

Sexual-Violence Offenses in Indonesia: Analysis of the Criminal Policy in the Law Number 12 of 2022

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Abstract

In 2022, Indonesia enacted the Law on Sexual Violence Offenses. The Law criminalizes ten acts of sexual violence and categorizes them as criminal offenses. The Law aims to prevent criminal offenses of sexual violence through deterrence, coordination, and monitoring by central and regional law enforcement agencies. The Law adopts both sanctions and treatment in the matter of criminal sanctions. The Law distinguishes types of punishment based on principal and additional penalties, including against corporations. Based on the severity of the penalty, the Law includes indefinite and definite sentences. However, the Law remains weak on restitution that should be action sanctions rather than criminal sanctions and lack of corporate criminal liability regulation. The severity of the penalty that was adopted by the Law should be in the form of indefinite sentences to provide the maximum deterrent effect. In addition, there is a lack of synchronization between the Law and other laws, including the Laws on Human Trafficking, Pornography, and the Elimination of Domestic Violence.

Keywords: criminal policy, sexual violence, Indonesia.

A. Introduction

Traditionally, sexual violence is a longstanding problem. In ancient Arabia, around the fourth century BC, sexual slavery was a tradition for generations.¹ Romans and Greeks practiced similar tradition since the fifth century BC. During the time, women's dignity was low. People considered women as a means of human reproduction or only to satisfy men's lust.² The first person to be tried on charges of sexual violence, a rape case, was Peter von Hagenbach in Breisach, Germany, 1474.³

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¹ Terence Wals and Kenneth M. Kunno, *Race and Slavery in The Middle East: History of Trans-Sahara Africans in 19-Century* (New York-Cairo: The American University in Cairo Press, 2013), 9.

² Gerben Bruinisma and David Weisburd, *Encyclopedia of Criminology and Criminal Justice* (New York-London: Springer, 2014), 1597.

³ M. Cherif Bassiouni, *International Criminal Law* (Leiden: Martinus Nijhoff Publishers, 2014), 15.

A German psychiatrist, Richard von Krafft-Ebing, is the first scientist who discussed sexual violence. His work was published in 1886.⁴

The Indonesian Criminal Code does not recognize the term *sexual violence*. The term can be found in Articles 5 and 8 of the Law Number 23 of 2004 on the Elimination of Domestic Violence (Domestic Violence Law). The Law limits sexual violence to the domestic scope; and does not cover the public or other settings.

The Criminal Code mentions only the term *molestation* and *sexual harassment* (Articles 289, 290, and 294), rape (Article 285), and abortion (Article 347). These articles were criticized by the activists of human rights and gender equality because they are considered too narrow, while sexual violence may take various forms.⁵ Most civil-law states regulate sexual violence in the criminal code. The French Penal Code 1810 (2020 revised version) regulates sexual violence in *Sexion III*, under the title *Sexual Aggression*. It covers rape, sexual assault, and sexual harassment.⁶ In the Netherlands' *Wetboek van Strafrecht* 1881 (2017 revision) regulates it in Part XIV, under the title *Serious Offenses against Public Morals*. It covers indecency; rape; and sexual intercourse with unconscious persons, physically unable persons, and persons with mental illness.⁷

England, a common law state, regulates sexual violence in Part I of the Sexual Offences Act 2003. The Act covers rape, assault, sexual activity without consent, rape, and sexual offenses against children under 13, abuse of a position of trust, offenses against persons with a mental illness, indecent photographs of children, sexual exploitation of children, prostitution, trafficking for sexual exploitation, and familial child sex offenses.⁸

Epistemologically, sexual violence is related to public morality because the act is a prohibited behavior. It damages human dignity and social order;⁹ is considered a despicable act degrading people's morality.¹⁰ In general, sexual violence may include sexual exploitation, slavery, intimidation, punishment, and control as well as forced abortion, prostitution, contraception, pregnancy, sterilization, and rape.¹¹

⁴ Kieran McCartan, *Responding to Sexual Offending* (London: Palgrave Macmillan, 2014), 3-4.

⁵ Kuswardani, "Sexual Violence in Indonesia and Malaysia: A Comparative Study," *Jurnal Media Hukum* 26, no. 2 (2019): 47-59, <https://doi.org/10.18196/jmh.20190122>.

⁶ Criminal Code of The French Republic (as of January 2020).

⁷ Criminal Code of The Kingdom of Netherlands (1881 amended 2017).

⁸ United Kingdom Sexual Offences Act (2003).

⁹ Mara Martini, Stefano Tataglia & Norma De Piccoli, "Assessing Rape Myth Acceptance: A Contribution to Italian Validation of the Measure for Assessing Subtle Rape Myth," *Journal Sage Publication* 29, no. 2 (2021): 117-220, <https://doi.org/10.1177/10790632211028158>.

¹⁰ Caroline Gordon, Hannah Stanton, Joddie Harrison "Experience of Young People with Harmful Sexual Behaviours in A Residential Treatment Programme: A Qualitative Study," *Journal of Sexual Aggression* 27, no. 2 (2020): 213-220, <https://doi.org/10.1080/13552600.2020.1787533>.

¹¹ Neil M Malamuth, "Predictors of Naturalistic Sexual Aggression," *Journal of Personality and Social Psychology* 50, no. 5 (2016): 953-962, <https://doi.org/10.1037/0022-3514.50.5.953>.

According to the Indonesian Ministry of Women and Children Empowerment, in 2021, there were 8,800 cases of sexual violence; and 6,547 of them were cases against children.¹² Based on the annual records of the National Commission on Violence against Women, in 2021, there were 4.500 cases. Previously, in 2020 and 2019, there were 3.660; and 4.898 cases respectively.¹³ In other words, although the number of sexual violence has fluctuated over the years, the quantity is still significant.

Following the description, there are two points to be proposed. Firstly, the Criminal Code indeed regulates some forms of sexual violence. However, the regulations are still limited and tend to be narrow in scope. Secondly, cases of gender-based violence, including sexual violence, have been rising over the past five years. The situation poses threats to the society, especially women and children. Consequently, the Law on Sexual Violence Offenses has been developed to handle the threats.

From the perspective of criminal law, the Law on Sexual Violence Offenses is a criminal policy that aims to tackle sexual violence. The use of the word 'offenses' in the title means that the Law is an intra special criminal law, similar to the Law Number 21 of 2007 on the Eradication of the Criminal Offenses of Human Trafficking (the Law on Human Trafficking). The hallmark of intra-special criminal law is that both substantive and procedural criminal law is derived from the Criminal Code and the Criminal Procedure Code.

To ascertain the originality of ideas, several previous studies on sexual offenses can be reviewed. For instance, Willis et al.¹⁴ reviews report on sexual relations based on mutual consent involving students from Canada and the United States. Then, Kuswardani¹⁵ compares the regulations of sexual violence in Indonesian and Malaysian Criminal Codes. The formulation of rape in the Malaysian Criminal Code accommodates the values of Islamic teachings. It is broader in terms of treatment, of criminal sanctions, and formulation than the Indonesian Criminal Code. Next,

¹² Kementerian Pemberdayaan Perempuan dan Perlindungan Anak Republik Indonesia, "Kemenpppa: Negara Hadir Dalam Upaya Menyelesaikan Permasalahan Kekerasan Seksual Terhadap Perempuan Dan Anak," accessed on September 8, 2021, <https://www.kemenpppa.go.id/index.php/page/read/29/4158/kemenpppa-negara-hadir-dalam-upaya-menyelesaikan-permasalahan-kekerasan-seksual-terhadap-perempuan-dan-anak>.

¹³ Komnas Perempuan, "Perempuan dalam Himpitan Pandemi: Lonjakan Kekerasan Seksual, Kekerasan Siber, Perkawinan Anak, dan Keterbatasan Penanganan di Tengah Covid-19 (Siaran Pers: CATAHU 2020 Komnas Perempuan: Lembar Fakta dan Poin Kunci, Maret 2021)," accessed on August 16, 2021, <https://komnasperempuan.go.id/siaran-pers-detail/catahu-2020-komnas-perempuan-lembar-fakta-dan-poin-kunci-5-maret-2021>.

¹⁴ Malachi Willis, Tiffany L. Marcantonio, Kristen N. Jozkowski, Terry Humphreys, "Sexual Consent at First-Time Intercourse: Retrospective Report From University Student in Canada and The United States" *International Journal of Sexual Health* 33, no. 2 (2021): 19-20, <http://doi.org/10.1080/19317611.2020.1862382>.

¹⁵ Kuswardani, "Sexual Violence in Indonesia and Malaysia: A Comparative Study," 55.

Spohn¹⁶ affirms that victim-survivors of sexual violence remain reluctant to report sexual assault to the police because victim-survivors' reputation is often tarnished as a result. On the other hand, the rate of criminal proceedings being taken against perpetrators is low. It makes reports unworthy. Martini et al.¹⁷ explain that Italian society's perception of rape creates a myth that rape is not necessarily the fault of the perpetrator but also the victim-survivor. Yuningsih¹⁸ also explain that the increasing severity of criminal sanctions and imposing additional penalties against perpetrators of sexual violence against children is effective to provide a deterrent effect, prevent future crimes, and provide rehabilitation. Widiyaningrum (et.al.).¹⁹ adds that the more severe the impact of sexual violence against children on their psychological development, the more perpetrators deserve to be given a severe and commensurate punishment for their treatment, such as chemical castration. Finally, Nurisman²⁰ discusses the Law on Sexual Violence Offenses' position as a supplemental criminal law instrument to combat sexual violence.

Based on the previous studies, this study used the criminal policy to examine the contents of penal, non-penal, criminal sanctions, and treatment against corporations in the Law on Sexual Violence Offenses.

B. Law on Sexual Violence Offenses Within the Frame of Criminal Policy

Philosophically, the Law on Sexual Violence Offenses can be described in some points. Firstly, everyone has the right to be protected from violence and to be free from torture or treatment that degrades human dignity. Secondly, sexual violence is contrary to divine and human values and disturbs the security and peace of the community. Thirdly, laws and regulations that are related to sexual violence have not been optimal in providing prevention, protection, access to justice, and recovery. It is also unable to fulfill the rights of victims of sexual violence offenses.²¹

The philosophical foundation implicitly illustrates the gap between the number of cases of sexual violence (*das sein*) and the inadequate regulation (*das sollen*) in

¹⁶ Cassia Spohn, "Sexual Assault Case Processing: The More Things Change, the More They Stay the Same," *International Journal for Crime, Justice and Social Democracy* 9, no. 1 (2020): 86-94, <https://doi.org/10.5204/ijcsd.v9i1.1454>.

¹⁷ Mara Martini, Stefano Tataglia, & Norma De Piccoli, "Assessing Rape Myth Acceptance: A Contribution to Italian Validation of the Measure for Assessing Subtle Rape Myth," 119.

¹⁸ Henny Yuningsih, "Ratio Legis of Chemical Castration to The Perpetrators of Sexual Violence," *Sriwijaya Law Review* 42 (2020): 285–305, <http://dx.doi.org/10.28946/slrev.Vol4.Iss2.652.pp285-303>.

¹⁹ Irene Widianingrum, M. Syukri Akub, Abdul Razak, & Marwati Riza "Castration of Sex Offenders: Indonesian Criminal Law Reform," *Hasanudin Law Review* 5, no. 3 (2019): 338–348.

²⁰ Eko Nurisman, "Risalah Tantangan Penegakan Hukum Tindak Pidana Kekerasan Seksual Pasca Lahirnya Undang-Undang Number 12 Tahun 2022," *Jurnal Pembangunan Hukum Indonesia* 4, no. 2 (2022), <https://doi.org/10.14710/jphi.v4i2.170-196>.

²¹ The philosophical foundation is a consideration or reason that illustrates that the regulations formed take into account the view of life, awareness and legal ideals which include the spiritual atmosphere and the philosophy of the Indonesian nation.

Indonesian criminal law. Therefore, the Law is a government criminal policy to eradicate the crime of sexual violence in Indonesia.²²

Hoefnagels describes the choice to use criminal policy as the rational organization of the social reactions to crime.²³ It is in line with Ancel's idea about rational organization of the control of crime by society.²⁴ The integral approach can be through penal or non-penal means.²⁵ When the means of penalization is chosen, the direction is criminalization, penalization, decriminalization, and depenalization.²⁶ In the penalization, there are three stages to the policy: the formulation, the application, and the execution of policy.²⁷

Formulation is the most strategic initial stage of overall policy planning of the criminal law process.²⁸ The stage is the domain of the lawmakers to determine two main elements: (1) actions to be defined as criminal offenses; and (2) sanctions to be imposed on offenders.²⁹ Then, the implementation of policy implements criminal regulations by judges. Finally, the execution of policy is the imposition of a sentence on offenders, which is carried out by the administrative authority.³⁰

In legal terms, the first stage is often referred to as the stage of imposing the sanction *in abstracto*, while the second and third stages are called the stages of imposing the sanction *in concreto*.³¹ Both the first stage and the second stage are often referred to as penal means. There are three central problems in criminal policy, using the penal means, namely: (1) what actions should be made into criminal offenses; (2) what sanctions should be used or imposed on the offender; and (3) the legal procedures to be taken if there is a violation of the criminal provisions, so that offenders may be subject to criminal sanctions.³² On the other hand, if the non-penal means is chosen, procedures will focus on preventive measures.³³

Substantially, the Law on Sexual Violence Offenses consists of 12 chapters and 93 articles. The systematics are as follows: Chapter I General Provisions; Chapter II

²² Irene Widianingrum, M. Syukri Akub, Abdul Razak, & Marwati Riza, "Castration of Sex Offenders: Indonesian Criminal Law Reform," 341-343.

²³ Frank Schmalleger and Daniel E. Hall, *Criminal Law Today* (New York: Pearson, 2017), 85.

²⁴ Gaetan Cliquenois and Hugues de Suremain, *Monitoring Penal Policy in Europe* (London & New York: Routledge Taylor & Francis Group, 2018), 1.

²⁵ Marjono Reksodiputro, *Sistem Peradilan Pidana* (Jakarta: PT RadjaGrafindo Persada, 2020), 182.

²⁶ Marjono Reksodiputro, 183.

²⁷ Barda Nawawi Arief, *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan* (Jakarta: Kencana Prenada Media Group, 2014), 91-93.

²⁸ Barda Nawawi Arief, 94.

²⁹ Barda Nawawi Arief, 115.

³⁰ Ali Zaidan, *Menuju Pembaruan Hukum Pidana* (Jakarta: Sinar Grafika, 2015), 9-11.

³¹ Barda Nawawi Arief, *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan*, 70.

³² Marjono Reksodiputro, *Sistem Peradilan Pidana*, 37-39.

³³ Barda Nawawi Arief, *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan*, 44.

Crimes of Sexual Violence; Chapter III Other Crimes Related to Sexual Violence; Chapter IV Investigation, Prosecution and Examination of Court Sessions; Chapter V Rights of Victims, Victims' Families and Witnesses; Chapter VI Implementation of Integrated Services for the Protection of Women and Children at the Center and the Regions; Chapter VII Prevention Coordination and Monitoring; Chapter VIII Community and Family Participation; Chapter IX Funding; Chapter X International Cooperation; Chapter XI Transitional Provisions; and Chapter XII Closing Provisions. The systematic elaboration of the subject matter of the Law on Sexual Violence Offenses is analyzed based on criminal-policy perspective below.

1. Penal Policy

Looking at the nomenclature and substance of the articles in the Law on Sexual Violence Offenses, it cannot be denied that the Law is more inclined to use the means of criminal law in tackling the crime of sexual violence in the community. In other words, the penal means is a priority for lawmakers in controlling sexual violence.

The first step taken by the lawmakers was to develop the policy formulation of prohibited acts to be categorized as sexual violence offenses, including the threat of criminal sanctions. This step is often referred to as 'criminalization'. Guyora Binder defines it as a process twofold phenomenon that involves both the grounds for labeling activity and labeling procedure.³⁴

When criminalization is to be carried out, there are three basic elements that require attention: (1) the conduct must be wrongful; (2) it must be necessary to employ criminal law to condemn or prevent such conduct; and (3) it must be permissible to criminalize the activity.³⁵ Referring to these theoretical arguments, criminalization is the most elementary part of the process. Criminalization cannot be done haphazardly. It must consider the conduct of criminal law, including the impact it will have. An act, for example, can be criminalized when the act is jointly condemned by the community and the government because it is considered a violation of public morality.

In relation to the criminalization of sexual violence offenses in the Law on Sexual Violence Offenses, the rising number of sexual violence reports is shocking to the Indonesian people, because the behavior is considered evil by itself (*mala in se*) since it degrades human dignity, is contrary to the values of divinity and humanity, and disturbs the security, order, and peace of the community. Therefore, the government must make the choice to use penal means to end this antisocial behavior.

³⁴ Guyora Binder, *Criminal Law*, (New York: Oxford University Press, 2016), 217.

³⁵ Keating & Cunningham Clarkson, *Criminal Law: Text and Materials 10th Ed*, (London: Thomson Sweet & Maxwell, 2020), 17.

In the Law on Sexual Violence Offenses, criminalization can be found in Chapter II under the heading of Sexual Violence Offenses, from Article 4 to Article 18. In addition, other crimes related to sexual violence are formulated in Article 19. In this case, the actions of the perpetrators are not included in the category of sexual violence offenses as regulated in Articles 4 to 18, but their actions are still closely related to efforts to overcome sexual violence offenses. Article 4 states that the crimes of sexual violence include:

- a. non-physical sexual harassment;
- b. physical sexual harassment;
- c. forced contraception;
- d. forced sterilization;
- e. forced marriage;
- f. sexual torture;
- g. sexual exploitation;
- h. sexual slavery; and
- i. electronic-based sexual violence.

The category of sexual violence offenses also includes:

- a. obscene acts;
- b. sexual intercourse with children, lewd behavior against children,
- c. and/or sexual exploitation of children;
- d. an act of violating decency that is against the will of the victim;
- e. pornography involving children or pornography that explicitly contains sexual violence and exploitation;
- f. forced prostitution;
- g. the crime of human trafficking intended for sexual exploitation;
- h. domestic sexual violence;
- i. money laundering crime which predicates crime is a crime of sexual violence; and
- j. other criminal offenses that are defined expressly as sexual violence offenses as regulated in the provisions of laws and regulations.³⁶

The formulation of the acts that qualify as criminal offenses of sexual violence in the Law on Sexual Violence Offenses can be seen in the following table.

Table 1. Sexual Violence Offenses in the 2022 Law on Sexual Violence Offenses

No	Article Formulation
1.	Article 5: Any person who commits non-physical sexual acts aimed at the body,

³⁶ Article 4 paragraph (2) Law of Sexual Violence Offenses.

	sexual desire, and/or reproductive organs with the intention of degrading a person's dignity based on sexuality and/or decency.
2.	<p>Article 6: Sentenced for physical sexual harassment:</p> <ol style="list-style-type: none"> Anyone who performs a physical sexual act aimed at the body, sexual desire, and/or reproductive organs with the intention of degrading a person's dignity based on sexuality and/or decency. Any person who performs physical sexual acts aimed at the body, sexual desire, and/or reproductive organs with the intention of placing someone under his control against the law, both within and outside marriage. Any person who abuses position, authority, trust, or disposition arising from deceit or relationship circumstances or exploiting a person's vulnerability, inequality or dependence, coercing or by misleading that person to commit or allow sexual intercourse or obscene acts to be carried out with him or her or with another person.
3.	Article 8: Anyone who commits an act of forcing another person to use contraception with violence or threats of violence, abuse of power, misdirection, fraud, creating or taking advantage of a powerless condition that can cause temporary loss of reproductive function.
4.	Article 9: Anyone who commits an act of forcing another person to use contraception with violence or threats of violence, abuse of power, misdirection, fraud, creating or taking advantage of a powerless condition that can cause permanent loss of reproductive function.
5.	<p>Article 10 (1): Anyone unlawfully coerces, places a person under his control or another person, or abuses his power to perform or allow a marriage to be carried out with him or with another person, shall be punished for forced marriage</p> <p>Article 10 paragraph (2): Including forced marriage as referred to in paragraph (1):</p> <ol style="list-style-type: none"> child marriage; forced marriage in the name of cultural practice; or forced marriage of the victim with the perpetrator of the rape.
6.	<p>Article 11: Any official or person acting in the capacity of an official, or any person acting because of being instigated or acknowledged by an official commit sexual violence against a person with the aim of:</p> <ol style="list-style-type: none"> intimidating to obtain information or confession from that person or a third party; persecuting or punishing acts that have been suspected or committed; and/or humiliating or degrading for reasons of discrimination and/or sexual in all its forms, shall be punished for sexual torture.
7.	Article 12: Anyone by violence or threat of violence or by abusing one's position, authority, trust, abuse arising from deception or relations of circumstances, vulnerability, inequality, powerlessness, dependency on a person, debt bondage or giving payments or benefits with the intention of obtaining profit, or taking advantage of sexual organs or other organs of that person which are aimed at sexual desire with him or with another person, shall be punished for sexual exploitation.

8.	Article 13: Anyone who unlawfully places a person under his control or another person and renders him/her powerless with the intention of sexually exploiting him/her shall be punished for sexual slavery.
9.	Article 14 paragraph (1): Anyone without the right to: a. records and/or to take pictures or screenshots of sexual content against the will or without the consent of the person being the object of the recording or the pictures or screenshots; and/or b. transmit electronic information and/or electronic documents with sexual content against the will of the recipient which is directed against sexual desires; c. commit stalking and/or tracking using an electronic system against people who are objects in electronic information/documents for sexual purposes, shall be punished for committing electronic-based sexual violence. Article 14 paragraph (2): In the event the acts as mentioned in paragraph (1) is carried out by the intention to: a. extort or threaten, coerce; or b. mislead and/or deceive, a person into doing, allowing to be done, or not doing something.
10.	Article 18 paragraph (1): Corporations that commit crimes of sexual violence.
11.	Article 19: Anyone who intentionally prevents, obstructs, or thwarts directly or indirectly investigation, prosecution, and/or examination in court against suspects, defendants, or witnesses in cases of sexual violence offenses.

Based on the formulation of sexual violence offenses, several important points can be noted. First, sexual violence offenses are regulated in Articles 4 to 18 of the Law. Second, acts that qualify as sexual violence offenses only consist of ten acts as regulated in Articles 5-6, Articles 8-14, and Article 18 paragraph (1). Third, criminalization against acts related to sexual violence offenses is regulated in Article 19. Fourth, the term 'anyone' is defined as an individual or a corporation, as stated in Article 1 Number 2 of the Law. The definition is not novel in Indonesia but is nevertheless essential. Several other regulations related to sexual violence introduced the term, such as Article 1 Number 1 of the Law on Human Trafficking, Article 1 Number 16 of the Law Number 31 of 2014 on the Amendment to the Law Number 23 of 2002 on Child Protection, and Article 1 Number 3 of the Law on Pornography. However, the Law on Sexual Violence Offenses is more progressive than the Law on Domestic Violence and the Law Number 11 of 2012 on the Juvenile Criminal Justice System. These two laws do not use the term 'anyone', leading to a logical conclusion that the subject of the offense only covers individuals, not a corporation. Fifth, there is a special regulation in Article 11 for offenders of sexual violence offenses, who are officials or people acting in the capacity of officials. Sixth, there are regulations regarding obstruction of justice. It is related to the nature and characteristics of sexual violence offenses involving well-planned and systematic criminal offenders. It is common for offenders to hide behind the backs of

corporations when committing acts of sexual violence. To avoid legal proceedings against sexual violence offenders, *mutatis mutandis*, offenders will face both physically and psychologically against law enforcer to hinder the judicial process. Seventh, the sexual violence in Article 4 paragraph (2) is very broad in scope. It covers everything from rape and obscene acts to child pornography, human trafficking for sexual exploitation, and domestic sexual violence. Some of the acts have been regulated in other laws, such as the Criminal Code, the Law on Pornography, the Law on Human Trafficking, and the Law on Domestic Violence. The Law on Sexual Violence Offenses currently regulates the types of sexual violence offenses that were previously regulated by other laws. It brings material juridical consequences. For example, rape and sexual abuse are regulated in the Criminal Code and then re-regulated in the Law on Sexual Violence Offenses. It generates a question: which law will prevail? If it refers to the principle of *lex specialis derogat legi generali*, then it is the Law on Sexual Violence Offenses.

The problem can be more complicated when it comes to the crime of sexual violence. Sexual violence was previously regulated in the Law on Pornography, the Law on Human Trafficking, and the Domestic Violence Law. Still, it was re-regulated in the Law on Sexual Violence Offenses. However, the status of these four laws is the same: they are all special regulations (*lex specialis*) of the Criminal Code (*lex generalis*). For example, child pornography is regulated in Article 38 of the Law on Pornography and has been re-regulated as a criminal offense in the Law on Sexual Violence Offenses. Both laws are *lex specialis*. Which law will prevail? Law enforcement officials must choose one of them, although theoretically, one cannot just choose randomly; the choice must be based on credible theoretical arguments. This is because, in the doctrine of special criminal law, the principle of *lex specialis sistematice* refers to the object of a general definition regulated more comprehensively or in more detail in special provisions.³⁷

Eighth, in relation to the rape offense. It is only listed as a part of the criminal act of sexual violence in Article 4 of the Law on Crime of Sexual Violence and is not further defined. Conversely, it is specified in Article 473 of the Law Number 1 of 2023 on Criminal Code, such as: (1) employing force or threats of violence to coerce an individual to engage in intercourse with him/her; (2) engaging in sexual relationship with someone with his/her consent despite not being his/her legal spouse; (3) sexual intercourse with children; (4) engaging in sexual activity with someone while being aware that they are unconscious or defenseless; (5) engaging in sexual activity with a person who has a mental handicap and/or an intellectual disability even though it is known that they are disabled by providing or promising money or goods, abusing power derived from a connection of circumstances, or by deception; (6) Inserting genitalia into someone else's mouth or anus; (7) Inserting

³⁷ Jan Rimmelink, *Pengantar Hukum Pidana Material 1* (Yogyakarta: MaHaRSa Publishing, 2014), 28.

another person's genitalia into his own anus or mouth; and (8) Inserting an object or a body part that is not a genital into the genitalia or anus of another person.

In that context, the Law on Pornography is more detailed and comprehensive in regulating child pornography than the Law on Sexual Violence Offenses, so law enforcement should apply the Law on Pornography. Likewise, for example, regarding human trafficking for sexual exploitation. These crimes have been regulated in the Law on Human Trafficking and regulated again in the Law on Sexual Violence Offenses. Based on the *lex specialis sistematidis* principle, the applicable regulation is the Law on Human Trafficking because it is more detailed and specific in regulating sexual exploitation in human trafficking. Unfortunately, this means that the Law on Sexual Violence Offenses has the potential to cause confusion for law enforcement if legal principles or criminal law doctrines are not well-understood.

2. Non-Penal Policy

This section will discuss the non-penal policy adopted by the lawmakers of the Law on Sexual Violence Offenses. According to Arief, non-penal policies are prevention (*preventie*) before a crime occurs, focusing on factors conducive to the occurrence of crime.³⁸ Ancel similarly emphasizes that social defense implies acceptance of action of prevention and social therapy.³⁹ Thus, through a social defense policy, the concept of crime prevention is implicitly accepted as well as acts as an early treatment against the occurrence of crime. Prevention of criminal offenses, according to Hoefnagels, can be done in three ways: (1) influencing views of society on crime and punishment (such as through mass media); (2) criminal law application (practical criminology); and (3) prevention without punishment.⁴⁰

Article 1, number 15 of the Law on Sexual Violence Offenses states that prevention is all actions or efforts taken to eliminate various factors that cause the occurrence of sexual violence offenses and the recurrence of sexual violence offenses. Prevention is explicitly regulated in Chapter VII under the heading of Prevention, Coordination, and Monitoring. The provisions cover Article 79 to Article 84. Article 79 paragraph (1) states that the central and regional governments are obliged to prevent sexual violence offenses in a rapid, solid, and integrated manner. Implementation of the prevention of sexual violence is carried out through the following areas: (a) education; (b) public facilities and infrastructure; (c) governance and institutional governance; (d) economy and employment; (e) social welfare; (f) culture; (g) information technology; (h) religious; and (i) family.⁴¹ Such prevention must take into account: (a) conflict situations; (b) disasters; (c) the geographical

³⁸ Barda Nawawi Arief, *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan*, 73-74.

³⁹ Gaetan Cliquot and Hugues de Suremain, *Monitoring Penal Policy in Europe*, 117.

⁴⁰ Frank Schmalleger and Daniel E. Hall, *Criminal Law Today*, 101.

⁴¹ Article 79 paragraph (2) of the Law on Sexual Violence Offenses.

location of the area; and (d) other special situations.⁴² In order to be more focused, the prevention of sexual violence is focused on three places, namely social institutions, educational units, and other facilities that have the potential for sexual violence offenses to occur.⁴³

To increase understanding related to the prevention and handling of sexual violence offenses, the central government and local governments are required to provide education and training for law enforcement officers, government service personnel, and service personnel at community-based service providers. The implementation of such education and training will be coordinated by the which minister and in collaboration with the minister responsible for government affairs in the fields of law and human rights.⁴⁴

In the context of effective prevention and handling of victim-survivors of sexual violence, the minister is to conduct cross-sectoral coordination and monitoring with relevant ministries/institutions. Governors, regents, and mayors coordinate and monitor the prevention and handling of victim-survivors in the regions. Coordination is carried out through planning, service, evaluation, and reporting. Then monitoring is carried out by the minister and national commissions on violence against women, human rights, child protection, and disability, as well as by the community.⁴⁵ To facilitate the prevention and coordination of sexual violence offenses, a national policy on the eradication of sexual violence will be drawn up.⁴⁶ The national policy will be regulated by presidential regulation.⁴⁷

Related to the prevention of sexual violence offenses, another provision regards community participation in efforts to prevent sexual violence. Community participation can be carried out in several ways, such as

- a. developing literacy (understanding) on sexual violence among all ages of society to prevent sexual violence from occurring and prevent people from becoming victims or offenders;
- b. disseminating the laws and regulations governing the crime of sexual violence; and
- c. creating environmental conditions that can prevent the occurrence of sexual violence.

In a broader context, the prevention of sexual violence offenses can be done through international cooperation, which aims to make the prevention and handling of cases more effective. Therefore, by referring to laws and regulations, the

⁴² Article 79 paragraph (3) of the Law on Sexual Violence Offenses.

⁴³ Article 79 paragraph (4) of the Law on Sexual Violence Offenses.

⁴⁴ Article 81 of the Law on Sexual Violence Offenses.

⁴⁵ Article 83 of the Law on Sexual Violence Offenses.

⁴⁶ Article 84 paragraph (1) of the Law on Sexual Violence Offenses.

⁴⁷ Article 84 paragraph (2) of the Law on Sexual Violence Offenses.

government can carry out international cooperation, whether it is bilateral, regional, or multilateral.⁴⁸

Overall, we can summarize that the Law on Sexual Violence Offenses is apparent on what the government requires for prevention. First, the prevention of sexual violence involves the central government, regional governments, and law enforcement officers. Second, the government must organize training for law enforcement officers to handle cases of sexual violence in the community properly. Third, the Law on Sexual Violence Offenses provides for the obligations and authorities of central officials such as the minister, governor, regent, and mayor to issue national and regional policies regarding the prevention of sexual violence. Fourth, there are efforts to involve the community in preventing sexual violence. Fifth, the government can expand efforts to prevent sexual violence offenses at the international level through bilateral, regional, and multilateral cooperation.

3. Criminal Sanctions Policy and Treatment

In the formulation of policy, one of the most fundamental parts is the development of criminal sanctions when criminalizing an act. The threat of criminal sanctions or treatment in the formulation of the criminalized offense must be prepared appropriately, ensuring the weight of the sanctions meets the severity of the offense. This is crucial because, after all, the purpose of criminal law is to deal with crime, meaning the punishment must fit the crime.⁴⁹

Rommelink stated that in criminal law there are two forms of sanctions: criminal sanctions, and treatment sanctions.⁵⁰ Muladi and Arief also stated that criminal sanctions and treatment have their respective intentions and focii. Criminal sanctions are intended to provide suffering or misery (backward-looking). Meanwhile, treatment sanctions are intended to foster or improve the mentality of the offender (forward-looking).⁵¹

Both criminal sanctions and treatment sanctions are used in the Law on Sexual Violence Offenses. Therefore, to be more systematic, the criminal sanctions will be reviewed first and then followed by a discussion on treatment sanctions. In the Law on Sexual Violence Offenses, criminal sanctions are regulated in Articles 5-6, 8-14, 16, and 18 paragraph (1):

Table 2. Criminal Sanctions in the Law on Sexual Violence Offenses

No	Article of Criminal	Criminal Sanction
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⁴⁸ Article 88 of the Law on Sexual Violence Offenses.

⁴⁹ Cesare Beccaria, *On Crime and Punishment*, (New York: Routledge Taylor & Francis Group, 2017), 31.

⁵⁰ Jan Rimmelink, *Pengantar Hukum Pidana Material 1*, 30.

⁵¹ Barda Nawawi Arief, *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan*, 77-79.

	Provisions	
1.	Article 5	Imprisonment for a maximum of 9 (nine) months and/or a fine for a maximum of Rp 10,000,000.00 (<i>ten million rupiah</i>).
2.	Article 6	(a) imprisonment for a maximum of 4 (four) years and/or a maximum fine of Rp 50,000,000.00 (<i>fifty million rupiah</i>). (b) imprisonment for a maximum of 12 (twelve) years and/or a maximum fine of Rp 300,000,000.00 (<i>three hundred million rupiah</i>). (c) imprisonment for a maximum of 12 (twelve) years and/or a fine of a maximum of Rp 300,000,000.00 (<i>three hundred million rupiah</i>)
3.	Article 8	Imprisonment of a maximum of 5 (five) years and/or a fine of a maximum of Rp 50,000,000 ,00 (<i>fifty million rupiah</i>).
4.	Article 9	Imprisonment of a maximum of 9 (nine) years and/or a maximum fine of Rp 200,000,000.00 (<i>two hundred million rupiah</i>).
5	Article 10	Imprisonment of a maximum of 9 (nine) years and/or a maximum fine of Rp 200,000,000.00 (<i>two hundred million rupiah</i>).
6	Article 11	Imprisonment of a maximum of 12 (twelve) years and/or a maximum fine of Rp300,000,000.00 (<i>three hundred million rupiah</i>).
7	Article 12	Imprisonment of a maximum of 15 (fifteen) years and/or a maximum fine of Rp 1,000,000,000.00 (<i>one billion rupiah</i>).
8	Article 13	Imprisonment of a maximum of 15 (fifteen) years and/or a maximum fine of Rp 1,000,000,000.00 (<i>one billion rupiah</i>).
9	Article 14	(1) Imprisonment for a maximum of 4 (four) years and/or a fine of a maximum of Rp 200,000,000.00 (<i>two hundred million rupiah</i>). (2) Imprisonment for a maximum of 6 (six) years and/or a fine of a maximum of Rp 300,000,000.00 (<i>three hundred million rupiah</i>).
10	Article 18 paragraph (1)	shall be punished with a minimum fine of Rp 5,000,000,000.00 (<i>five billion rupiah</i>) and a maximum of Rp 15,000,000,000.00 (<i>fifteen billion rupiah</i>).

Referring to the table of criminal sanctions above, the following can be explained. First, the formulation of criminal sanctions is adjusted to the severity of the crime.

Second, the types of punishment (*strafsoort*) provided are imprisonment and fines. Third, the lightest prison sentence is regulated in Article 5, which is 9 months, and as the lightest fine is Rp10,000,000.

Fourth, the Law on Sexual Violence Offenses uses a system of formulating criminal sanctions in the form of cumulative alternatives in Articles 5-6 and Articles 8-14. The cumulative alternative formulation system is commonly referred to as a combined or mixed formulation system. To recognize it, it can be marked using the conjunction 'and/or'. Arief notes that this system cannot be found in the Criminal Code.⁵²

Fifth, the Law on Sexual Violence Offenses adopts the *strafmaat* form of an indefinite sentence. Theoretically, the general maximum system is a system in which each criminal act has its own weight or quality, defined by setting the minimum and maximum criminal sanctions for each crime.⁵³ Historically, the indefinite sentence roots in the neo-classical school which emphasizes its conception of the freedom of people's will.⁵⁴ In the Law on Sexual Violence Offenses, general maximum penalties can be found in Articles 5-6 and Articles 8-14. The use of the indefinite sentence in the Law is less prevalent because this law was born in response to the positioning of sexual violence as a serious crime against public morality. In this view, the lawmakers should use the indefinite sentence; in other words, the lawmakers should provide special minimum and maximum limits for sentences that can be imposed by judges. This is necessary because individual rehabilitation is needed as the main goal in sentencing. For example, the threat of imprisonment in Article 2 of the Law on Human Trafficking is a minimum of 3 years and a maximum of 15 years.

Sixth, the Law on Sexual Violence Offenses regulates criminal sanctions against corporations as the perpetrator of offenses in Article 18 paragraph (1). Such an arrangement is in line with the recognition of a corporation as the subject of an offense in Article 1 Point 3, which states that a corporation is an organized collection of people and/or assets, both legal entities and non-legal entities. In addition, this is further provided for using the term 'anyone' in Article 1 Number 2.

Seventh, the use of single formulation (definite sentences). This system shows that criminal sanctions are formulated as the only type of sanctions for the offense in question. For this reason, this single formulation can be in the form, only imprisonment, or fines.⁵⁵ Sudarto said from the point of view of determining the type of crime, single formulation is a very striking legacy from the classical school, aiming to objectify criminal law from the personal characteristics of the offender.⁵⁶

⁵² Barda Nawawi Arief, 116.

⁵³ Barda Nawawi Arief, *Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru* (Jakarta: Kencana Prenada Media Group, 2017), 132.

⁵⁴ Barda Nawawi Arief, 133.

⁵⁵ Barda Nawawi Arief, 151.

⁵⁶ Marjono Reksodiputro, *Sistem Peradilan Pidana*, 55.

The single formulation in the Law on Sexual Violence Offenses aims to corporations. This is inseparable from the nature of corporations, as corporations cannot be subject to the deprivation of independence. They can only be subject to sanctions related to monetary penalty. On that basis, fines are the only option that can be threatened against corporations.⁵⁷ Another consideration is that corporations may own property or assets that make it easier for the state to carry out criminal prosecutions. Therefore, corporations that are able to do so can pay their fines, while those that are unable to do so will have their assets can be confiscated by the state as a form of recovery from losses.⁵⁸

It should be noted that although Article 18 regulates the criminal act of sexual violence by corporations, the regulation is inadequate. For example, how do we determine that a corporation has committed a crime of sexual violence? As a comparison, Article 13 of the Law on Human Trafficking stipulates that the criminal act of human trafficking is considered to be committed by a corporation if the crime is committed by persons acting for and/or on behalf of the corporation or for the benefit of the corporation, whether based on employment or other relationships, acting within the corporate environment, either individually or jointly.

Therefore, it is necessary to add a clause in the article in the Law on Sexual Violence Offenses which emphasizes that if the corporation is prosecuted, who will act on behalf of the corporation? The lawmakers of the Law on Sexual Violence Offenses can look at Article 14 of the Law on Human Trafficking, which states that in the case of summoning a corporation, the summons to appear and the submission of the summons is submitted to the management at the management's office, where the corporation operates, or at the management's residence. Another issue that deserves attention is the threat of fines against corporations. What if the corporation fails to pay the fine? Article 18 has not yet regulated in detail other alternatives that can be taken by law enforcers. Referring to Article 28 paragraph (3) of the Supreme Court Regulation Number 13 of 2016 concerning Procedures for Handling Criminal Offenses by Corporations, it is stated that corporate assets can be confiscated by prosecutors and auctioned off to pay fines. In theory, when the assets of the corporation are not sufficient to pay off the fine, the obligations are transferred to the management so that the assets of the management can be confiscated to pay the fine (*quo non habet in aere, luat in corpore, ne quis peccetur*).⁵⁹ Therefore, the provisions regarding corporate criminal responsibility in the Law on Sexual Violence Offenses need to be improved, including synchronization with other regulations.

⁵⁷ Kieran McCartan & Philip Rumney (Ed), *White Collar Crime and Risk* (London: Palgrave Macmillan, 2018), 117.

⁵⁸ Hariman Satria, *Hukum Pidana Korporasi: Doktrin, Norma & Praksis* (Jakarta: Kencana Prenada Media Group, 2020), 258.

⁵⁹ Hariman Satria.

The following section explains the use of additional punishments in the Law on Sexual Violence Offenses. Article 16 paragraph (2) states that judges can impose additional punishments in the form of:

- a. revocation of child custody or revocation of pardon;
- b. announcement of the identity of the offender; and/or
- c. confiscation of profits and/or assets obtained from sexual violence offenses.

Specifically, for corporations, additional penalties are regulated in Article 18 paragraph (4) of the Law on Sexual Violence Offenses, such as:

- a. confiscation of profits and/or assets obtained from sexual violence offenses;
- b. revocation of certain permits;
- c. announcement of court decisions;
- d. permanent prohibition of certain actions;
- e. freezing of all or part of corporate activities;
- f. closing all or part of the place of business of the corporation; and
- g. corporate dissolution.

In addition to the main and additional punishments as mentioned above, the Law on Sexual Violence Offenses also introduces action sanctions. These are in the form of treatment. Article 17 paragraph (1) states that in addition to being sentenced, offenders of sexual violence offenses can also be subject to rehabilitation. Rehabilitation is divided into two forms: medical rehabilitation and social rehabilitation.⁶⁰ Psychiatric rehabilitation is included in medical rehabilitation.⁶¹ Article 1 Number 22 defines rehabilitation as an effort aimed at victims and offenders to recover from disturbances to their physical, mental, and social conditions to be able to carry out their roles again normally, both as individuals, family members, and society. Based on the provision for the treatment sanctions, it is inadequate. In fact, the severity is much less than the criminal sanctions described above, even though treatment sanctions can be applied more effectively than criminal sanctions: the execution is easier and does not require high costs.⁶² Treatment sanctions that can be used as comparisons by the lawmakers can be seen in Article 114 of the New Criminal Code was passed by the legislation, such as counseling, submission to a mental hospital, and submission to the government.

Treatment sanctions in the Law also cover child offenders by referring to another law. Article 82 of the Law Number 11 of 2012 on the Juvenile Criminal Justice System includes:

- a. return to parents/guardians;

⁶⁰ Article 17 paragraph (2) of the Law on Sexual Violence Offenses.

⁶¹ Elucidation of Article 17 paragraph (2) letter a of the Law on Sexual Violence Offenses.

⁶² Barda Nawawi Arief, *Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru*, 172.

- b. surrender to someone;
- c. treatment in mental hospitals;
- d. care in a social welfare institution;
- e. the obligation to attend formal education and/or training held by the government or private institution;
- f. revocation of driving license; and/or
- g. remediation because of a criminal act.

The Law on Sexual Violence Offenses also provides criminal sanction. For example, Article 16 paragraph (1) states that, in addition to imprisonment, fines, or other punishment according to the provisions of the law, the judge has an obligation to determine the amount of restitution for a crime of sexual violence which is punishable by imprisonment of four years or more. In other words, when a judge tries a sexual violence offender whose actions are punishable by imprisonment for more than four years, the judge is required to add restitution sanctions. The judge must also determine the amount of restitution to be imposed on the perpetrator. To be more effective and prevent misinterpretation, the lawmakers of Law on Sexual Violence Offenses should include sanctions for restitution as treatment sanctions, not criminal sanctions.

Based on the theory that the purpose of law is legal certainty, benefit, and justice,⁶³ the Law on Sexual Violence Offenses has provided sufficient legal certainty at the penal and non-penal policies. The formulation of criminal provisions is regulated (*lex certa and lex scripta*) to achieve justice for the offense subject. Restitution is stated as a criminal sanction even though it is an action sanction in the section on criminal sanctions and treatment, which does not give legal clarity. The regulation of corporate criminal liability is still insufficient. The Law on Sexual Violence Offenses will seem less valuable to society in this situation.

C. Conclusion

To conclude this study, the Law on Sexual Violence Offenses is an intra-special criminal law (*lex specialis*). The formulation of the Law is a criminal policy, which is performed by the government to reduce the annual growing of sexual violence offenses. In terms of penal policy, the Law on Sexual Violence Offenses has criminalized ten acts by categorizing them as criminal offenses. in terms of non-penal policy, the Law aims to prevent and handle sexual violence offenses through prevention, coordination, and monitoring by the central and regional governments, as well as law enforcement. Furthermore, at the level of criminal sanctions policy, the Law distinguishes between individuals and corporations as the subject of the offense.

⁶³ Kuswardani, "Sexual Violence in Indonesia and Malaysia: A Comparative Study," 58.

An individual subject of offense is threatened with imprisonment and/or a fine as the main type of punishment (*strafsoort*). the Law on Sexual Violence Offenses also regulates additional punishments. On the other hand, a corporation that becomes the subject of offense is threatened with a main punishment, which is adjusted to the characteristics of corporation: a fine. In addition, corporations can be subject to additional punishment. Based on the *strafmaat*, there are both indefinite and definite sentences. However, the Law on Sexual Violence Offenses has several weaknesses. In detail, the regulations on corporate criminal liability are inadequate. In fact, the law still contains a criminal sanction with the character of treatment sanctions (restitution). In addition, the adopted *strafmaat* should be in the form of indefinite sentences that adapt to the nature of the crime of sexual violence as a serious crime against public morality. There should be a synchronization between laws that are related to sexual violence (Laws on Domestic Violence Law, Human Trafficking, and Pornography) and the Law on Sexual Violence Offenses. However, the enactment of the Law on Sexual Violence Offenses is a positive step for Indonesia to eradicate sexual violence.

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