

# AN OUTLOOK ON SEXUAL VIOLENCE CASE HANDLING IN INDONESIA

An Analysis on Court Decisions  
from 2018-2020





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(An Analysis on Court Decisions from 2018-2020)**

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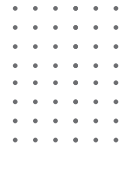
# FOREWORD

Based on the 2018–2020 Annual Record (CATAHU) of Komnas Perempuan, sexual violence against women such as incest, cyber sexual violence, *marital rape*, fornication and rape often occurs in personal/private and community spheres. Various studies related to sexual violence corroborate the data that women victims experience many difficulties in accessing justice for sexual violence that has befallen them. Moreover, these are worsened as it also happened to victims who were still underage or with disabilities having to deal with law enforcement officials with lack empathy for the vulnerability faced by the victim.

Thus far, the Indonesian criminal justice system is still oriented toward the prosecution of perpetrators (*offender oriented*). This perspective often harms the victims whose needs are often ignored during the court process and even after the process had ended. There needs to be an inclusive treatment of victims that can ensure their recovery. This is because the impact of sexual violence in inflicting suffering and trauma can persist even long after the sexual violence occurs.

To get a clear picture of the phenomenon of sexual violence in Indonesia, we need to see cases of sexual violence resolved through the courts. Therefore, the Indonesia Judicial Research Society (IJRS) as an institution of research and advocacy since 2019, which also focuses on criminal justice reform for vulnerable groups, viewed that this research using indexation of the court decision is highly crucial.

It is expected that findings from this research can serve as a base for the renewal of studies related to handling cases and recovery measures for victims of sexual violence. This indexation will show that quite many victims and perpetrators are still underage. It is also found that there is still a lack of restitution in sexual violence decisions from the court as well as the tendency of victims to report sexual violence only if it has occurred more than once.



Finally, I would like to thank all of those who have helped this research, especially IJRS colleagues, Australia Indonesia Partnership for Justice (AIPJ) 2, as well as all the experts and academics who have supported this research. Hopefully, this publication can be a reflection and can also be a reference for law enforcement officials such as police, prosecutors / public prosecutors, judges and also the general public to always prioritize the principle of protection and recovery of victims in sexual violence cases. No less important, hopefully, this research will also be a reference for the community in reflecting on each other and educating about evidence-based sexual violence as well as being a catalyst for better handling of sexual violence cases in Indonesia.

Jakarta, 22 Maret 2022

**Nisa Istiani**

Head of IJRS Community



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## EXECUTIVE SUMMARY

Based on the 2018-2020 Annual Record (CATAHU) of Komnas Perempuan, sexual violence against women such as incest, cyber sexual violence, marital rape, fornication and rape often occurs in personal/private and community spheres.

Official numbers of sexual violence cases are only the tip of the iceberg, with the real number of cases of sexual violence actually being higher than currently recorded including unreported cases. So, it is important to look at the data on sexual violence cases, especially cases that are reported and have been processed to the court. The Indonesia Judicial Research Society (IJS) with the support of the Australian Government through the Australia Indonesia Partnership for Justice 2 conducted research with secondary data analysis methods or indexation of 735 court decisions to understand the picture experienced by women victims of sexual violence cases resolved through the courts. IJS also conducts an analysis of various research reports, books or related journals as supporting data.

The research team conducted a study based on data collection through the results of the 2018-2020 court decisions index. The data collecting is carried out by downloading court decisions from the Supreme Court Directory with the criteria of first-level judicial criminal offences (District Court, Military Court and Syar'iyah Court) in 2018-2020. The research team only analyzed the decision in which women as defendants or victims, so a comprehensive analysis could be studied in relation to the condition of women facing the law (PBH) itself. In addition, the decisions analyzed by the research team is a verdict that meets criminal acts related to sexual intercourse and sexual abuse, both against children and adults. Here are the findings of sexual violence phenomena based on the results of the indexation of decisions in 2018-2020:

- The study quantitatively analyzed first-degree court decisions from the Supreme Court's Decision Directory in the 2018 to 2020 timeframes. In total, 735 decisions were analyzed.



- The majority of articles used in the decision analyzed are articles of the provisions of the Child Protection Law, namely Article 81 (child sexual intercourse) and Article 82 (child abuse) of the Child Protection Law (64.9 %).
- In the decision analyzed, the majority of the defendants were single defendants (98.5 %). In addition, the majority of the victims were also single victims (96.6 %)
- The majority of perpetrators of sexual violence are in the age range of 18-25 years or the final years of the adolescent age group which is 33.5 per cent.
- The majority of the victims, 72.1 per cent of the victims, were women aged 6-18 years. This suggests that girls are vulnerable to being victims of sexual violence.
- The findings also showed that there were also victims of sexual violence who had disabilities such as mental disabilities (1.1%), physical disabilities (0.7%) to intellectual disabilities (0.3%).
- The majority of victims, 87.9 percent knew the perpetrator. The findings showed that the majority of perpetrators known to the victim were the victim's boyfriend (25.2 percent), other family members (13.5 percent), core family members (13.3 percent), friends (12.7 percent) to neighbors (12.4 percent).
- Other findings showed that the majority of sexual violence cases against women and children entered the court when they had experienced repetition or recurrence (76.9 percent).
- This study found that the majority of victims, namely 59.6 percent, decided to first tell their families about sexual violence before entering into legal proceedings.
- The majority of victims (59.9 percent ) were sexually assaulted in their own homes. Of all the decisions in sexual violence cases, 78.1 percent were decisions that came from areas in the district (rural).

- The results of this study showed that women in contact with the law (PBH) who had a companion with only 8.7 percent and those accompanied by lawyers / legal counsel were also very few, which is only 0.4 percent. While the rest there is no information on the availability of escorts, which is as much as 90.9 percent.
- The majority of PBH as victims of sexual violence suffered psychological impacts, which amounted to 78.0 percent and physical impacts were as much as 43.8 percent. The psychological impact experienced by PBH varies, ranging from deep trauma, fear, shame to changes in behaviour due to sexual violence experienced. While the physical impact experienced by PBH ranges from bruises, and wounds in sexual organs to severe injuries such as fractures and damage to the reproductive organs as experienced by 0.5 percent of PBH. PBH was also found to experience financial impact.
- Of the impacts experienced, only 0.1 percent of female victims were granted restitution and 19.2 percent did not apply. Meanwhile, from the majority of decisions, no information was obtained regarding recovery efforts both submitted and granted.

These findings can be an illustration of the pattern of sexual violence phenomena that occur today. The data set of the results of this study is expected to be a reference material to reflect the conditions experienced by women who solve their cases through the courts.

These data findings are also expected to be useful for service providers and stakeholders. In addition, considering that when this research report was drafted, there's still an ongoing discussion of the Draft Law on Sexual Violence (RUU TPKS) in the House of Representatives, it is hoped that this research can also be input and reference for the discussion.

# CHAPTER I

## INTRODUCTION



## 1.1 Research Background

The phenomenon of sexual violence in Indonesia has reached an alarming point. According to *Komnas Perempuan* (National Woman's Committee) in its Yearly Notes of 2021, there were almost 8,000 reports of sexual violence during 2020<sup>1</sup>. From such number, *Komnas Perempuan* recorded 6,480 out of 8,234 cases happened in households/domestic areas are sexual violence.<sup>2</sup> Meanwhile, sexual violence was also recorded as the highest case reported by women who experienced violence in public with total of 962 cases, mostly in the form of sexual intercourse/rape and obscene acts/harassment<sup>3</sup>. These cases were not only happened to adult women as children also vulnerable to sexual violence. Ironically, *Komnas Perempuan* recorded 954 cases of sexual violence happened to under-age girls during the year of 2020<sup>4</sup>, which has increased from 822 cases happened in 2019.<sup>5</sup>

Nevertheless, it is believed that these data do not reflect an accurate portrait of the actual situation of sexual violence within the society. Within the context of examination in the court of law, cases of sexual violence towards women seeking justice in the court could not represent all similar cases that have occurred across Indonesia. It's important to understand that not all victims have the courage and are empowered to report her case to undergo judicial process. *Komnas Perempuan* has identified a number of contributing conditions, such as 1) the relationship between the victims and the perpetrator during the restriction of movement in the time of Covid-19 pandemic; 2) there is an inclination that victim only dare to tell her family or keep silent; 3) technological/digital illiteracy; 4) a complaint handling model that is not ready for pandemic conditions (not yet converting the model to online scheme).<sup>6</sup>

1 This data is gathered from reports obtained from *Lembaga Layanan Mitra Komnas Perempuan*, a total of 8,234 cases in the year of 2020. Read *National Committee Against Violence on Women (Komnas Perempuan) (6), Yearly records 2021: Woman in the Hordes of Pandemic: An Increase of Sexual*

2 *Ibid.*

3 *Komnas Perempuan (6), op.cit., pg. 2*

4 *Ibid.*

5 *Komnas Perempuan (5), Yearly Notes 2020: Increase on Violence: Policy on The Elimination of Sexual Violence to Establish A Safe Space for Women and Female Children--Records on Violence Against Women 2019*, (Jakarta: Komnas Perempuan, 2020), pg. 1.

6 *Komnas Perempuan (7), op.cit., pg. 8.*

On the other hand, women also experience unfair treatment and received the act of discrimination whilst undergo the process of law. Women often blamed by law enforcer as the reason of domestic violence conducted by her spouse, mostly wives were deemed not devoted enough in taking care of their husbands, disloyal, as well as lacking of parenting skill.<sup>7</sup> In other situation, many law enforcer suggest that the women who invite the act of raping because of their choice of clothing, wandering at night, and engage themselves to a free-spirited crowds.<sup>8</sup> Moreover, women-victim mostly received questions, or remarks that put them in precarious position =, and harassing statement from law enforcer are drawing fear and leads to a sense of trauma<sup>9</sup>. When the court manages the case, judges often ask about sexual history of the victim and tends to ignore the victim's needs for proper assistance and recovery.<sup>10</sup> These situations put more challenge on women in contact with the law and in accessing their rights, especially the rights to receive a fair trial.<sup>11</sup>

From such notions, Indonesia Judicial Research Society (IJRS) with the support from Australia-Indonesia Partnership for justice 2 (AIPJ2) working on the research that examines the court decision on sexual violence as an effort to draw a more comprehensive picture of this phenomenon and how sexual violence has been handled in court. This research is directed to obtain a description of characters of the victims, perpetrators, and the type of sexual violence to the process of managing the case in court.

7 Bestha Inatsan Ashila et. al., *Pedoman Pendamping Perempuan Berhadapan dengan Hukum 'Supplementary Guide for Women in Facing The Law'*, (Depok: Masyarakat Pemantau Peradilan Indonesia Fakultas Hukum Universitas Indonesia (MaPPI FHUI), 2019), pg. 14.

8 *Ibid.*

9 *Ibid.*

10 Komnas Perempuan (8), *Laporan Penelitian Kualitatif: Tinjauan Penerapan Peraturan Mahkamah Agung Republik Indonesia No. 3 Tahun 2017 tentang Pedoman Mengadili Perkara Perempuan Berhadapan dengan Hukum di Lima Mitra Wilayah Sistem Peradilan Pidana Terpadu Penanganan Kasus Kekerasan Terhadap Perempuan (SPPT: PKKTP) 'Qualitative Research Report: A Study of The Implementation of Indonesian Supreme Court Regulation No.3 Year 2017 about Guidelines for Judges in Handling Women in Contact with Laws in Five Regional Partners of The Integrated Criminal Justice System Handling Violence Againsts Woman Case'* – unpublished report.

11 *Ibid.*, pg 14-15.

## 1.2 Research Objective

The research aims to reflect the condition or the phenomenon of sexual violence that happened with the women who are trying to solve her case in the court. Moreover, the research also hopes to be the source of reference in the process of composing the draft about Sexual Violence Offenses Law material.

## 1.3 Research Methodology

### 1.3.1 Data Gathering Method

This research implements qualitative approach with secondary data analysis<sup>12</sup>/Indexation<sup>13</sup>. The secondary data in this research are the court decisions that are available for download on putusan3.mahkamahagung.go.id. The directory is the official source made available by the Supreme Court for the public to access all decisions from all courts in Indonesia. Taking that all the information about the sexual violence phenomena can be found in the court decision into account, the secondary data analysis was implemented by filtering the important information in the decision that in-line with the aim of this research. In addition, the easy access to the court decisions gives additional justification to carry out this research in time of COVID-19 Pandemic, which puts barriers in the movement of researchers to collect the data directly from the field.

### 1.3.3 Means and partners in data collection

This research is conducted by exercising the means of indexation form which is available on [http://pantauperadilan.org/OS-Indeksasi\\_Putusan\\_PERMA\\_No\\_3\\_Tahun\\_2017](http://pantauperadilan.org/OS-Indeksasi_Putusan_PERMA_No_3_Tahun_2017). Drafting the means was based on the observation guidelines published by MaPPI FHUI<sup>14</sup> and readjusted with

12 Secondary data is data obtained from existing source. Researchers did not take or gather the data directly, however it is related to the issue which being presented in the research plan. International Organization for Migration (IOM), "Methodologies for Data Collection and Analysis for Monitoring and Evaluation," dalam *IOM Monitoring and Evaluation Guidelines*, (Geneva: IOM, 2020), pg. 115

13 *Ibid*

14 Arsa Ilmi Budiarti, et. al., *Pedoman Panduan Pemantauan PERMA No. 3 Tahun 2017 tentang Pedoman Mengadili Perkara Perempuan Berhadapan dengan Hukum*, (Depok: Masyarakat Pemantau Peradilan Indonesia Fakultas Hukum Universitas Indonesia (MaPPI FHUI), 2020), pages. 58.

predetermined variables and research methodology<sup>15</sup>. To gather the data, enumerator analyzed court decisions with the form mentioned above to yields unbiased data with unified variables.

### 1.3.4 Criteria for Required Data

The process of data gathering was done by downloading court decisions from The Supreme Court Decisions Directory and filtering the decisions into few criteria, such as:

- a. The decisions must take place around the year of 2018–2020, to get the most updated sexual violence cases.
- b. The first level of court decision (covering State Court, Military Court, and the Sharia Court) so the facts of law and judge's consideration can be gathered comprehensively.
- c. Decisions adjudicating criminal matters.
- d. Decisions that contain information about women, either as defendants or victims. The purpose of choosing such decision is related to the completeness of information in regard of the condition of women in cases of sexual violence. We must remember that the information about the identity of the women and their condition are not always recorded comprehensively in the court decision if the women took position as witness.
- e. Decisions that cover the information about criminal acts with the following details:

#### I. Fornication/Sexual Intercourse

I.1. With violence or threat of violence, and coercion

I.1.1. Towards women outside of a marriage

I.1.2. Towards Children

15 Referring to observation form in the book of *Pedoman Pemantauan PERMA 3/2017* by MaPPI FHUI which composed to observing directly in court to record few elements that is visible to eyes (such as gesture, facial expression, tone of voice, et cetera), but not been incorporated in the decisions. Therefore, the form or data completion means are readjusted with the need of information that is available in court decision.

I.1.3. Towards any person living under one household

I.1.3.1. Causing any wounds/ pains that are difficult to heal, mental disorders, miscarriage, or damaging reproductive organs.

I.1.4. Towards any member of household with another person to pursue commercial gain/other intention

I.2. With deception/series of lies/persuasion

I.2.1. Towards children

I.3. Without act of violence or threat of violence

I.3.1. Towards girls below age of 15 who is not his wife

I.3.2. Towards girls below age of 12 who is not his wife

I.3.3. Towards a wife who is not ready

I.4. In the state of unconsciousness or helpless

I.4.1. Towards woman outside marriage

## II. **Molestation**

II.1. With violence or threat of violence

II.1.1. Towards adult

II.1.2. Towards children

II.2. In the state if unconsciousness or helpless

II.3. Without violence or threat of violence

II.3.1. Towards person under the age of fifteen or underage

II.3.2. From adult against their children with the same sex

II.3.3. From parents against children in their authority

II.3.4. State officer to their subordinate

II.3.5. From an administrator of a place against a person who is placed there.



## II.4. With deception, series of lies, or persuasion

### II.4.1. Towards children

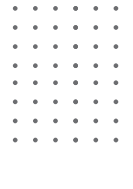
The determination of criminal acts is carried out by looking at the decisions handed down by the judge or the prosecutor's demands. If the verdict is in the form of conviction, then the criminal action refers to the article that is stated as proven by the panel of judges. Meanwhile, if the verdict is in the form of an independent or free verdict, then the criminal action refers to the article demanded by the Public Prosecutor.<sup>16</sup> Therefore, the indexed decisions were limited to sexual violence only (which according to *KUHP* or 'Criminal Code Procedure' is referred as Crime againsts Morality) or as regulated in article 285–294 Criminal Code Procedure (*KUHP*), and article 81 and article 82 of The Child Protection Law<sup>17</sup>, Article 26–28 of Law Number 23/2004 concerning the Eradication of Domestic Violence (PKDRT), and Article 46–60 of Acehese Qanun Number 6/2014 about the Islamic Criminal Law or *Jinayat* Law.

### 1.3.5 Sample Determination Technique

Because there is no exact data or valid number about the sum of sexual violence case in the first level court, the data gathering equipped decision retrieving machine from PT. Indexa Law as partner of IJRS. Decision retrieving was take place in 1 (one) month duration to get all the sexual violence decision in the last 5 (five) years resulting in 7.934 sexual violence decisions. After the decisions were filtered according to the determined criteria, 735 decisions were gathered (with 3% margin of error from total decision retrieved) as the sample of this research. This sample determination technique is known as

16 Decision indexation to cases that are acquitted/released are still accommodated in this study, considering the purpose of this research is to see the phenomenon of sexual violence that is processed through the court so that it can be used as a reflection to handle cases of sexual violence.

17 Laws number 23 in the year of 2002 about Children Protection as it has been revised several times and it was last revised with the Law number 17/2016 concerning Stipulation of Government Regulation in Lieu of Law Number 1/2016 about the Second Revision of Laws number 23 /2002 concerning Child Protection.




purposive sampling, a technique that select sampling with non-random approach where there is condition or specific needs to achieve and usually can be implemented if the population is hard to find or not known precisely.<sup>18</sup>

### 1.3.6 Duration of data gatherings

Gathering the data from the Supreme Court Decisions Directory was taken place in the month of April 2021. Afterward, the selection of population and sample determination was carried out during May–August 2021.

### 1.3.7. Processing and analysing the data

All the data gathered from the Supreme Court Decisions Directory was analuzed with indexation form that is already prepared. Then, the raw data is gathered in the .csv and .xls format that can be processed with Microsoft Excel. Processing the data is executed in few stages, that are: 1) data cleaning; 2) data processing; and 3) data visualization. Data cleaning is to make sure that the data is similar, there is no error in typing, and to guarantee completeness. Data processing sorts out the clean data from the data cleaning process to become accumulated number and percentage. Data visualization converts the frequency numbers and percentage into a series of grahic/diagrams to be analyzed further.



Analysing the main data in this research conducted descriptively. This action is choosen to gather the root information about sexual violence case that happened to Woman in contact the law, including identification and jduges consideration in the decisions.

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18 W. Laurence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches*, cet. 7, (Wisconsin: University of Wisconsin–Whitewater, 2011), pg. 273.

## ➤➤ 1.4 Measuring Variables

The variables measured in the process of monitoring and evaluation is as follows:

### 1. Decision profile

#### a. Characteristics of decision

Including the year of decision, type of decision, type of case, status of the Woman in contact the law, article in the decision, number of defendants, number of victims, the evidence of children facing the laws in the decision.

#### b. Characteristics of defendant

Including age, sex, marital status, and the duration of detention.

#### c. Characteristics of victim

Including age, sex, marital status, any disabilities or their specific condition, and publication of victim's data in the decision.

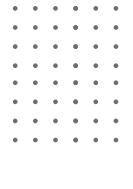
### 2. Sexual Violence Phenomenon

Including the relation between the parties, the way of reporting, repetition<sup>19</sup> of the case, and the location of the case.

### 3. Characteristics of Sexual Violence Case Examination in Court

Covering identifiable elements and consider by the judge based on Supreme Court Rules (PERMA) Number 3/2017 concerning the Trial Guideline of Woman in contact the Law. Some articles that is considered and made into indicator/questions in this research such as Article 4 about the consideration regarding gender equality and non-discrimination (assistance, situation of helplessness, power relation, violence record), Article 5 in relation to consideration of sexual records of the Woman in contact the laws, Article 8 in relation to the aftermath and recovery of Woman in contact the laws, Article 9 in relation to the availability of attorney/assistance for woman in contact with the laws,

<sup>19</sup> Repetition in question in this research is the perpetrator's action that is done repeatedly to the same victim. This referred to the concept of *concurus realis* in the article 65 of the Criminal Code (KUHP). This matter will be elaborated further in the repetition sub-chapter.



and Article 20 in relation to the examination of audio visual. Not all the articles in PERMA are viable in decision indexation because of the limitation of information in the decision. For example, the information about the implementation of PERMA Article 7 mentioned above is related to the role of the judge in rebuking another parties undermining Woman in contact the laws, which is only noticeable through observation or direct supervision.

#### **4. Comparison of Prosecutions and Court Decisions in the Cases of Sexual Violence**

Including the article charged, the form of prosecution, the amount / length of demand, the type of action demanded, the medical evidence used, the expert presented, the article that was decided, the form of punishment, the amount / length of punishment, the type of action that was decided.

### **➤ 1.5 Stages of Research**

All the research stages were conducted during April-October 2021. These were the stages in order to complete this research:

#### **a. Determining the criteria and variable in the decisions**

In the beginning, the researcher determined the criteria of court decisions that is sexual violence cases; therefore, the process of finding the document in the Supreme Court Decisions Directory can be conducted with more specific. Moreover, researchers also decided the kind of variable to investigated in the court decision.

#### **b. Downloading the court decision from the directory**

After determining the criteria, researcher downloaded the court decision from the Supreme Court Decisions Directory and collected 7.934 decisions in April 2021.

#### **c. Composing the monitoring means and evaluation**

To conduct the process of indexation, it is necessary to have means with the same standard. Therefore, based on the variables that have been

determined, researcher composed a series of questions in the form of questionnaire that was used to identify those main variables in the court decisions. The form of indexation is available at [http://pantauperadilan.org/OS-Indeksasi\\_Putusan\\_PERMA\\_No\\_3\\_Tahun\\_2017](http://pantauperadilan.org/OS-Indeksasi_Putusan_PERMA_No_3_Tahun_2017). This process took place during April-May 2021.

**d. Testing the monitoring means and evaluation**

To make sure the means can be used, easy to understand, and able to answer the desired needs, researcher conducted the process of testing in May 2021. This testing process was conducted in 3 (three) court decisions by 3 (three) researchers.

**e. Enumerator recruitment**

To conduct the process of indexation, researchers recruited 4 (four) enumerator personnel. The enumerators were chosen through an open recruitment process and after they were selected, they received training on gender concept, the protection of women and judge's examination according to PERMA No. 3/2017 and the way to perform indexation with appropriated means.

**f. The process of indexation court decision**

The process of indexation was conducted by 4 (four) enumerator personnel in the course of 4 (four) months from May-August 2021.

**g. Cleaning process and data processing**

From the result of indexation by the enumerator, there are 735 decisions that can be examined further. Researchers have to make sure the data is filled correctly, unified, and there is no blank space (known as cleaning process). Afterward, researcher start to process the clean data, which is converting and visualized the data into percentage that is easy to interpret in the final report. The process took place during August-September 2021.

**h. Writing the final report**

From the outcome of data processing, researchers drafted a report that draws a picture about the result of indexation that is the implementation of PERMA 3/2007 in the Supreme Court decisions.

## ➤➤ 1.6 Research Limitations

According to the selected method, this research is not aimed to provide all the answers to questions related to phenomenon and handling of sexual violence case in Indonesia. Limitation of this research was as follows:

- a. This research is carried away by indexation method and only limited to court decisions on sexual violence circa 2018–2020.
- b. The result in this research can not be generalized to give an overall picture of sexual violence phenomenon that women received during her time in resolving her case in the court. However, the result of this research can contribute to the availability of data relating to the phenomenon of sexual violence that is settled through court.
- c. The result of this research is not to generalize in the national scope. It is because the total number of case decision relating to sexual violence in the overall of the decision directory is unknown. Moreover, this result also only includes decisions available and can be downloaded in the Supreme Court Decision Directory.
- d. The result of this research only limited to sexual violence court decision. It is motivated by the awareness of growing sexual violence action in Indonesia and the increase of public attention in issues related to sexual violence. Therefore, it is necessary to further examine other cases that are related to woman in contact with the law.

# CHAPTER II

## A PORTRAIT OF SEXUAL VIOLENCE IN INDONESIA



## 2.1 Definition of Sexual Violence

The issue of sexual violence has been the subject of discourse in various state forums, science assemblies, mass media, and in the public. This discourse has further expanded, mainly as a result of the increasing number of victims and variation in types of sexual violence, quantitatively as well as qualitatively<sup>20</sup>.

According to World Health Organization (WHO), sexual violence is interpreted as any sexual act, attempt to obtain a sexual act, undesirable comment, or action, toward one's sexuality with an element of coercion by anyone (regardless of the relationship with the victim) and in any situation (not limited to domestic or work settings)<sup>21</sup>. The coercion mentioned in the definition can be in the form of physical or psychological violence, for example, psychological threat, threat of layoffs, or physical threats<sup>22</sup>. The presence of the element of coercion is intended to force the victim to submit to the perpetrator's will. Apart from exercising the element of coercion, this crime may also occur when an individual does not have the ability to give full consent to participate in the sexual act that the perpetrator is about to perform, for example: due to being under the influence, asleep or unconscious, or having a mental disability<sup>23</sup>. Moreover, United Nations (UN) has defined sexual violence as an aggressive and cruel conduct with different varieties and consequences, ranging from unwanted touch to forced sexual intercourse and rape<sup>24</sup>.

Moreover, WHO has assessed that sexual violence is not limited to the conventional definition of sexual intercourse. Whilst drafting the concept of rape, WHO expanded the types of penetration that can be categorized as a form of rape. Sexual violence is not only limited to the penetration of the

20 Lidwina Inge Nurtjahyo and Choky Ramadhan, eds., *Kekerasan Terhadap Perempuan dalam Peradilan Pidana: Analisis Konsistensi Putusan*, (Depok: Badan Penerbit Fakultas Hukum Universitas Indonesia dan Masyarakat Pemantau Peradilan Indonesia, 2016), pg. 268.

21 Etienne G. Kruh, et. al., *World Report on Violence And Health*, (Jenewa: World Health Organization, 2002), hlm. 149 as quoted in Akbari, et. al., *op.cit.*, pg. 9.

22 *Ibid.*

23 *Ibid.*

24 UN Report Chapter 6: Violence Against Women, as quoted in Sulistyowati Irianto, ed., *Hukum Perlindungan Perempuan dan Anak*, (Jakarta: USAID & E2J The Asia Foundation, 2015), pg. 388.



vagina by the penis<sup>25</sup>, but also the penetration of the mouth and anus by the penis.<sup>26</sup>

Besides the act of rape, the other types of sexual violence identified by the WHO include sexual slavery, sexual harassment, trafficking for the purpose of forced prostitution, forced exposure to pornography, forced pregnancy, forced sterilization, forced abortion, forced marriage, and female genital mutilation <sup>27</sup>. Acts of rape and other sexual violence acts are deemed to breach human rights and if these acts are performed in war and political conflicts, they are regarded as crimes against humanity<sup>28</sup>. Therefore, the state has the responsibility to protect women from all types of sexual violence and provide appropriate medical and psychosocial assistance<sup>29</sup>.

To date, sexual violence is generally experienced by women and children. In socio-cultural constructions, women and children are in a subordinate position within society<sup>30</sup>. In such dimensions, women and children are regarded as part of men's or parents' property<sup>31</sup>, therefore they must accept whatever demeanor of 'the owner'<sup>32</sup>. Such a framework of thinking is formed from social norms that have been practiced for centuries. Considering that women do not have autonomy over their own bodies and are regarded as men's property, according to an old common law in Britain, an act of rape towards a woman was regarded as a crime against one's property or wealth, and not a crime against a person/body. <sup>33</sup>

25 Etienne G. Kruh, *et. al.*, *World Report on Violence And Health*, as quoted in Akbari, *et. al.*, *op.cit.*, pg. 9.

26 *Ibid.*

27 World Health Organization (WHO), *Guidelines for Medico-Legal Care for Victims of Sexual Violence*, (Geneva: WHO, 2003), pg. 7.

28 *Ibid.*

29 International Criminal Court, *Rome Statute (1998)*, as quoted in Lauren Harris and Julie Freccero, *Sexual Violence: Medical And Psychosocial Support*, (California: Human Rights Center University of California Berkeley, 2011), pg. 1.

30 Lidwina Inge Nurtjahyo, *Perempuan dan Anak Korban Kejahatan Seksual* as quoted in Irianto, *op.cit.*, pg. 393.

31 *Ibid.*

32 *Ibid.*

33 Women's body, especially her virginity, considered as property and is vital in maintaining inheritance rights. A woman's sexuality is considered to belong to her father and is then given to a man who becomes a woman's husband. Therefore, the rape law protects the economic interests of men because it places rape as a crime against property. Carol E. Tracy, *et. al.*, *Rape and Sexual Assault in the Legal System* as quoted in Akbari, *et. al.*, *op.cit.*, pg. 54.

Related to such notion, Indonesian criminal law does not include the term sexual violence. The Indonesian Criminal Code (KUHP) only uses the term crime against morality in Chapter XIV, Second Book, that prohibits a number of actions that can be compared to the terminology of sexual violence such as rape, acts of attacking morality, sexual relations with underage girls, and so forth<sup>34</sup>. The understanding that regards sexual violence as a crime related to morality is an orthodox way of thinking that has been abandoned by many countries. In the present day, sexual violence has been regarded as a sexual crime or a crime against the integrity of the human body, and therefore it is necessary to be categorized as a crime against the human life and human body<sup>35</sup>. The term sexual violence only seems to appear in the promulgation of The Law of Eradication of Violence in a Household (PDKRT)<sup>36</sup>, Law Number 21/2007 on the Criminal Act of Trafficking (TPPO) and the Child Protection Law.

## ➤➤ 2.2 The History of the Regulation of Sexual Violence in Indonesia

The regulation on sexual violence was first introduced in the Indonesian Criminal Code (KUHP) through 'the act of rape' that is mentioned in article 285–288 and 'actions that breach general morality' in article 289–294. In summary, the regulation regarding the crime of sexual violence is The Indonesian Criminal Code is regulated as follows:

34 Indonesia, Kitab Undang-Undang Hukum Pidana (KUHP), Article 285–294

35 Akbari, *et. al.*, *op.cit.*, pg. 90–91.

36 Dio Ashar Wicaksana, *et. al.* (2), *Laporan Studi Kualitatif Barometer Kesetaraan Gender: Persepsi dan Dukungan Pemangku Kepentingan Terhadap RUU Penghapusan Kekerasan Seksual dan UU Nomor 16 Tahun 2019 tentang Perubahan Atas UU Perkawinan*, (Jakarta: INFID, 2020), pg.15.

**Table 2.1****Regulations on Sexual Violence in the Indonesian Criminal Code (KUHP)**

<b>Rape</b>		<b>Violation of Morality</b>	
<b>Criminal Act</b>	<b>Article</b>	<b>Criminal Act</b>	<b>Article</b>
With violence or threats of violence that force women to have sexual intercourse outside of marriage.	285	With violence or threats of violence that force a person to conduct or allow a licentious act to happen.	289
An act of intercourse with unconscious or helpless woman outside of marriage.	286	Performing a licentious act towards an unconscious or helpless person.	290 (first)
Intercourse with a woman outside of marriage, who is known or should reasonably be suspected to not yet have reached the age of 15, or is not yet capable of having sexual relations.	287	Performing a licentious act towards a person, who is known or should reasonably be suspected to not yet have reached the age of 15, or is not yet capable of having sexual relations.	290 (second)
Intercourse with a woman in marriage, who is known or should reasonably be suspected to not yet have reached the age of 15, or is not yet capable of having sexual relations, and the act results in injuries.	288	Persuade someone, who is known or should reasonably be suspected to not yet have reached the age of 15, or is not yet capable of having sexual relations, to perform or allow licentious acts or intercourse with someone outside of marriage.	290 (third)
		Performing licentious acts towards another person of the same sex or who is known or should reasonably be suspected to be underage.	292

		by giving or promising money or means, taking advantage of the authority that arises from a relationship of circumstances, or with deliberated deception to make someone under the age of maturity perform or allow licentious acts to be carried out with them.	293
		Performing licentious acts toward a biological child, step-child, adopted child, child under their supervision who is not yet mature and who's parenting, education, and guardianship has been bestowed unto them, a retainer, or underage subordinate.	294 clause (1)
		Any state officials who perform a licentious act toward a person who because of their position is their subordinate, or with a person whose care is entrusted handed over to them.	294 clause (2) first
		Administrator, doctor, teacher, staff, supervisor, or workers in correctional facilities, government institutions, educational institutions, orphanages, hospitals, psychiatric hospitals, or any social institution who perform licentious acts with any person who is admitted into these institutions.	294 clause (2) second



In its further development, the drafting of sexual violence regulations has been expanded since the Child Protection Law took into effect. Although it is not officially defined as sexual violence, the law prohibits intercourse with or licentious behavior toward children, through article 81 and Article 82 as follows:



#### Article 81

- (1) Every person who intentionally **commits violence or threats of violence to force a child to have sexual intercourse with themselves or another person**, is sentenced to imprisonment for a maximum of 15 (fifteen) years and minimum of 3 (three) years and a maximum fine of Rp300.000.000 (three hundred million rupiah) and minimum of Rp60.000.000 (sixty million rupiah).
- (2) The criminal provisions as referred to in paragraph (1) also apply to any person who intentionally **performs an act of deception, a series of lies, or persuades children to have sexual relations with themselves or with another person**.



#### Article 82



Any person who intentionally commits violence or threats of violence, coerces, performs an act of deception, a series of lies, or persuades a child to commit or allow licentious acts to be carried out, will be sentenced to imprisonment with a maximum duration of 15 (fifteen) years and minimum duration of 3 (three) years and fined a maximum of Rp300.000.000 (three hundred million rupiah) and a minimum of Rp60.000.000 (sixty million rupiah).

In the above deliberation, there is a significant change between the Indonesian Criminal Code (KUHP) and Child Protection Law in interpreting a victim of sexual intercourse. While the Indonesian Criminal Code (KUHP) limits children who are victims of sexual intercourse to girls<sup>37</sup>, the Child

37 Please refer to article 287 and 288 Indonesian Criminal Code (KUHP).



Protection Law does not limit the sex of children who are formulated as victims of sexual intercourse. In other words, children of male and female sex shared the same position to be protected by the law, from sexual intercourse carried out by a perpetrator.

The Child Protection Law underwent 2 (two) changes, namely Law Number 34/2014 and Law Number 17/2016. The formulation of criminal provisions related to sexual violence against children within the three laws is elaborated in the following table:

**Table 2.2**  
**Comparison of the Formulation of Criminal Provisions related to Sexual Violence**  
**in the Child Protection Law of 2002, 2014, and 2016**

Law No. 23/2002	Law No. 35/2014	Law No. 17/2016
<i>Not regulated</i>	<b>Article 76</b> Every person is prohibited from committing violence or threats of violence to force children to have sexual intercourse with themselves or another person.	<i>No change</i>
<b>Pasal 81</b> (1) Every person who intentionally commits violence or threats of violence to force a child to have sexual intercourse with themselves or another person, is sentenced to imprisonment for a maximum of 15 (fifteen) years and <b>minimum of 3 (three) years</b> and a <b>maximum fine of Rp300.000.000 (three hundred million rupiah)</b> and minimum of Rp60.000.000 (sixty million rupiah).	<b>Pasal 81</b> (1) Every person who violates the provisions as referred to in Article 76D shall be sentenced to imprisonment with a <b>minimum time of 5 (five) years</b> and maximum time of 15 (fifteen) years and fined with <b>the maximum amount of Rp.5.000.0000.000 (five billion rupiahs)</b> . (2) The criminal provisions as referred to in paragraph (1) also apply to any person who intentionally performs an act of deception, a series of lies, or persuades children to have sexual relations with themselves or with another person.	<b>Pasal 81</b> (1) Every person who violates the provisions as referred to in Article 76D shall be sentenced to imprisonment with a minimum time of 5 (five) years and maximum time of 15 (fifteen) years and fined with the maximum amount of Rp.5.000.0000.000 (five billion rupiahs).

Law No. 23/2002	Law No. 35/2014	Law No. 17/2016
<p>(2) The criminal provisions as referred to in paragraph (1) also apply to any person who intentionally performs an act of deception, a series of lies, or persuades children to have sexual relations with themselves or with another person.</p>	<p>(3) <b>In the event that the criminal act as referred to in paragraph (1) is committed by a parent, guardian, caretaker, educator, or educational staff, the sentence shall be extended by 1/3 (one third) of the sentence as referred to in paragraph (1).</b></p>	<p>(2) The criminal provisions as referred to in paragraph (1) also apply to any person who intentionally performs an act of deception, a series of lies, or persuades children to have sexual relations with themselves or with another person.</p> <p>(3) In the event that the criminal act as referred to in paragraph (1) is committed by a parent, guardian, caretaker, educator, or educational staff, the sentence shall be extended by 1/3 (one third) of the sentence as referred to in paragraph (1).</p> <p>(4) <b>In addition to the perpetrators as referred to in paragraph (3), the extension of 1/3 (one third) of the sentence is also applied to perpetrators who previously have been convicted of committing a crime as referred to in article 76D.</b></p> <p>(5) <b>In the event that the criminal act as referred to in Article 76D results in more than 1 (one) victim, causing serious injury, mental illness, infectious disease, impaired or lost reproductive function, and/or loss of life, the perpetrator shall be sentenced to death, given a life sentence, or a minimum imprisonment time of 10 (ten) years and maximum of 20 (twenty) years.</b></p>

Law No. 23/2002	Law No. 35/2014	Law No. 17/2016
		<p>(6) In addition to the sentence as referred to in paragraph (1), paragraph (3), paragraph (4), and paragraph (5), the perpetrator may be subject to additional punishment in the form of announcing the perpetrator's identity.</p> <p>(7) The perpetrators as referred to in paragraphs (4) and (5) may be subject to action in the form of chemical castration and installation of electronic detection devices.</p> <p>(8) The action as referred to in paragraph (7) shall be sentenced collectively with the main sentence by specifying the period of execution of the act.</p> <p>(9) Additional penalties and actions are excluded for child perpetrators.</p>
Not regulated	<p><b>Article 76E</b></p> <p>Every person is prohibited from using violence or threats of violence, coercing, performing an act of deception, committing a series of lies, or persuading a child to commit or allow licentious acts to be carried out.</p>	No Change





Law No. 23/2002	Law No. 35/2014	Law No. 17/2016
Not regulated	Not regulated	<p><b>Article 81A</b></p> <p>(1) The action that is referred to in article 81 paragraph (7) is imposed for a maximum period of 2 (two) years and is taken into effect after the convict has served the principal sentence.</p> <p>(2) Implementation of the actions as referred to in paragraph (1) is carried out under regular supervision by the ministry that administers government affairs in the legal, social, and health fields.</p> <p>(3) The execution of chemical castration is accompanied by rehabilitation.</p> <p>(4) Further provisions regarding the procedure for implementing the action and rehabilitation shall be regulated in a Government Regulation.</p>
<p><b>Article 82</b></p> <p>(1) Every person who intentionally commits violence or threats of violence to force a child to have sexual intercourse with themselves or another person, is sentenced to imprisonment for a maximum of 15 (fifteen) years and minimum of 3 (three) years and a maximum fine of Rp300.000.000 (three hundred million rupiah) and minimum of Rp60.000.000 (sixty million rupiah).</p>	<p><b>Article 82</b></p> <p>(1) Every person who violates the provisions as referred to in Article 76E shall be sentenced to imprisonment with a <b>minimum time of 5 (five) years</b> and maximum time of 15 (fifteen) years and fined with <b>the maximum amount of Rp.5.000.0000.000 (five billion rupiah)</b>.</p>	<p><b>Article 82</b></p> <p>(1) Every person who violates the provisions as referred to in Article 76E shall be sentenced to imprisonment with a minimum time of 5 (five) years and maximum time of 15 (fifteen) years and fined with the maximum amount of Rp.5.000.0000.000 (five billion rupiah).</p>

Law No. 23/2002	Law No. 35/2014	Law No. 17/2016
	<p>(2) <b>In the event that the criminal act as referred to in paragraph (1) is committed by a parent, guardian, caretaker, educator, or educational staff, the sentence shall be extended by 1/3 (one third) of the sentence as referred to in paragraph (1).</b></p>	<p>(2) In the event that the criminal act as referred to in paragraph (1) is committed by a parent, guardian, caretaker, educator, or educational staff, the sentence shall be extended by 1/3 (one third) of the sentence as referred to in paragraph (1).</p> <p>(3) <b>In addition to the perpetrators as referred to in paragraph (3), the extension of 1/3 (one third) of the sentence is also applied to perpetrators who previously have been convicted of committing a crime as referred to in article 76E.</b></p> <p>(4) <b>In the event that the criminal act as referred to in Article 76E results in more than 1 (one) victim, causing serious injury, mental illness, infectious disease, impaired or lost reproductive function, and/ or loss of life, the perpetrator shall be sentenced to death, given a life sentence, or a minimum imprisonment time of 10 (ten) years and maximum of 20 (twenty) years.</b></p> <p>(5) <b>In addition to the sentence as referred to in paragraph (1) to paragraph (4), the perpetrator may be subject to additional punishment in the form of announcing the perpetrator's identity.</b></p>



Law No. 23/2002	Law No. 35/2014	Law No. 17/2016
		<p>(6) The perpetrators as referred to in paragraphs (2) and (4) may be subject to action in the form rehabilitation and installation of electronic detection devices.</p> <p>(7) The action as referred to in paragraph (6) shall be sentenced collectively with the main sentence by specifying the period of execution of the act.</p> <p>(8) Additional penalties and actions are excluded for child perpetrators.</p>
<i>Tidak diatur</i>	<i>Tidak diatur</i>	<p><b>Pasal 82A</b></p> <p>(1) The action that is referred to in article 82 paragraph (6) is taken into effect during and/ or after the convict has served the principal sentence.</p> <p>(2) Implementation of the actions as referred to in paragraph (1) is carried out under regular supervision by the ministry that administers government affairs in the legal, social, and health fields.</p> <p>(3) Further provisions regarding the procedure for implementing the action shall be regulated in a Government Regulation.</p>



With the enactment of the Child Protection Law, the provisions for rape and acts of violating decency against children in the Indonesian Criminal Code (KUHP) become invalid. Therefore, any rape and licentious act committed toward children will be processed using the Child Protection Law. Moreover, the regulation of sexual violence in Indonesia is increasingly complemented by the enactment of the Law on the Elimination of Domestic Violence (PKDRT), that defines sexual violence as follows:



“...all acts in the form of forced sexual intercourse, forced sexual intercourse in an unnatural and/or unwelcome way, the coercion of sexual intercourse with other people for commercial and/or certain purposes<sup>38</sup>.”

Moreover, this law elaborates the scope of sexual violence, as follows<sup>39</sup>:

- a. The coercion of sexual intercourse toward another person within the same household and
- b. The coercion of sexual relationship toward someone in the same household, with another person, for a commercial purpose/other purpose.

Based on the above elaboration, it is important to keep in mind that the PKDRT Law emphasizes the action of ‘coercion’ or ‘disliked action’ without detailing on how such actions are carried out. The matter is rather different with the regulation in the Indonesian Criminal Code (KUHP) that narrowly limits the element of coercion to violence or violent threats<sup>40</sup>. Therefore, any sexual relationship that occurs within a household can be deemed as sexual violence if the action is carried out without consent, in an undesired way, and under pressure.

38 Indonesia, The Eradication Law of Domestic Violence, *Undang-Undang Penghapusan Kekerasan dalam Rumah Tangga*, Law No. 23 yaer 2004, LN No. 95 Year 2004, TLN No. 4419, Article. 5.

39 *Ibid.*, Article. 8 point a and b.

40 For example in article 285 Indonesian Criminal Code (KUHP) about the act od rape that regulated the act of sexual relationship was conducted “with violence or threat of violence”.

In relation to such matters, UU PKDRT explicitly regulates parties categorized as being within the scope of household, such as:

- a. Husband, wife, and children, including adopted children and stepchildren;
- b. People who family relationships with any parties mentioned in point a above due to blood relations, marriage<sup>41</sup>, breastfeeding, care, and guardianship, who live in the household; and/or
- c. Domestic staff contributing in the household daily errands and live within the household concerned.

In addition to regulation at the national level, sexual violence is also a subject of discussion of Aceh Qanun Law Number 6/2014 regarding the Jinayat law<sup>42</sup>. It is important to understand that, in the context of criminal violation in Aceh, the Qanun will apply even though the same crime is regulated in other laws and regulations at the national level<sup>43</sup>. In the Qanun, there are two forms of sexual violence, namely rape and sexual harassment, with each detailing as follows:

#### A. Rape

- a. Rape<sup>44</sup>
- b. Rape toward a person who is the immediate family (mahram)<sup>45</sup>
- c. Rape toward children<sup>46</sup>

#### B. Sexual harassment

- a. Sexual harassment<sup>47</sup>
- b. Sexual harassment toward children.

41 Parent in-laws, daughters-in-law, son in-laws are included in this scope as long as they live and settled in the household concerned.

42 The *Jinayat* law is the law that regulated *Jarimah* (actions that are forbidden according to *syariah* Islamic teaching) and applies in Aceh territory. To simplify, the *Jinayat* law can be interpreted as Islamic Criminal Law.

43 Indonesia, Aceh, *Qanun Hukum Jinayat*, Qanun Number 6 Year 2014, Article 72.

44 *Ibid*, Article 48,

45 *Ibid*, Article 49.

46 *Ibid*, Article 50.

47 *Ibid*, Article 46.

Nevertheless, *Qanun Jinayat Law* only regulates the provisions for the crime of rape crime and sexual harassment in the form of its paragraph qualification, without any formulation of elements or definitions of each of the qualifications for these crimes.

### 2.3.1. Supreme Court Regulation Number 3/2017

Supreme Court Regulation (PERMA) Number 3/2017 is a breakthrough by the Supreme Court in securing the right for women to have access to justice and are free from discrimination in the justice system. Broadly speaking, this PERMA regulates several protocols that a judge should and should not do in adjudicating Women in Conflict with the Law (PBH), including equal access for PBH to obtain justice. The important elements that are regulated in the PERMA are as follows:

#### A. Case Examination of Women in Conflict with the Law (PBH)

Judges are required to identify the facts of the trial by considering the principles that form the foundation of this regulation, such as the principle of non-discrimination and gender equality<sup>48</sup> which serves as parameters for judges to examine if there is any inequality and vulnerability experienced by women in conflict with the law. This provision is formulized within Article 4, which reads as follows:



“Judges in examining cases must consider the principles of gender equality and non-discrimination, by identifying the facts of the trial as follows:

- a. Inequality of social status between the litigants;
- b. Inequality of legal protections that will effect access to justice;
- c. Discrimination;
- d. Psychological impact experienced by the victim;

48 Article 4 Supreme Court Regulations (PERMA) No. 3 Years 2017 quoted as follow: “Judges adjudicate cases of women in contact with the law based on the following principles: a. respect for human dignity and worth; b. non-discrimination; c. Gender equality; d. equality before the law; e. justice; f. benefit; and g. legal certainty.”

- e. The physical and psychological limitations of the victim;
- f. Power relations that cause the victim/witness to become powerless;
- g. History of violence from the perpetrator against the victim/witness.”

To identify inequalities between the litigants, judges must examine both the gender inequality and the social status<sup>49</sup>. Judges also must consider the nature of convenience for women to obtain legal protection, both preventive and repressive, to investigate the inequality of access impacting any barriers for woman in conflict with the law to get access to justice.<sup>50</sup>

What’s more, for the first time this Supreme Court Regulation provided a definition on power relations, with the following formulation:



“Power relations are hierarchical relationships, inequality and/or dependence on social, cultural, knowledge/educational, and/or economic status that give rise to power of one party over another in the context of inter-gender relations to the detriment of in a lower position.”<sup>51</sup>

Moreover, the power relations in question can occur in a number of situations, including but not limited to the household (between husband and wife), work situation (between the director and employees, film directors and artists, employers and the household assistants), and in the scope of education (teacher and students).<sup>52</sup>

In relation to such matters, judges need to examine the power relation between the victim and perpetrator, which results in or exacerbates the victim’s helplessness.<sup>53</sup> The power relation is so influential that it can provide some authority for one person to ask another to cater to his or her

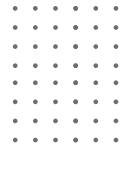
49 Arsa Ilmi, et. al., *Panduan Pemantauan PERMA No. 3 Tahun 2017 Pedoman Mengadili Perkara Perempuan Berhadapan dengan Hukum*, print 1, (Depok: Masyarakat Pemantau Peradilan Fakultas Hukum Universitas Indonesia, 2020), pg. 16.

50 *Ibid.* pg. 17.

51 Mahkamah Agung, Supreme Court Regulations (PERMA) No. 3 Year 2017, Article. 1 Number 9.


52 *Ibid.*

53 Ilmi, et. al., *loc.cit.*



desires, with or without coercion<sup>54</sup>. Additionally, judges also must look into the impact of the perpetrator's action on the psychological condition of the victim, noticing the unusual change in attitude, becoming moody, fearful, anxious, and depressed<sup>55</sup>. These findings will give light to the construction of the relationship that was built between the victim and the perpetrator, which led sexual violence against women victims.

At the implementation level, the state of powerlessness experienced by victims/witnesses can be distinguished into two kinds: namely physical and psychological powerlessness<sup>56</sup>. According to PERMA Monitoring Guide 3/2017, the state of physical powerlessness is defined as the inability of someone to physically conduct or prevent an act, for example, someone can be categorized as physically incapacitated they are paralyzed, suffer a stroke or any serious illness, are in a state of unconsciousness, and are of elderly age.<sup>57</sup> Meanwhile, psychological powerlessness is defined as the inability of a person psychologically to conduct or prevent an act, for example, people with Down syndrome or other mental disabilities.<sup>58</sup>



This PERMA also criticizes the phenomenon of law enforcement blaming the victim for the criminal violation experienced by the victim. This situation is influenced by the patriarchal mindset adopted by law enforcement and society, by seeing women as a source of problems that encourage men to commit acts against the law. Such a situation seems to provide justification for the violence suffered by women as well as an element of forgiveness for men who commit violence.

To overcome this, the Supreme Court Regulation (PERMA) Number 3/2007 regulates matters that must be considered by judges in responding to women in conflict with the law in court. More specifically, Article 5 of this PERMA regulates the prohibitions of judges in conducting including:

- a. showing attitude or casting remarks that demean, blame, and/or intimidate women in conflict with the law;

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54 *Ibid.*

55 *Ibid.* pg. 18.

56 *Ibid.*

57 *Ibid.*

58 *Ibid.*



- b. justifying the occurrence of discrimination against women by using culture, customary rules, and other traditional practices, as well as using expert interpretations that are gender biased;
- c. questioning and/or considering the experience or background of the victim's sexuality as the basis for releasing the perpetrator or reducing the sentence;
- d. casting remarks or views that contain gender stereotypes.

Moreover, PERMA Number 3/2017 also requires judges to reprimand parties who demean women in conflict with the law during court examinations. Such notions are regulated in Article 7 with the following formulation:



In the course of court examination, judges must prevent and/or reprimand any parties, legal counsel, public prosecutor and/or lawyer who display any attitude or casting any remarks that demean, blame, intimidate and/or use the experience or sexual background of women in conflict with the law.

Aside from regulating the code of conduct for examining criminal cases, Article 11 of the PERMA above also provides guidelines for Supreme Court Judges when conducting judicial examinations related to women in conflict with the law to consider the following few aspects:



- a. principals of human rights;
- b. the best interests and the recovery of women in conflict with the law;
- c. ratified international conventions and/or treaties related to gender equality.
- d. power relations and any views of gender stereotypes contained in the legislation; and
- e. the comprehensive gender analysis.

## B. The Rights of Women in Conflict with the Law

In contrast with other laws, the Supreme Court Regulation (PERMA) Number 3/2017 regulates the rights of women in conflict with the law in more detail, such as the right to receive legal assistance, to conduct separate examination through long-distance audio-visual communication, and the right to recovery.

Related to the right to receive legal assistance, this PERMA provides a more comprehensive definition and scope of assistance when compared to similar concepts in the Law on the Elimination of Domestic Violence (UU PKDRT):

PERMA Number 3/2017	UU PKDRT
Article 1 point 10	Explanation of Article 17
A companion is a person or a group or organization that has been entrusted and/or has the capacity or knowledge to assist women in conflict with the law, with the purpose of providing the women with a sense of comfort and ease during the trial process.	What is meant by the "companion volunteer: in this provision is a person who has the skill to conduct counseling, therapy, and advocacy to strengthen and support self-recovery of the victim of violence.

Moreover, Article 9 of this PERMA also gives guidance for judges to make sure that access to a companion can be realized in practice. According to this provision, woman in conflict with the law who experience any physical and psychological barriers and need assistance can access these rights at trial. In addition, the judge can give advice and grant the request of the women in conflict with the law in presenting the companion.

Regarding examinations using long-distance audio-visual transmission, PERMA Number 3/2017 justifies the regulation formulated by the Witness and Victim Protection Law<sup>59</sup> by formulating the technical examination in Article 10 as follows:

<sup>59</sup> Indonesia, *Witness and Victim Protection Law*, Law No. 13 Year 2006, LN Number. 64 Year 2006, TLN Number. 4635, Article. 9 verse (3).



“Judges at his or her own initiative and/or at the request of the parties, public prosecutors, legal advisors, and/or the victim can order women in conflict with the law to have their statements heard through examinations using long-distance audio-visual equipment at the local court or elsewhere, if:

- a. The mental/ psychological condition of the women in conflict with the law is not in a healthy state caused by fear/trauma, based on a doctor’s or psychologist’s assessment;
- b. Based on judge’s assesment, the safety of the women in conflict with the law cannot be guaranteed if she is out in a public or open place, or
- c. Based on the decision of the Witness and Victim Protection Agency (LPSK), the women in conflict with the law were declared to be in the witness and/or victim protection program and according to the agency’s assessment, could not attend the trial to provide information either for safety reasons, or reasons of physical and psychological barriers.”<sup>60</sup>

Moreover, this PERMA also regulates the role of judges to ensure the victim’s access to recovery, as written in Article 8:

- (1) *Judges must ask the women, as victims, about the losses, the impact of this case, and the need for recovery.*
- (2) *Judges should inform the victim of their right to merge cases as in accordance with Article 98 of the Criminal Procedure Code and/ or common lawsuit or the restitution requests as regulated in the provisions of laws and regulations.*
- (3) *In terms of recovering the victim or the injured party, judges are expected to be:*
  - a. *consistent with human rights principals and standards;*
  - b. *free from any view of gender stereotyping; and*
  - c. *considerate of the situation and victim’s interest from the disproportional loss casued by gender inequality.*

60 Article 10 Supreme Court Regulations (PERMA) Number 3 year 2017.

### 2.3.2. Persecutor Guideline Number 1/2021

In 2021, the Attorney General's Office published the Persecutor Guideline Number 1/2021 concerning Access to Justice for Women and Children in Handling Criminal Cases. This guideline was encouraged by the need to provide access to justice for women and children when handling criminal cases<sup>61</sup>. This guideline aimed to give direction to persecutors in optimizing the fulfillment of access of justice for women and children in conflict with the law when handling a criminal case.<sup>62</sup> The extent of the guideline covers criminal cases involving women and children at the stage of investigation, inquiring, pre-prosecution, prosecution, examination in the court and the implementation of court decisions that have permanent legal force<sup>63</sup>. A few considerations that are regulated in the guideline, include:

#### A. Case Examination of Women In Conflict with the Law

In testimonial inquiry and examination of victims, witnesses, women perpetrators, and children, the Prosecutor must pay attention to the following<sup>64</sup>:

1. Uphold human rights, honor, dignity, values, without intimidation and without giving any justification to wrongdoings, way of life and morality, including sexual experience, with questions that are cornering and not related to the criminal case,
2. Must not give any remarks that are sexist, perpetuating discrimination based on sex and gender;
3. Building irrelevant assumptions on socio-economic backgrounds or certain conditions that undermine dignity and harm women and children;
4. Victims and/or witness can be accompanied by social workers, the Victim and Witness Protection Agency (LPSK), family, the victim's attorney, and other companions;

61 Indonesia, *Pedoman No. 1 Tahun 2021 tentang Akses Keadilan Bagi Perempuan dan Anak dalam Penanganan Perkara Pidana*, Chapter 1 in the section of background, objective, and scope of work

62 *Ibid.*

63 *Ibid.*

64 *Ibid. Chapter 3 Investigation and Inquiring section A. No.1-10*

5. Must inform the rights of women and children perpetrators as regulated in the law;
6. Deliver information regarding the judicial, the rights of victims and/or witnesses including the rights of indemnification, restitution, and/or compensation<sup>65</sup>;
7. If there is a need for the child victim and/or the witness to not attend in the trial, an examination can be carried out through electronic recording by completing the formal documents in the form of a doctor/psychologist's statement, a notification letter to the child's parent/guardian/companion for examination. through electronic recording; and a letter of request for approval from the head of the district court;
8. For the women victim/witnesses that have health, safety, security, or other legal reasons not to attend the trial, their statements can be obtained under oath and an official report of oath will be made;
9. Considering the victim's or witness' condition during the examination, a psychologist, psychiatrist, doctor, or religious clerk can accompany.

## B. Case File Preparation

In elaborating facts, the public prosecutors can refrain from providing descriptions that are too detailed and vulgar. This consideration is to respect the human rights, dignity, and privacy of children and women in conflict with the law and prevent re-victimization<sup>66</sup>. In terms of the protection of information and documents that have sexual elements, public prosecutors must separate document with images, illustration, and/or photographs that show sexual organs, activities, and objects. This action is to keep the identities, information, and documents confidential as regulated in a number of rules.<sup>67</sup>

65 Where as compensation only applied to terrorism victim and human rights violation victim according to Article 7 verse (2) Law Number 31 Year 2014 about the Alteration of Law Number 13 Year 2006 about Witness and Victim Protection.

66 *Ibid.*, section D point number 1-5

67 *Ibid.*

### C. Completion of Material and Formal Requirement

The above regulation is to stipulate that, for the purposes of prosecution, the public prosecutor must complete the dossier of the case that they are handling with the following documents<sup>68</sup>:

- a. *Visum et Repertum* (VeR) or medical certificate for forensic examination;
- b. The results of the forensic laboratory examination, such as the examination of body fluids, hair, and/or body cells of the perpetrator and the victim that require penetration into the vagina, anus, and/or mouth;
- c. *Visum et Repertum Psikiatrikum* or a certificate from a psychiatrist or psychologist to determine the impact to the victim's mental preparedness to undergo a criminal justice process, or to determine the ability of the perpetrator to take responsibility, the mental ability of the perpetrator, and a history of violence that has the potential to psychological conflict or tendency to commit criminal acts accompanied with violence.

The completion of documents is primarily intended for the prosecution of cases of (i) criminal acts against body and life, including crimes against the liberty of persons, (ii) rape, (iii) sexual abuse, (iv) adultery, (v) domestic violence, (vi) human trafficking, (vii) sexual exploitation, (viii) criminal acts of pornography, (ix) crimes of information and electronic transactions that violate decency or contain pornography, (x) terrorism, and (xi) serious violations of human rights.<sup>69</sup>

If the persecutor intends to persecute the perpetrator of domestic violence with additional counseling, the process of completing the document must be accompanied by a *VeRP*, observation, and/or letter from a psychiatrist, letter from a psychologist, and/or report of peer observation about the perpetrator<sup>70</sup>. If a testimonial letter is only obtained from the victim, witness testimonial without oath, or witness testimonial *tetimonium de auditu*, the general persecutor must indicate for the investigator to optimize means of proof derived from<sup>71</sup>:

68 *Ibid.*, Chapter 4 Pre-persecution, section B Number 1

69 *Ibid.*

70 *Ibid.*

71 *Ibid.*

- a. Persons who can provide testimony related to the incident, even though he or she did not hear, see, or experience it themselves;
- b. Witnesses whose testimony stands independently and is inter-related so that verify the existence of an incident.
- c. Experts who produced the written evidence such as VeR, VeRP or forensic laboratory results or other experts who can help provide evidence.
- d. Related electronic information and/or electronic documents.

#### **D. Preliminary Meeting**

After receiving investigation results, if necessarily, the prosecutor can conduct a preliminary meeting with the victim or witness to ensure a successful prosecution and to decide on case delegation<sup>72</sup>. The preliminary meeting can take place in the prosecutor's office or other location; it can also be held through an online meeting considering the health, security, and/or safety of the witness/victim<sup>73</sup>. The victim and/or witness may also be assisted by a social worker from Witness and Victim Protection Agency (LPSK), family, guardian, and other parties<sup>74</sup>. During the meeting, the prosecutor will provide information regarding the court process, rights of witness and/or victim including the right of remuneration, restitution, right of compensation, and the right of conducting the examination from afar using audio visual equipment for women or conduct examination outside the court through electronic recording and/or long distance examination using audio visual instruments for children as administered by a judge<sup>75</sup>.

#### **E. Protection of Witness and Victim**

If the victim or/and witness is qualified to receive protection from the Witness and Victim Protection Agency (LPSK), the general prosecutor shall advise the investigator to coordinate with the LPSK in such matters<sup>76</sup>. The general prosecutor also must ask the investigator to separate any documents

<sup>72</sup> *Ibid.*, Chapter 5 Persecution section A

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*, Chapter 4 Pre-persecution section C number 1-4

containing images, illustrations, or photos of the victim that display sexual organs, activities, and/or sexual objects to protect the information and the document<sup>77</sup>. This protection also includes the confidentiality of identity, information, and other related documents as regulated within the law<sup>78</sup>.

## F. Evidencing

For female perpetrators or children who have committed a crime, there are certain conditions, such as (a) record of violence, (b) experienced certain psychological conditions while committing the crime or as a result of the crime, (c) existence of gender stereotypes that place women in a certain position within the family, and/or (d) a relationship of subordination and other conditions provide a background of the crime. In these conditions, the general prosecutor must build causality for the conditions. Such processes must be completed with information, reports from expert, testimonials from social workers/social report, and other conforming means of proof<sup>79</sup>. Moreover, the prosecutor must further investigate the condition of the victim, such as their mental state, gender stereotype, subordination relationship, and power relation<sup>80</sup>. For evidencing a criminal case related to marriage, the presence of marriage documents are not the only legal means of proof to validate a marriage<sup>81</sup>.

General prosecutors must understand the standard of evidencing in the matter of acts of intercourse must not be based on certain assumptions and must be directed to matching the seminal fluid on the victim's body through hair examination, serologic diagnostic, and DNA testing<sup>82</sup>. Evidencing the perpetrator can also be carried out by medical examination in order to find sperm cells component and seminal fluid within the vagina, and DNA examination of the sperm cells, along with biological evidence such as hair, saliva, cells from perpetrator's mouth found on the victim's body<sup>83</sup>.

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77 *Ibid.*

78 *Ibid.*

79 *Ibid. Section D number 1*

80 *Ibid.*

81 *Ibid.*

82 *Ibid.*

83 *Ibid.*



## F. Compounded Claim of Damage, Restitution, and Compensation

In cases where the judge decides to compound cases to claim damages in a criminal case, the general prosecutor must summon the victim or party in loss to provide their testimony<sup>84</sup>. Afterwards, the general prosecutor must ask the person to prepare any documents in relation to material loss, including all the bills as a result of the crime<sup>85</sup>. The compensation claim is recorded in the criminal charges<sup>86</sup>. The recorded amount is calculated based only on the material loss that can be proven to be as a result of the crime<sup>87</sup>.

Meanwhile, the request of restitution carried out as regulated in the Victim and Witness Protection Law and Government Regulation Number 35/2020 about the alteration of Government Regulation Number 7/2018 about the Dispense of Compensation, Restitution, and Assistance to Witness and Victim<sup>88</sup>. Children and parties representing the child may claim the restitution request in the process of investigation or persecution without LPSK.<sup>89</sup> The general prosecutor must prove the facts that support the occurrence of the crime as well as prove that the victim has the right to receive restitution by compiling evidence demonstrating a causal relationship between the loss and the crime<sup>90</sup>. Within 7 days from the issuance of a copy or excerpt of the court's decision, the prosecutor submits a letter of claim for restitution and a statement of ability to pay restitution to the convict<sup>91</sup>.

However, until now, compensation still cannot be dispersed to the victim of sexual violence. According to Law Number 31/2014 about the alteration of Law Number 13/2006 about Witness and Victim Protection, every victim of serious human rights violence and victims of terrorism crime, have the right to receive compensation<sup>92</sup>.

84 *Ibid.* Chapter 8 Compounded Claim of Damage, Restitution, and Compensation section A

85 *Ibid.*

86 *Ibid.*

87 *Ibid.*

88 *Ibid.*, section D

89 *Ibid.*

90 *Ibid.*

91 *Ibid.*

92 Indonesia, Undang-Undang No. 31 tahun 2014 tentang Perubahan atas Undang-Undang Nomor 13 Tahun 2006 Tentang Perlindungan Saksi dan Korban, Pasal 7 ayat (1).

From the above elaboration, the regulation of sexual violence in Indonesia has shown improvement, with regards to the law and criminal procedure. The Supreme Court and Attorney's Office have also demonstrated their active commitment to handling sexual violence in Indonesia through the implementation of several regulations in their respective institutions. However, implementation of the regulations must continue to be observed. Monitoring and evaluation mechanisms need to be implemented to determine the effectiveness in handling cases of sexual violence in Indonesia.

Using the mapping above, stakeholders may determine strategic steps needed to improve the handling system of sexual violence in Indonesia. These steps can be in the form of increasing the capacity of law enforcement, socializing regulations at all levels of society, and making changes to existing regulations to better accommodate the needs of handling sexual violence in Indonesia, including through the Draft Law on Elimination of Sexual Violence (RUU TPKS).

## ➤➤ 2.3 The Outlook of Sexual Violence Cases in Indonesia

The number of sexual violence cases has increased every year. In 2018, WHO declared that one-third women in the world, or approximately 736 million women at the age of 15 above had endured physical and sexual violence<sup>93</sup>. The number has not changed much since the last WHO study in 2013<sup>94</sup>. WHO also find that women who live in low-income nations are more prone to endure physical and sexual violence by their own spouse<sup>95</sup>.

The National Commission on Violence Against Women (Komnas Perempuan) divides the pattern of violence against women into three dimensions, namely domestic and personal relations, community, and state. In 2018, sexual violence placed second after physical violence

93 World Health Organization, Violence Against Women Prevalence Estimates, 2018, <https://www.who.int/publications/i/item/9789240022256>

94 *Ibid.*

95 *Ibid.*

in terms of violence against women in the domestic/personal relation dimension<sup>96</sup>. In the meantime, for acts of violence occurring in the public space/community, sexual violence placed first.<sup>97</sup>

In a closer spectrum, cyber sexual violence, incest, and rape crimes within families are the cases that were most frequently reported in this period. For example, incest held the first position in the sexual violence category occurring in the private/personal space<sup>98</sup>. There was also an increase in the report of rapes within a marriage as many as 195 cases<sup>99</sup>. On the other hand, cyber sexual violence also experienced a 100% increase from the past two years with a total of 97 cases reported, which was dominated by cyber recruitment and revenge porn, distribution of pornographic digital content<sup>100</sup>.

In the next year, the National Commission on Violence Against Women (Komnas Perempuan) recorded a growth of the bravery of victims to report a criminal act they experienced<sup>101</sup>. Similar to the previous year, the number of sexual violence cases were below the physical violence committed in the private space<sup>102</sup>. This pattern matched with previous years, showing that domestic and private relations still fail to provide a safe space for women. From the 2.807 cases reported, incest became the highest number of cases happening to girls, surpassing the number of rapes, sexual intercourse, molestation, and exploitation<sup>103</sup>. Moreover, a total of 2.070 sexual violence cases happening in public spaces were reported, with rape at the top of the list, molestation second, and sexual harassment third<sup>104</sup>. In addition, the National Commission on Violence Against Women (Komnas Perempuan) also recorded 91 cases of cyber sexual violence through the threat of distributing pornographic images in 2019<sup>105</sup>.

96 Komnas Perempuan (4), *Catatan Tahunan tentang Kekerasan Terhadap Perempuan Tahun 2018*, (Jakarta: Komnas Perempuan, 2019), page.13

97 *Ibid.*

98 *Ibid.*

99 *Ibid.*, page 15

100 *Ibid.*, hlm. 57

101 Komnas Perempuan (5), *op.cit.*, hlm.7

102 *Ibid.*

103 *Ibid.*, page 10-11

104 *Ibid.*

105 *Ibid.*, page 16

The same pattern also occurred 2020. From a total of 1.930 cases of sexual violence toward women in the private space<sup>106</sup>, the types of violence with the highest number of reports were molestation, cyber sexual violence, rape, sexual harassment, incest<sup>107</sup>, and rape within a marriage<sup>108</sup>. Cases of cyber sexual violence saw an increase of 920% from the previous year and became a new pattern making women become more vulnerable as victims. Nevertheless, in the public space or community, sexual violence cases ranked the highest, with the number of reports amounting to 962 cases<sup>109</sup>. The types of sexual violence with highest reported cases were sexual violence in another form<sup>110</sup>, rape, sexual harassment, and molestation<sup>111</sup>.

From the statistics above, the National Commission on Violence Against Women (Komnas Perempuan) highlighted the increase in women bravely coming forward to report sexual violence they endured<sup>112</sup>. For example, the growth in reports of rapes inside a marriage during this period gave indication on the rise of public awareness that forcing sexual intercourse in a marriage is an act of crime<sup>113</sup>. This is a step forward for the women who were previously unwilling to make a report.<sup>114</sup>

However, there are still a number of victims that choose to remain silent and are reluctant to make a report because a number of reasons. According to the INFID Gender Equality Barometer Qualitative Study Report and IJRS in the year of 2020, 93% of respondents had knowledge of where to report a sexual violence case, 41,6% of respondents chose to report to

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106 *Ibid.*

107 Incest is a sexual relationship between people who have blood relations or close sibling relationships which are considered to violate customary, legal and religious rules. For example, sexual relations between parents and children, between siblings, or close relatives and have blood ties either straight up, down or sideways such as uncles, aunts, grandfathers, grandmothers, nephews.. *Ibid.*, page.16-18

108 *Ibid.*

109 *Ibid.*

110 In yearly record of National Women Committee 2019, it was explained that the classification of the types of sexual violence includes sexual harassment, sexual exploitation, forced use of contraception, forced abortion, rape, forced marriage, forced prostitution, sexual slavery, and sexual torture. Therefore, other sexual violence may include the classification above except rape, sexual molestation, and harassment. *Ibid.* page 63

111 *Ibid.*

112 *Ibid.*

113 *Ibid.*

114 *Ibid.*

the police, and 43.8% were more inclined to report to their family, while the rest of respondents were more comfortable making a report to the National Commission on Violence Against Women (Komnas Perempuan), and Local Community Units<sup>115</sup>. Despite that, this study also showed that from all respondents who had experienced sexual violence themselves or knew people who had experienced sexual violence, 57.2% decided not to make a report due to fear, embarrassment, did not know where to report, and the feeling of guilt.<sup>116</sup>

The above research confirmed the assumption that sexual violence statistics will never succeed in giving a full picture of what really happens in society. Reluctance to report a case to law enforcers contributes to a high number of undisclosed sexual violence cases and suggests an iceberg phenomenon<sup>117</sup>. Moreover, there were great number of victims that did not have the ability and courage to make a report or ask for help. This inability can be caused by few factors, such as unavailability of victim services in all locations, stigma that blames women in cases of sexual violence<sup>118</sup>, fear of the perpetrator's revenge, feelings of shame, low trust in the court institution, fear of rejection and stigma from their partners and society<sup>119</sup>.

Sexual violence occurs because of the prevalence of inadequate power relations between the victim and perpetrator<sup>120</sup>. This power relation is a hierarchal relation, inequality and/or dependency in terms of social status, culture, knowledge, education, and/or economy, causing one party to have more power over the other, in the context of gender relations and tends to harm to the party standing in the lower position<sup>121</sup>. Power relations can

115 Wicaksana et. al. (2), *op.cit.*, page 52.

116 *Ibid.*, page 75

117 Abdul Wahid and Muhammad Irfan, *Perlindungan Terhadap Korban Kekerasan Seksual: Advokasi atas Hak Asasi Perempuan*, (Bandung: Refika Aditama, 2001), page. 12.

118 Komnas Perempuan (3), *Yearly Record 2015: Kekerasan Terhadap Perempuan, Negara Segera Putus Impunitas Pelaku. Catatan Kekerasan Terhadap Perempuan Tahun 2014*, (Jakarta: Komnas Perempuan, 2015), page 8.

119 Xabier Agirre Aranburu, "Sexual Violence Beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases," *Leiden Journal of International Law*, (23: 2010), page 615.

120 Nurtjahyo and Ramadhan, eds., *Kekerasan Terhadap Perempuan dalam Peradilan Pidana*, page 240.

121 Indonesia, Supreme Court, Supreme Court Regulation about Guideline Handling Women in contact with the Law, PERMA No. 3 Year 2017. Article 1 number (9).

be linked to the relationship between the superior and the subordinate or formal and informal horizontal relation, for example supervisor with employee, teacher with student, domestic worker with employer, capital owner and employee, director and artist, and other forms of relationship<sup>122</sup>.

Based on National Commission on Violence Against Women (Komnas Perempuan) Annual Record, sexual violence is mostly conducted by persons close to the victim, such as their boyfriend, father, uncle, stepfather, husband, grandfather, cousin, and siblings who possess power relation with the victim<sup>123</sup>. The evidence were in sync with the findings of MaPPI FHUI during 2016, which showed that 76,1% of perpetrators of sexual violence are persons familiar with the victim, such as friends, boyfriend, neighbor, colleague, senior, teacher, and superior; whilst only 13.8% of sexual violence crimes were committed by a stranger<sup>124</sup>. The INFID Gender Equality and Qualitative Barometer Study indicated the same data, where a total of 99.8% perpetrators were someone familiar, such as friend (40.6%), boyfriend (27,2%), and family members (17,9%)<sup>125</sup>.

In relation to this, judges need to see and interpret the power relation between victims and perpetrator during sentencing<sup>126</sup>. For example, numerous victims of incest did not have a choice but to stay silent because of economic dependency<sup>127</sup>. In few cases of power relations, economic dependency limits to victim's physical space, for example in a power relation between a working husband and stay-at-home wife, or the power relation between a domestic worker with the head of household<sup>128</sup>. These conditions amplify the vulnerability of the victim to experience sexual violence.

122 Kelompok Kerja Perempuan dan Anak Mahkamah Agung Republik Indonesia (Pokja Perempuan dan Anak MA) dan MaPPI FHUI, *Pedoman Mengadili Perkara Perempuan Berhadapan dengan Hukum*, (Jakarta: Mahkamah Agung RI dan Australia Indonesia Partnership for Justice 2, 2018), page. 26.

123 National Committee against Violence toward Women (Komnas Perempuan) (3), *Yearly Record 2017: Labirin Kekerasan terhadap Perempuan: Dari Gang Rape hingga Femicide, Alarm bagi Negara untuk Bertindak Tepat. Catatan Kekerasan Terhadap Perempuan Tahun 2016*, (Jakarta: Komnas Perempuan, 2017), page 24–25.

124 Masyarakat Pemantau Peradilan Indonesia Fakultas Hukum Universitas Indonesia (MaPPI FHUI) (1), *Executive Summary: Penelitian Konsistensi Putusan Perempuan*, (Depok: MaPPI FHUI, 2019), page 13.

125 Wicaksana, et. al. (2), *op.cit.*, page 72–73

126 Nurtjahyo and Ramadhan, eds., *op.cit.*, page 261–263.

127 *Ibid.*

128 *Ibid.* page 283

## 2.4 Barriers of Sexual Violence Victims to Access Justice

Sexual violence can affect a victim's body, mind, and social standing<sup>129</sup>. Physically, sexual violence can cause light to serious wounds, permanent disability, and loss of life<sup>130</sup>. On the other hand, this crime also affects their mental health, causing trauma, depression, and triggering suicidal thoughts<sup>131</sup>. Victims of sexual violence also have difficulty interacting with their environment, especially if the environment stigmatizes the victim<sup>132</sup>. Foa and Rothbaum indicated the massive impact of sexual violence to a victim's mental being. In the last 20 years, both studies showed that victims of rape have the most damaging stress and trauma (post-traumatic stress disorder)<sup>133</sup>.

In addition to experiencing physical and psychological suffering, victims of sexual violence still have to face the stereotypes that society has placed on them. Victims are often considered the cause of sexual violence because they are at the wrong time and place, do not fight back, or because the victim invites crime through her dress style or behavior<sup>134</sup>. Sexual violence is the only crime where the victim is more stigmatized than the perpetrator<sup>135</sup>.

Moreover, the solutions developed by the community to resolve cases of sexual violence also pay less attention to the condition of the victim. The option to marry the victim to the perpetrator is still widely chosen to avoid shame and protect the good name of the victim's family. In 2013, the Legal Resource Center for Gender Equality and Human Rights (LRC-KJHAM) received a report from a 17-year-old girl from Semarang City<sup>136</sup>. The victim

129 Nurtjahyo, *Perempuan dan Anak Korban*, as quoted in Sulistyowati Irianto, ed., *op.cit*, page 384.

130 *Ibid*.

131 *Ibid*.

132 *Ibid*.

133 E.B. Foa dan B.O Rothbaum, *Treating the Trauma of Rape: Cognitive Behavioural Therapy For PTSD*, as quoted in, et. al., *op.cit*, page 66.

134 Nurtjahyo, *Perempuan dan Anak Korban*, as quoted in Irianto, ed., *op.cit*, page 386-387.

135 The United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), *Progress of the World's Women: In Pursuit of Justice*, (New York: UN Women, 2011), page 49.

136 Komnas Perempuan dan Forum Pengada Layanan (FPL), *Naskah Akademik Rancangan Undang-Undang tentang Penghapusan Kekerasan Seksual (RUU PKS)*, (Jakarta, Komnas Perempuan, 2017), page 42.

admitted that she was forced to marry her rapist<sup>137</sup>. Initially, the victim's parents reported the perpetrator to the police, but the police and the perpetrator's family continued to ask the victim's family that the pregnant victim be married to the perpetrator as a form of responsibility<sup>138</sup>. A similar case also occurred in East Nusa Tenggara, where a 15-year-old rape victim was married off by the victim's parents to the 70-year-old man who raped her<sup>139</sup>. Beside getting married, the victim had to drop out of school because of the incident<sup>140</sup>. Based on the Sense of Justice survey conducted by MaPPI FHUI in 2016, the majority of respondents (51,6%) believed that rapist who are willing to marry the victim are entitled to leniency<sup>141</sup>. In addition, this research also found a number of court decisions that made the reason 'the perpetrator was willing to marry the victim' as a consideration that eased the sentence for the perpetrator<sup>142</sup>.

Based on the Jakarta 2020 Annual Record of LBH APIK, the handling of cases of violence toward women still indicate the same ongoing structural problem, such as (i) law enforcers did not have knowledge of gender perspective; and (ii) the culture of law in society does not extend any support to women because it believes that women are responsible for the violence, they experience<sup>143</sup>. Moreover, the difficulty of proving sexual violence against the victim causes the legal process to be complicated and require a relatively long time to complete<sup>144</sup>. From the 32 cases of sexual violence against children handled by Jakarta LBH APIK Legal Aid, in 2020, only 11 cases could be processed to the police, and only 4 that completed the court process<sup>145</sup>. This data shows that legal protection for victims of sexual violence, especially children, is still very low<sup>146</sup>.

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137 *Ibid.*

138 *Ibid.*

139 *Ibid.*

140 *Ibid.*

141 MaPPI FHUI (1), *op.cit.*, page 10.

142 State Court of Sukoharjo, Putusan No. 106/Pid.Sus/2011/PN.SKH.

143 LBH Apik Jakarta (2), *Perempuan Korban Menuntut Komitmen Negara untuk Menciptakan Ruang Aman dari Kekerasan Berbasis Gender*, Catatan Akhir Tahun LBH Apik Jakarta, (Jakarta: LBH APIK Jakarta, 2020), page 6

144 *Ibid.*, page 26.

145 *Ibid.*

146 *Ibid.*



The rape case conducted by an Islamic school owner, Tahfidz Irsyadul Athfal in Bogor City, is the perfect illustration to draw a picture on the condition of law enforcement against sexual violence<sup>147</sup>. With the power relation between the religious clerk and his student aged 10 and 11 years old, the perpetrator manipulated his victims into that the act was a reward for his religious teachings, and therefore his students must fulfill his desires<sup>148</sup>. Unfortunately, the police did not name the perpetrator as a suspect because there was not enough evidence<sup>149</sup>. Another case was the rape committed by a senior lecturer at the Medical Faculty of Cendrawasih University. The perpetrator also held a position as Head of Public the Health Office of Papua Province in 2020. and the victim was a daughter of a friend<sup>150</sup>. Even though it is believed the 18-year-old girl was raped, there was not enough evidence to prove<sup>151</sup> the incident, causing the police to stop the investigation<sup>152</sup>.

Related to the cyber sexual violence, victims of sexual violence also still experience various difficulties in accessing justice. Making a report is difficult due to lack of evidence, complex case patterns, threats by perpetrators to distribute photos and videos of the victim, limited number of experts who can explain online gender-based violence according to the Indonesian Cyber and Electronic Law (UU ITE), to barriers in the process of evidencing because of the need to employ digital forensics, are just a few of the difficulties faced by victims of cyber sexual violence<sup>153</sup>. In addition to these, the victim is also burdened with the responsibility to look for witnesses who saw the incident, even though the post-mortem evidence and the perpetrator's confession have been obtained by the investigator<sup>154</sup>. As a result, the victim becomes tired of the complexities of the legal process

147 Komnas Perempuan (5), *op.cit.*, page. 47

148 *Ibid.*

149 *Ibid.*

150 Komnas Perempuan (6), *op.cit.*, hlm. 83-84.

151 The obstacles that occur in the legal process are usually the difficult burden of proof, the opinion of law enforcers that sexual relations occur on the basis of consensual and there is no element of violence, so the police advise the victim to withdraw the report.. LBH Apik Jakarta (2), *op.cit.*, page 27.

152 *Ibid.*

153 *Ibid.* page 32

154 LBH Apik Jakarta (1), *Kekerasan Terhadap Perempuan dan Upaya Setengah Hati Negara dalam Pemenuhan Hak Perempuan Korban*, Catatan LBH Apik Jakarta berdasarkan Pengalaman Penanganan Kasus dan Advokasi Tahun 2018, (Jakarta: LBH APIK Jakarta, 2018), page 20.

and eventually decides to make peace with the perpetrator and withdraw the police report<sup>155</sup>.

Although there have been a numerous laws and regulations that are considered adequate, the procedures and practices in law institutions still discriminate victims of sexual violence. Courts often find difficulty in securing the rights of the victim, do not have enough facilities, and do not have the capacity to handle sexual violence cases. These are few of the difficulties faced by victims of sexual violence in their search for justice:

### A. Re-victimization

Legal procedures to handle victims of sexual violence have been a practice of re-victimizing during the process of examination<sup>156</sup>. Victims are often blamed, cornered, and harassed with questions<sup>157</sup>. Victims are also frequently asked to retell the story of what she has endured, causing trauma, exhaustion, and depression<sup>158</sup>. According to LBH APIK Jakarta, in handling victims of sexual violence, law enforcements tend to re-victimize the victim by conducting the following:

- a. Asking vulgar questions, such as “To which direction they (the perpetrator) move?”, “How did it feel, was it good?”;
- b. The victim was asked to demonstrate the rape;
- c. Victim was shouted at for providing an unclear testimony;
- d. Victims are not allowed to be accompanied during the examination process;
- e. Judges who laugh at the victim and believe that the victim enjoyed the rape, calling them an easy woman; and
- f. Victim demanded to look for perpetrator’s address<sup>159</sup>.

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155 *Ibid.*

156 Shelby Quast, *Gender and Security Sector Reform Toolkit – Justice Reform and Gender*, (Geneva: DCAF, OSCE/ODIHR, UN-INSTRAW, 2008), page 13.

157 *Ibid.*

158 *Ibid.*

159 Ratna Batara Munti, “Kekerasan Seksual dari Perspektif Hukum dan Seksualitas di Indonesia,” (disampaikan pada Konferensi Pengetahuan dari Perempuan III, Fakultas Hukum Universitas Indonesia, Depok, 24-26 Oktober 2017), page 307.

Moreover, public prosecutors have not fully fought for access to recovery that victims desperately need<sup>160</sup>. On the other hand, victims, who are mostly women, are often seen as allowing the violence to occur, not trying to fight back, placing themselves under the influence of the perpetrators and being lulled by lure of the perpetrator<sup>161</sup>. Victims are also blamed for the way they dress, their body language, their way of interacting, their marital status, their occupation or their presence at a certain time and location<sup>162</sup>. Female victims are considered responsible for incidents of sexual violence they experience<sup>163</sup>. The viewpoint of victim blaming is detrimental to the victim because it makes them feel insecure, blames themselves and often end up not daring to report the events that they experienced<sup>164</sup>. In addition, the absence of resistance by the victim leads law enforcement to think that the incident of sexual violence occurred under consent<sup>165</sup>.

The practice of re-victimization has not only appeared in law enforcement. Aside from the absence of safety in public space (75,8 percent), the public believes that sexual violence happens because of the victim was flirty, coquettish, and like to seduce (71,5 percent), the victim's clothing was too revealing (69,2%), and the victim is often photographed wearing provoking clothes (53,7%)<sup>166</sup>. Moreover, the public tends to blame the victim for the sexual violence she endured because they cannot look after themselves (51,2 percent), frequently go out at night (51,2 percent) are weak or could not ask for help (40,6 percent), etc.<sup>167</sup>. These findings show the prevalence of stereotypes about victims of sexual violence within society<sup>168</sup>. These stigmas and stereotypes also cause certain perceptions to form within society, placing women as the main instigators of criminal acts such as rape, prostitution, pornography, and others<sup>169</sup>. These stereotypes are formed

160 *Ibid.*, page 308.

161 Nurtjahyo and Ramadhan, *eds.*, *op.cit.*, page 316.

162 *Ibid.*

163 *Ibid.*

164 Pokja Perempuan dan Anak MA dan MaPPI FHUI, *op.cit.*, hlm. 26.

165 *Ibid.*

166 Wicaksana, *et. al.* (2), *op.cit.*, hlm. 59.

167 *Ibid.*

168 Herni Sri Nurbayanti, *Konsep-Konsep Utama Hukum dan Gender*, as quoted in Irianto ed., *op.cit.*, page. 109–110.

169 *Ibid.*

because of society's inability to understand women's sexuality, causing the criminalization of women's bodies<sup>170</sup>.

Interestingly, the Gender Equality Barometer Quantitative Study in 2020 found that the majority of respondents opposed negative stereotypes against women<sup>171</sup>. As much as 69.2 percent of respondents disagreed with the statement that a woman who is no longer virgin is not respectable<sup>172</sup>. 63.3 percent of respondents disagreed with the view that women who like to going out in the evening are bad women<sup>173</sup>.

However, on the other side, 45.7 percent of the public still agree that women who wear revealing clothes are not good women<sup>174</sup>. In addition, 69.7 percent of respondents thought that women are sexual harassed or raped because of their revealing clothes<sup>175</sup>. These assumptions are not backed with valid proof. According to surveys by few organizations such as Hollaback! Jakarta, perEMPUan, Lentera Sintas Indonesia, Perkumpulan Lintas Feminis Jakarta, and Change.org in the year of 2019, most women who were the victims of sexual violence wore modest clothing during the attack<sup>176</sup>. In fact, 17 percent of victims wore a hijab during the incident<sup>177</sup>.

With regards to the proximity of obtaining justice, victims of sexual violence still have difficulty in obtaining the best settlement. Based on the Gender Equality Barometer Qualitative Study by INFID and IJRS, a total of 57 percent of respondents did not receive closure for their sexual violence case<sup>178</sup>. Ironically, 39.9 percent confessed that their case was settled with the perpetrator paying certain amount of money, and 26,2 percent of respondents admitted to marrying the perpetrator<sup>179</sup>. In another part of the survey, 72,2 percent of respondents believed that law enforcement had

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170 *Ibid.*

171 Wicaksana, et. al. (2), *op.cit.*, page 45.

172 *Ibid.*

173 *Ibid.*

174 *Ibid.*

175 *Ibid.*

176 Rolando Fransiscus Sihombing, "Survei Pelecehan Seksual: Pakaian Terbuka Bukan Sebab Perempuan Jadi Korban", *Detik*, July 2019, can be access on <https://news.detik.com/berita/d-4627690/survei-pelecehan-seksual-pakaian-terbuka-bukan-sebab-perempuan-jadi-korban>

177 *Ibid.*

178 Wicaksana, et. al. (2), *op.cit.*, page 76.

179 *Ibid.*

been responsive to the victim, and only 27.7 percent believed the opposite<sup>180</sup>. However, if scrutinized further, the 57.6 percent of respondents who believed that law enforcement has been quite responsive never experienced sexual harassment<sup>181</sup>. Meanwhile, a total of 57.4 percent of respondents who judged law enforcement as being unresponsive had experienced sexual violence<sup>182</sup>. This data shows that the handling of sexual violence cases in Indonesia has not been optimized and there is a need for mechanisms to handle cases that specifically deal with victim recovery<sup>183</sup>.

## B. The Difficulties Acquiring Assistance

The next challenge for the female victims of sexual violence are difficulties in acquiring assistance in the process of law enforcement. A companion is someone or a group of people or a trusted organization that has the capacity and knowledge to assist the victim, providing them with a sense of security and comfort when testifying during the court processes<sup>184</sup>. The companion can be a family member, paralegal, psychologist, psychiatrist, social worker, officer from an integrated service, legal advisor, sign language interpreter, service organization, and other parties trusted by the victim<sup>185</sup>.

Based on the assessment of court sentencing consistency in the cases sexual violence against disabled persons by MaPPI FHUI in 2015, most female victims in sexual harassment cases were not accompanied (68 percent) by any companions during examination in court<sup>186</sup>. Only 18 percent of victims were accompanied by people close to them or family members, while other 9 percent were accompanied by translators<sup>187</sup>. Even though the right to receive assistance has been regulated in a number of laws, such as the Law on the Elimination of Domestic Violence (UU PKDRT) and Law Number 13/2006 on Witness and Victim Protection.

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180 *Ibid.*, page 55.

181 *Ibid.*

182 *Ibid.*

183 *Ibid.*

184 Supreme Court, PERMA Number 3 Year 2017, Article 1 Number 10.

185 Pokja Perempuan dan Anak MA dan MaPPI FHUI, *op.cit.*, page 50.

186 The indexation of decisions on cases of persons with disabilities in 2011–2015 aims to assess the consistency of the courts in examining cases and aims to provide a database showing the attitude of the courts in handling cases of sexual violence against persons with disabilities as carried out by MaPPI FHUI, 2015, *unpublished report*

187 *Ibid.*

In several cases, judges did not allow the companion to be present in the courtroom<sup>188</sup>. The presence of a companion instills the victim with a sense of comfort, bravery and confidence while undergoing examination<sup>189</sup>. Many findings show that sexual violence perpetrators are persons with connections to many people, and as such, the presence of a companion is needed to see how the victim is affected psychologically<sup>190</sup>. The presence of a companion will not only benefit the victim but also ease the process of examination<sup>191</sup>.

### C. Considering Sexual Records in The Case of Sexual Violence

While handling sexual violence cases, law enforcers frequently use sexual history to determine if the victim's report is accepted or rejected. The sexual record comprises the relationship between the victim and perpetrator, marital status of the victim, sexual experience of the victim, and victim's virginity<sup>192</sup>.

In the investigation process, the tendency to consider sexual records is represented in the questions laid out in the police's investigation report (BAP).<sup>193</sup> Investigators often cast questions asking if the victim enjoyed the experience, with the intention of examining whether the element of consent was present during the incident<sup>194</sup>. In the study conducted by MaPPI FHUI in 2016, sexual records were found to be an extra legal factor found in the consideration of sexual violence cases<sup>195</sup>. In cases of rape of an adult woman, judges tend to impose heavier penalties on perpetrators who rape women who have never had sex before, with an average sentence of 6 years in prison<sup>196</sup>. In contrast, if the victim is a woman who has a sexual history, the average sentence given to the perpetrator is 3.6 years<sup>197</sup>.

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188 *Ibid.*

189 *Ibid.*

190 Pokja Perempuan dan Anak MA dan MaPPI FHUI, *op.cit.*, page 51.

191 *Ibid.*

192 Nurtjahyo & Ramadhan, *eds.*, *op.cit.*, page 317.

193 Restu Diantina Putri, "BAP Polisi: 'Apakah Saudari Menikmati Berhubungan Seks atau Tidak?'" *Tirto.id*, November 2017, can be accessed on <https://tirto.id/cAy8>

194 *Ibid.*

195 Choky Risda Ramadhan *et. al.* (1), *Asesmen Konsistensi Putusan Pengadilan Kasus-Kasus Kekerasan terhadap Perempuan*, (Depok: Badan Penerbit Fakultas Hukum Universitas Indonesia dan Masyarakat Pemantau Peradilan Indonesia, 2016), page 27-28.

196 *Ibid.*

197 *Ibid.*

This trend of considering the sexual record of the victim is clearly visible in the verdict Number 1390/Pid.B/2012/PN.LP<sup>198</sup> and verdict Number 30/PK/Pid/2010. This case started when a woman (the victim) was in a hut alone and under heavy influence of alcohol<sup>199</sup>. At that time, the defendant and his friends approached the hut and saw that the woman was unconscious<sup>200</sup>. Taking advantage of the situation, the defendant and his friends took turns raping the victim<sup>201</sup>. Ironically, the judge thought that rape occurred because the woman was naughty, not a virgin, and previously had sexual relations with her boyfriend<sup>202</sup>. In addition, the notion that the victim liked to consume alcoholic beverages strengthened the judges belief that the woman as the cause of the rape<sup>203</sup>. In the end, the defendant was found guilty of committing licentious acts according Article 290 clause (1) of the Indonesian Criminal Code<sup>204</sup>. However, the panel of judges reduced the defendant's sentence to 5 months in prison based on the sexual history of the victim<sup>205</sup>.

In another rape case judged through sentence Number 74/Pid.B/2008/PN.KPG<sup>206</sup>, the panel of judges considered the condition of the victim having a children outside marriage, and the relationship between the victim and perpetrator, as the deciding factors ending in the conclusion that the sexual intercourse happened based on mutual consent<sup>207</sup>. In their decision, the judge acquitted the defendant of all charges<sup>208</sup>. In reality, it was found that the victim was coerced and had refused to have sexual intercourse, and it was found that there was bleeding in the *visum et repertum*<sup>209</sup>. Unfortunately, the judge only looked at the sexual history of the victim during the evidentiary process and did not refer to the sexual history of the perpetrator and his tendency to commit crimes<sup>210</sup>.

198 Nurtjahyo & Ramadhan, eds, *op.cit.*, page 318.

199 *Ibid.*

200 *Ibid.*

201 *Ibid.*

202 *Ibid.*

203 *Ibid.*

204 *Ibid.*

205 *Ibid.*

206 *Ibid.*, page 324

207 *Ibid.*

208 *Ibid.*

209 *Ibid.*

210 *Ibid.*

The *Sense of Justice* survey conducted by MaPPI FHUI in 2016 showed that 60.9 percent of respondent believed that the perpetrator's sentence should still be increased in the condition where a woman has had a previous sexual relationships prior to the case<sup>211</sup>. Until now, the victim's past sexual history has been considered important, and needed to ascertain that the woman is good. This question is certainly not addressed to victims of murder or theft when the judge wants to prove that a crime has occurred<sup>212</sup>. The sexual history of the victim should not be the basis for a judges' consideration in examining and adjudicating cases of sexual violence that would discredit the trauma and impact on the victim<sup>213</sup>.

#### **D. Disregarding the Impact of Sexual Violence and Victim's Recovery**

According to M. Hisyam Syafioedin and Faturochman, trials of rape cases have not touched the urgency of recovery for victims because none of the court decisions contain a warning regarding the impact and recovery needed by the victim<sup>214</sup>. Recovery efforts are attempts to support victims to face the legal process and/or strive for welfare and a dignified life based on the principle of victim's rights, which may include physical, psychological, economic, social and cultural recovery as well as compensation<sup>215</sup>.

Regulations regarding the recovery of victims have been stipulated in the law, for example the Witness and Victim Protection Law<sup>216</sup> and Government Regulation Number 44/2008 Concerning Granting of Compensation, Restitution, and Relief to Witness and Victim. However, this mechanism has not been implemented optimally in practice. The recovery required by the victim, be that economic, social, and the restoration of rights to reproduce

211 The Sense of Justice survey conducted by MaPPI FHUI in 2016 to 2040 community respondents and 32 experts to see the public's views on indicators that should be considered by judges in sexual violence cases.

212 Irianto, *op.cit.*, page 400.

213 *Ibid.*, page 317.

214 M. Hisyam Syafioedin and Faturochman, "Hukuman Bagi Pemerkosa dan Perlindungan Bagi Korban," dalam *Menggugat Budaya Patriarki* (Yogyakarta: Pusat Studi Kependudukan dan Kebijakan Universitas Gadjah Mada, 2001), page 127-128

215 *Ibid.*

216 Law Number 13 of 2006 concerning Protection of Witnesses and Victims as amended by Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Protection of Witnesses and Victims.



such as pregnancy, transmission of sexual transmitted diseases, infection or even bleeding, are still hard to obtain through the process of law<sup>217</sup>.

In some court sentences, the judge did not consider the psychological condition, physical and mental impact, and trauma experienced by the victim.<sup>218</sup> The absence expert testimony from a psychologist or psychiatrist, or even *visum et repertum psikiatrikum* (psychiatrist's letter) and *visum et repertum psikologikum* (psychological test result) to explain the psychological condition of the victim of sexual violence, affirmed this finding<sup>219</sup>. The role of experts, especially psychologists, are in dire need during proofing, as sexual violence also affects mental health after the incident, including mid-term and long-term consequences that are more permanent<sup>220</sup>.

### E. Sentencing and Punishment in Sexual Violence Cases

The average sentence determined by a judge in the rape of an adult is 64 months or around 5,3 years<sup>221</sup>. Moreover, in the case of molestation towards an adult, the average sentence in jail is 28 months or around 3,1 years<sup>222</sup>. If the victim is a minor, the average verdict for the perpetrator is 71 months or 5,9 years and 56 months or 4,6 years for molestation cases<sup>223</sup>. Furthermore, judges have a tendency to issue sentences below the demand, in all types of sexual violence and in various levels of court<sup>224</sup>.

If we compare this with the maximum sentence of 9 years in prison for molestation and 12 years for rape, the average sentence for those cases is low. On the other hand, the public actually hopes that the sentence for

217 Syafioedin and Faturachman, loc.cit.

218 Nurtjahyo and Ramadhan, op.cit., page 337.

219 *Visum et repertum psychiatricum* can also be used to see the psychological impact of victims due to sexual violence as regulated in Article 3 of the Regulation of the Minister of Health No. 77 of 2015 concerning Guidelines for Mental Health Examinations for the Purpose of Law Enforcement. *Ibid.*, page 337

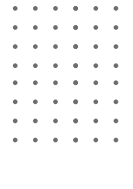
220 E. Kristi Poerwandari dan Ester Lianawati, *Petunjuk Penjabaran Kekerasan Psikis: Buku Saku untuk Penegak Hukum*, (Jakarta: Pusat Studi Kajian Wanita Pascasarjana UI, 2010), page 13-14.

221 MaPPI FHUI (1), op.cit., page 16.

222 *Ibid.*

223 *Ibid.*

224 78 percent of first level court decisions handed down sentences under the demands of the Prosecutor, as well as the courts of appeal and cassation.



perpetrators of sexual violence ranges from around 10–15 years<sup>225</sup>. The public also considers that the punishment for crime has been below expectation (35,7 percent)<sup>226</sup>. In other words, the enforcement of law toward sexual violence has not been optimal. Low sentencing, failure to consider the context of victim recovery, revictimization and stereotyping of the victim still pose challenges for sexual violence victim to receive justice and proper handling of their cases.

If we look into the practices of other countries, the main challenges in handling cases of sexual violence were mostly (a) difficulties in persecuting the perpetrator when the person is the partner or ex-partner of the victim, (b) no use of a weapon, (c) absence of physical threat, (d) no physical wounds, (e) no resistance during incident, (f) the victim was unconscious, and (g) the victim has a history of mental health problems<sup>227</sup>. In practice, the criminal justice system has not been able to adjudicate the types of sexual violence that are most common in society, because such actions are regarded as normal in society<sup>228</sup>. This condition causes more than 80 percent of victims of sexual violence to avoid the law enforcement process because of low trust towards the criminal justice system<sup>229</sup>.

In the issue of sentencing, the Indonesian Criminal Code only regulates jail sentence or fines as punishment for perpetrator of sexual violence, and has yet to consider additional penance, such as rehabilitation. Rehabilitation is way to change the way of thinking, perspective, and sexual behavior to prevent the same sexual violence from happening again, through counseling, therapy, and other interventions<sup>230</sup>. The terminology of rehabilitation was only introduced in the Child Protection Law and Law Number 11/2012 concerning the Child Criminal Justice System that allowed the process of rehabilitation for a child perpetrator<sup>231</sup>. In addition, rehabilitation also

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225 *Ibid.*, page 15.

226 *Ibid.*

227 Larcombe, *op.cit.*, page 146.

228 *Ibid.*, page 147.

229 *Ibid.*, page 145

230 Komnas Perempuan dan FPL, *op.cit.*, page 59 and 100.

231 In the Article 18 Child Protection Law No 23 Year 2022, it is mentioned that Every child who is a victim

was mentioned in the Government Regulation on Procedures for the Implementation of Chemical Castration, Installation of Electronic Detection Devices, Rehabilitation, and Announcement of the Identity of Perpetrators of Sexual Violence against Children. In this regulation, rehabilitation is granted to perpetrators of sexual intercourse who have been chemically castrated and perpetrators of molestation.<sup>232</sup>

In the Assessment on the Consistency of Court Sentencing in the Cases of Violence Against Women conducted by MaPPI FHUI in 2016 to evaluate 297 court decision, the sentence for perpetrators of rape and domestic violence, done repetitively or non-repetitively, was still in the form of jail sentence<sup>233</sup>. Whereas in the *Sense of Justice* survey by MaPPI FHUI, the public believed that the sentence must cover jail time and rehabilitation<sup>234</sup>. 50.5 percent of the public strongly agreed that perpetrators should receive religious rehabilitation during their time in prison, while 43.7 percent of the public who is strongly agreed that the perpetrator undergo medical and psychological rehabilitation<sup>235</sup>. 45.2 percent of respondents also agreed that the perpetrator should be given a second chance to return to society after serving their punishment<sup>236</sup>.

One good practice in implementing the rehabilitation process to child perpetrators of sexual violence occurred in Panti Sosial (Social Home) Marsudi Putera in Mataram. This institution provided physical rehabilitation (by supplying medication and hospital referral), mental rehabilitation (through social and religious guidance, counseling, and therapy), and social rehabilitation (by providing lessons in practical skills, religious knowledge,

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or perpetrator of a crime has the right to get legal assistance and other assistance such as medical, social, rehabilitation, and educational assistance. In Article 91 verse (3) it's mentioned that based on the results of Community Research and social reports, children in contact with the law are entitled to medical rehabilitation, social rehabilitation and social reintegration from institutions or agencies that handle child protection. Article 76 D and E Law Year 2014 about Child Protection also mandates that molesters who are 12 years old but not yet 14 years old can only be subject to punishment.

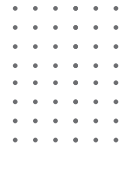
232 Article 18 verse (1) and verse 2 of Government Regulations No. 70 Year 2020 about concerning Procedures for the Implementation of Chemical Castration, Installation of Electronic Detection Devices, Rehabilitation and Announcement of the Identity of Perpetrators of Sexual Violence Against Children.

233 See Ramadhan *et. al* (1), *loc.cit*.

234 *Ibid*.


235 *Ibid*.

236 See MaPPI FHUI (1), *loc.cit*.



social approach, and motivational classes)<sup>237</sup>. The success of this social institution was boosted by strong support from families, the public, and government, the availability of effective facilities and resources, and a capable rehabilitation officer to run the program<sup>238</sup>. On the other hand, based on the experience of the Social Rehabilitation Help Units from the Government of Pontianak that have been running a rehabilitation program for child perpetrators of molestation, the rehabilitation process promotes positive behavior showed in children and has become a better option than than putting children in prison<sup>239</sup>.

However, the Child Protection National Committee (KPAI) assessed that the completion rate of rehabilitation for victims and perpetrators of child sexual violence in Indonesia is at a low level of 48.3 percent<sup>240</sup>. The factors that cause the rehabilitation process to be low are the perpetrator or victim dies, the victim escapes leave the court process, the victim is uncooperative, and the objection of some children towards rehabilitation<sup>241</sup>.



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237 Romi Susanto, Yuliatin dan Maburur Haslan, *Upaya Rehabilitasi Terhadap Anak Pelaku Kekerasan Seksual di Panti Sosial Marsudi Putra Paramita Mataram*, Jurnal Pendidikan Sosial dan keberagaman 2018, page 6-9.

238 *Ibid.*

239 Nyi R. Irmayani, *Problematisa Penanganan Terhadap Anak Pelaku Kekerasan Seksual Selama Menjalankan Proses Hukum: Kasus Provinsi Kalimantan Barat*, Sosio Konsepsia: Jurnal penelitian dan Pengembangan Kesejahteraan Sosial, Vol.8 No. 3 Tahun 2019, page 294-298

240 Statement of the Chairman of Indonesian Child Protection Committee, Medcom.id, 28 December 2021, <https://www.medcom.id/pendidikan/news-pendidikan/5b2G8n2k-penuntasan-rehabilitasi-korban-dan-pelaku-kekerasan-seksual-anak-baru-48-3> accessed on 24 Januari 2022.

241 *Ibid.*

# CHAPTER 3

## FINDINGS



90%

75%

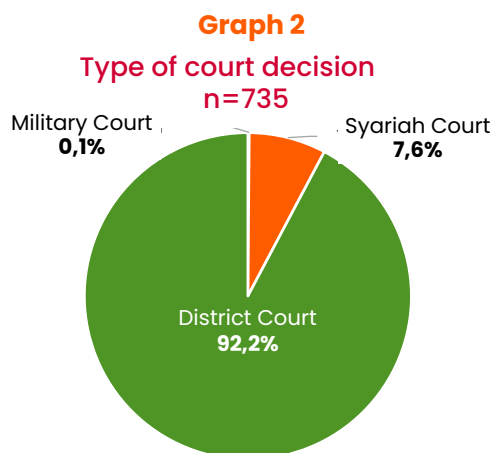
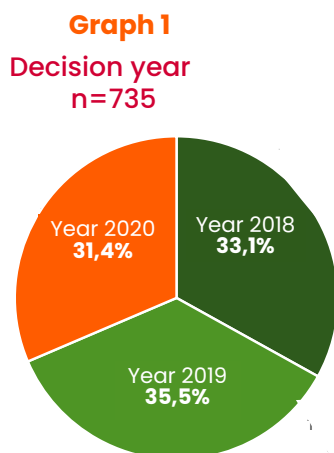
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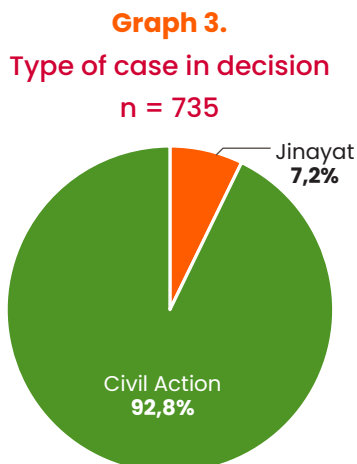


## 3.1 Profile of Indexed Court Decisions

As previously explained, this research analyzes decisions on sexual violence adjudicated by the court of the first instance obtained from the Directory of Supreme Court Decisions from 2018 to 2020. Overall, there are 735 decisions used as a research sample. Most of the samples come from the decision of a court in 2019, contributing 35.5% of the overall total analyzed court decisions. However, there are no significant differences in general regarding the number of decisions that are analyzed per year.

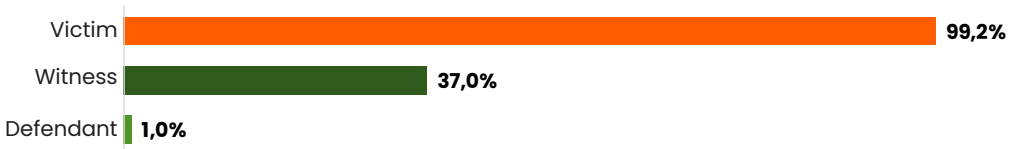


From the number of samples above, most of the court decisions available are District Court decisions, which reach 92.2% of overall analyzed data. Meanwhile, the other analyzed decision came from Syariah Court for 7.6% and Military Court for 0.1%.



In terms of the type of case, 92.8% of analyzed decisions are civil action and 7.2% are *jinayat* cases. While the sexual violence cases analyzed come from various places in Indonesia, *jinayat* cases will only be adjudicated in Aceh based on Qanun Aceh Number 6 of 2014 about Jinayat Law (Qanun Jinaya), especially articles that are related to sexual violence such as rape, pedophilia, and sexual harassment.

**Graph 4.**  
**PBH status in decision**  
**n = 735**  
*(answer can be more than one)*

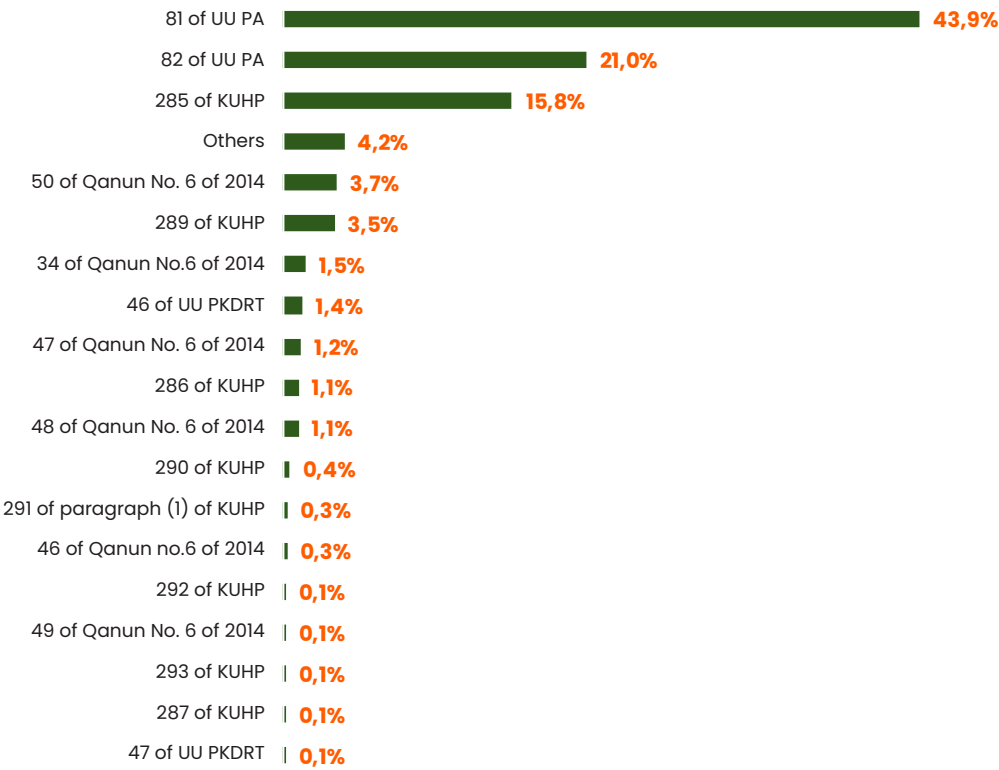


This research focuses on sexual violence phenomena resolved through court and involves women in conflict with the law. Referring to provisions of Article 1 number (1) Regulation of Supreme Court (PERMA) Number 3 of 2017, Women in Conflict with the Law (PBH) are women that have a conflict with the law, either as the victim, the witness, or other parties. Meanwhile, the PBH status that is found the most in this research is PBH as a victim (99.2%), PBH as a witness (37%), and PBH as a defendant (1%).

The majority of articles used in this research sample come from the Child Protection Law (Undang-Undang Perlindungan Anak), namely article 81 and article 82 (64.9%), followed by article 285 of the Indonesian Criminal Code (KUHP) with 15.8%. Given the high prevalence of articles that arrested the perpetrators of sexual intercourse against children and child molestation, as seen in Graph 5.1, related stakeholders must give special attention to protecting children from perpetrators of sexual violence, including preventing their children from committing sexual violence towards other children. The point above is in-line with other cases in Graphs 11 and 12 that state children between the age of 8 and 18 years old are reported to be found guilty as the third-largest sexual violence perpetrators with a 14.1% proportion of total cases that are analyzed. Meanwhile, according to

Graphs 16 and 17, victims of sexual violence mainly were children between the ages of 6 and 18, making up 72.1% of the overall data.

**Graph 5.**  
**Article in decision**  
**n = 735**





**Table 5.3**  
**Article within decision (others)**  
**n = 31**

Name Category	Percentage
Article 76E Conjunction with Article 82 paragraph (1) Child Protection Law	64.5%
Article 76D Conjunction with Article 81 paragraph (1) Child Protection Law	16.1%
Article 76I Conjunction with Article 88 Child Protection Law	6.5%
Article 88 Child Protection Law	3.2%
Article 281 KUHP	3.2%
Article 83 Conjunction with Article 76F and Article 82 Paragraph (1) Child Protection Law	3.2%

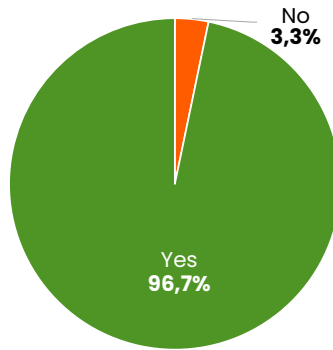
Besides, this research successfully uncovered the judicial practice that almost always includes victims' identity in the court rulings (96.7%). This trend shows that the protection of women's personal identity as a victim still does not operate well, considering that the court decisions are a document that the public can access. Even though SK-KMA Number 1-144/KMA/SK/211 regulates that before a court decision is published on the website, judges must conceal the case number and the victim's identity in court decisions on cases of licentious acts, crimes related to domestic violence, criminal acts in which, according to Law of the Witness and Victim Protection Agency (UU LPSK), the witness and victim's identities must be protected, and other criminal acts that must be handled in a closed trial according to the law<sup>242</sup>.

242 Indonesia, Mahkamah Agung, *Surat Keputusan Ketua Mahkamah Agung tentang Pedoman Pelayanan Informasi di Pengadilan*, SK KMA No. 1-144/KMA/SK/2011, Attachment 1

**Graph 6.**

**Victim data publication in decision**

**n = 735**



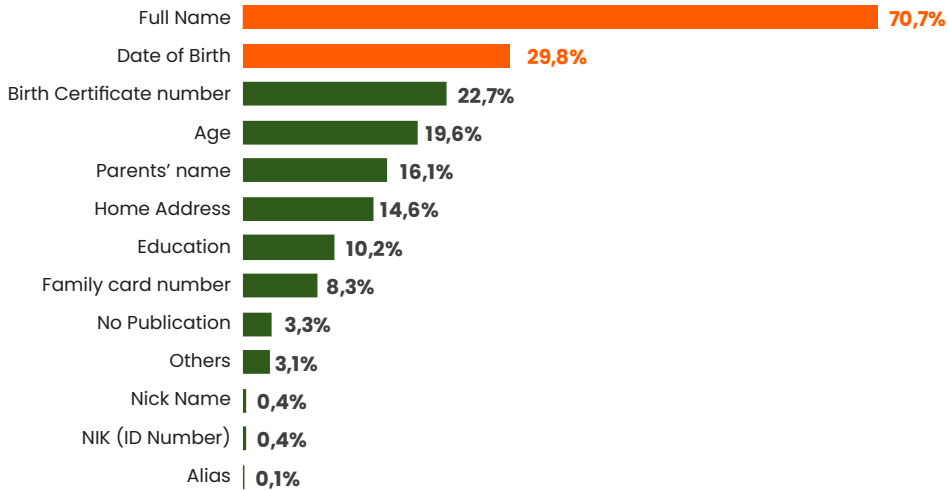
This research also summarizes the distribution of information regarding the listed and published identity on court decision documents. The majority of decisions published the victims' full names (70.7%) as well as place and date of birth (29.8%). Furthermore, the birth certificate number (22.7%), age (19.6%), parents' name (16.1%), home address (14.6%), and even victims' education (10.2%) is also published in court decisions. This practice shows that the personal information of victims of sexual violence is increasingly being exposed in judicial practice. Considering that most victims listed in this research are children, this trend potentially reduces children's right to live and grow well in society given that their history as victims of sexual violence continues to be disseminated to the public through court decisions.

**Graph 7.**

**Published victim data**

**n = 735**

*(answer can be more than one)*

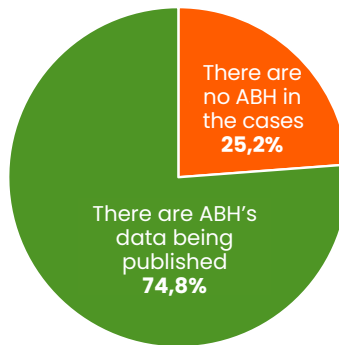


The personal data protection issue above is essential for the compliance of constitutional rights for sexual violence victims that are guaranteed by Article 28 paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Every person, including victims of sexual violence, has the right to protection for themselves, their family, their honor, their dignity, and their personal property, as well as the right to a sense of security and protection from any fear of threat to do or not to do something<sup>243</sup>. The context of personal data protection should include ensuring the protection of sensitive information on court decisions that are strongly related to the victims' honor and dignity and must be seen as part of the victims' recovery<sup>244</sup>. The inclusion of the identities of victims of sexual violence as shown in Graph 7 above actually discredits efforts to protect victims and may potentially cause discrimination or stigmatization against victims, even exclusion from society. This matter should be considered and evaluated in the preparation of court decisions on sexual violence, especially those involving women and children as victims.

<sup>243</sup> Komnas Perempuan, Larangan "Pencantuman Identitas Korban Kekerasan dalam Putusan Pengadilan yang Dipublikasikan," <https://komnasperempuan.go.id/laporan-pemantauan-ham-detail/larangan-pencantuman-identitas-korban-kekerasan-dalam-putusan-pengadilan-yang-dipublikasikan>, accessed on Oct 11 2021.

<sup>244</sup> *Ibid*

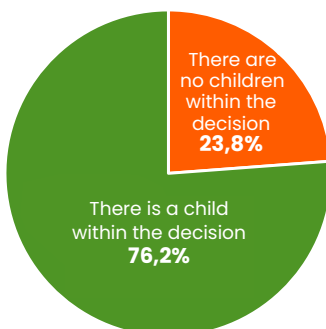
**Graph 8.**  
ABH Published Data in Decision



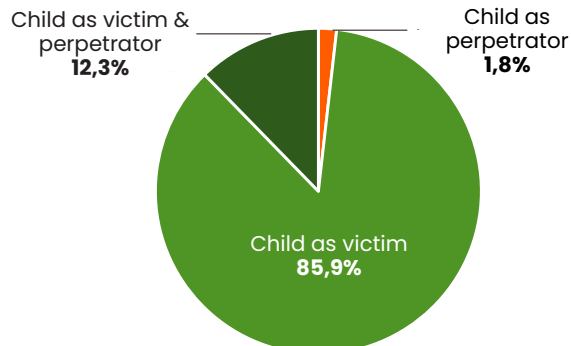
In another section, from all of the decisions analyzed, this research reveals a trend that the majority of decisions (74.8%) also publish children's data and around 25.2% do not include any child defendant or victim. This has to become an input for child protection mechanisms especially toward children dealing with the law.

## ➤➤ 3.2. Sexual Violence Phenomenon Resolved by The Court

**Graph 9**  
Child's presence in decision  
n = 735



**Graph 9.1**  
Child's status in decision  
n = 560



In previous section, it is explained that the court decisions on sexual violence cases that accounted for the largest proportion of this research sample, are cases that were adjudicated using the criminal provisions of the Child Protection Law. Of the 76.2% decisions on sexual violence involving Children in Conflict with the Law (ABH), 85.9% are positioned as victims, 1.8% as perpetrators, and the remaining 12.3% identified ABH as victims and perpetrators.

**Table 9.1**  
**Article imposed on child**

Imposed Article	No ABH	ABH Perpetrator & Victim	ABH Victim	ABH Perpetrator
285 KUHP	87.1%	0.9%	7.8%	4.3%
286 KUHP	100.0%	0.0%	0.0%	0.0%
287 KUHP	0.0%	0.0%	100.0%	0.0%
289 KUHP	100.0%	0.0%	0.0%	0.0%
290 KUHP	100.0%	0.0%	0.0%	0.0%
291 paragraph (1) KUHP	100.0%	0.0%	0.0%	0.0%
292 KUHP	0.0%	0.0%	100.0%	0.0%
293 KUHP	100.0%	0.0%	0.0%	0.0%
34 Qanun No. 6/2014	0.0%	0.0%	100.0%	0.0%
46 Qanun No. 6/2014	100.0%	0.0%	0.0%	0.0%
46 UU PKDRT	100.0%	0.0%	0.0%	0.0%
47 Qanun No. 6/2014	0.0%	0.0%	100.0%	0.0%
47 UU PKDRT	100.0%	0.0%	0.0%	0.0%
48 Qanun No. 6/2014	100.0%	0.0%	0.0%	0.0%
49 Qanun No. 6/2014	0.0%	0.0%	100.0%	0.0%

Imposed Article	No ABH	ABH Perpetrator & Victim	ABH Victim	ABH Perpetrator
50 Qanun No. 6/2014	7.4%	11.1%	81.5%	0.0%
81 UU PA	1.9%	13.3%	83.9%	0.9%
82 UU PA	1.9%	11.0%	85.7%	1.3%
Others	6.5%	16.1%	77.4%	0.0%

Furthermore, this research successfully collected data that indicates 83.9% of cases with children as victims were adjudicated using Article 81 of the Child Protection Law. On the other hand, when a decision involves ABH as the perpetrator and victim, only 13.3% are adjudicated using the same article. Meanwhile, the court also often uses Article 82 of Child Protection Law if it encounters a condition where ABH is positioned as a victim, with proportion of 85.7%.

This finding confirms the trend of sexual violence that is mostly perpetrated by and against children. As previously informed, a third of women in the world aged 15 years or older (around 736 million people) have experienced physical or sexual violence<sup>245</sup>. Data collected by The National Commission for Child Protection (KPAI) shows a continuous increase in sexual violence against children. If in 2011, sexual violence against child accounted for 887 of the 2,275 cases reported to KPAI, the numbers rose to 1,028 from 3,871 cases in 2012 and again increased to 1,266 from 2,637 cases the following year<sup>246</sup>. On the other side, the National Commission on Violence Against Women (*Komnas Perempuan*) recorded as many as 954 cases of sexual violence that occurred against girls in the private sphere in 2020<sup>247</sup>. These data demonstrate the need to pay attention to the interest of children, especially girls, in positioning policies on sexual violence in Indonesia.

245 Ivo Novana, "Kekerasan Seksual terhadap Anak: Dampak dan Penanganannya," *Sosio Informa* 01 (Januari-April 2015:1), hlm. 14.

246 *Ibid*

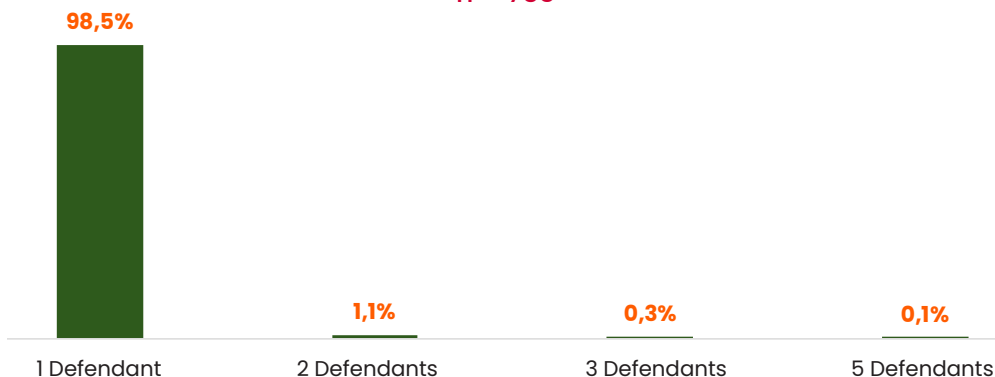
247 Komnas Perempuan (6), *loc.cit.*

### 3.2.1 Defendant Characterization

Graph 10

Number of defendants in decision

n = 735



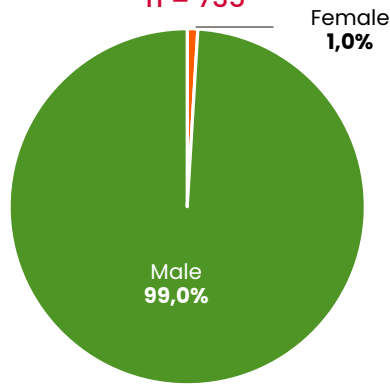
In the analyzed decisions, the perpetrators of sexual violence who were adjudicated are single actor that sit at the top at<sup>248</sup> 98.5%. Meanwhile, cases with two perpetrators accounted only 1.1% of the overall data, three perpetrators accounted for 0.3%, and five perpetrators accounted for 0.1%.

On other note, as will be explained further in the next section, sexual violence committed by a single actor is correlated with the repetition of the act, especially if there is a power relation that places the victim in a vulnerable position to experience a sexual violence. Of all the decisions that have 1 (one) perpetrator, it was found that 77.3% of perpetrators committed sexual violence repeatedly to the victim, or there was repetition<sup>249</sup> of sexual violence. The findings below will also explain that most sexual violence occurs in personal domain and is conducted by intimate partners or by the family of the victim PBH.

248 Single defendants referred to in this research are the side listed as defendants in indexed decision documents. This matter rules out the possibility of other defendants who are in the same matter but is indicted in a separate file.

249 Repetition referred in this research is perpetrators' act in committed repeatedly to the same victim. This refers to the *concurso realis* concept in article 65 of KUHP. This will be explained further in sub chapter repetition.

**Graph 11.**  
**Gender of defendant**  
**n = 735**



In graph 11 above, it is found that the majority of perpetrators of violence are male (99%) with the majority of victims being children (71.4%) and the remained being committed against adults. Meanwhile, a female perpetrator (1%) always commits sexual violence against other female victims. In the event that the sexual violence defendant is female, they are arrested on the grounds of perpetrating acts of molestation, child molestation, child exploitation, and also rape.

This finding corresponds with the root of sexual violence, namely the patriarchal culture in Indonesia. This culture incidentally promotes women as the weak party<sup>250</sup>. In addition, the social system in society has perpetuated vulnerability as part of the lives of many women<sup>251</sup>. This condition is formed by the influence of social construction, norms and values, tradition, along with religious interpretation that is not always favorable to women and is prone to being used for perpetuating patriarchal culture and practices<sup>252</sup>. These matters are reflected in various habits in society and policies that are often prejudiced towards women<sup>253</sup>. Prejudice and discrimination against

250 Hilaire Barnett, *Introduction to Feminist Jurisprudence*, (Britania Raya: Cavendish Publishing Limited, 1998), hlm. 12.

251 *Ibid*

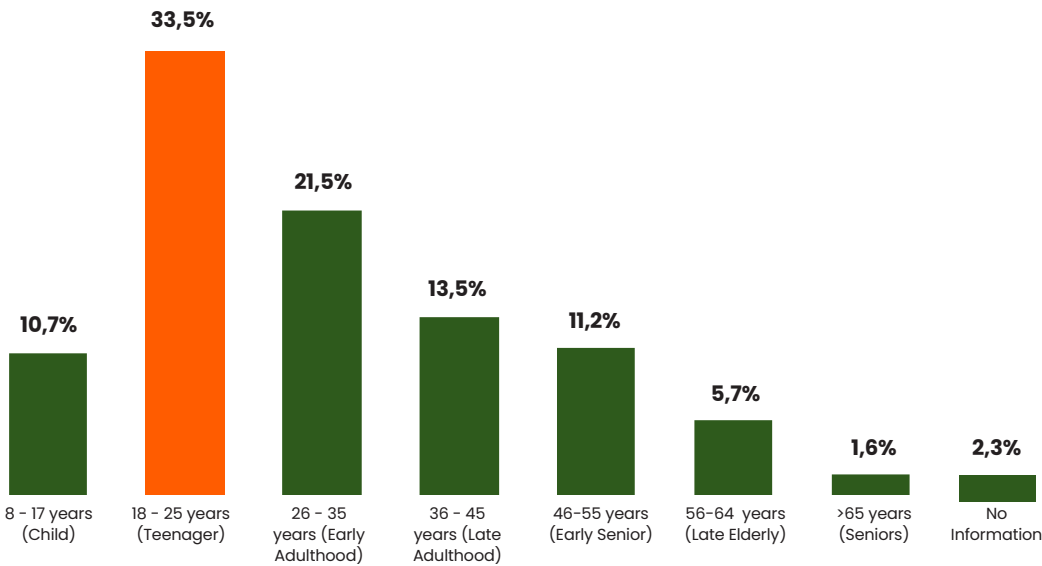
252 *Ibid*

253 *Ibid*



women are so ingrained in human civilization that the patriarchal order with male superiority and female inferiority appears as ‘natural’ order<sup>254</sup>. This is often justification for men commit sexual violence, either means of coercion or by exploiting the vulnerability of women.

**Graph 12.**  
**Age of defendant**  
**n = 735**



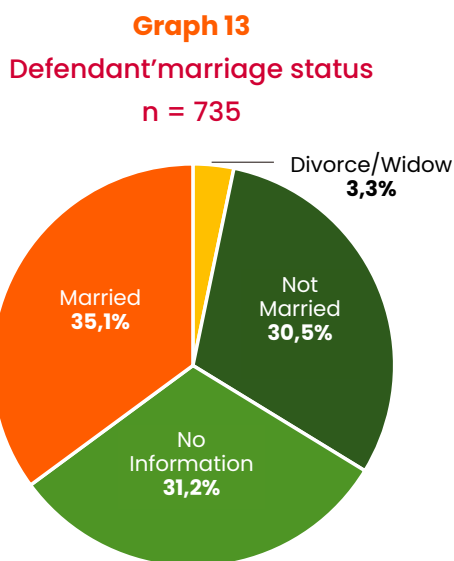
Referencing to the age categorization by the Department of Health of the Republic of Indonesia<sup>255</sup>, this research shows that the majority of sexual violence perpetrators are in the age range of 18-25 years or the adolescent age group, with a proportion of 33.5%. The next highest age group for sexual violence perpetrators is the range of 26-35 years or the early adult age group (21.5%) followed by the age range of 8-17 years or child age group (14.1%) and the age range of 36-45 years or late adulthood age group (13.5%). Older age groups, such as the early elderly, late elderly, and senior

254 *Ibid*

255 As listed in the Department of Health of the Republic Indonesia. *Klasifikasi Umur menurut Kategori*. (Jakarta: Ditjen Yankes, 2009) which was modified by the researcher by adapting Law Number 23/2002 on Child Protection, defines Children are those under 18 years old. The Department of Health (2009) categorizes the age of 12-16 years old as early teens and 17-25 years old as late teens. Thus, the researcher uses the category of children according to the Child Protection Law, and the late teens category is changed to Teens to follow the categorization of children according to that law.

age groups, account for fewer than the other four younger age groups previously mentioned.

With this data, the Indonesian government needs to give special attention to materialize a formal sex education curriculum in all levels of education according to children's reasoning abilities growth and development, gender sensitivity, medically accuracy<sup>256</sup>. In other word, the prevention of the emergence of a potential sexual violence perpetrator can begin at early levels of education as a provision for every child to establish healthy relationships in the future.



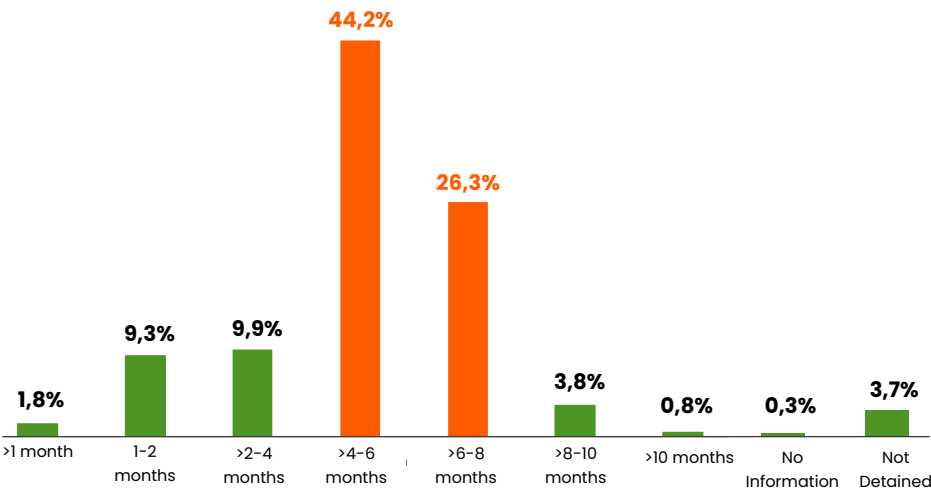
According to graph 13, we can see that the majority of defendants who are sexual violence perpetrators have marital status (35.1%) and followed by unmarried status (30.5%). On the other hand, this research also shows that court decisions that do not identify the defendant's marital status are in a fairly high proportion, at 31.2%. With such a position, it is possible that

<sup>256</sup> Aspects of reproductive health education (in the context of sex education) which are included in local content can be found in Physical and Health Education, Natural Sciences, Social Sciences, and also Religious Education, but there are objections from students' parents and religious leader, *refer to* Zainal Fatoni, et al., "Implementasi Kebijakan Kesehatan Reproduksi di Indonesia Sebelum dan Sesudah Reformasi," *Jurnal Kependudukan Indonesia* 10 (June 2015), page 65-74.

the number of defendants with a marital status of married, unmarried, or divorced/widowed is also increasing.

The high number of married sexual violence defendants indicates that marriage does not automatically stop someone from committing sexual violence. In addition to committing sexual violence against other people outside the scope of their household, married men, where they are husbands or parents, are the parties most frequently reported as perpetrators of sexual violence in the 2019 *Komnas Perempuan* Annual Records<sup>257</sup>.

**Graph 14.**  
**Length of defendant's detention**  
**n = 735**



What should be noted from those data is that parents, biological fathers, and adoptive fathers have a high prevalence as a sexual violence perpetrator. This condition is clearly seen in incestuous sexual violence against biological children and/or adopted children as well as sexual violence against people who live in the household, i.e., household assistants/workers. Throughout 2018–2020, *Komnas Perempuan* also recorded reports of rape in marriage (*marital rape*) even though reports of incest and marital rape cases have decreased during the COVID-19 pandemic<sup>258</sup>. The decline in reporting

257 *Komnas Perempuan* (5), *op.cit.*, page 15.

258 *Komnas Perempuan* (5), *op.cit.*, page 17.

was also caused by the limitation of victim service agencies during the COVID-19 pandemic and the limited mobility of victims, which becomes an obstacle for reporting their case<sup>259</sup>.

In another section, Graph 14 above shows the period of detention of the defendant during the legal process, from the investigation stage to the trial. Most sexual violence perpetrators undergo detention for 4–6 months (44.2%) and 6–8 months (26.3%).

In this regard, the period of detention for defendants in each stage of the trial already been regulated respectively in Law Number 1/1981 on the Criminal Procedure Code (KUHP).

**Table 14.1**  
**Regulation of the Length of Detention in KUHP**

Detention Level	Authorized Person Carrying Out Detention	Legal Basis	Maximum Detention Period	Detention Extension Period
Investigation	Investigator, can be extended by the Public Prosecutor	Article 24 paragraph (1) and paragraph (2) KUHP	20 days	40 days
Prosecution	Public Prosecutor, can be extended by the Head of the District Court	Article 25 paragraph (1) and paragraph (2) KUHP	20 days	30 days
Examination in District Court	District Court Judge, can be extended by the Head of the District Court	Article 26 paragraph (1) and paragraph (2) KUHP	30 days	60 days
Examination in High Court	Judge of the High Court, may be extended by the Chief Justice of the High Court	Article 27 paragraph (1) and paragraph (2) KUHP	30 days	60 days
Examination at the Court of Cassation	Judge of the Supreme Court, may be extended by the Chief Justice of the Supreme Court	Article 28 paragraph (1) and paragraph (2) KUHP	50 days	60 days

259 *Ibid*

Based on article 29 paragraph (1) KUHP, the length of detention can be extended for the purpose of the investigation. The extension of the detention must be based on a reasonable and unavoidable reason, such as the suspect or the defendant suffering from severe physical or mental disorders proven by medical records from a doctor. Furthermore, it can be extended if the case being examined is punishable by imprisonment of nine years or more. The extension in Article 29 paragraph (1) KUHP is given for a maximum of 30 days and if needed, can be extended again for a maximum of 30 days.<sup>260</sup>

**Table 14.2**

**Detention duration in investigation**  
n = 735

Name Category	Percentage
<1 month	15.6%
<b>1 – 2 months</b>	<b>43.8%</b>
> 2 – 4 months	29.9%
> 4 – 6 months	1.4%
> 6 months	0.4%
No information	1.4%
No detention	7.5%

**Table 14.3**

**Detention duration in prosecution**  
n = 735

Name Category	Percentage
<b>&lt;1 month</b>	<b>83,0%</b>
1 – 2 months	10,5%
> 2 – 4 months	1,8%
No Information	0,5%
No Detention	4,2%

**Table 14.4**

**Detention duration in court**  
n = 735

Name Category	Percentage
<1 month	15.9%
1 – 2 months	10.3%
<b>&gt; 2 – 4 months</b>	<b>66.0%</b>
> 4 months	3.5%
No Information	0.5%
No Detention	3.7%

260 Indonesia, *Undang Undang Hukum Acara Pidana*, Law Number 8/1981, LN No. 76/1981, TLN Numer 3209, Article 29 paragraph (2).

In Table 14.2 to Table 14.4, the majority of investigators detain the defendant for a period of 1–2 months (43.8%) and 2–4 months (29.9%). It is important to remember that the total duration of detention at the investigation stage allowed by KUHAP is around 90–120 days, including if the detention is extended due to provisions of Article 29 KUHAP. Since there are findings of detention in the investigation stage that exceeds three months or 120 days as seen in Table 14.2, these data indicate the potential for malpractice that occurs in detention at the investigation stage. Therefore, the suspect or defendant must be released from detention by law, following Article 29 paragraph (6) KUHAP.

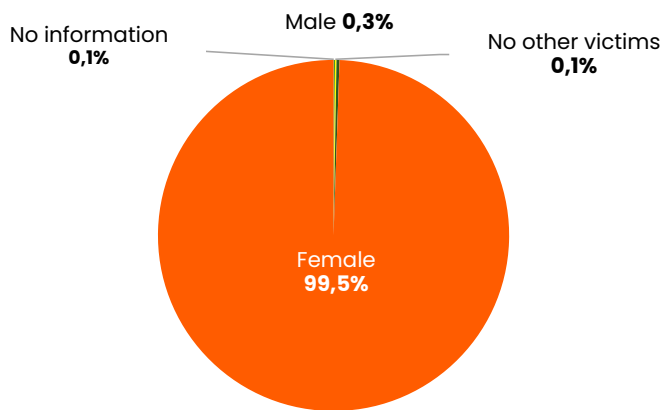
Moreover, Table 14.3 shows that most of the length of detention at the prosecution stage is approximately 1 month (83%). These findings shows the conformity between practice in the field and provisions in KUHAP regarding the length of detention carried out at the prosecution stage. The same trend is also found for detention at the trial state. Table 14.4 records that the majority of detention periods at the trial stage are 2–4 months (66%). This is in accordance with the provisions in KUHAP and SEMA No. 2/2014 concerning Settlement of Cases in the Court of First Instance and Appellate Level in 4 Jurisdictions, which state that case resolution n the court of first instance must be carried out within 5 months at the latest.

### 3.2.2 Victim Characterization



Based on the decisions analyzed in this research, most victims of sexual violence are single victims (96.6%). Of all court decisions within a single victim, 74,2% of victims are in the age range of 2-17 years. Cases of sexual violence with more than one victim have a smaller proportion, with 2.3% for 2 victims, 0.8% for more than 3 victims, 0.1% for 16 victims and the same proportion for 7 victims.

**Graph 16.**  
**Gender of victim**  
**n = 735**



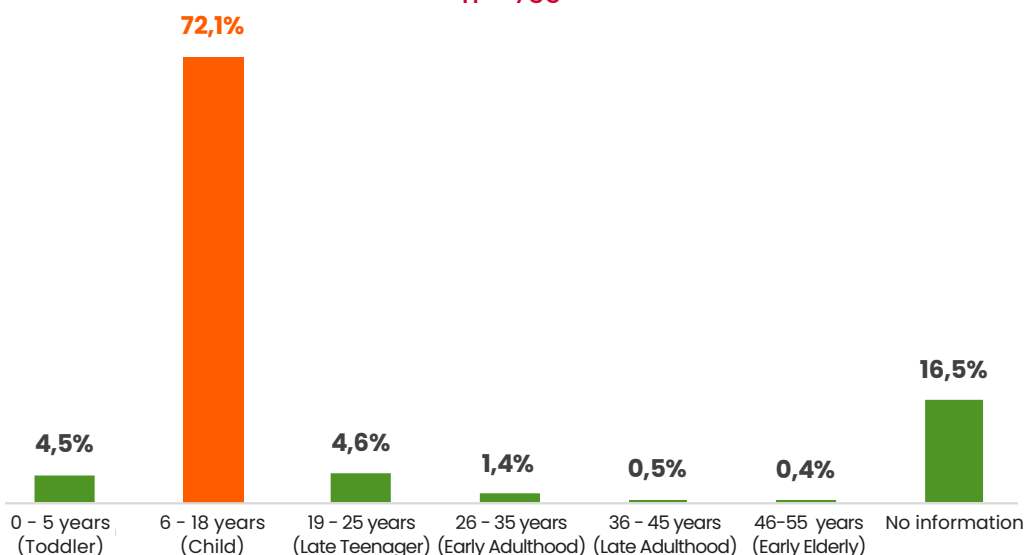
The result of this research reveals the fact that almost all sexual violence victims identified in court decisions are female (99.5%). Men only accounted for 0.3% of the total victims as a whole percentage of decisions in which the victims are male. This finding shows that women have a high vulnerability to become sexual violence victims. In addition, this data also proves that victims of sexual violence are not only limited to women. Even though the proportion is so small in this study, men can also be victims of sexual violence.

This finding is also in line with the 2020 Sexual Violence Barometer: Quantitative Study Report in Indonesia, which shows that 33.3% of men are victims of sexual violence<sup>261</sup> – in other words, men have the potential to also become victims of sexual violence. Additionally, the lack of male victims of sexual violence who are children does not necessarily mean that

261 [Wicaksana, et. al. (2), op.cit., page. 70.]

they have not experienced or are in the no-risk category in experiencing sexual violence. Stereotypes and patriarchal demands in society often show that men are dominant, strong, and masculine. Therefore, there is the perception that it is impossible for men to become victims. However, this mindset contributes to the neglect of sexual violence against men and boys, and it is the reason why men and boys tend to be reluctant to report cases<sup>262</sup>.

**Graph 17.**  
**Age of victim**  
**n = 735**



In line with previous findings, this study shows that 72.1% of sexual violence victims are girls aged 6–18 years. This reinforces the assumption that girls are vulnerable to becoming sexual violence victims and underlines the factual situation that state protection<sup>263</sup> provided to children is not yet at an ideal level. Children who are supposed to grow up, undergo education, and

262 [Bestha Inatsan Ashila and Naomi Rehulina Barus, “Kekerasan Seksual pada Laki-Laki: Diabaikan dan Belum Ditangani Serius”, Hukumonline, 27 September 2021, <https://www.hukumonline.com/berita/baca/lt6151421019441/kekerasan-seksual-pada-laki-laki--diabaikan-dan-belum-ditangani-serius/?page=all>, accessed on 28 November 2021.

263 Child protection is defined as all action to guarantee and protect children and their rights so that they can live, grow, develop, and participate optimally in accordance with human dignity, and receive protection from violence and discrimination. Indonesia, Law Number 35/2014, Article 1 number 2.



play with their friends are instead experiencing physical impacts such as injuries or damage to reproductive organs along with psychological impacts such as trauma, anxiety, and even depression. When sexual violence is experienced by a child, they do not know understand they are a victim<sup>264</sup>. In addition, children tend to be afraid to report because the perpetrators are often people that they know closely, such as family members, neighbors, and so on<sup>265</sup>. This matter must be a serious concern for policymakers, considering that sexual violence has a large negative impact on children, especially in regard to the child's growth and development and future.

Moreover, this research shows that some victims of sexual violence have disabilities. However, the proportion of disabilities found in court decisions is low in terms of quantity. For example, victims with mental disabilities were found to account for 1.1% of all victims, physical disabilities accounted for 0.7%, and victims with intellectual disabilities accounted for 0.3%. These findings only depict a small part of the disability phenomenon in criminal justice, considering that that information about disability does not have to be recorded within court decisions. Meanwhile, *Komnas Perempuan* assesses that people with disabilities are vulnerable to sexual violence<sup>266</sup>. In 2017, there were 47 cases of violence against women with disabilities recorded by *Komnas Perempuan*<sup>267</sup>. Sexual violence accounted for 57 cases, physical violence was recorded at only 6 cases, psychological violence was at 18 cases, and neglect was found in 5 cases<sup>268</sup>.

In CATAHU 2018, *Komnas Perempuan* again recorded 57 cases of sexual violence perpetrated against women with disabilities, with the majority of accusations being rape and molestation<sup>269</sup>. Next in 2019, data on sexual violence perpetrated against women increased to 69 cases, 10 cases of physical violence, 5 cases of psychological violence, and 5 cases of neglect<sup>270</sup>.

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264 Noviana, *op.cit.*, page 18.

265 *Ibid*

266 *Komnas Perempuan* (7), *Laporan Ringkas Kajian Disabilitas*, (Jakarta: *Komnas Perempuan*, 2020), page. 2.

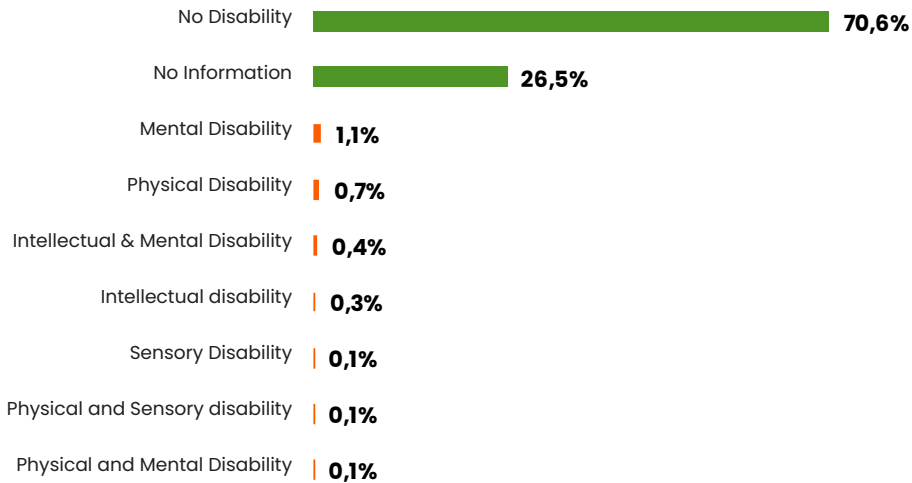
267 *Ibid*

268 *Ibid*

269 *Komnas Perempuan* (4), *op.cit.*, page 45.

270 *Ibid*

**Graph 18.**  
**Victim's disability**  
**n = 735**



The disability condition makes women and children have increasingly layered vulnerabilities. Furthermore, this condition makes it difficult for victims of sexual violence with disabilities to achieve justice. For example, law enforcers and service providers often view that the best solution for victims of violence against women and children with disabilities is through non-judicial channels, considering that disability is seen as synonymous with intellectual and mental retardation or stupidity<sup>271</sup>. As a result, settlements through extra-judicial means give room for impunity for the perpetrators and at the same time re-victimize women victims of sexual violence with disabilities<sup>272</sup>.

In addition, this study clarifies the condition that the majority of sexual violence victims are those who are not married (80.1%). This is in line with previous findings that most victims of sexual violence are in the age range of children and adolescents. Nevertheless, single adult victims also have the potential to become victims of sexual violence. This also applies to married adult victims, as well as underage children in the same category. In addition, the proportion of 12.4% of victims whose marital status cannot

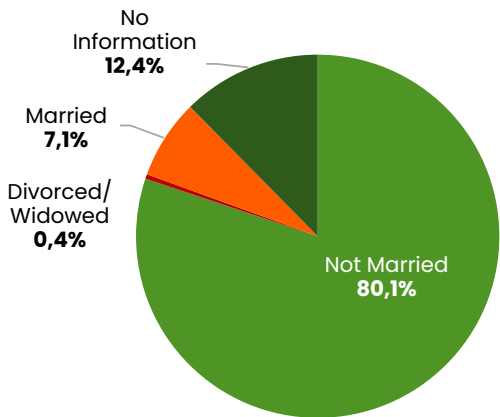
<sup>271</sup> *Ibid.*, page 11

<sup>272</sup> *Ibid*

be identified in the court decision also increases the possibility that the number of victims of sexual violence in this category will increase. Moreover, the discovery of sexual violence victims who are married emphasizes the phenomenon of marital rape, commonly done by a husband to the wife.

**Graph 19.**

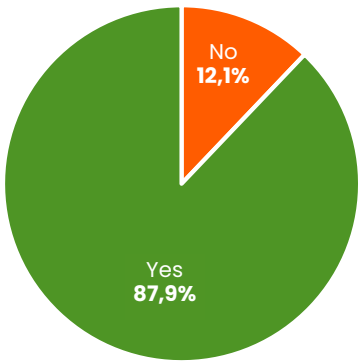
**Victim's marital status**  
**n = 735**



**3.2.3 Relation and Inequality of Power Relations in Sexual Violence Cases**

**Graph 20.**

**Relationship with the party within decision**  
**n = 735**



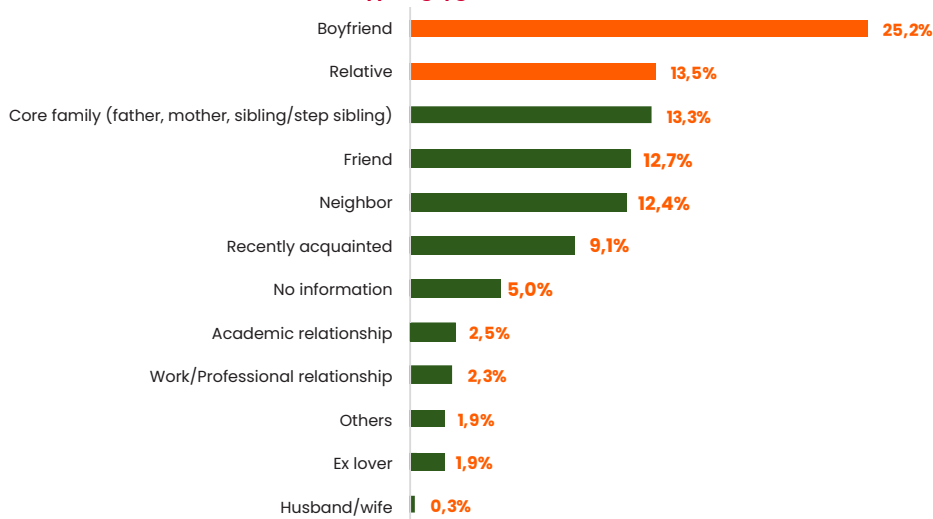
**Graph20.1**

**Party related with PBH**  
**n = 646**

Name Category	Percentage
Defendan	87,6%
No party related	12,1%
Victim 2	0,1%
Victim 1	0,1%

Another finding in the results of this research is that 87.9% of sexual violence victims personally know the defendant. This is in line with MaPPI FHUI study in 2016 that states that most sexual violence perpetrators are people that the victim knows<sup>273</sup>. Ironically, research also shows that the people who are by victims as protectors, mentors, or role models have a high chance of becoming perpetrators of sexual violence against them<sup>274</sup>.

**Graph 21.**  
**Relation type of PBH**  
**n = 646**



In this regard, this research also found that lovers account for the most perpetrators of sexual violence (25.2%). In the next order, other family members accounted for 13.5% of perpetrators, meanwhile the nuclear family member accounted for 13.3%, friends for 12.7%, and neighbors for 12.4% of the total perpetrators.

This pattern is consistent with the trend of sexual violence trend studied by *Komnas Perempuan*. During the 2018–2020 period, sexual violence cases tended to be committed in the realm of personal/private relations

273 MaPPI FHUI (2), *Booklet Kekerasan Seksual di Indonesia: Data, Fakta, Realita*. (Depok: MaPPI FHUI, 2016), page 33.

274 *Ibid*

and ranked second in terms of case quantity<sup>275</sup>. Lovers, biological fathers, stepfathers, uncles, siblings/relatives, husbands, and cousins were the parties identified as perpetrators of sexual violence in this period<sup>276</sup>. Furthermore, *Komnas Perempuan* also recorded a high number of incest cases in the year 2018 which indicated that the perpetrators are within the victim's closest environment<sup>277</sup>. This corresponds with KPAI's finding that clarifies that 62% of sexual violence cases experienced by children in 2016 occurred in the immediate environment, namely families and schools<sup>278</sup>. Moreover, KPAI also identified that sexual violence was perpetrated by parents, relatives, teachers, neighbors, and even school guards<sup>279</sup>. INFID and IJRS's 202 Gender Equality Barometer: Quantitative Study Report provides similar findings, that 99.8% of perpetrators of sexual violence are the closest people known to the victim, namely friends (40.6%), lovers (27.2%), and family members (17.9%)<sup>280</sup>.

The findings above show that power relations are unequal between the perpetrator and victim, where the victims positioned as weak and powerless<sup>281</sup>. In one sexual exploitation case, a child was forced to comply with the wishes of their mother's partner, a notary public, to have sexual intercourse<sup>282</sup>. While living together, the mother forced the victim to treat the perpetrator as a father, which led to a power relationship the perpetrator used to rape the victim for years<sup>283</sup>. The Semarang District Court Judges finally sentenced the perpetrators to 13 years in prison and a fine of 1.5 billion rupiah subsidiary four months of confinement for violating Article 76 D in conjunction with Article 81 Paragraph (1) of Law Number 35/2014<sup>284</sup>.

275 *Komnas Perempuan* (4), *op.cit.*, page 13.

276 *Ibid*

277 *Ibid*

278 *Ibid*

279 *Ibid*

280 Wicaksana, *et. al.* (2), *op.cit.*, page 72-73.

281 *Ibid*

282 *Komnas Perempuan* (5), *op.cit.*, page 45.

283 *Ibid*

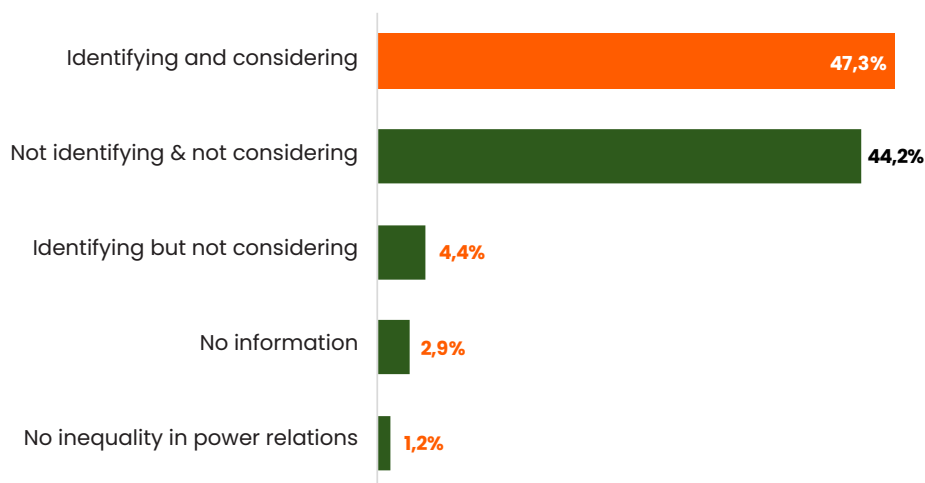
284 *Ibid*

**Graph 22.**

**Consideration of power relations in the court decision**

**n = 735**

*(Answer can be more than one)*



In relation to the findings above, Graph 29 shows that 47.3% of the court decision have identified and considered<sup>285</sup> the power relations that result in the victim/witnesses being powerless in sexual violence. Nevertheless, the proportion of decisions which do not identify and do not consider the power relations is also not small, that is 44.2%. On the other hand, 4.4% of other decisions successfully identified power relations but did not take them into consideration in the proofing process. Only 2.9% of decisions did not provide any information regarding the presence or absence of power in the adjudicated case.

Consideration of power relations that render the victim/witness helpless is an essential matter in the examination process of sexual violence cases. With serious consideration, the judge can identify the causes of sexual violence, give more attention to the victims, and impose appropriate sentences for the perpetrators. The importance of understanding power relations is agreed upon by the judges who handles sexual violence cases. Based on a

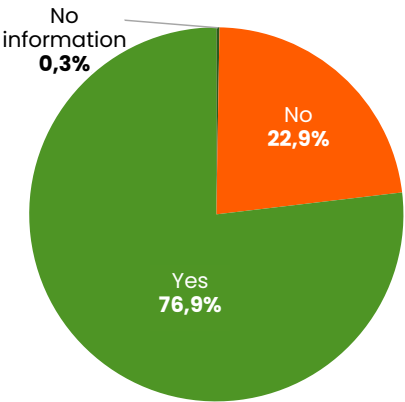
<sup>285</sup> Identifying means the availability of relevant information in legal facts within the court decision document. Meanwhile, considering is defined as the availability of relevant information in determining the elements and criminal provision or mitigating aggravating-leveraging factors in the decision document.

study conducted by *Komnas Perempuan* regarding the practice of PERMA Number 3/2017, judges who were respondents in the research confirmed that power relations and social status inequality are essential factors in proving criminal acts, especially in cases of KDRT (domestic violence)<sup>286</sup>. Furthermore, judges at the East Jakarta District Court elaborate further that women who are victims of domestic violence are generally unemployed have no income, resulting in the husband having a more dominant position and feeling that they can treat their wives as they please<sup>287</sup>. For this reason, the law enforcers must carefully consider the facts of the trial and observe whether the litigants are involved in unequal power relations or experience unequal treatment, unequal legal protection, or multiple discrimination.

### 3.2.4 Repetition of Sexual Violence

**Graph 23.**

**Case repetition**  
n = 735



**Table 23.1**

**Number of case repetition**  
n = 565

Item	Percentage
1 time	0,7%
>1-10 times	57,5%
> 10 Times	1,9%
Several times (Countless/ not remember, happened repeatedly)	35,6%
No Information	4,2%

Another things found in this study is that most cases of sexual violence against women and children are only processed in court when repetition occurs (76.9%). This data shows the victims' struggle to report sexual violence that they experienced, and that they had to go through more than

<sup>286</sup> *Komnas Perempuan* (8), *loc.cit*

<sup>287</sup> *Ibid*

one act of sexual violence act against them to be able to proceed to the court of law. In fact, 35.6% of the findings show that victims are assaulted multiple times. The repetition referred to in this research is an action committed repeatedly by the perpetrator against the same victim. As an illustration, a perpetrator who commits rape more than once on different occasions against the same, was seen as one data by the researcher. The term 'repetition' represents the concept of *concursum realis* which is regulated in Article 65 and Article 66 of KUHP, as follows:



### Article 65 KUHP

1. In case of conjunction of more acts which must be considered as separate acts and which form more crimes on which constitute several crimes which are punishable by the same principal punishment, then only one sentence will be applied.
2. The maximum penalty imposed is the maximum amount of punishment that is threatened for that act, but it may not be more, and the maximum heaviest punishment is added one third.



### Article 66 KUHP

3. In case of conjunction of more acts which must be considered as separate acts and which form more crimes on which dissimilar basic punishments are imposed, each of said punishments shall be pronounced, but altogether their term shall not exceed the longest term by more than one third.
4. Fines are calculated in said cases according to the duration of the maximum substitutive light imprisonment imposed upon the act.



Of all the decisions with repetition of sexual violence above, the most repeated act was sexual intercourse with a child, at 44.2%. This confirms the findings described in Graph 21 of the high level of vulnerability of children as victims of sexual violence with incest nuances, especially by their own family members, with the prevalence of cases of sexual intercourse and molestation against children being carried out repeatedly. Moreover, oftentimes sexual intercourse is perpetrated by intimate partners or a child's adult 'boyfriend/girlfriend' with a large age gap. In other words, sexual intercourse is carried out as a result of grooming by the perpetrator.

**Table 23.3**  
**Action Type with Repetition**  
**n = 565**

Act with repetition	Frequency	Percentage
Sexual intercourse against child	250	44.2%
Rape	126	22.3%
Child molestation	88	15.6%
Molestation	38	6.7%
Sexual intercourse	36	6.4%
Adultery against child	8	1.4%
Child rape	3	0.5%
other	16	2,8%

In this study, researchers also looked at the correlation between the repetition of sexual violence and the length of sentences handed down by the judge. Table 23.4 summarizes this information as follows:

**Table 23.4**

Comparison of the amount of punishment for repetition and non-repetition cases

Article	Number of decisions with acquittal	Number of decisions with criminal sentences	Average length of imprisonment (Year)	Minimum length of imprisonment (Year)	Maximum length of imprisonment (Year)	Length of imprisonment sentence (Year)
Group of Repetition						
Article 81 of the Child Protection Law	-	274	7,7	0,2	8	7,2
Article 82 of Child Protection Law	-	110	6,2	0,5	8	7,5
285 of KUHP	2	93	5,6	0,4	7	6,6
289 of KUHP	-	15	5,3	0,4	12	11,6
Group of Non-repetition						
Article 81 of the Child Protection Law	1	57	7	0,8	8	7,2
Article 82 of the Child Protection Law	-	68	6,3	0,5	8	7,5
285 of KUHP	-	12	3,3	0,2	15	14,8
289 of KUHP	-	13	3,2	0,7	6	5,3

Based on the table above, in general, the perpetrators of sexual violence committed against child are sentenced to heavier imprisonment than those committed against adults. Furthermore, repeated acts of sexual violence is sentenced to a heavier prison sentence compared to non-repetition. The exception was found in child molestation cases which, if done repeatedly, received a lower sentence (0.1 year) compared to non-repetition.

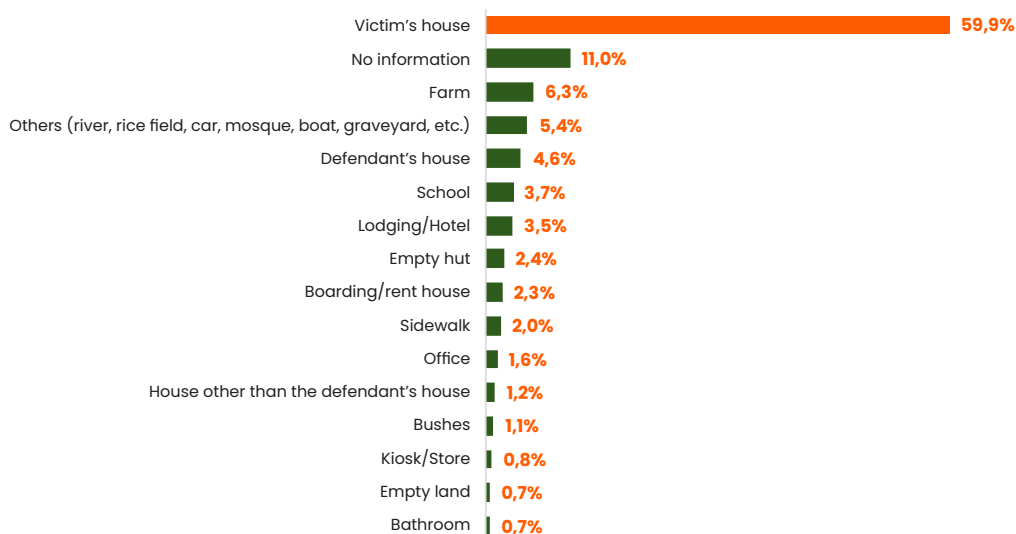
### 3.2.5 Incident Location

Graph 24.

#### Incident Location

n = 735

(answer can be more than one)



On the other hand, 59.9% of victims experience sexual violence in their own homes. Additionally, 6.3% victims actually experience the incident in the garden. A total of 4.6% of sexual violence was committed in the defendant's house and only 3.7% occurred in schools. This is in line with *Komnas Perempuan's* Annual Records that reveal that most violent acts against women were committed at (1) the victim's home, (2) at work, (3) in public places.<sup>288</sup> Ironically, research by the International NGO Forum on Indonesian Development (INFID) and Indonesian Judicial Research Society (IJRS) in 2020 shows that people consider their homes to be the least vulnerable location for sexual violence to happen.<sup>289</sup> This contradiction emphasizes the lack of public awareness that sexual violence can and is most likely to occur at home. Sexual violence prevention policies must prioritize handling

288 Dwi Hadya Jayani, "Di Mana Kekerasan terhadap Perempuan Kerap Terjadi? – Kekerasan terhadap Perempuan di Ranah Publik Berdasarkan CATAHU *Komnas Perempuan* 2019," <https://databoks.katadata.co.id/datapublish/2019/09/25/di-mana-kekerasan-terhadap-perempuan-kerap-terjadi#>, accessed on July 21, 2020.

289 Wicaksana, et. al. (2), *op.cit.*, page 48.

in the domestic sphere. Given the close the close interaction between perpetrator and victim<sup>290</sup> cases of sexual violence that occur in this area tend to be difficult to report.<sup>291</sup>

**Table 24.1**  
Indexed jurisdiction of sexual violence decisions  
n = 735

Area	Frequency	Percentage
Regency	574	78.1%
City	161	21.9%

Judging from the administrative area, 78.1% of decisions documented in this research come from the regency (rural) area. Given the limited economical and geographical conditions<sup>292</sup>, victims living in rural areas tend to have more difficulty in accessing health assistance, both physical and psychological, as well as legal assistance<sup>293</sup>. Such conditions affect the difficulty of accessing assistance, both in terms of reporting a case, examination at every court stage and companionship victims with mental disabilities<sup>294</sup>.

290 *Ibid.*

291 *Ibid.*, page 49.

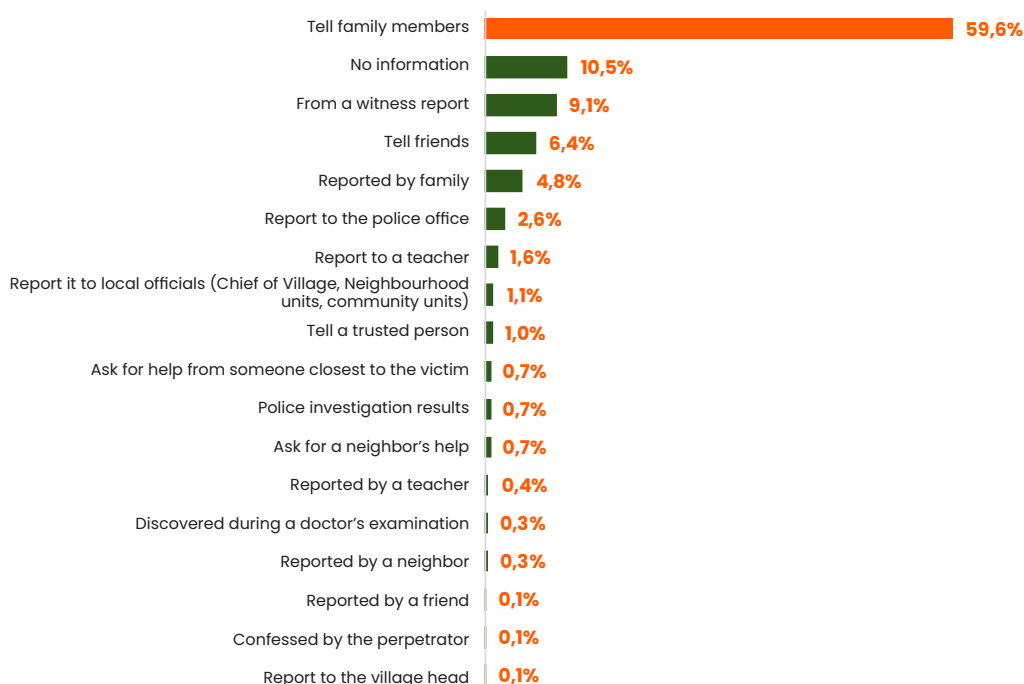
292 Susan H. Lewis, "Sexual Assault in Rural Communities," [https://vawnet.org/sites/default/files/materials/files/2016-09/AR\\_RuralSA.pdf](https://vawnet.org/sites/default/files/materials/files/2016-09/AR_RuralSA.pdf), accessed on December 2, 2021

293 *Ibid.*

294 *Ibid.*

### 3.2.6 Victim's Method of Reporting Cases

**Graph 25.**  
**Method of reporting case**  
**n = 735**



This study discovered the pattern that 59.6% of sexual violence victims reported the violence to their families before entering the legal process. This pattern is in line with the findings of the 2019 Access to Justice Index in Indonesia, which explains that 88% of people who need legal assistance will ask for help from non-legal companions such as family, local officials of neighborhood units (RT)/ community units (RW)/ Chief of Village (Kades), and friends<sup>295</sup>. Nevertheless, there are still some victims who choose to remain silent and are reluctant to report the case for various reasons. Based on the INFID and IJRS's Gender Equality Barometer: Quantitative Study Report in 2020, the reasons for victims not reporting the case (57.2%) varied from

<sup>295</sup> Dio Ashar Wicaksana, et al. (1), *Indeks Akses Keadilan di Indonesia Tahun 2019*, (Jakarta: Konsorsium Masyarakat Sipil untuk Indeks Akses Keadilan, 2020), page 9.

fear, shame, having no idea where to report, and feeling guilty<sup>296</sup>. However, the study also explains that 93% of respondents know where to report when experiencing sexual violence or harassment<sup>297</sup>. Meanwhile, 41.6% of respondents choose to report the incident to the police, 43.8% report it to their family and the rest will report it to Komnas Perempuan, local RT/RW, and others<sup>298</sup>.

This pattern clarifies the position of sexual violence victims who are more comfortable telling their cases to their families first. However, on the other hand, reporting to family can also have a negative impact on victims of sexual violence. If the perpetrator comes from the family itself, the victim will not get the resolution and recovery expected. Additionally, based on the research conducted by INFID and IJRS, the resolution of sexual violence cases is more directed towards marriage with the perpetrator (26.2%) and resolving it in a family manner (23.8%)<sup>299</sup>. Therefore, parties who have the potential to become important actors in the mechanism for reporting victims in the family must also be supported and empowered.

### ➤➤ 3.3 Characteristics of Sexual Violence Case Investigation

This research successfully captured several characteristics of the examination of sexual violence case in court. As the majority of victims are women and children, this study perceives the court's compliance with the principles regulated in PERMA Number 3/2017 concerning Guidelines for Adjudicating Women in Conflict with the Law and the compliance of public prosecutors in carrying out Prosecutor's Guideline No. 1/2021 concerning Access to Justice for Women and Children in Criminal Justice. The principles explored by this research include (a) the importance of knowing the victim's powerlessness, (b) history of violence, (c) availability of companion, (d) impact of the experienced sexual violence, and (e) prohibition of victim-blaming.

296 Wicaksana, et. al. (2), *op.cit.*, page 52.

297 *Ibid.*

298 *Ibid.*

299 *Ibid.*, page 69.

The pattern of handling sexual violence cases found in this research will be beneficial for mapping the needs of victims of sexual violence in court. It may function as evaluation material for the protection and respect of victims' rights in criminal case investigations.

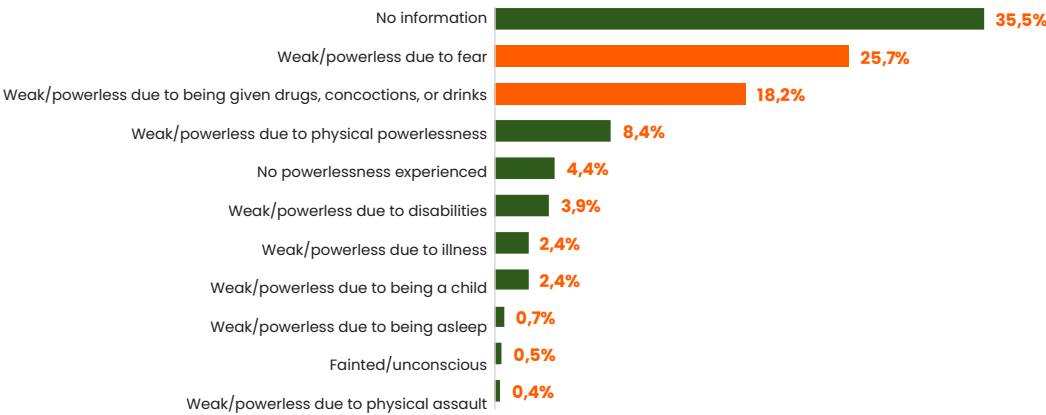
### 3.3.1 Consideration of Women's Powerlessness in Sexual Violence Case Decisions

**Graph 26.**

**Information of women's powerlessness in decisions**

**n = 735**

*(Answer can be more than one)*

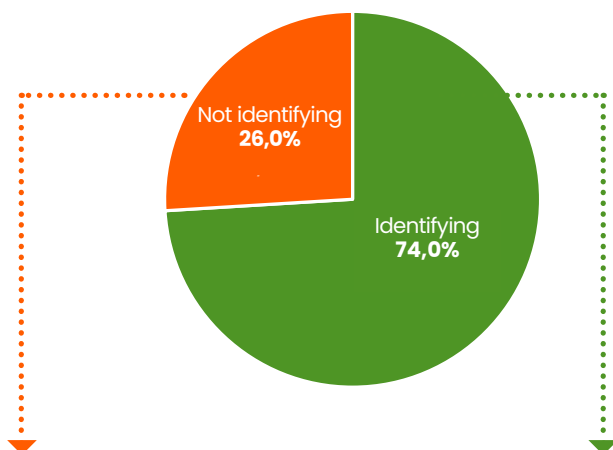


In Graph 26, we can see that the majority of decisions (35.5%) do not include information about the physical and psychological powerlessness of victims. Around 25.7% of decisions inform that victims were powerless due to fear, whereas 18.2% of decisions record they were powerless due to being given drugs concoctions, or drinks. In addition, 8.4% of decisions emphasized powerlessness due to women's lack of physical strength, 3.9% due to disabilities, 2.4% due to illness, and 2.4% due to being children.

**Graph 27.**

**The identification of victim's powerlessness in decision**

**n = 462**



**Table 27.1**

**Unidentified condition in decision**

**n = 120**

*(answer can be more than one)*

Item	Percentage
Weak/powerless due to fear	41,5%
Weak/powerless due to being given drugs, concoctions, or drinks	31,3%
Weak/powerless due to physical powerlessness	11,7%
Weak/powerless due to disabilities	7,6%
Weak/powerless due to illness	3,8%
Weak/powerless due to being asleep	1,5%
Weak/powerless due to being a child	1,2%
Fainted/unconscious	0,9%
Weak/powerless due to physical assault	0,6%

**Table 27.2**

**Identified condition in decision**

**n = 342**

*(answer can be more than one)*

Item	Percentage
Weak/powerless due to fear	39,2%
Weak/powerless due to being given drugs, concoctions, or drinks	22,5%
Weak/powerless due to physical powerlessness	18,3%
Weak/powerless due to being a child	11,7%
Weak/powerless due to illness	4,2%
Weak/powerless due to disabilities	2,5%
Weak/powerless due to physical assault	0,8%
Fainted/unconscious	0,8%

Of the 462 decisions containing information about women's physical and psychological powerlessness, most decisions (74%) succeeded in identifying<sup>300</sup> women's physical and psychological powerlessness in the legal facts of the

<sup>300</sup> In this case 'identify' means to include the information of powerlessness in legal fact to further see whether the judges take the condition into account in their considerations.

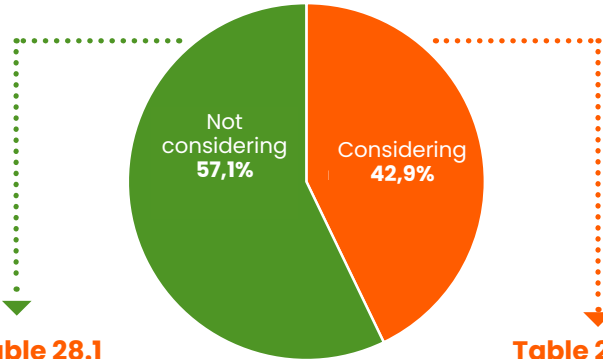


decision. The most often identified types of powerlessness are weakness/ powerlessness because of fear, and because of being given a drug, concoction, or drink. The existence of this identification shows that the powerlessness of the victim is also considered as a fact to be reviewed.

**Graph 28.**

**Consideration of powerlessness in decision**

**n = 462**



**Table 28.1**

**Elements not considered in decision**

**n = 264**

*(answer can be more than one)*

Item	Percentage
Weak/powerless due to being given drugs, concoctions, or drinks	47,5%
Weak/powerless due to fear	32,8%
Weak/powerless due to disabilities	12,6%
Weak/powerless due to physical powerlessness	3,0%
Weak/powerless due to illness	2,0%
Fainted/unconscious	1,5%
Weak/powerless due to physical assault	0,5%

**Table 28.2**

**Elements considered in decision**

**n = 198**

*(answer can be more than one)*

Item	Percentage
Weak/powerless due to fear	47,0%
Weak/powerless due to physical powerlessness	21,2%
Weak/powerless due to being given drugs, concoctions, or drinks	15,2%
Weak/powerless due to being a child	6,8%
Weak/powerless due to illness	5,3%
Weak/powerless due to being asleep	1,9%
Weak/powerless due to disabilities	1,5%
Weak/powerless due to physical assault	0,8%
Pingsan/tidak sadarkan diri	0,4%

Furthermore, of the 462 decisions identified above, a total of 42.9% of decisions also succeeded in considering<sup>301</sup> conditions when proving the criminal act and guilt of the defendant, particularly if the victim was found to be fearful, underage, ill, or powerless due to physical assault carried out by the perpetrator. Although this has not yet been a majority trend, the pattern shows a positive

<sup>301</sup> In this case 'considering' means the judges include information of women's powerlessness as a reference to determine the amount, type or criminal penalty for the perpetrator's actions.

development for the handling sexual violence cases where the judges place the victims' powerlessness as an important element in the evidence in court.

In this regard, it is important to underline that a victim's powerlessness is divided into two, namely (a) physical powerlessness, which is related to the victim's physical inability to prevent sexual violence, such as paralysis, stroke, illness, fainting, or old age<sup>302</sup>, and (b) psychological powerlessness, which emphasizes the victim's exploited psychological condition such as Down syndrome, senile dementia, and mental disabilities<sup>303</sup>. In the case of victims with disabilities, there is a possibility that they do not realize that the perpetrator's actions are criminal acts and are detrimental to themselves<sup>304</sup>. In some situations, they are addicted or show dependency towards the perpetrator<sup>305</sup>. For instance, people with Down syndrome are unable to understand social norms, sexual expression, and self-identity, and do not have emotions<sup>306</sup>.

To be able to explore psychological powerlessness more deeply, the judge can use the information of a psychologist, either in the context of being presented as an expert or in a written statement, to assess the psychological condition of the victim from the events experienced<sup>307</sup>. However, in practice, the explanation of psychologists is usually limited to children's cases only<sup>308</sup> and rarely found in cases involving adult women as victims<sup>309</sup>.

In accordance with the finding, some judges that were interviewed by *Komnas Perempuan* in the PERMA implementation study Number 3/2017 conveyed their understanding of exploring the psychological condition PBH more intensely in court<sup>310</sup>. In one case assisted by Care Center for the Empowerment of Women and Children (P2TP2A) Central Kalimantan and a Palangkaraya Indonesian Bar Association (PERADI) advocate, the judge coordinated with P2TP2A about the victim's condition and asked for the availability of a safe house for the victim<sup>311</sup>.

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302 Ilmi, et. al., *op.cit.*, page 18.

303 *Ibid.*

304 Choky R. Ramadhan et. al. (2), *Difabel dalam Peradilan Pidana: Analisis Konsistensi Putusan*, (Depok: Law Faculty of University of Indonesia and MaPPI FHUI, 2016), page 89–90.

305 *Ibid.*

306 *Ibid.*

307 Nurtjahyo & Ramadhan, eds., *op.cit.*, page 337.

308 Based on the testimony of the judge of East Jakarta District Court in *Komnas Perempuan* (8), *loc.cit.*.

309 *Ibid.*

310 *Ibid.*

311 *Ibid.*

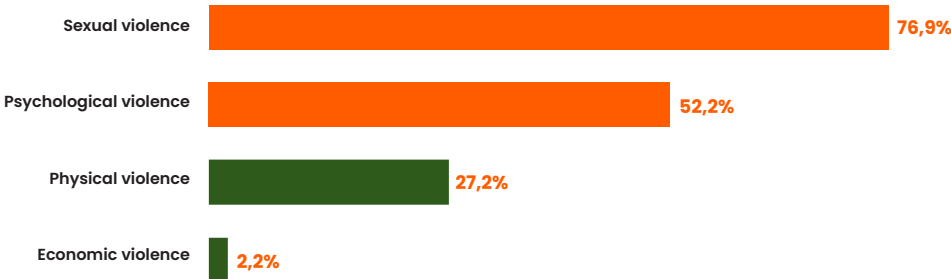
Additionally, public prosecutors also underline the importance of women's powerlessness as the main factor in formulating lawsuits<sup>312</sup>. For instance, Prosecutor's Guideline Number 1/2021 orders public prosecutors to elaborate on two elements when handling women and children's cases, namely the special circumstances behind the crimes committed and the consequences of the crimes against the victims<sup>313</sup>. To determine these two things, the prosecutor can identify certain syndromes that show deviations in women and children, psychological responses, errors in interpreting relationships that cause victims to tolerate the defendant's actions, position in vulnerable groups, and so on<sup>314</sup>. The identification of matters above can help the public prosecutor formulate a claim that prioritizes the best interests of the victim<sup>315</sup>.

### 3.3.2 Consideration of History of Violence in Sexual Violence Case Decisions

This study also analyzes the significance of the history of violence experienced by women in the judge's consideration. History of violence is defined as everything related to violence that occurred in the past including identification of the type, frequency, and time of the violence<sup>316</sup>. This matter needs more consideration due to the fact, represented in Graph 23, that the majority of female victims experience sexual violence more than once.

**Graph 29.**

**Information of PBH's violence history**  
**n = 735**  
*(answer can be more than one)*



312 Tarigan, *et al. op.cit.*, page 104

313 *Ibid.*

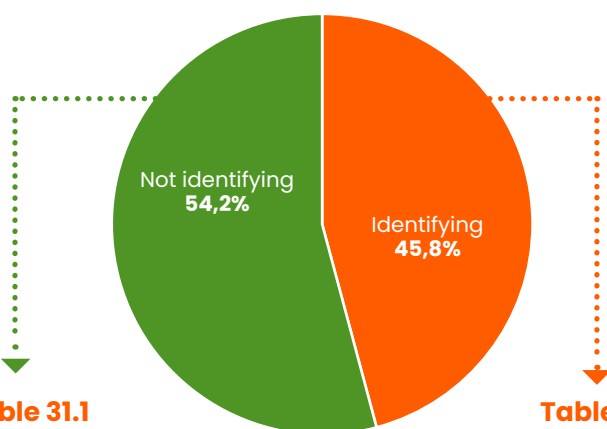
314 *Ibid.*, page 105.

315 *Ibid.*, page 104.

316 Ilmi *et.al, op.cit.*, page 19

In this regard, this research records data that all decisions analyzed have included information about the history of violence experienced by the victim. In other words, all female victims had experienced sexual violence before. When viewed from the type of violence experienced, 76.9% of victims experienced sexual violence, 52.2% of victims experienced psychological violence, another 27.2% experienced physical violence, and only 2.2% experienced economic violence.

**Graph 31.**  
Identification of violence history in decision  
n = 1165



**Table 31.1**

Elements unidentified in decision

n = 631

(answer can be more than one)

Item	Percentage
Physical violence	18,4%
Other sexual violence	73,1%
Psychological violence	8,6%

**Table 31.2**

Elements identified in decision

n = 534

(answer can be more than one)

Item	Percentage
Economic violence	3,2%
Physical violence	15,5%
Psychological violence	61,8%
Other sexual violence	19,5%

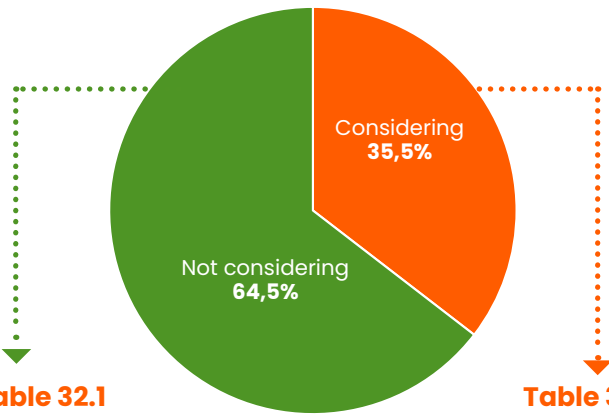
From the decisions analyzed, there is a large proportion of decisions that successfully identify<sup>317</sup> a history of violence history experienced by women in the past (45.6%). Furthermore, this research shows that the history of violence identified tends to be identified only with physical (61.8%)

<sup>317</sup> In this case 'identifying' means to include the information of women's powerlessness in legal facts to further see whether or not the judges take this matter into account in their decision.

and economic violence (3.2%). Meanwhile, even though the information regarding the history of violence was informed through testimony in court, 73.1% of decisions did not identify history of sexual violence, and another 18.4% did not identify the victim's history of physical abuse in the legal facts. This pattern shows that judges and public prosecutors have not acknowledged the significance of the victim's experiences of violence as an essential legal fact to be investigated better in the evidentiary process. In fact, the condition of female victims can be better comprehended through identification of the history of violence. Thus, it can result in comprehensive considerations that support the victims.

**Graph 32.**

**Consideration of violence history in decision**  
**n = 1165**



**Table 32.1**

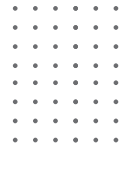
**Elements not considered in decision**  
**n = 752**  
*(answer can be more than one)*

Item	Percentage
Economic violence	1,7%
Physical violence	16,1%
Psychological violence	15,6%
Other sexual violence	66,6%

**Table 32.2**

**Elements considered in decision**  
**n = 413**  
*(answer can be more than one)*

Item	Percentage
Economic violence	0,7%
Physical violence	19,1%
Psychological violence	64,6%
Other sexual violence	15,5%



Of this proportion, only 35.5% of decisions consider<sup>318</sup> the perpetrators history of violence against the victim in the evidentiary process. The indexation results show that most of the decisions (64.5%) have not yet considered the historical aspect of the perpetrator's violence against the victim. Histories of violence not yet considered in decisions include the history of previous sexual violence (66.6%) and economic violence (1.7%). However, 19.1% of decisions considered the history of physical violence, and another 64.6% also consider the history of psychological violence against the victim.

This pattern shows that judges have not yet optimally considered the history of violence experienced by victims when sentencing crimes. In fact, it is essential to understand the history of violence to clarify the cycle of violence<sup>319</sup> experienced by victims that make it difficult for them to get out of that cycle.<sup>320</sup> In handling cases of sexual violence, law enforcement must also look at the violence experienced by victims, regardless of whether or not the incident was reported to authorities.<sup>321</sup>

However, the effort to considering the history of violence against women is not without its own challenges. Based on *Komnas Perempuan's* research, a judge of the East Jakarta District Court explained that a history of violence is often found in domestic violence cases (KDRT).<sup>322</sup> Yet, when a judge wants to consider a heavier sentence for the defendants, the victims instead ask the judge to not severely sentence the defendant.<sup>323</sup> This usually happens because the victim is economically dependent on the defendant, who is her husband, and also considers the well-being of her children.<sup>324</sup>

On the other hand, companions always try to explain the background of the victim, such as education, socio economic status, history of violence, vulnerability, gender inequality, or other conditions. However, in some cases, there are still judges who tend to be passive in exploring the vulnerability factors of women. Yet, some practices show otherwise. For example, when

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318 In this case 'identifying' means to include the information of women's powerlessness in legal facts as a reference to determine the amount, type or criminal penalty for the perpetrator's actions.

319 *Ibid.*, page 19.

320 *Pokja Perempuan and Anak MA and MaPPI FHUI, op.cit.*, page 28.

321 *Ilmi, loc.cit.*

322 *Komnas Perempuan (8), loc.cit.*

323 *Ibid.*

324 *Ibid.*

the Community Legal Aid Institute (LBH Masyarakat) accompanied a woman indicted as a drug user and seller,<sup>325</sup> the judge explored and considered her condition, background, and even her household dynamics instead.<sup>326</sup> In a court examination, it was revealed that the perpetrator’s husband had an affair, left the home, and abandoned their children.<sup>327</sup> Even though the PBH was sentenced to 17 years of imprisonment by a prosecutor, the judge granted the request for rehabilitation and suspension of detention.<sup>328</sup> Such practices should be appreciated and used as a reference in handling sexual violence cases.<sup>329</sup>

**Table 32.3**  
**Comparison of Sentences with Identification & Consideration of the History of Violence**  
**(n=627)**

Item	Average Length of Sentence (Years)
Identifying & considering the history of violence	7,1
Identifying, but not yet considering the history of violence	7,1
Not identifying and not considering the history of violence	6,4

Furthermore, this study also compares decisions that identify and/or consider the history of sexual violence experienced by the victims, with those that do not. Then it relates the two to the severity of the sentence given to the perpetrator.

From table 32.3, it can be seen that the average prison terms imposed by judges who identify and consider the victims’ history of violence is 7.1 years. The same figure can also be found in decisions that successfully identified a history of violence but do not take this into account the evidentiary and sentencing process. Both patterns are higher than the verdicts given in cases that neither identify nor consider the victim’s history of violence. Thus,

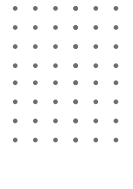
325 *Ibid.*

326 *Ibid.*

327 *Ibid.*

328 *Ibid.*


329 Based on the interview with PBH assistants from the Community Legal Aid Institute (LBHM). *Ibid.*



it can be concluded that judge considerations or at least the identification of history of violence, is related to the frequency of sentences given to the perpetrators. Decisions that consider and/or identify the victims' history of violence tend to sentence the perpetrator more severely compared to those that do not.

On the other hand, a history of sexual violence should also be considered to assess the impact of sexual violence on the victim. Someone who experiences repeated violence will receive a worse impact compared to those who experience it for the first time. Additionally, physical and psychological wounds experienced by the victim will be more difficult to recover when the victim is subjected to repeated violence<sup>330</sup>.

Reflecting on the handling of sexual violence cases in the United Kingdom, the history of violence is one of the essential considerations in the sentencing process<sup>331</sup>. The UK has a criminal code for criminal cases, including violence as well as sexual violence<sup>332</sup>. In the criminal code, judges are asked to consider the degree of harm and culpability before determining the amount of punishment to be decided on a case<sup>333</sup>. The context of the impact (harm) is measured by assessing the severity of the injuries and psychological impact experienced, or by assessing whether it is a one-time or repeated violation<sup>334</sup>. Judges are also directed to impose heavier sentences if it is found violence has occurred repeatedly<sup>335</sup>.



The use of the criminal code can be considered to be applied in Indonesia. It is hoped that special conditions, such as a history of repeated violence, can really be considered and have a significant influence in the sentencing process.

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330 Gregory R. Janson and Richard J. Hazler, "Trauma reactions of bystanders and victims to repetitive abuse experiences," *Violent Victim*, 2004: 19(2), page 239.

331 For more information see The Sentencing Council, "Assault," <https://www.sentencingcouncil.org.uk/outlines/assault/>. Accessed on December 4, 2021.

332 *Ibid.*

333 *Ibid.*

334 *Ibid.*

335 *Ibid.*



### 3.3.3 Victim-Blaming and Sexual History in Sexual Violence Case Decisions

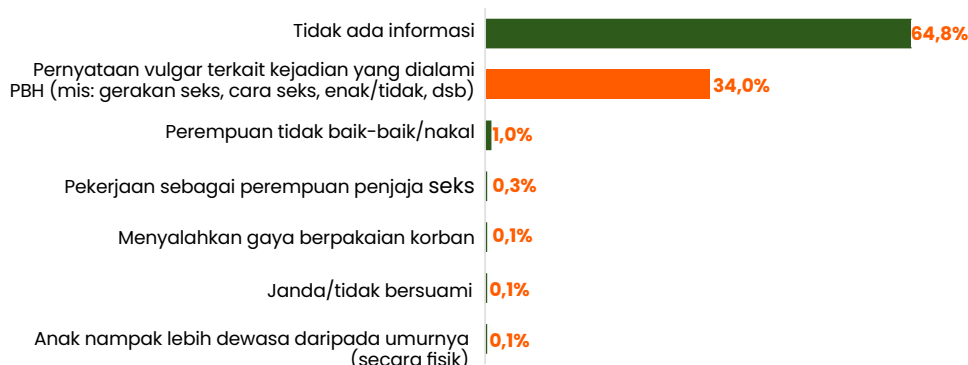
Data produced in the Sexual Violence Barometer: Quantitative Study Report of 2020 in Indonesia shows that 69.7% of respondents think victims are raped or sexually harassed because of their revealing/provocative clothing<sup>336</sup>. Additionally, 71.5% of respondents believe that it is caused by the flirtatious, coquettish, or teasing behavior of the victim<sup>337</sup>. This survey confirms that the victim-blaming culture is very dominant in society.

**Graph 32.**

**Informasi pernyataan yang bersifat merendahkan, menyalahkan, vulgar kepada PBH**

**n = 735**

*(jawaban dapat lebih dari satu)*



To examine trends in the examination of sexual violence cases in court, this research analyzes a similar pattern indicating the presence or absence of statements that demean, blame, and/or intimidate women in court decisions. The result is that the statements above were not found in 64.8% of the decisions sampled in this study. Yet, the other 34% of decisions are still perpetuating this erroneous practice. There are still judges who write vulgar statements in their decision including movement during sexual intercourse, ways of having sex, and other statements. In addition, 1% of

336 Wicaksana, *et. al.* (2), *op.cit.*, page 44

337 *Ibid.*, page 59

decisions also state that PBH are bad women, 0.3% of decisions confirm that the female victims are sex workers, and 0.1% of judges' decisions were found to be concerned with the victims' dress style.

*Komnas Perempuan's* finding in 2020 are similar to the findings of this study<sup>338</sup>. According to the study, judges still ask about matters unrelated to the case and even deepens the examination of the topic of privacy between the woman and their partner<sup>339</sup>. Besides that, judges also perceive the victims as bad women, seducers, or lowly women. They ask for the victims' sexual history and other gender-biased questions<sup>340</sup>. Oftentimes victims are burdened with the responsibility to prove that they actually experienced sexual violence, faced coercion, and did not provoke sexual intercourse with the perpetrator<sup>341</sup>.

*Komnas Perempuan* also found patterns of negative intellectual property rights statements for victims, comprising:

1. Statements that demean the victim, i.e., saying they are easy women, asking vulgar questions, or making statements that the wife has no morals for not obeying her husband<sup>342</sup>;
2. Statements that intimidate the victim, i.e., yelling at the victim because they feel that their statement is not clear<sup>343</sup>;
3. Statements that blame the victim, i.e., blaming the clothing style at the time of the incident or blaming the wife for the violence and divorce<sup>344</sup>. So far, victims of sexual violence have been blamed for the way they dress, their body language, their way of interaction, their marital status, occupation, and or where they were at certain times and places. Women as victims are considered responsible for the sexual violence they experience<sup>345</sup>.

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338 *Komnas Perempuan (8)*, loc.cit.

339 *Ibid.*

340 *Ibid.*

341 Nurtjahyo & Ramadhan, eds., *op.cit.*, page 23.

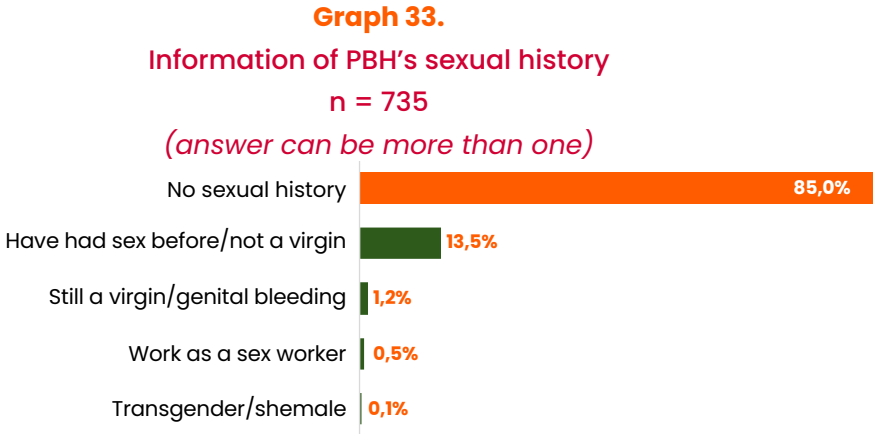
342 *Ibid.*, page 20.

343 *Ibid.*

344 *Ibid.*, page 21.

345 *Ibid.*, page 316.

The attitude of victim-blaming is detrimental to the victims because it makes the victim feel insecure, and makes the victim blame themselves so that they do not dare to report the events experienced<sup>346</sup>.



In this regard, this study also found the fact that most of the decisions (85%) indexed did not include information on the victim's sexual history. However, 13.5% of the decisions were found to still state that the victim had prior history of having sexual intercourse or was no longer a virgin. Additionally, it was also found that 1.2% of judges' decisions included information that the victim was a virgin or her genitals were bleeding, 0.5% of the sample emphasized the victim's work as a sex worker, and 0.1% said that the victim was transgender.

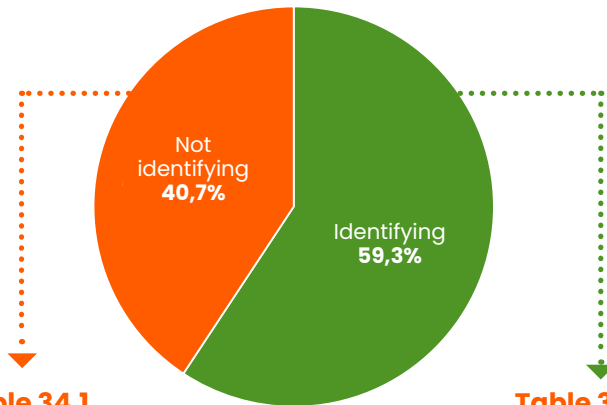
These statements are generally found in the testimony of the victim's witnesses, which implies that the victims were questioned about their sexual history during the examination process at trial. It should also be underlined that this finding only emerged from indexed decisions. Withdrawal of information through decisions does not reflect the overall situation of handling sexual violence in a concrete way. In other words, it is possible that such a pattern has greater frequency and intensity in trials. To know for sure about this, it is necessary to monitor or observe in court, the examination of cases of sexual violence.

346 Pokja Perempuan and Anak MA and MaPPI FHUI, *op.cit.*, page 26.

**Graph 34.**

**Identification of sexual history in decision**

n = 113



**Table 34.1**

**Unidentified elements in decision**

n = 46

(answer can be more than one)

Item	Percentage
Work as prostitute	2,2%
Virgin/genital bleeding	8,7%
Have had sex before/not a virgin	87,0%
Transgender/shemale	2,2%

**Table 34.2**

**Identified element in decision**

n = 67

(answer can be more than one)

Item	Percentage
Work as prostitute	4,5%
Virgin/genital bleeding	7,5%
Have had sex before/not a virgin	88,1%

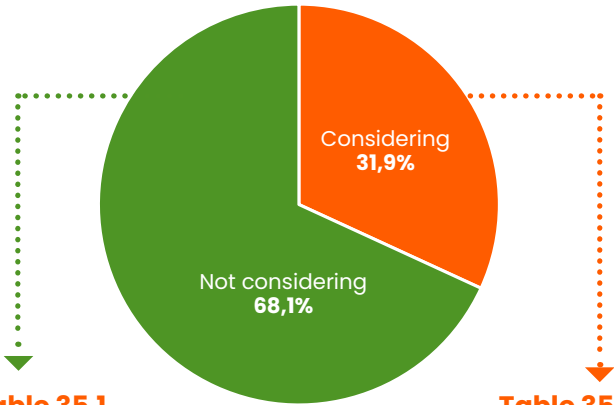
Of the 113 decisions that included information on the victim's sexual history, the majority of the sample (59.3%) gave detailed information such as explaining that the victim had had sexual intercourse before or was not a virgin (88.1%). Even though there are about 40.7% of decisions that do not inform this, such a pattern confirms the view that the sexual history of victims is important as an important fact in a sexual violence case. By focusing the evidence on this matter, judges tend to ignore other aspects that are more important and needed by victims in cases of sexual violence, such as powerlessness and the need for recovery.

Furthermore, of the 113 judges' decisions that identified women's sexual history in sexual violence case decisions, most (68.1%) did not include it as a legal consideration. However, there were still 31.9% of the decisions which indicated the opposite. So far, legal considerations in cases of sexual violence are often linked to the victim's 'morality trail' which puts blame on the victim<sup>347</sup>. The sexual history is considered important to give the judges confidence that the victims are good women<sup>348</sup>. INFID-IJRS's Gender Equality Barometer: Quantitative Study also supports this finding, with 42.9% of the public supporting the extraction of information about victims' sexual past as consideration in adjudicating sexual violence cases.<sup>349</sup>

**Graph 35.**

**Consideration of PBH's sexual history**

**n = 113**



**Table 35.1**

**Elements not considered in decision**

**n = 46**

*(answer can be more than one)*

Item	Percentage
Have priorly had sexual intercourse/not a virgin	84,4%
Virgin	9,1%
Transgender/shemale	1,3%
Work as prostitute	5,2%

**Table 35.2**

**Elements considered in decision**

**n = 47**

*(answer can be more than one)*

Item	Percentage
Virgin	5,6%
Have priorly had sexual intercourse/not a virgin	94,4%

347 Sexual history includes victims relationship with perpetrators, victims' marital status, victims' sexual experience including their virginity. Nurtjahyo & Ramadhan eds, *op.cit.*, page 317.

348 Nurtjahyo, *Perempuan dan Anak Korban*, sebagaimana dikutip dalam Irianto ed., *op.cit.*, page 400.

349 Wicaksana, et. al. (2), *op.cit.*, page 57.

Law enforcement so far has been focusing on the behavior and sexual history of victims in the evidentiary process. The victims are considered to have to prove their thoughts, disapproval, and resistance to sexual intercourse. Contrary to this, judges should, for instance, focus on proving the perpetrator's actions and the losses suffered by the victim instead.<sup>350</sup> The victims' sexual history influences verdicts that will further incur losses and add a psychological burden to the victims.<sup>351</sup> Therefore, the victims' sexual history should not be the basis for considering adjudication of sexual violence cases.

Furthermore, this research provides a comparison of convictions in decisions that identify and/or consider sexual history with ones that do not take it into account. The complete information is recorded in table 36.3 below.

**Table 36.3**  
**Comparison of Sentences Identifying & Considering the Victims'**  
**Sexual History**  
**(n=36)**

Item	Average length of sentence (years)
Identifying & considering sexual history	6.2
Identifying but not considering sexual history	6.5
Not identifying and not considering sexual history	7.3

From the table above, it can be clearly seen that the prison sentence imposed by judges when sexual history is identified as a legal fact and considered tends to be lighter than when judges do not consider it at all. In fact, this trend is also repeated when compared to decisions that successfully identify the victim's sexual history even though it was not considered by judges in the sentencing process. In other words, the handling of sexual violence cases in court is still influenced by the perspective of victim-blaming that ultimately affects the imposition of criminal charges for the perpetrators.

350 Nurtjahyo & Ramadhan eds., *op.cit.*, page 337.

351 Pokja Perempuan and Anak MA and MaPPI FHUI, *op.cit.*, page 28.

One of the factors that fosters stigma toward women with a sexual history is the provision of the evidentiary process in Article 185 paragraph (6) of KUHP which requires a judge to consider the witness' way of life and morality to assess whether the witness' testimony can be trusted. By assessing the sexual history of victims as a form of moral judgment, judges can conclude that the victim's statement cannot be fully trusted and use that as justification for a lighter sentence for the perpetrators. Additionally, judges who considers the sexual history of victims automatically conclude that victims agreed to sexual acts that occurred, and therefore the sexual relations are considered consensual.

In fact, the victims' sexual history is irrelevant and should not be considered in examining cases of sexual violence. In California, the United States of America, this principle is affirmed in the Rape Shield Law. Based on this regulation, the victims' sexual history should not be considered in proving sexual violence, especially if it is used to prove the victims' consent to having sexual relations with the perpetrator<sup>352</sup>. In Indonesia, a similar provision is regulated in Article 5 letter c of PERMA Number 3/2017 which prohibits judges from questioning or considering the experience or background of the victim's sexuality as a basis for acquitting the perpetrator or reducing the sentence. Likewise, Prosecutor's Guideline No. 1/2021 prohibits prosecutors from issuing questions of a sexist nature and/or discriminating based on sex or gender that is irrelevant to the case.

### 3.3.5 Consideration of Losses/Harm and the Recovery Needs of Victim in Decisions

Sexual violence can cause physical, sexual, and psychological suffering, unwanted pregnancy, risk of death, and the threat of being infected with infectious disease<sup>353</sup>. The impact does not even affect the victim alone, but extends to affect the victim's family<sup>354</sup> in the form of threats, restrictions, exclusion, deprivation of rights and social, political and economic distinctions.

352 For details see California Evidence Code, division 9, chapter 1, section 1103, subdivision (c), paragraph

353 Wicaksana, *et. al.* (2), *op.cit.*, page 28.

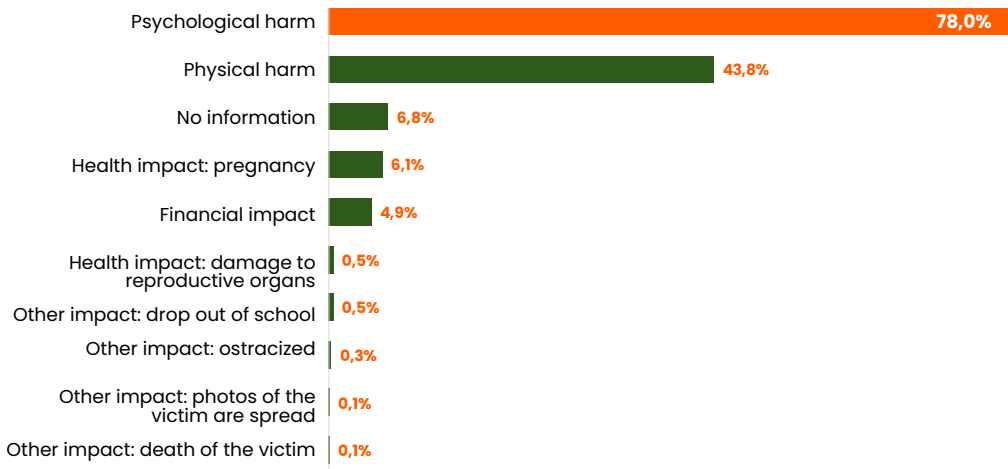
354 *Ibid.*

**Graph 36.**

**Information of harm suffered by PBH**

**n = 735**

*(Answer can be more than one)*



From the indexation results in this study, most decisions informed the psychological harm (78%) such as deep trauma, fear, shame, and changes in behavior, that was experienced by victims. Victims also experience physical harm (43.8%) such as bruises, injuries in their reproductive organs, and even severe wounds, including fractures and damage to the reproductive organ as stated in 0.5% of decisions. This research has also noted that 4.9% of victims experience financial harm from sexual violence. Additionally, victims were recorded to experience other impacts such as dropping out of school (0.5%), being ostracized (0.3%), having their intimate photos spread (0.1%), and even death (0.1%). The data confirms the terrible harm caused by sexual violence to the victim's personality.

From index resulted in this research, most of decision inform victims experience the psychological harm (78%) such as deep trauma, fear, shame to changes in behavior and physical harm (43.8%) such as bruises, injuries in their reproductive organs even to severe, fractures, damage to reproductive organ as stated in 0.5% of decisions. This research has also noted that victim who experience financial harm from sexual violence are 4.9%. Moreover, victims also experience other harms such as dropping out of school (0.5%), ostracized (0.3%), shared intimate photos (0.1%) and even

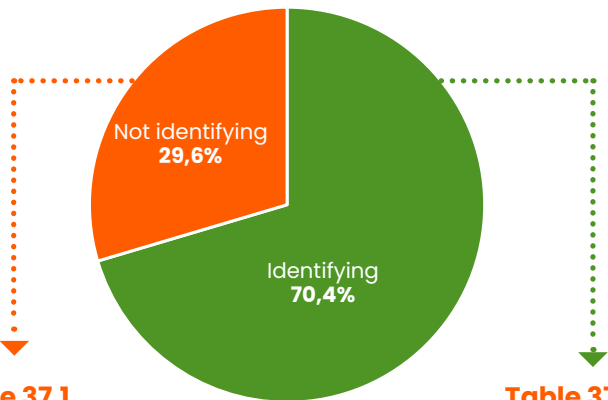


death (0.1%). The data confirm the bad harms caused by sexual violence toward the victim's personality.

**Graph 37.**

**Identification of harm suffered by PBH in decision**

n = 988



**Table 37.1**

**Unidentified matter in decision**

n = 223

(answer can be more than one)

Category name	Percentage
Other impact: death of victim	0,4%
Other impact: photo spread	0,4%
Other impact: school dropout	0,9%
Health impact: damaged reproduction organ	1,8%
Financial impact	1,8%
Health impact: pregnancy suffered by victim	1,8%
Psychological harm	15,7%
Dampak psikis	77,1%

**Table 37.2**

**Identified matter in decision**

n = 765

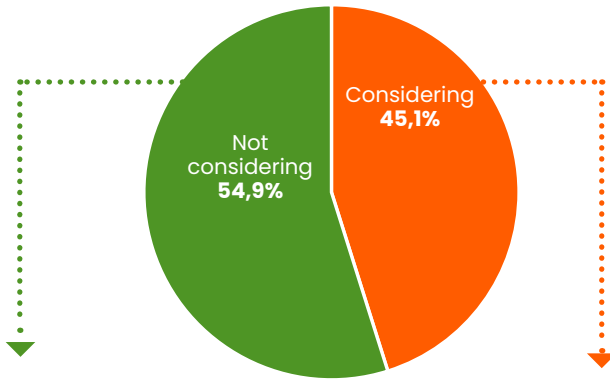
(answer can be more than one)

Category name	Percentage
Financial impact	3,9%
Physical harm	39,4%
Health impact: pregnancy	1,2%
Psychological harm	49,1%

If explored further, Graph 38 shows that 70.4% of decisions identify the impact experienced by victims of sexual violence as legal facts. The types of impact identified range from physical harm (39.4%), psychological harm (49.1%), financial harm (3.9%), and health impacts, i.e., pregnancy (1.2%). However, 29.6% of decisions do not identify the impact experienced

by victims of sexual violence. The impact ignored in legal facts include psychological harm (77.1%), health impacts in the form of pregnancy as a result of sexual violence (15.7%), health impacts in the form of damage to the reproductive organ (1.8%), financial harm (1.8%), dropping out school (1.8%), ostracization (0.9%), the victims' intimate photos are spread (0.4%) and death as a result of the sexual violence experienced (0.4%). In addition, 77.1% of decisions also ignore and do not identify the psychological impact of sexual violence.

**Graph 38.**  
**Considerations of harm suffered by PBH**  
**n = 988**



**Table 38.1**  
**Elements not considered by the judge**  
**n = 542**  
*(answer can be more than one)*

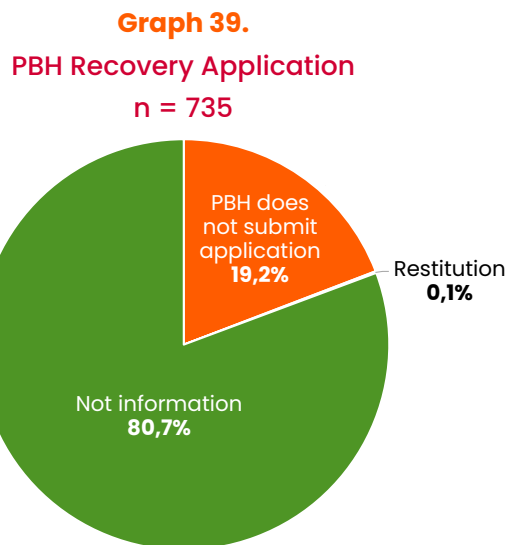
Category name	Percentage
Other impact: death of the victim	0,2%
Other impact: photos of the victim are spread	0,2%
Other impact: ostracized	0,4%
Other impact: drop out of school	0,7%
Health impact: damage to reproductive organs	0,7%
Financial impact	3,0%
Health impact: pregnancy	7,2%
Physical harm	54,8%
Psychological harm	32,8%

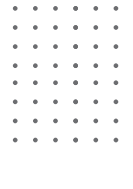
**Table 38.2**  
**Elements considered by the judge**  
**n = 446**  
*(answer can be more than one)*

Category name	Percentage
Financial impact	4,5%
Physical harm	32,3%
Health impact: pregnancy	1,3%
Psychological harm	61,9%

Furthermore, Graph 39 shows that 54.9% of analyzed decisions in this study do not take into consideration the impact experienced by victims as sentencing factors in decisions. Although 45.1% considered the impact on victims, which is a positive indication, neglect of this impact element indicates that the handling of sexual violence cases is still oriented towards punishment of the perpetrators and has not yet fully touched the element of losses suffered and the interests of the victims.


In this regard, the types of losses that are most often ignored not considered in decisions are psychological harm (54.8%) and physical harm (32.8%). However, psychological (61.9%) and physical harm (32.3%) are the impacts most often considered by judges in the sentencing process if it is included, followed by financial impacts (4.25%) and health impacts, i.e., pregnancy (1.3%). This finding shows that judges need to study more deeply the impacts experienced by victims of sexual violence, both visible and invisible, in order to bring the verdict closer to justice and needs fought for by the victim.





Unfortunately, 80.7% of decisions do not include information regarding sexual violence victims' recovery. It is recorded that 19.2% of women victims do not submit a recovery application to judges, and only 0.1% of judges sentence perpetrators to pay restitution to their victims. When these findings are compared to the trend of decisions that identify and consider the impact of sexual violence harms in sentencing, it can be concluded that judges restrict their role in considering these components as a part of the perpetrators' sentencing process. The victims' recovery has not been given the same attention as the sentencing process. Meanwhile, in fact, victims need more than just punishing perpetrators to be able to recover from the effects they suffered.

The lack of attention given to the recovery of sexual violence victims can be seen from the victims' knowledge level regarding their rights to restitution. Unfortunately, *Komnas Perempuan* identified that, based on the testimony of the victims' companion, victims are never informed of their rights during investigation in various criminal justice stages<sup>355</sup>. Information regarding losses or suffering experienced by victims is solely intended as reference for the sentencing process<sup>356</sup>. Judges have not considered factual the harm suffered by victims nor have they offered other forms of recovery such as psychological and medical recovery, social rehabilitation, and so on<sup>357</sup>. Meanwhile, if a woman is a defendant in a sexual violence case, then judges only consider and provide the need for legal assistance or companionship<sup>358</sup>.



This condition is reflected in the framework of the Indonesian criminal procedure that prioritizes protection and respect for rights of the suspect and does not position the victim as an important actor in the criminal justice system<sup>359</sup>. In the context of providing compensation for victims, KUHAP only allows it through the integration of compensation cases with criminal cases as stipulated in Article 98 paragraph (1) of KUHAP:

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355 *Komnas Perempuan* (8), *loc.cit.*

356 *Ibid.*

357 *Ibid.*

358 *Ibid.*

359 Ida Bagus Paramaningrat Manuaba dan Ni Made Ari Yulianti Griadhi, "Hak Untuk Melakukan Upaya Hukum Oleh Korban Kejahatan dikaji dari Kitab Undang-Undang Hukum Acara Pidana Indonesia," *Jurnal Ilmu Hukum Kertha Wicara* 1 (2013), page 2.



If an act which becomes the basis of a charge in the examination of a criminal case by a court of first instance causes harm to another person, the judge/ chairman of the court session at the request of said person can decide to combine the case of the compensation demand with criminal case<sup>360</sup>.

As a consequence of the lack of guarantees for the victims' rights, victims are unsatisfied with the settlement scheme offered by the criminal justice system. Victims, in view of their limited role, have not yet been given optimum opportunity to recover from the harms they suffered due to the criminal acts<sup>361</sup>.

Meanwhile, judges agree that victims' recovery is an important matter to be fought for in the criminal justice system<sup>362</sup>. Nevertheless, restitution or compensation in the mechanism of Article 98 of KUHAP also has its own limitations that cannot be implemented optimally for each case. For example, compensation permitted in Article 98 of KUHAP is limited to material compensation in the form of reimbursement of costs incurred by the victim as a result of the criminal act<sup>363</sup>. Therefore, if perpetrators desire to assist victims' recovery, judges can only consider it as a matter that may lighten the sentence<sup>364</sup>. Based on one of the judges' statements in research conducted by *Komnas Perempuan*, judges are even reluctant to punish perpetrators by giving compensation to victims, considering the immeasurable loss experienced by victims<sup>365</sup>. In a rape case, for example, judges are of the opinion that virginity is immeasurable, and therefore judges do not sentence perpetrators to pay for compensation to the victim<sup>366</sup>.

360 Article 98 of KUHAP.

361 *Ibid.*, page 3.

362 *Komnas Perempuan (8)*, *loc.cit.*

363 Article 99 paragraph (2) of KUHAP.

364 *Komnas Perempuan (8)*, *loc.cit.*

365 *Ibid.*

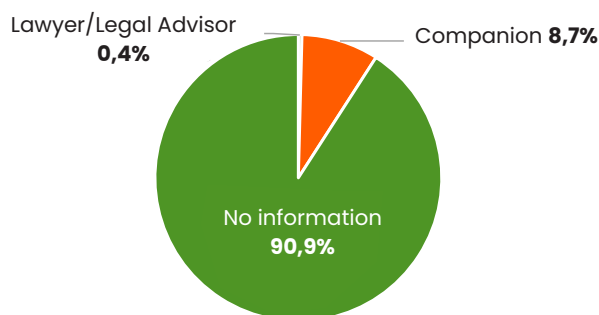
366 *Ibid.*

### 3.3.6 Legal Assistance for Women in Sexual Violence Cases

**Graph 40.**

**PBH Companion**

**n = 735**



**Table 40.1**

**PBH Companion Category**

**n = 735**

Companion category	Percentage
Biological sister/brother	20,9%
Biological mother	19,4%
No information	19,4%
Parents	17,9%
Biological Mother & Aunt	4,5%
Parents & Social Worker	4,5%
Social Worker	3,0%
Family	1,5%
P2TP2A	1,5%

Graph 41 shows the companion availability of women companions in sexual violence cases. Based on this data, 90.9% of decisions do not include information on the companionship process provided to women. Meanwhile, a small number of decisions (8.7%) record that 0.4% of companionships are in the form of legal assistance for women victims. The parties who assisted PBH the most in cases of sexual violence were siblings (20.9%), biological mothers (19.4%), and parents (17.9%). Meanwhile, 19.4% did not specify the parties accompanying PBH in such cases.

Such practice reflects the construction of criminal procedural law regarding the victims' rights to companionship in court. As previously explained, KUHAP has not given the same attention to victims' rights as it has to perpetrators (Article 50-68 of KUHAP). There is no obligation for the court to include information of victims' companions in the decision. Reflecting on the data above and such arrangement, the fulfilment of PBH rights to legal assistance has not yet been well portrayed through court decisions.

On the other hand, Article 9 of PERMA Number 3 of 2017 gives PBH the right to obtain companionship, especially for victims suffering from physical or psychological harm due to sexual violence. This provision also encourages judges to suggest and be able to grant PBH's request for companionship in the court. Chapter VI letter A number 9 of Prosecutor's Guideline Number 1/2021 confirms this regulation by emphasizing that victims and/or witnesses may be accompanied by a psychologist, psychiatrist, doctor, and/or clergy at the time of the investigation. Furthermore, Article 23 paragraph (2) of the Criminal Justice System of Children (UU SPPA) also stipulates that, in each level of investigation, child victims and witnesses must be accompanied by a parent and/or a person trusted by the child victims and/or witnesses, or social worker.<sup>367</sup>

In this regard, the practice in the East Jakarta District Court can be made an example for judges to better guarantee the victims' rights to companionship. In the research of *Komnas Perempuan*, one of the on-duty judges in the court has requested PBH to be accompanied during the investigation in court.<sup>368</sup> Previously, the public prosecutor informed the judge that the victim has special needs in the form of mental disability. Due to this reason, the judge ordered the public prosecutor to ask the victim's family to accompany the victim.<sup>369</sup> However, some judges are of the opinion that such companionship is only limited to children and must be done since the preliminary investigation.<sup>370</sup> If victims are not accompanied by anyone during the investigation in court, it means that victims chooses not to be accompanied during the investigation process.<sup>371</sup>

*Komnas Perempuan* finds a trend depicting judges' mindset that the rights to companionship must solely be interpreted as legal assistance.<sup>372</sup> The fact is that companionship has a wider scope than legal assistance alone. Companionship plays a role in providing information, ensuring victims' and/or witnesses' rights are protected, and ensuring victims are

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367 Tarigan *et.al*, *op.cit.*, page 59

368 *Komnas Perempuan* (8), *loc.cit.*

369 *Ibid.*

370 *Ibid.*

371 *Ibid.*

372 *Ibid.*

psychologically comfortable during the investigation process.<sup>373</sup> Hence, it is important that legal enforcers' have a uniform understanding regarding the right to companionship, so that they can guarantee a more conducive legal enforcement process for victims of sexual violence.

### 3.3.7 Expert Explanation and Forensics Evidence in Sexual Violence Cases

**Table 42.1**  
**Forensics Evidence in Decisions**  
**(n=735)**

Item	Frequency (may be answered more than one)	Percentage (may be answered more than one)
Visum et repertum	658	89.5%
No medical evidence	148	20.1%
Result of psychological examination	16	2.2%
Visum et repertum psychiatricum	7	1.0%
Social report	6	0.8%

Among all decisions that have been analyzed in this research, 89.5% of them include information regarding the use of forensic evidence *visum et repertum*. Moreover, 2.2% of them were recorded to involve psychological examination results, and 1% of decisions used medical evidence in the form of a *visum et repertum psychiatricum*. In 2.2% of other decisions, *visum et repertum* and psychological examination were used simultaneously as forensics evidence. Based on the data, *visum et repertum* (VeR) is the mostly widely used evidence in sexual violence cases, followed by psychological examination results, *visum et repertum psychiatricum* (VeRP), and social reports.

373 Tarigan *et.al*, *op.cit.*, page 70



In relation to the use of forensic evidence above, it is critical to understand that sexual violence is a criminal act that is quite difficult to be prove, given such acts are mostly committed in private spaces and there are no witnesses to the incident. Most of the time there is only one witness who appears in court to explain the chronology of sexual violence, namely the victim herself/himself. Nonetheless, a testimony of one witness that is not supported by other evidence is not adequate to prove the occurrence of a crime.<sup>374</sup> Therefore, the use of forensic evidence such as general VeR greatly helps the evidencing process against sexual violence accusations,<sup>375</sup> especially to support the victims' testimony on the sexual violence that occurred.

**Table 42.2**  
**Expert Explanation in Decisions**  
(n=735)

Item	Frequency (may be answered more than one)	Percentage (may be answered more than one)
No expert is requested to come	705	95,9%
Doctor	33	4,5%
Psychologist	10	1,4%
Academics	3	0,4%
Paralegal	2	0,3%
Community Advisor	2	0,3%
P2TP2A	1	0,1%

Besides forensics evidence, expert testimony also can be used as evidence in sexual violence cases. However, as can be seen in the data above, more than 95% of sexual violence cases handled by the court do not present experts in the investigation process. Although it cannot always be used to prove the occurrence of sexual violence, expert testimony, especially doctors or psychologists, can explain the impact of sexual violence on

374 Article 185 paragraph (2) and (3) of KUHP.

375 Diana Kusumasari, "Jerat Hukum dan Pembuktian Pelecehan Seksual," <https://www.hukumonline.com/klinik/detail/ulasan/c13746/pelecehan-seks>, accessed on December 6, 2021.

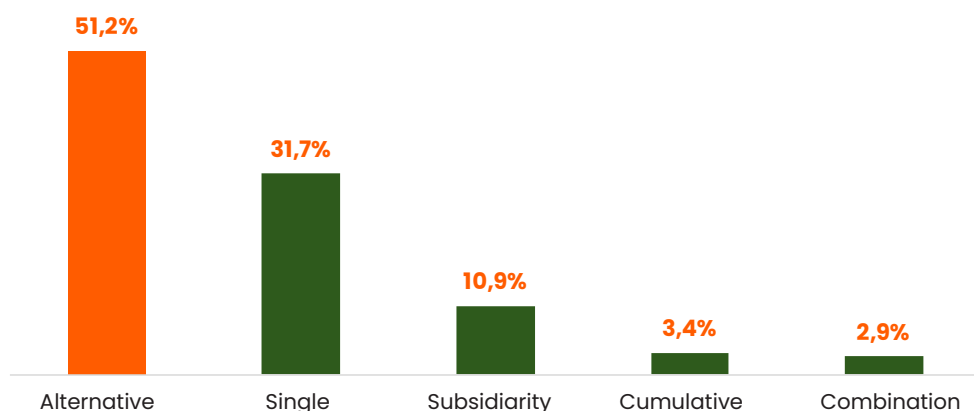
victims. Consequently, judges may consider such matters in determining the severity of the sentence handed down to defendants or to identify victims' needs, such as recovery or companionship.

## 3.4 Claims Comparison and Sexual Violence Case Verdicts

**Graph 42.**

Form of indictment

n = 735



In graph 42 above, it can be seen that most of the indictments in sexual violence cases used alternative types of indictment (51.25%). In addition, 31.7% of them used single indictment and 10.9% of them used a subsidiarity form, while the remaining 3.4% indicted the perpetrator cumulatively and the other 2.9% used a combination of indictment.

**Table 42.1****Form of Alternative indictment**

Item	Frequency	Percentage
<b>First</b>		
Article 81 paragraph (1) of UU PA (Child Protection Law)	118	31,3%
Article 81 paragraph (2) of UU PA	53	14,1%
Article 285 of KUHP	32	8,5%
Article 50 of Qanun Jinayat	18	4,8%
Others	156	41,3%
Item	Frequency	Percentage
<b>Second</b>		
Article 82 paragraph (1) of UU PA	100	26,5%
Article 81 paragraph (2) of UU PA	42	11,1%
Article 81 paragraph (1) of UU PA	30	8%
Article 289 of KUHP	30	8%
Article 47 of Qanun Jinayat	12	3,2%
Others	163	43,2%

Based on table 42.1 above, it can be seen that the articles used by public prosecutors in establishing alternative indictments focus on sexual violence as set forth in Article 81 and 82 of the Child Protection Law. Generally, the first commonly used alternative indictment is Article 81 of the Child Protection Law (UU PA) which regulates the criminal action of forcing sexual intercourse against a child, either by using violence, the threat of violence,<sup>376</sup> or even by deception, lies, and persuasion.<sup>377</sup> The second most commonly used alternative indictment is Article 82 of UU PA that prohibits child molestation. If sexual violence is committed against adults, the alternative indictment article is Article 285 of KUHP concerning rape and Article 289 of KUHP on licentious acts. In the context of using Qanun Jinayat, Article 50 of Qanun

<sup>376</sup> Indonesia, Law No. 35 of 2014, Article 81 paragraph (1).

<sup>377</sup> *Ibid.*, Article 81 paragraph (2).

is often used as the first alternative indictment. Meanwhile, Article 47 of Qanun Jinayat is widely used as the second alternative indictment.

Referring to **Circular Letter of Attorney General Number SE-004/J.A/11/1993 on Drafting the Letter of Indictment**, alternative indictment is used if there is uncertainty on what criminal act that is most appropriate to be proven.<sup>378</sup> In view of the intensive use of alternative indictment in sexual violence cases and the frequency of public prosecutors alternating articles on rape/sexual intercourse<sup>379</sup> and articles on molestation<sup>380</sup>, it indicates public prosecutors' doubts about proving perpetrator's actions as rape (which emphasize sexual intercourse) or otherwise as molestation.

This confusion can be linked to the *Hoge Raad* interpretation of sexual intercourse on February 5, 1912, which was defined as "a collision of male and female genitals to obtain a child and requires the male genital to penetrate the female genital until ejaculation happens (sperms come out)".<sup>381</sup> This definition is widely used by law enforcement to process any reports on sexual intercourse.

MaPPI FHUI confirmed the situation through its research in 2016. A total of 82% of court decisions still consider the presence or absence of sperm when adjudicating and deciding sexual violence cases in the form rape, whether the sperm is ejaculated outside or inside the vagina.<sup>382</sup> Furthermore, judges often sentence perpetrators guilty of molestation because the traces of sperm needed to prove rape could not be found on the victim.<sup>383</sup>

Such interpretation trends show the court's inability to follow the recent developments on sexual violence. Sexual intercourse and sperm trace as a condition for rape is no longer relevant to current conditions. The definition of rape has expanded globally and encompasses "penetration, however slight, of the vagina or anus with any body part or object, or oral penetration

378 Marry Margaretha Saragi, "Bentuk-bentuk Surat Dakwaan," <https://www.hukumonline.com/klinik/detail/ulasan/lt4f4c5a4ea3527/bentuk-bentuk-surat-dakwaan/>, accessed on November 5, 2011.

379 Article 81 of UU PA arranges sexual intercourse criminal act against children, Article 285 arranges rape criminal act, and Article 50 of Qanun Jinayat arranges *jarimah* of rape against children.

380 Article 82 of UU PA arranges molestation criminal act against children, Article 289 arranges molestation criminal act, and Article 47 of Qanun Jinayat arranges *jarimah* of sexual abuse against children.

381 Refer to R. Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*, (Bogor: Politeia, 1986), page 209.

382 Akbari, *et. al.*, *op.cit.*, page 48.

383 *Ibid.*, Article 49.

by a sex organ of another person, without the consent of the victim”.<sup>384</sup> Meanwhile, molestation can be defined as sexual touch or contact without penetration.<sup>385</sup> Therefore, overlapping and confusion in differentiating these two types of sexual violence can be avoided in the future.

On the other hand, 31.7% of indictments collected in this research are arranged in a single form. This indictment is usually used when public prosecutors believe that there is only one criminal act committed by the perpetrator. The high frequency of this single indictment shows the public prosecutor’s confidence in prosecuting defendants using only one criminal provision.

**Table 42.3**  
**Article in Single Indictment**  
**n = 233**

Item	Number	Percentage
Article 82 Paragraph (1) of UU PA	53	22,7%
Article 285 of KUHP	26	11,2%
Article 81 Paragraph (2) in conjunction with Article 76D of UU PA	26	11,2%
Article 82 Paragraph (1) in conjunction with Article 76E of UU PA	25	10,7%
Article 76 E in conjunction with Article 82 paragraph (1) of Law of the Republic of Indonesia Number 35/2014	15	7,3%
Article 81 Paragraph (1) in conjunction with Article 76D of UU PA	15	6,4%
Article 285 in conjunction with Article 53 paragraph (1) of KUHP	8	3,4%
Article 289 of KUHP	8	3,4%
Article 82 Paragraph (2) in conjunction with Article 76E of UU PA	6	2,6%
Article 47 of Qanun Aceh Number 6/2014	5	2,1%
Article 48 of Qanun Aceh Number 6/2014	5	2,1%
Others	39	16,7%

384 Federal Bureau of Investigation, “Uniform Crime Report: Crime in the United States, 2013 – Rape,” [https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/violent-crime/rape/rapemain\\_final.pdf](https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/violent-crime/rape/rapemain_final.pdf), accessed on November 26, 2011.

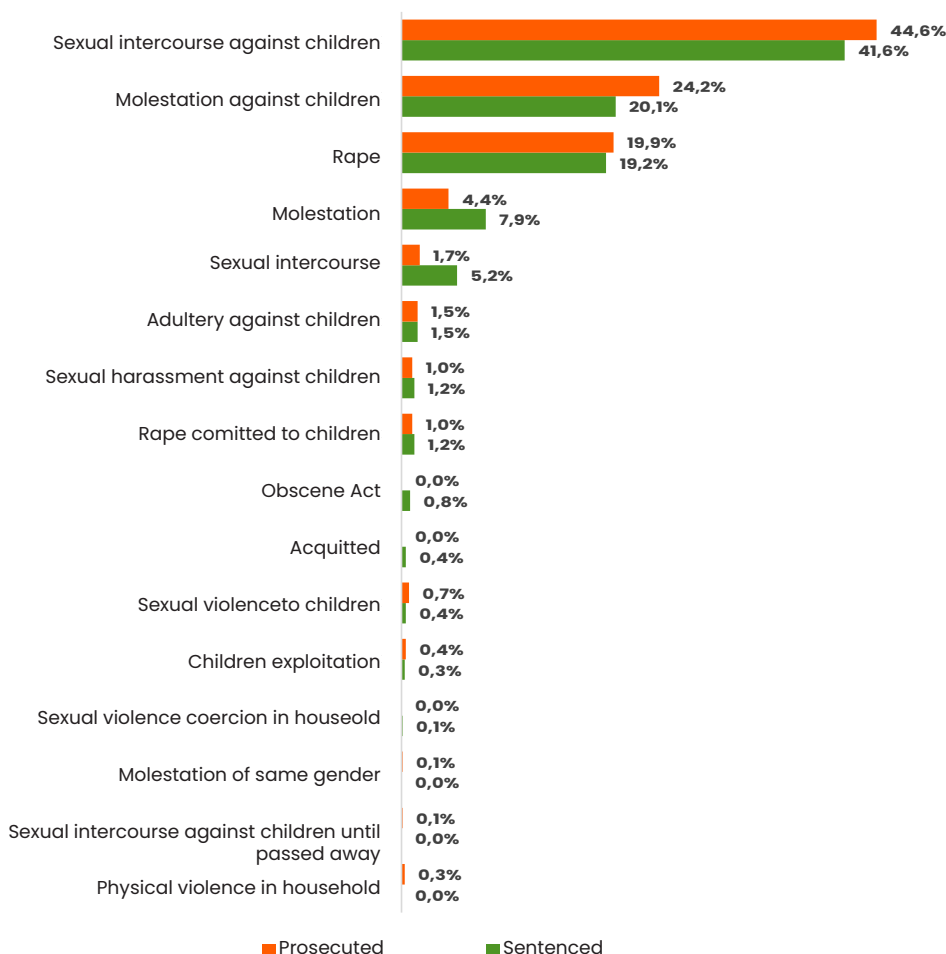
385 Lauren Baldwin, *Sexual Battery: Laws and Penalties*, <https://www.criminaldefenselawyer.com/crime-penalties/federal/sexual-battery.htm>, accessed on March 7, 2022. As a disclaimer, here the writer identifies ‘pencabulan’ as molestation/sexual battery, which—together with rape—is a part of sexual violence with various aspects and scope of action. Sexual violence is not only limited to molestation and rape, but the writer sees molestation not as a term with a wide scope as sexual violence in general, but as a form of acts of sexual violence.

Looking at Graph 42.3 above, the most used article for a single indictment is Article 82 paragraph (1) of the Child Protection Law (UU PA) that regulates child molestation. This provision can be used when, for example, an individual sexually touches a child without involving penetration. In such conditions, public prosecutors do not need to hesitate in determining such action as molestation. In other cases, if it is found where a woman is forced to have sexual intercourse and traces of sperm and wound are found on the woman's body, public prosecutors obviously will not hesitate to indict the perpetrator with Article 285 of KUHP without the need for any other provisions on such indictments.

**Graph 43.**

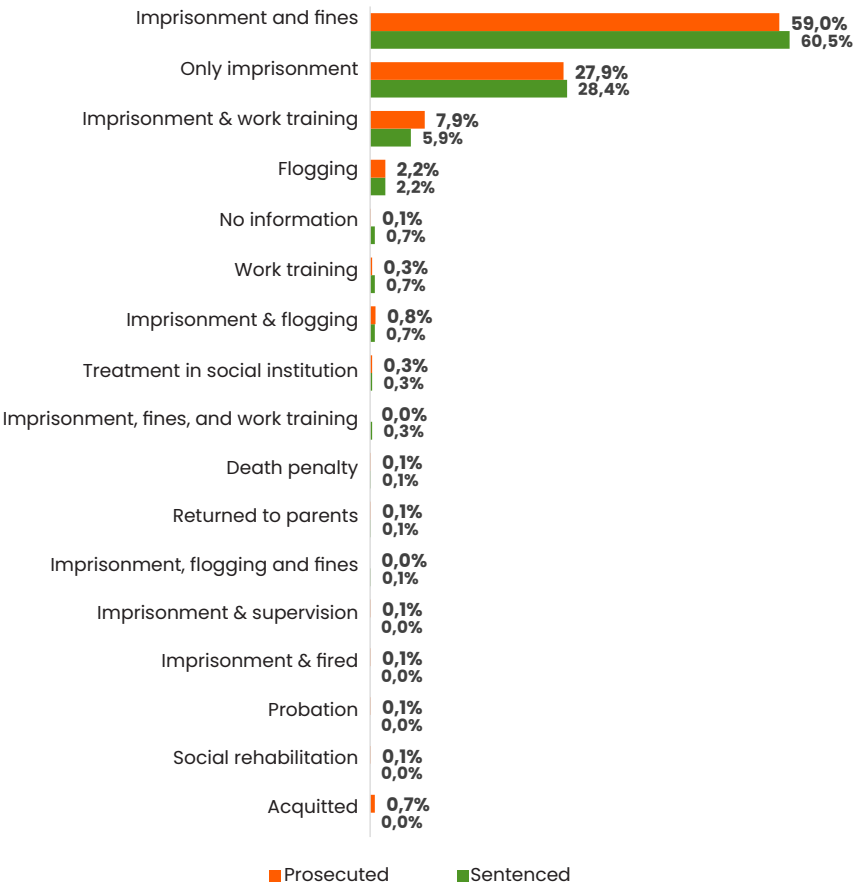
**Prosecuted vs. sentenced criminal acts**

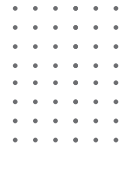
**n = 735**



In Graph 43 above, it can be seen that the most frequently prosecuted criminal act by public prosecutors is sexual violence against children. A total of 44.6% of cases were found to be related to sexual intercourse against a child, followed by child molestation at 24.2%. For sexual violence against adult victims, the most prosecuted criminal action is rape with a 19.9% proportion. When juxtaposed with the offenses proven in the verdict, 41.6% of the data in this research shows that judges accused perpetrators of forcing sexual intercourse with a child. This represents at least 93.2% of the demands of the public prosecutor agreed upon by the judge in their decision.


**Graph 44.**  
**Prosecuted vs. Sentenced Punishment**  
**n = 735**





Graph 44 shows the most prosecuted punishments are imprisonment and fines with a 59% proportion. Furthermore, demands for imprisonment alone (without fines) were found in 27.9% of the sample cases in this study. Additionally, 7.9% of sexual violence cases were prosecuted with imprisonment and work training. These demands are generally made against children who are perpetrators of sexual violence<sup>386</sup>. Furthermore, 2.2% of cases were prosecuted with caning in accordance with the provision of *'uqubat* (sentencing) of Qanun Jinayat in Aceh.

The high frequency of imprisonment and fines that are prosecuted by public prosecutors and sentenced by judges is a consequence of the many sexual violence cases against children that are found in this research. The combination of imprisonment and fines as punishment are established by the Child Protection Law, thus the findings above are in line with the prevalence of sexual violence cases suffered by children. However, this trend is not apparent in sexual violence as regulated in the Law of Elimination of Domestic Violence (UU PKDRT). This study reveals the fact that only 0.1% of cases sentenced by judges violate criminal act provisions in the Law of Elimination of Domestic Violence relating to sexual violence. Furthermore, public prosecutors do not even prosecute perpetrators using such provisions. In view of the conformity of the types of criminal acts prosecuted and sentenced, this study shows that judges' positions tend to be similar to public prosecutors. In more detail, 59% of cases were prosecuted with imprisonment and fines and 60.5% of cases were sentenced with the same punishment. Similarly, 27.9% of cases prosecuted with imprisonment were sentenced by judges with the same punishment, with the proportion of 27.9% cases.



Furthermore, trends shown by Graph 44 regarding prosecution and penalties in the form of work training combined with other punishments<sup>387</sup> needs to be specifically concerned. It is critical to understand that, in the sentencing framework of the Criminal Justice System of Children, work training is positioned as the principal punishment or as a substitute for fines

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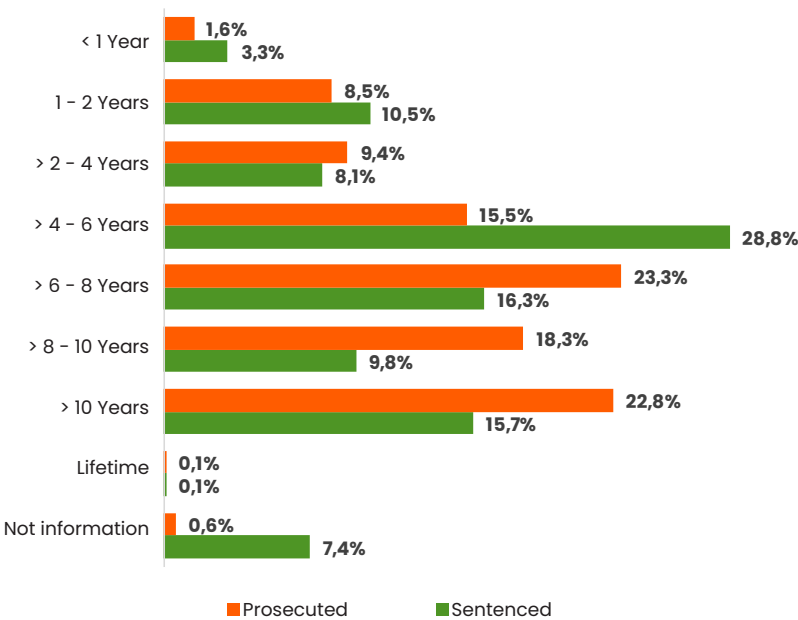
386 Indonesia, *Undang Undang Sistem Peradilan Pidana Anak*, UU No. 11 Tahun 2012, LN No. 153 Tahun 2012, TLN No. 5332, Article 71 paragraph (1) letter c.

387 Law Number 11 of 2012, Article 71 paragraph (1).



threatened by other laws, which are specifically designated for children<sup>388</sup>. By following such constructions, work training can only be sentenced alone, combined with other additional penalties, or combined with imprisonment as a consequence of the combination of imprisonment and fines in other laws and regulations. This research, however, finds that 0.3% of decisions impose imprisonment, fines, and work training at the same time even though public prosecutors did not prosecute such combinations.

**Graph 45.**  
**Prosecuted vs. Sentenced Imprisonment Duration**  
**n = 705**



Furthermore, Graph 45 shows the pattern of length of imprisonment prosecuted and sentenced in sexual violence cases. The prison term that is mostly recommended by public prosecutors range from 6–8 years with a proportion of 23.3%. When compared to the Judges’ decision, only 16.3% of perpetrators were sentenced to a term of imprisonment in line with the demands of 6–8 years. Meanwhile, most cases were sentenced to 4–6 years of imprisonment (28.8%), whereas only 15.5% of cases were prosecuted with the same length of imprisonment.

388 *Ibid.*, Article 71 paragraph (3).

Nonetheless, in general, judges tend to impose lighter sentences compared to the prosecution. For example, 3.3% of cases were sentenced to less than 1 year of imprisonment, even though only 1.6% of indictments were made for this length of imprisonment. The same is true for imprisonment with a range of 1–2 years. Among the 8.5% that applied for such punishment, the judge’s decision that agreed with this range of imprisonment was more than 2 percent of the demands. On the other hand, the number of cases that are sentenced severely is smaller than the number of claims made. From 23.3% of cases prosecuted with 6–8 years of imprisonment, only 16.3% were approved by judges. On the other hand, the judges approved 9.8% of cases to be sentenced with a prison term of 8–10 years when the public prosecutor filed the claim with a proportion of 18.3%. The same is also seen for imprisonment of more than 10 years. Although 22.8% of cases are prosecuted with more than 10 years imprisonment, only 15.7% of perpetrators are sentenced with such imprisonment durations.

Of all the judges’ decisions, the average length of sentences prosecuted and sentenced are as follows:

**Table 45.1**  
**Average of claim vs. punishment**

Article	Average of punishment duration prosecuted	Average of punishment duration sentenced
<b>Article 81 of the Child Protection Law</b>	<b>8.9 years</b>	<b>7.5 years</b> Minimum: 2 months Maximum: 20 years
<b>Article 82 of the Child Protection Law</b>	<b>7.9 years</b>	<b>6,3 years</b> Minimum: 6 months Maximum: 15 years
<b>285 of KUHP</b>	<b>5.9 years</b>	<b>5,5 years</b> Minimum: 1 month Maximum: 15 years <sup>389</sup>
<b>289 of KUHP</b>	<b>3.8 years</b>	<b>4,2 years</b> Minimum: 8 months Maximum: 9 years

389 The maximum sentence for Article 285 of KUHP is 12 years of imprisonment, it was found that there was a ballast basis imposed by article 53 paragraph 1 of KUHP, article 55 paragraph 1 of KUHP and 351 paragraph 2 of KUHP. Therefore, some decisions may sentence perpetrators to up to 15 years of imprisonment.

The findings in Table 45.1 is in line with the previous discussion that judges tend to give sentences lower than the prosecution. For example, the average imprisonment sentenced by judges for cases of sexual intercourse against children is 7.5 years. This figure is smaller than the average prosecution for the same case, which is 8.9 years. Additionally, in cases of child molestation, the average prison sentence received by perpetrators is 6.3 years. Once again, the sentence is lighter than the average sentence proposed by public prosecutors, which stands at 7.9 years.

The same trend is also found in the case of rape of adult women. When public prosecutors recommend an average sentence of 5.9 years, the average prison sentence handed down by judges stood at 5.5 years. Exceptions occur in adult molestation cases; on average, prosecutors' demands were 4 months lighter than the average imprisonment received by perpetrators, which was 4.2 years.

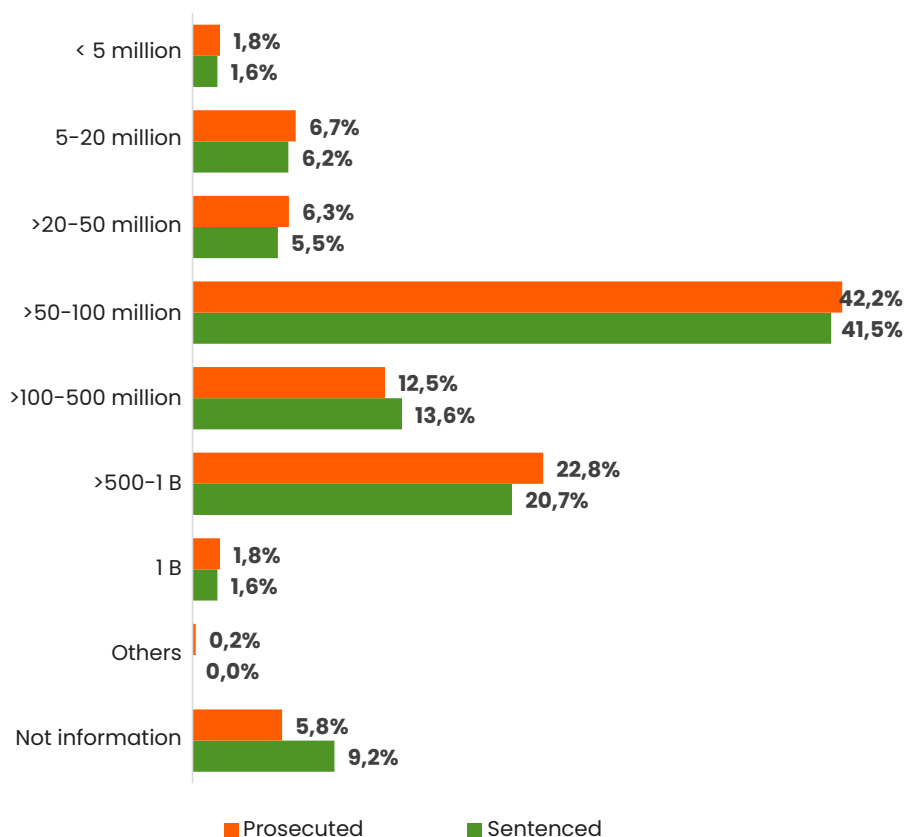
Specifically for sexual violence committed against children, this research found decisions that sentenced defendants to 2 months of imprisonment for cases of sexual intercourse and six months imprisonment in cases of molestation. Considering that the criminal penalties for the two offenses are regulated as at least 5 years in prison, this finding shows the behavior of judges to impose criminal penalties under the specific minimum sentence stipulated by law.

In addition to the average sentence, another interesting finding that needs special attention is the minimum sentence for each case of sexual violence. If the victim is an adult woman, rape is given a minimum sentence of 1 month in prison, while the licentious acts have a minimum sentence of 8 months in prison. If the victim is a child, the perpetrator will be sentenced to a minimum 2-month imprisonment. These data show that the minimum sentence handed down by judges tend to be heavier for perpetrators of molestation compared to rape, regardless of whether the victim is a child or an adult woman. The fact is that in terms of the seriousness of the crime, rape should be sentenced more severely than licentious acts.



**Graph 46.**

**Prosecuted vs sentenced amount of fines**  
**n = 434**



In addition to imprisonment, one of the punishments sentenced to perpetrators of sexual violence is fines given cumulatively together with imprisonment. In the above graph, it can be seen that fines that have been prosecuted and sentenced to perpetrators of sexual violence are in the range of <Rp5,000,000.00 (less than five million rupiahs) to >Rp1,000,000,000.00 (more than one billion rupiah). Based on this range, the most prosecuted fines are above Rp50,000,000.00 (fifty million rupiah), but not more than Rp100,000,000.00 (one hundred million rupiah) with a proportion of 42.2%. In line with public prosecutors' claim, most cases (41.5%) sentenced by judges also imposed fines in the same range.

Moreover, this research also finds cases that were prosecuted and sentenced with fines of more than Rp500,000,000.00 (five hundred million rupiah). At least 22.8% of cases were prosecuted with fines ranging from Rp500 million to Rp1 billion and 20.7% of sexual violence cases were sentenced with fines within the same range. Furthermore, prosecution (1.8%) and sentencing (1.6%) of fines more than Rp1 billion is also found in the analyzed decisions. The fines prosecuted and sentenced with a nominal value of more than Rp500 million stem from cases of sexual violence against children. This is because other laws and regulations<sup>390</sup> do not carry a criminal penalty of more than IDR 500 million and even the KUHP does not threaten a fine for offenses related to sexual violence.

On the other hand, only a few cases were prosecuted and sentenced with fines lesser than Rp50,000,000.00 (fifty million rupiah). In the range of Rp20–50 million, the number of cases prosecuted with this nominal amounted to 6.3%, while those sentenced in that range amounted to 5.5%. Furthermore, the percentage of cases prosecuted with fines ranging from Rp5–200 million is 6.7% and those sentenced with the same nominal amounted to 6.2%. In addition, the prosecution and sentencing of a fine lesser than Rp5,000,000.00 (five million rupiahs) did not even reach 2%.

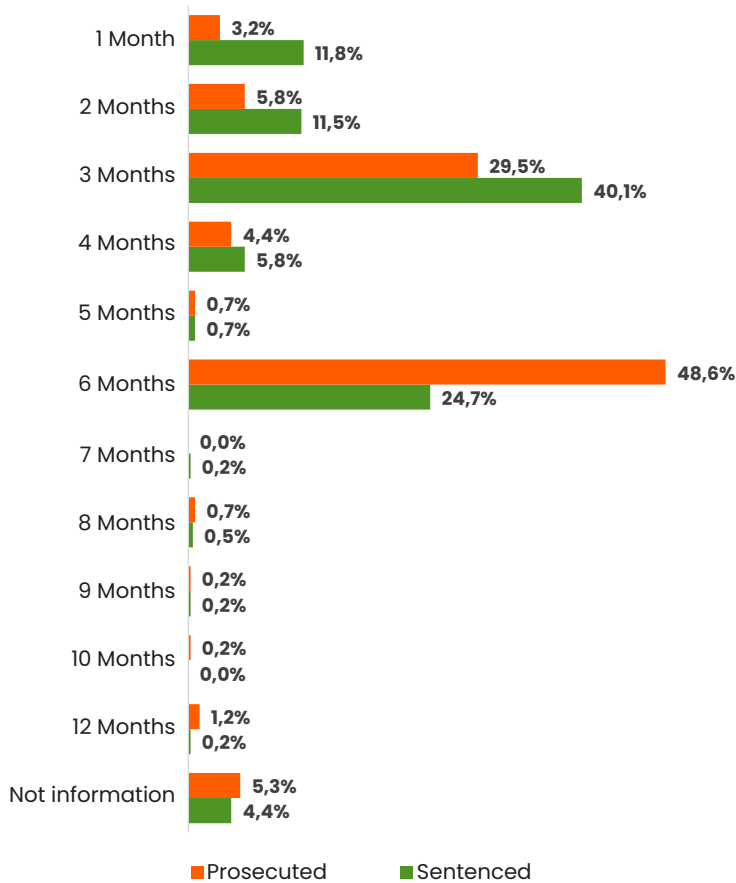
Overall, the difference between the ranges of fines decided by the judges is not much different from the claims. In other words, it can be concluded that the judge's decision regarding the fine tends to be in line with the claims.

390 For example, maximum fines punishment in the Law of Elimination of Domestic Violence respectively is Rp36,000,000 (thirty six million rupiah) in Article 46, Rp300,000,000.00 (three hundred million rupiah) in Article 47, and Rp500,000,000.00 (five hundred million rupiah) in Article 48.

**Graph 47.**

**Amount of prosecuted vs sentenced fines substitution**

**n = 434**



Relating to the foregoing, it is important to explain that perpetrators sentenced with fines are often unwilling or unable to pay the fines. Such conditions are anticipated by criminal law by preparing a mechanism to substitute unpaid fines with imprisonment.

To portray this condition, this study maps out the length of substitution imprisonment prosecuted by public prosecutors and sentenced by judges to replace unpaid fines. Based on Graph 47 above, public prosecutors often recommend 6 months imprisonment as a substitute for fines (48.6%). However, only 24.7% of judges agreed with the claim. Meanwhile, most judges' decisions prefer 3 months of imprisonment as a substitute for the

fines (40.1%), even though the demands in line with this are only around 29.5%.

Another pattern found by this study is the tendency of judges to impose a shorter term of imprisonment in lieu of a fine compared to the demands of the public prosecutor. For example, while public prosecutors recommend 2 months of imprisonment as a substitution for unpaid fines with a percentage of 5.5%, judges only agree on the fine's substitution scheme in the same range with a proportion of 11.5%. The difference in this comparison is even greater in cases of claims for 1-month imprisonment as a substitution for fines. If the public prosecutor claims the substitution in 3.2% of cases analyzed in this research, such punishment is agreed by judges with proportion 4 times greater than prosecutors claim (11.8%).

Notwithstanding the foregoing trend, this research also reveals that perpetrators are required to serve imprisonment for more than eight months, if the fine imposed on them is not paid. A total of 0.2% of prosecutions and 0.2% of sentences impose 9 months imprisonment as a substitute for fines. On the other hand, a public prosecutor is also found to have sentenced a perpetrator to 10 months' imprisonment (0.2%) and 12 months' imprisonment (1.2%) because the fine sentenced by a judge was not paid. Moreover, a judge also recorded to have agreed on 12 months' imprisonment (0.2%) as unpaid fines substitution. Meanwhile, Article 30 paragraph (3) of KUHP regulates imprisonment as a substitute punishment that cannot extend more than 6 months. Although in the context of combining or repetition of a criminal act, imprisonment as a substitute for fines is not allowed to exceed 8 months.<sup>391</sup>

391 Article 30 paragraph (5) and paragraph (6) of KUHP

# CHAPTER 4

## CONCLUSION & RECOMMENDATION





## ➤➤ 4.1 Conclusion

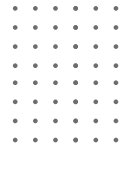
### 4.1.1 Profile of Victim and Defendant in Sexual Violence Cases in Indonesia

This research reflects the handling of sexual violence case in courts from 2018 to 2020. In general, this research proves the high prevalence of sexual violence in Indonesia. On the other hand, such prevalence also inflicts its own challenges to guarantee the fulfillment of sexual violence victims' rights, including access to justice, in the Indonesian criminal justice system.

Based on the research conducted, the perpetrators of sexual violence that occurred in Indonesia in the period were dominated by men (99%). Although its proportion is small (1%), this research of decisions shows factual situations regarding the opportunities for women to become perpetrators of sexual violence. From the aspect of age, perpetrators identified by this research were in the age range of 18–25 years with a percentage of 33.5% and 26–35 years representing 21.5% of analyzed cases. Meanwhile, the majority of sexual violence victims are women (99,5%), although there are records of men as victims of sexual violence (0,3%). Ironically, 72.1% of these male victims are children in the age range of 6–18 years.

This research also shows that most perpetrators (87.6%) are parties closely related to the victim. Romantic relationships were recorded as the most common relation that has a possibility of sexual violence occurring, with percentage of 25.2%. Furthermore, other relation types are family relations, including members of the nuclear family (13.3%) and other relatives (13.5%). In respect of the matter, this research also found the fact that sexual violence is often committed in the victim's house, with a proportion of 59.9%. Moreover, friends (12.7%) and neighbors (12.4%) were also recorded as perpetrators of sexual violence in this study. These data show the high potential for sexual violence in personal domain. Homes, that are supposed to be a safe place for victims, were listed as the least safe place from sexual violence.






On the other hand, this study confirms findings of other sexual violence research, that victims tend to not report sexual violence they suffered to authorities or lawyers. 59.6% of victims prefer to tell their families. Only 2.6% of victims have the courage and willingness to report their case to the police. This finding discloses a condition where the victims have a preference to tell the event experienced to someone who provides them with a sense of comfort. Nonetheless, based on the previous finding, this pattern needs further attention given the possibility that victims' families may hinder the victims' effort to fight for justice, especially if the perpetrator is someone close to the victim.

### **4.1.2 Characteristic of Sexual Violence Case Investigation**

This study of decision provides an explanation of the characteristic of sexual violence case investigation. However, it should be underlined that this study only captures such characteristics through decisions. Consequently, the information recorded is limited to matters found in court decisions. In searching for the information needed, this study uses indicators in the form of investigation principles of sexual violence cases set forth in two documents, namely PERMA Number 3/2017 and Prosecutor's Guideline Number 1/2021.



The first finding of this research is the inclusion of the element of powerlessness of sexual violence victims in the majority of analyzed decision samples (more than 70%). Although most judges succeeded in identifying victims' powerlessness as legal fact (70.4%), 57.1% of decisions did not consider victims' powerlessness in the sentencing process. This indicates that victims' powerlessness is not considered too significant to be considered in the context of evidencing and sentencing for sexual violence perpetrators.

The next finding shows that information on the history of violence experienced by the victim is provided on all analyzed decisions in this research. In other words, all sexual violence victims in this study had already priorly experienced various types of violence. Furthermore, 45.8% of decisions have succeeded in including the history of violence. Unfortunately, similar to the previous finding, 64.5% of decisions have not yet considered this element in the evidentiary process.

This research also reveals that the history of sexual violence previously suffered by victims is not well-considered by judges in analyzing wrongdoings, criminal action evidencing and sentencing the perpetrator. Whereas exploration on history of sexual violence or other violence helps the judge understand the psychological and physical conditions of the victim so that proportional sentencing options may be realized that will also support victim recovery. Additionally, most decisions analyzed in this research do not include information or statements that demean, blame, and consider the victims' sexual history. However, a small number of decisions are recorded using the sexual history of the victim as a reference in the sentencing process.

In addition to the things above, this research also shows the lack of identification and consideration of decisions that discuss the impacts or losses experienced by victims of sexual violence. Despite the fact that almost all decisions analyzed in this research include information on victims' losses, it is recorded that only a few (0.1%) decisions sentence the perpetrator to pay restitution to the victim. Meanwhile, 19.2% of victims do not apply for recovery application to the judge, and 80.7% of other decisions did not include information regarding whether the victim was recovering in the case being tried. On the other hand, the availability of companions for victims is also still minimal (8.7 Most of the assistants identified in the decision came from the victims' family and not from assistance institutions or advocates. These data confirm that sexual violence law enforcement in Indonesia is still oriented towards punishment for perpetrators and has not touched the basic concepts of protection and recovery of victims.

### 4.1.3 Claim and Command of Sexual Violence Cases

This research shows that imprisonment and fine punishments are the most prosecuted form of punishment by public prosecutors with a percentage of 59%. Moreover, this research also proves that judges tend to conform with imprisonment and fine sentencing claims with a prevalence of 60.5%.

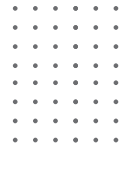
## ➤➤ 4.2 Recommendation

Given its empirical nature and valid evidence, the facts collected in this research may be referred by stakeholders in formulating policies on the prevention and handling of sexual violence in Indonesia. This is in line with National Medium-Term Development Plan (RPJMN) 2020-2024 with one of the targets being to improve the quality of children, women and young generation through improvement of gender equality and women empowerment as well as improving protection of women, including migrant worker from violence and Human Trafficking (TPPO).

Referring to the finding of this study, several recommendations are proposed as improvements to legal policy on sexual violence, as follows:

1. Given the many findings that perpetrators of sexual violence are people who have personal closeness with victims, especially lovers, it is necessary to redefine sexual violence, both through the Bill of Criminal Code (RKUHP) and the Bill of Law on Sexual Violence (RUU TPKS). The element of consent needs to be included as an important element of sexual violence. This element of 'consent' needs to be well defined so that evidence of sexual violence will be directed at the existence of coercion (psychic/physical) or an unequal power relationship between the perpetrator and the victim which results in the victim being powerless to refuse or resist the perpetrator's actions. Furthermore, the formulation of 'consent' must also be positioned in such a way as to dismantle the assumption that every sexual relationship that occurs between partners is always carried out on a consensual basis.

2. With reference to the age of the perpetrators and victims who are young, sexual education or prevention of sexual violence is important to do from an early age. Therefore, relevant stakeholders need to develop concepts and techniques for mainstreaming sexual education and prevention of sexual violence in the best possible way and involve experts who genuinely understand the development of the education in question.
3. Sexual violence case investigation principles set forth in PERMA 3/2017 are used by most judges when adjudicating such cases. Such regulations need to be replicated in the Bill of Law of Sexual Violence (TPKS) or even Bill of KUHP so that the handling of cases of sexual violence is not only oriented to punishing the perpetrators, but also to protecting and recovering victims. In respect of sentencing, data in this research can be used as reference to develop decision formats for sentencing sexual violence cases to the Supreme Court as well as prosecution guidelines for the Attorney General's Office.
4. Given the high use of alternative indictment to prove rape or molestation, this pattern indicates the public prosecutors' hesitation to draw a line between rape and molestation. One of the reasons is the very conventional understanding of law enforcement when it requires proof of rape in the presence of penetration and ejaculation. Therefore, the definition of rape needs to be redefined as "penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim". This definition shall be followed with re-formulation of the definition of molestation to prevent overlapping limitations on these two offenses.
5. The Attorney General's Office needs to develop policies, both in the institutional context and in individual prosecutors, to strengthen the context for the recovery of victims of sexual violence. The Attorney General's Office must respond to the lack of compensation claims by victims of sexual violence so that the interests of the victims are



accommodated in the prosecution process. It is pursuant to the matters arranged in Prosecutor's Guideline Number 1/2021 on Access to Justice for Women and Children. Furthermore, the Witness and Victim Protection Agency (LPSK) involved and encouraged to play its role in handling sexual violence cases so that it can optimally fight for the rights of victims from the start of the examination.

6. Socialization and education concerning legal assistance and handling of sexual violence need to be performed to strengthen community capacity in this field. The community needs to be empowered to be able to create a conducive environment for sexual violence victims to defend their rights or continue their lives as member of the community.



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