

REFORMING INDONESIAN RAPE LAW: ADOPTING U.S. RAPE SHIELD LAW IN EXCLUDING PREJUDICIAL EVIDENCE

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Abstract

Rape is a complex crime in terms of law enforcement and is usually perpetrated by somebody who has a close relationship or connection to the victim. The availability of evidence is usually limited. Unfortunately, law enforcement officials and the justice system often poorly deal with victims of sexual violence. There have been several cases in which a judge undermined a victim's testimony because of the victim's sexual history and purported lack of resistance during the rape, leading to a lenient punishment for or acquittal of the defendant. Therefore, I assert that rape law should be revised to minimize the involvement of a judge's prejudice or bias with regard to certain forms of evidence. I suggest that Indonesia could learn from the introduction of a rape shield law in the U.S., which protects sexual violence victims from being cross-examined in court about their sexual history. This law encourages victims to report a sexual crime and increases the probability of a conviction because it excludes from court accounts of the victim's sexual history and inability to resist the attack.

Keywords: Rape, Criminal Law, Criminal Procedure

Abstrak

Perkosaan merupakan kejahatan yang rumit dalam hal penegakan hukum. Kejahatan ini biasanya dilakukan oleh seseorang yang memiliki hubungan dekat dengan korban. Ketersediaan bukti juga terbatas. Sayangnya, korban perkosaan yang mengalami kekerasan seksual seringkali tidak mendapatkan penanganan yang layak dari penegak hukum. Dalam beberapa kasus, hakim menilai rendah keterangan korban karena riwayat seksual korban dan ketiadaan perlawanan yang mengarah pada hukuman rendah atau justru membebaskan terdakwa. Oleh karena itu, saya menegaskan bahwa pengaturan mengenai hukum dalam kejahatan perkosaan itu seharusnya direvisi untuk meminimalisir prasangka dan/atau bias hakim dalam pembuktian. Saya menyarankan bahwa Indonesia dapat mempelajari hukum pemerkosaan di Amerika Serikat yang memberikan perlindungan lebih kepada korban kekerasan seksual. Hukum ini mendukung korban untuk melaporkan dan meningkatkan probabilitas penghukuman karena mengecualikan riwayat seksual korban dan ketiadaan perlawanan korban.

Kata Kunci: Pemerkosaan, hukum pidana, acara pidana

I. INTRODUCTION

Recently, there have been numerous news reports of rape attacks occurring across Indonesia. The National Commission on Violence Against Women (Komnas Perempuan) reported that the greatest proportion of sexual violence committed against women was accounted for by rape cases.¹ Between January and June 2015, 34% of news items from nine media sources publicized rape cases.² In February 2016, news shocked the nation when it was reported that a woman was raped by three men in Central Java. Another rape case that occurred in Palembang has horrified the entire country; a 14-year-old girl was brutally attacked and repeatedly raped by 14 sexual predators.³ Tragically, the perpetrators strangled the victim to death, and one of the perpetrators raped her even after she was dead.

Komnas Perempuan's annual report records that over the past three years, rape has been the most common form of sexual violence committed against women. There were 2.399 (72%) rape cases reported in 2015.⁴ This is an increase from the two previous years—2.183 (56%) rape cases in 2014⁵ and 1.074 (23%) in 2013.⁶

The general public has expressed grave concerns over the threat posed to society by such extreme rape violence. There have been increasing demands to severely punish rape perpetrators. The government has responded to public demand by revising the Child Protection Law to increase the severity of punishment for rapists. In September, the revision received approval from the legislature.⁷

Under this law, the crime of sexual intercourse with a child carries a minimum sentence of 10 years imprisonment. This law also provides further penalties for recidivist rapists after their release, including chemical castration and monitoring by

¹ Komisi Nasional Anti Kekerasan Terhadap Perempuan, "Analisis Media: Sejauh Mana Media Telah Memiliki Perspektif Korban Kekerasan Seksual? [Media Analysis: How far the media are having the the sexual violence victim's perspective]" (Januari – Juni 2015), <http://www.komnasperempuan.go.id/wp-content/uploads/2016/01/ANALISA-MEDIA-27JAN-16.pdf>, accessed September 19, 2016.

² *Ibid.*, p. 46.

³ Chaidir Anwar Tanjung, "Kejinya 14 Pemerksa Gadis 14 Tahun di Bengkulu: Pemerksaan Dilakukan Berkali-kali [Cruelty of the fourteen of the rapists of the 14 year's old girl in Bengkulu: the rape was conducted repeatedly]" May 3, 2016, <http://news.detik.com/berita/d-3202349/kejinya-14-pemerksa-gadis-14-tahun-di-bengkulu-pemerksaan-dilakukan-berkali-kali>, accessed September 19, 2016.

⁴ Komisi Nasional Anti Kekerasan Terhadap Perempuan, *Kekerasan terhadap Perempuan Meluas: Negara Urgen Hadir Hentikan Kekerasan terhadap Perempuan di Ranah Domestik, Komunitas dan Negara [Violence against the women is spreading: The urgency of the state intervention for the violence against women in domestic, community, and state]* (Jakarta: Komisi Nasional Anti Kekerasan terhadap Perempuan, 2016), p. 19, <http://www.komnasperempuan.go.id/wp-content/uploads/2016/03/KOMNAS-PEREMPUAN--CATATAN-TAHUNAN-2016edisi-Launching-7-Maret-2016.pdf>, accessed September 19, 2016.

⁵ Komisi Nasional Anti Kekerasan Terhadap Perempuan, *Kekerasan Terhadap Perempuan: Negara Segera Putus Impunitas Pelaku [Violence against women: The state should cut off the offender's impunity]*, <http://www.komnasperempuan.go.id/wp-content/uploads/2016/05/CATAHU-2015-Kekerasan-terhadap-Perempuan-Negara-Segera-Putus-Impunitas-Pelaku.pdf>, accessed September 19, 2016

⁶ Komisi Nasional Anti Kekerasan Terhadap Perempuan, *Kegentingan Kekerasan Seksual: Lemahnya Upaya Penanganan Negara [The Emergency of Sexual Violence: The weak of the state's efforts]*, <http://www.komnasperempuan.go.id/wp-content/uploads/2014/11/Catatan-Tahunan-Komnas-Perempuan-2014.pdf>, accessed September 19, 2016.

⁷ Syamsul Anwar Khoemaeni, "UU Kebiri Disahkan, DPR Desak Pemerintah Keluarkan PP [The law on Castration is passed, Parliament pushes the Government to issue Government Regulation]" <http://news.okezone.com/read/2016/09/15/337/1489660/uu-kebir-disahkan-dpr-desak-pemerintah-keluarkan-pp>

tracking device.⁸ The majority of the public agrees with these heavier punishments proposed by the government with 85% of respondents finding the minimum sentence to be fair and 60% supporting chemical castration.⁹

However, several Non-Governmental Organizations criticized the measures, arguing that chemical castration as a type of corporal punishment is outdated and conflicts with the United Nations Convention against Torture.¹⁰ Moreover, the Indonesian Doctors Association (IDI) rejected the scientific premise of chemical castration. The Association issued a letter to its members, requesting them to refuse to participate in the practice of chemical castration.¹¹ In support of their stance, IDI pointed out that sexual desire does not necessary decrease after chemical castration.¹²

In agreement with these concerns, the author further argues that increasing the severity of the punishment will not by itself reduce sexual violence.¹³ Instead, crimes of sexual violence could be reduced if the probability of apprehension and the conviction rates were high.¹⁴ The law enforcement system has difficulties in prosecuting all rape cases. In 2014, the Attorney General Office reported that its prosecutor could only take on 92 of the 281 (32%) rape cases. Moreover, 74 of those 92 cases were still undergoing a trial process and had not yet been decided by the judge.¹⁵ The prosecution's performance in handling rape cases has not significantly improved. In 2015, the number of rape cases successfully prosecuted stood at 98 out of 283 (34%).¹⁶

In addition, the new law providing harsher punishment will only apply to instances of rape in which the victim is a child. However, women are still not fully protected by the rape law. In exercising the law, agents of the justice system such as the prosecutor and judge often manifest biased opinions against women.¹⁷ This situation has prevented women, especially rape victims, from being granted equal

⁸ Liza Yosephine, "Rapists would receive chemical castration punishment for 2 years", May 30, 2016, <http://www.thejakartapost.com/news/2016/05/30/rapists-would-receive-chemical-castration-punishment-for-2-years.html>, accessed 19 September 2016.

⁹ Ida Ayu Grhamtika Saitya, "Pro dan Kontra Hukum Kekerasan Seksual," Kompas June 20, 2016, p. 5.

¹⁰ ANT, LSM "Tolak Rancangan Perppu Kebiri [NGOs rejects the Draft Law on Castration]," February 19, 2016, <http://www.hukumonline.com/berita/baca/lt56c74569cec12/lsm-tolak-rancangan-perppu-kebiri>, accessed September 19, 2016.

¹¹ Nabilla Tashandra, "IDI Tolak Jadi Eksekutor Hukuman Kebiri, Pukulan Telak bagi Pemerintah [Indonesia's Doctor Association refuses to be the castration executor, a severe blow for the Government,]" June 10, 2016, <http://nasional.kompas.com/read/2016/06/10/07401521/idi.tolak.jadi.eksekutor.hukuman.kebiri.pukulan.telak.pemerintah>, accessed September 19, 2016.

¹² *Ibid.*

¹³ Choky Ramadhan, "Reformasi Penegakan Hukum Kekerasan Seksual [Reform of Sexual Violence Law Enforcement,]" Kompas June 21, 2016.

¹⁴ Mitchell Polinsky and Steven Shavell, "The Economic Theory of Public Enforcement of Law," Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series. Paper 235, 1998. http://lsr.nellco.org/harvard_olin/235, p. 37., accessed September 20, 2016.

¹⁵ Kejaksaan Agung, *Laporan Tahunan Kejaksaan Agung 2014 [Annual Report of the Indonesia Attorney's General Office 2014]*, <https://www.kejaksaan.go.id/upldoc/laptah/2015-Laptah%20Kejagung%202014-id.pdf>, p.48., accessed September 20, 2016.

¹⁶ Kejaksaan Agung, *Laporan Tahunan Kejaksaan Agung 2013 [Annual Report of the Indonesia Attorney's General Office 2014]*, <https://kejaksaan.go.id/upldoc/laptah/l2013f.pdf>, p. 45., accessed September 20, 2016.

¹⁷ Lidwina Inge Nurtjahyo, "Perempuan dan Anak Korban Kejahatan Seksual [Women and Children of the Victims of Sexual Violence], in *Hukum Perlindungan Perempuan dan Anak [The Law of the Protection of Women and Children]*, Sulistyowati Irianto ed. (Jakarta: USAID & E2) The Asia Foundation, 2015), p. 387.

access to justice.¹⁸

Nurtjahyo identified four conditions that burden sexual assault victims. *First*, the victim is occasionally demanded to present witnesses, which are rarely available in rape cases. *Second*, the victim is asked to prove that she resisted the act of sexual intercourse. *Third*, there are limits to the forms of sexual violence that are regulated by the Indonesian Penal Code. *Fourth*, the justice system perceives all sexual intercourse as a predominantly consensual act.¹⁹

The focus of this paper is to discuss potential policy reforms for dealing with rape crime, to tackle systemic prejudice against female victims by the justice system, especially with regard to the current requirements for women to discuss their sexual history in court and to prove that they were unable to resist the rape. Judges are too dependent on social custom when considering a victim's credibility.²⁰ Unfortunately, there is significant disparity in rape conviction rates between cases where the victim is considered a virgin and those where she is not.²¹ Also, the judge often considers evidence of the extent to which the victim resisted, whether verbally or physically, the rape.²² The judge scrutinizes the victim's evidence of resistance to prove that sexual intercourse was forceful and against the victim's will.

Under the Indonesian Penal Code ("the KUHP"), rape is defined as an act of forcefully sexual intercourse carried out by a man against a woman who is not his wife.²³ According to the KUHP, it does not constitute rape if the forcibly sexual intercourse was conducted by a woman against a man. Moreover, same-sex rape and marital rape are similarly not considered as rape in the eyes of Indonesian law. This description will be useful as a guide to the reader in understanding the scope of rape law in Indonesia.

Considering the above, I assert that a revision of Indonesian rape law should be concerned with not only increasing punishment but also providing guidance to the agents of law enforcement to ensure that they handle sexual violence cases more effectively and sensitively. Indonesia could learn from the rape shield law, which originated in the U.S. and does not permit any discussion of the victim's sexual history in court or require the victim to prove that they resisted the attack.²⁴ This protection arguably could reduce the systemic prejudice of the justice system that currently

¹⁸ Sulistyowati Irianto, "Perlunya Pemahaman terhadap Hukum Berperspektif Perempuan Bagi Perwujudan Reformasi Hukum [The Need for an Understanding of Women's Perspectives Law for the Realization of Legal Reform]" in *Buku Referensi: Penanganan Kasus-Kasus Kekerasan Terhadap Perempuan di Lingkungan Peradilan Umum [Reference Book: Handling of Sexual Violence towards Women in the General Court]*, ed. Lisa Wulansari (Jakarta, Komisi Nasional Anti Kekerasan Terhadap Perempuan, 2009), p.48.

¹⁹ Nurtjahyo, "Perempuan dan Anak Korban," p. 387.

²⁰ Ratna Batara Munti, "Wacana Seksualitas dalam Sistem Hukum Pidana di Indonesia [Discourses on Sexuality in the Indonesian Criminal Legal System]," in *Seksualitas: Teori dan Realitas [Sexuality: Theory and the Reality]*, Irwan M. Hidayana et. al. (Depok: Program Gender dan Seksualitas FISIP UI, 2004), pp. 126-128.

²¹ Choky Ramadhan et. al., *Asesmen Konsistensi Putusan Pengadilan Kasus-Kasus Kekerasan terhadap Perempuan [Analysis of Court Consistency on Violence Against Women]* (Depok: MaPPI FHUI, 2018).

²² Bela Annisa, Penafsiran Unsur 'Kekerasan atau Ancaman Kekerasan' pada Pasal Kejahatan Seksual dalam Kitab Undang-Undang Hukum Pidana [The interpretation of the element of "violence or threat of violence" in the Sexual Violence Articles in the Indonesian Penal Code]" in *Kekerasan Terhadap Perempuan dalam Peradilan Pidana: Analisis Konsistensi Putusan (Violence Against Women in Criminal Justice System: An Analysis of Court Consistency)*, Choky Ramadhan & Lidwina Nurtjahyo (Depok: MaPPI FHUI, 2016)

²³ Article 285 Indonesia Penal Code

²⁴ Kathleen Daly & Brigitte Bouhours, "Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries," *Crime and Justice* 39, no. 1 (2010): 57.

discriminates against female victims. Consequently, victims would be protected from the distress and trauma of having their character questioned while giving their testimony.

This paper analyzes several court decisions on rape cases to assess the performance of law enforcement representatives, especially judges, in handling sexual violence. The author explores the practice of “victim blaming” carried out by judges: in part one, by considering how judges deal with the victim’s sexual history, and in part two, by looking at the judges’ responses to the victim’s accounts of their inability to resist. Following that, the author explains the judge’s response to a victim’s sexual history where it resulted in lenient punishment, based on both a quantitative and qualitative analysis of the court’s decision. Then, the author describes a number of court decisions from both Indonesia and the U.S. in which it was reported that the victim was unable to prove they had resisted sexual intercourse, and therefore, the element of force as required by rape law had not been proven. Next, the author explains the U.S. experience of rape shield law by describing its history, features, and implementation. In conclusion, the author recommends that rape shield law should be adopted in revising rape law in the Indonesian Penal Code to improve the justice system’s handling of rape cases.

II. VIRGINITY AND SEXUAL HISTORY

In sexual violence cases where law enforcement representatives, in particular the judges, blame the rape victim, it can be argued that they are not acting impartially.²⁵ As all human beings are, law enforcement representatives are subject to the influence of any prejudice that exists in society. In many societies, including Indonesia, a woman is still labeled as a “... person who has a seductive body and [will] always be blamed [sic] as a significant cause of any sexual crime such as prostitution, rape, pornography, etc.”²⁶

In discussing commonly known rape myths, Helen Benedict describes some misconceptions regarding the victims, such as “women provoke rape,” “women deserve rape,” and “only *loose* women are victimized” [emphasis added].²⁷ All of those myths condemn the woman for her rape, and blame it on her appearance, actions, or attire.²⁸ It is easy to see why the general public believes that rape is justifiable since these myths perpetuate the idea that women can prevent rape by behaving “properly.”

Such gender stereotyping in the question of rape is not only common practice among lay people but also with high-ranking officials and some academics. In 2011, the former governor of Jakarta accused a girl because she wore a mini-skirt on *angkot* (public transportation).²⁹ A similar accusation was also made by the former

²⁵ Kamala Chandrakirana, *Introduction*, in *Kasus-kasus Hukum Kekerasan Terhadap Perempuan: Sebuah Drama tentang Patriarki dan Dominasi Laki-laki (Seri 2) [Violence towards Women Legal Cases: A Drama on the Patriarchy and the Men’s Dominance (Series 2)]*, Nursyahbani Katjasungkana (Jakarta: LBH Apik Jakarta, 2002).

²⁶ Herni Sri Nurbayanti, “Konsep-Konsep Utama Hukum dan Gender [The Main Concept of Law and Gender],” in *Hukum Perlindungan Perempuan dan Anak [The Law of the Protection of Women and Children]*, Sulistyowati Irianto ed. (Jakarta: USAID & E2] The Asia Foundation, 2015).

²⁷ Helen Benedict, “Virgin or Vamp: How the Press Covers Sex Crimes,” http://isites.harvard.edu/fs/docs/icb.topic1001965.files/Week%207%20Readings/Rape%20Myths_Benedict.pdf, pp 15-17, accessed September 21.

²⁸ *Ibid.*

²⁹ Yuli Saputra, “Kenapa perempuan korban pemerkosaan selalu disalahkan? [Why the women of rape

Indonesian Chief of Parliament.³⁰

Ironically, some academics also assert the same perspective. Arif Gosita, for example, proposes that the potential rape victim (a woman) should be responsible for preventing rape: the potential victim needs to be given instruction on what behavior is acceptable, or when is it safe to venture outside and where is she permitted to venture.³¹ Compounding these social attitudes, some Indonesian judges also agree with these assumptions. Regrettably, those prejudicial perceptions are frequently taken into consideration by the judge in court.

A. Virginitiy Concept

Social constructs remarkably influence women's sexuality.³² In a patriarchal society, every aspect of society—values, government, or mores—is controlled by men.³³ Man, for example, is justified in displaying aggressive sexual behavior. On the other hand, it is not appropriate for a woman to display aggressive sexual conduct.³⁴ Religion also has a role in shaping social values about sexuality, especially virginity "... as something that is akin with innocence, purity and chastity and most religions expect that it is something that should be reserved for marriage."³⁵

Historically, a woman is viewed as the property of a man, either her father or husband.³⁶ Rape law originally regulated to protect man's property so it would not be stolen.³⁷ Under this concept, a rapist steals a woman's virginity, which is viewed as the most valuable object possessed by a father before it is transferred to a husband.³⁸

In Indonesia, the majority of the public perceives the loss of virginity before marriage to be taboo and it brings shame upon transgressors.³⁹ However, a survey found that 62.7% of junior and senior high school students are not virgins.⁴⁰ Atkinson

victim are always be blamed?]," May 7, 2016, <http://www.rappler.com/indonesia/132176-kenapa-perempuan-korban-pemerkosaan-selalu-disalahkan>, accessed September 21, 2016.

³⁰ *Ibid.*

³¹ Arif Gosita, *Masalah Korban Kejahatan: Kumpulan Karangan [The Issue of Crime Victim: A Collection of Essays]* (Jakarta: Akademika Pressindo, 1993), p. 47

³² Ida Ruwaida Noor, "Relasi Seksual dan Isu Gender [Sexual Relation and Gender Issues]", in *Seksualitas: Teori dan Realitas [Sexuality: Theory and the Reality]*, Irwan M. Hidayana et. al. (Depok: Program Gender dan Seksualitas FISIP UI, 2004E

³³ Abeda Sultana, "Patriarchy and Women's Subordination: A Theoretical Analysis," *Arts Faculty Journal* 4 (2010-2011): 1.

³⁴ Noor, "Relasi Seksual dan Isu Gender," p. 66

³⁵ Stephanie, "Losing Your Virginity to Rape," Pandora's Project, <http://www.pandys.org/articles/losing-your-virginity-to-rape.html>, accessed September 22, 2016.

³⁶ Carol E. Tracy & Jennifer Gentile Long, "Rape and Sexual Assault in the Legal System," Presented to the National Research Council of the National Academies Panel on Measuring Rape and Sexual Assault in the Bureau of Justice Statistics Household Surveys Committee on National Statistics, June 5, 2012, <http://www.womenslawproject.org/resources/Rape%20and%20Sexual%20Assault%20in%20the%20Legal%20System%20FINAL.pdf>, pp. 4-5, accessed September 22, 2016.

³⁷ *Ibid.*

³⁸ *Ibid.* And Karina Eileraas, "Rape, Legal Definitions of." *Encyclopedia of Women in Today's World*. Ed. Mary Zeiss Stange, Carol K. Oyster, and Jane E. Sloan. Thousand Oaks, CA: SAGE, 2011. 1205-09. *SAGE Reference Online*. Web. 4 Apr. 2012, http://study.sagepub.com/sites/default/files/Ch09_Legal%20Definitions%20of%20Rape.pdf, accessed September 22, 2016.

³⁹ Satiti Nur Fatimah, "Konsep Diri Wanita yang Tidak Perawan dan Kepuasan Perkawinan [The Self Concept of Non-virgin Women and the Marital Satisfaction]," *eJournal Psikologi* 2, no. 2 (2014): 197.

⁴⁰ Mustiana Lestari, *Cinta Tidak Sebatas Selaput Dara [Love is not limited to the hymen]*, October 15, 2014, <https://www.merdeka.com/khas/cinta-tidak-sebatas-selaput-dara-arti-keperawanan-1.html>, ac-

claims that virginity exists in two states: (1) a physical state that is defined by either “hymen intact” or “never experiencing sexual intercourse”; and (2) a moral or spiritual state, which is connected to “a quality of the spiritual relationship with God.”⁴¹

Some people misguidedly consider the loss of a woman’s virginity to be marked by the bleeding that often (but not always) occurs after breaking her hymen upon consummation of a marriage by sexual intercourse.⁴² A woman, for example, might be worried that her potential husband would despise her because she loves horse riding.⁴³ Some doctors argue that tears in the hymen could not ascertain virginity.⁴⁴ Dr. Heru Oentong asserts that a woman’s hymen could be impaired for non-sexual reasons, such as extreme sports or an accident.⁴⁵ Hegazy and Al-Rukban also argue that bleeding of the hymen does not always occur after the first experience of sexual intercourse. Then, they asserted the following:

Other causes of hymenal rupture, other than sexual intercourse include vaginal insertion of objects such as tampons and digits, vigorous sporting activities, surgical procedures and falling on sharp objects.

A woman’s loss of virginity is also perceived as being the first act of sexual intercourse, regardless of whether bleeding occurs or not.⁴⁶ Most people reserve their virginity for his or her life partner, and we cannot dictate who their life partner will be. Some people may consider their special one to be the person in his or her marriage; however, other people who will not get married will consider this person to be his or her partner.⁴⁷

Under the Indonesian Penal Code, which was inherited by the Dutch during the period of colonization, the rape crime provision is as follows:⁴⁸

Any person who by using force or threat of force forces a woman to have sexual intercourse with him out of marriage, shall, being guilty of rape, shall be punished with a maximum imprisonment of twelve years.

According to this provision, a perpetrator could only be charged if he engages in (1) sexual intercourse, the intrusion of a penis into vagina, with a woman other than his wife; and (2) by using physical force or the threat of physical force. This concept privileges the virginity concept because the lawmaker and law enforcement representatives assume the woman will reserve her virginity for her husband and would refuse or resist any other form of sexual intercourse, so the perpetrator must enact the crime by use of physical force or the threat of physical force.

Arguably, in law and custom, the rape victim is not considered to have lost her

cessed September 22, 2016.

⁴¹ Clarissa Atkinson, “Precious Balsam in a Fragile Glass: The Ideology of Virginity in the Later Middle Ages,” *Journal of Family History* 8 (1983): 133 in Ashley Nicole Wallace, “Jeopardized Virginity: an Analysis of Rape and Spiritual Virginity in Medieval Europe,” *Florida State University Graduate Thesis* .

⁴² Michael Metekohy, “Selaput Dara Patokan Penanda Keperawanan? [Is hymen the sign of the virginity?],” July 19, 2016, <http://health.kompas.com/read/2016/07/19/220700123/Selaput.Dara.Patokan.Penanda.Keperawanan>., accessed September 23, 2016.

⁴³ *Ibid.*

⁴⁴ A. A. Hegazy and M. O. Al-Rukban, “Hymen: Facts and Conceptions,” *The Health* 3, no. 4 (2012): 109-115.

⁴⁵ *Ibid.*

⁴⁶ Stephanie, “Losing your virginity”

⁴⁷ *Ibid.*

⁴⁸ Article 285 Indonesian Penal Code

virginity if she is raped before having chosen to lose her virginity. Augustine excused a woman who was raped as a non-virgin. His view was influenced by the suicide of Lucrecia who was a rape victim.⁴⁹ Excusing virginal rape victims from the stigma of having lost their virginity before marriage is reasonable because a woman’s first sexual intercourse should be voluntary. Stephanie states that the victim “... was raped as a virgin rather than [she] lost [her] virginity to rape.”⁵⁰

The basic definition of rape should be described to let us understand why a woman’s virginity or sexual history is not a factor requiring scrutiny. Since Roman Law, rape has been considered primarily a crime of assault.⁵¹ Regardless of the victim’s virginity or sexual history, rape is still an assault on someone’s body that potentially causes physical and mental damage or injury. Sri Nurherawati even asserts that rape is more than an assault because it damages the victim’s pride as well as the body.⁵²

B. Judicial Reasoning on Virginity or Sexual History

Women’s virginity and previous sexual history are frequently scrutinized by the Indonesian criminal process. The examination of both aspects is carried out predominantly by way of negative labeling of the woman. Unfortunately, the judge sometimes takes on board this biased perspective when deciding his or her opinion in court, and in this article, the author has been arguing that such bias could bring injustice upon the victim.

Indonesia’s Court Monitoring Society (MaPPI FHUI)’s researcher found that the judge tended to mete out a lenient punishment to the defendant if the victim was not a virgin at the time when the rape occurred.⁵³ In 14 cases where the victim had had sexual intercourse before the rape, the average punishment was 3.6 years’ imprisonment. However, the average punishment of defendants across 27 cases who raped a “virgin” was a six-year prison sentence.

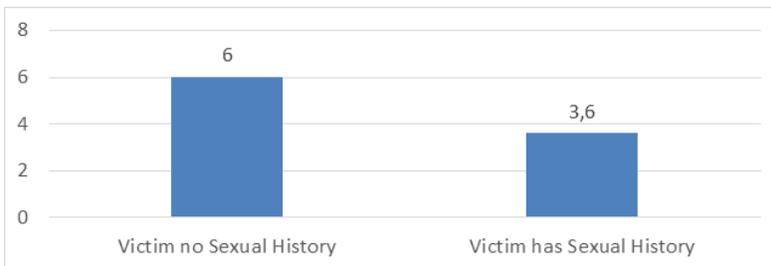


Figure 1: The Average Punishment of Rape

Moreover, Bela Annisa illustrates three cases whose judge used the victim’s virginity and previous sexual history to exonerate the defendants. Also, there are two cases in which the defendant was given a lenient punishment because of the nature

⁴⁹ Wallace, “Jeopardized Virginity,” p. 36.

⁵⁰ Stephanie, “Losing your virginity”

⁵¹ Eileraas, “Rape, Legal Definitions of”

⁵² Sri Nurherawati, “Perempuan dalam Persidangan [Women in Courts],” in *Buku Referensi: Penanganan Kasus-Kasus Kekerasan Terhadap Perempuan di Lingkungan Peradilan Umum [Reference Book: Handling of Sexual Violence towards Women in the General Court]*, ed. Lisa Wulansari (Jakarta, Komisi Nasional Anti Kekerasan Terhadap Perempuan, 2009), p. 107.

⁵³ Ramadhan, “Asesmen Konsistensi Putusan”

of the victim's sexual history.⁵⁴ During cross-examination, the judge weighed in on the victim's behavior and sexual history.

In *Putusan No.28/Pid.Sus/2013/PN.PWR*, the victim's boyfriend forced her to engage in sexual intercourse in exchange for money. The judge acquitted the defendant because of the victim's sexual history. She had had sexual intercourse four times with her boyfriend. The judge also considered her former experience in receiving money after being raped before.⁵⁵

Moreover, the judge set the defendant free in case *No.74/Pid.B/2008/PN.KPG*. The court focused on revelations that the victim had an affair with the defendant and a child out of wedlock.⁵⁶ The victim was bleeding and wounded because of the perpetrator's act; nevertheless, these facts could not convince the judge to put the perpetrator behind bars.

Lastly, the judge decided that the defendant was not a rapist and acquitted him in *Putusan No.35/Pid.B/2012/PN Marisa* and *MA No.10/K/PID/2013*. This was because the sexual intercourse between the victim and defendant occurred several times. The judge expressed the opinion that the victim should have reported the rape when it happened the first time. The victim's relationship with the defendant was also weighed up; in short, the judge determined that the sexual intercourse must have been based on their mutual consent. In fact, the victim had been threatened with violence and choked before the defendant forced sexual penetration.

In some cases, the victim's sexual history resulted in lenient punishment for the defendant. In case *1390/Pid.B/2012/PN.LP (Lubuk Pakan)* and *PK No.30/PK/Pid/2010*, for example, the victim had been presented to the court as a bad woman because she was not a virgin and had had sex with her boyfriend.⁵⁷ Moreover, the victim's drinking behavior added to the court's stereotyping of the victim as a "bad woman." Hence, the judge meted out a mere five-month imprisonment to the defendant. The judge also gave a five-month imprisonment to the defendant in case *No. 562/Pid.B/2014/PN.SIM*. During the relationship between the defendant and the victim, the defendant had sexual intercourse with the victim.⁵⁸ This fact influenced the judge to mete out a lenient punishment.

Those examples show that Indonesian judges have repeatedly taken into consideration the sexual history of the victim when deciding on the criminality of the defendant. As has been demonstrated above, a woman's sexual history could be weighed as evidence to prove a rapist's guilt, or, it could offer consideration to the judge to give the defendant lenient punishment. This prejudicial treatment of evidence arguably disadvantages the victim against reporting any rape crime that occurs against her.

III. FORCE AND THREAT OF FORCE IN RAPE CASES

The definition of rape in the Indonesian Penal Code is comparatively similar to rape in common law. Under the Indonesian Penal Code, rape is forcefully sexual intercourse

⁵⁴ Bela Annisa, "Penafsiran Unsur"

⁵⁵ Purworejo District Court, "Decision No. 28/Pid.Sus/2013/PN.Pwr"

⁵⁶ Kupang District Court, "Decision No. 74/Pid.B/2008/PN.KPG"

⁵⁷ Bela Annisa, "Penafsiran Unsur"

⁵⁸ Simalungun District Court, "Decision No. 562/Pid.B/2014PN.SIM"

acted out by a man with a woman who is not his wife. Based on *Commonwealth v. John Burke*, rape in common law had been defined "... as the having carnal knowledge of a woman by force and against her will."⁵⁹

One of the fundamental elements of Indonesian rape law is "force" or "threat of force" as an event that precedes the sexual intercourse. That element of rape crime needs to be proved to convict the perpetrator.⁶⁰ Those are used to coerce the victim to fulfill rapist's lust. The victim arguably involuntarily conducts sexual intercourse because of force, either through the rapist's use of a weapon or bare hands, or through verbal threats.⁶¹

In examining force or the threat of force, the Indonesian judge is influenced by several law scholars. Unfortunately, most scholars restrictedly define force or the threat of force, so its consequence is limited to physical injury. The police were influenced by two scholars who were also police officers, R Soesilo, and Dading.

R. Soesilo commented on force as it features in Article 89 of the Indonesian Penal Code, which describes physical power, such as battering or kicking.⁶² He explained that some acts could be considered as being a kind of force where the consequence of the act could make someone pass out or incapable of resisting. A perpetrator, for example, gives a drink or drug to the victim to make them unconscious. In addition, the perpetrator locks the victim in a room or ties the victim's hand with a rope; consequently, the victim is unable to resist.⁶³ In addition, former Brigadier General of Indonesian Police, Dading, limitedly explained force as a physical force to a woman. He also commented that the victim must resist countering such force.⁶⁴

Force has been broadly defined by contemporary feminist intellectuals. Elli, for example, explains that force is a structure or a treatment that constructs the physical and mental condition of the inequality of woman. This condition costs women across various aspects of her life.⁶⁵ Nursyahbani argues that violence against women should be perceived as a result of the unequal social relations between state and citizen, and also between men and women.⁶⁶ Those arguments are supported by The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).⁶⁷

Because of the Indonesian justice system's limitations in its interpretation of the

⁵⁹ *Commonwealth v. Burke*, 105 Mass. 376 (1870), <http://masscases.com/cases/sjc/105/105mass376.html>, accessed September 20, 2016.

⁶⁰ Abdul Wahid & Muhammad Irfan, *Perlindungan Terhadap Korban Kekerasan Seksual: Advokasi atas Hak Asasi Perempuan [The Protection for the Sexual Violence's Victims: Advocacy of the Women's Fundamental Rights]* (Bandung: Refika Aditama, 2001), p. 42.

⁶¹ P.A.F. Lamintang, *Delik-delik Khusus: Tindak Pidana-Tindak Pidana Melanggar Norma-Norma Kesusastraan dan Norma-Norma Keadilan*, (Bandung: Mandar Maju, 1990), p. 113

⁶² R. Soesilo, *Kitab Undang-undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal [The Penal Code with the Articles-to-Articles Commentaries]* (Bogor: Politea, 1995), p. 98.

⁶³ *Ibid.*

⁶⁴ H. A. K. Moch. Anwar, *Hukum Pidana Bagian Khusus (KUHP Buku II): Jilid 2 [Criminal Law Special Part (Book II of Penal Code): Volume 2]* (Bandung: Alumni, 1986), p. 227.

⁶⁵ Elli Nur Hayati, "Kekerasan Seksual [Sexual Violence]," in *Seksualitas: Teori dan Realitas [Sexuality: Theory and the Reality]*, Irwan M. Hidayana et. al. (Depok: Program Gender dan Seksualitas FISIP UI, 2004), p. 140.

⁶⁶ Nursyahani Katjasungkana & Mumtahanah, *Kasus-kasus Hukum Kekerasan Terhadap Perempuan: Sebuah Drama tentang Patriarki dan Dominasi Laki-laki (Seri 1) [Violence towards Women Legal Cases: A Drama on the Patriarchy and the Men's Dominance (Series 1)]*, Jakarta (LBH Apik Jakarta, 202), p. 6.

⁶⁷ *Convention on the Elimination of All Forms of Discrimination against Women*, United Nations, Treaty Series, vol. 1249, p. 13. New York, 3 September 1981, Article 2

element of force, Munti argues that rape law would be hardly expected to indict rape cases in the case of submissions (*ketundukan*), such as a boss to his staff, or a teacher to his student.⁶⁸ Rape is also unique in that "... because of the sex and socialization of the victim, it may require less force and generate less resistance."⁶⁹ Sexual assault does not only occur in the form of physical force, but also in the form of exertion, intimidation, or submission.⁷⁰ In addition, the World Health Organization states that sexual violence potentially occurs when the victim cannot give consent voluntarily, such as if drunk, asleep, or in the case of mental retardation.⁷¹

Next, I will illustrate the judicial reasoning on the element of force or threat of force both in Indonesian and U.S. courts. This explanation shows that the force element was and is still being examined at trial. We could also learn from court decisions that discuss the element of force. In that way, the explanation will support the reformation of rape law to exclude the requirement for a demonstration of resistance in proving an element of force having been used.

A. Judicial Reasoning on Force or Threat of Force in Indonesia

There are two interesting Indonesian court decisions discussing the element of force. In case *Nomor 110/Pid.B/2013/PN.SKG* (Sengkang), the perpetrator entered the victim's room and covered her face with a pillow until she was unconscious. Then, the defendant engaged in sexual intercourse with the victim twice. He was convicted guilty of rape and sentenced to four years' imprisonment.⁷²

However, a judge dissented that there was a lack of supporting evidence to prove the element of force. The dissenting judge did not believe the victim's testimony. He disregarded her testimony because the victim was unchaste, one of the irrelevant factors that I criticized above. Because of this factor, the judge argued that the sexual intercourse had been consensual and therefore lacking an element of force.⁷³

Recently, a Bengkulu District Court judge broadened the interpretation of force in the case of *Nomor 410/Pid.B/2014/PN.Bgl*. In this case, the victim lost her virginity to the perpetrator after he had promised to marry her. She asked the perpetrator twice not to leave her if she agreed to have sex with him. The defendant, however, stopped contacting and meeting the victim a month after engaging in sexual intercourse.

The majority of judges interpret force as including seduction. So for example, by promising to marry her, the perpetrator in *Nomor* enticed his victim into sexual activity. The judge viewed this hollow promise to bear similar consequences as physical force. The promise that he would marry her created a condition in which the victim was intimidated and unable to resist. The judge also recognized that physical force is almost absent in rape cases where perpetrator has had a relationship with

⁶⁸ Munti, "Wacana Seksualitas dalam Sistem Hukum Indonesia [The Discourse of Sexuality in the Indonesian Legal System]," in *Seksualitas: Teori dan Realitas [Sexuality: Theory and the Reality]*, Irwan M. Hidayana et. al. (Depok: Program Gender dan Seksualitas FISIP UI, 2004), p. 125.

⁶⁹ David P. Bryden and Sonja Lengnick, "Rape in the Criminal Justice System," *Journal of Criminal Law and Criminology* 87 (1996-1997): 1250.

⁷⁰ Nurtjahyo, "Perempuan dan Anak Korban," pp. 383-384.

⁷¹ Etienne G. Krug, et. al., *World Report On Violence And Health* (Geneva: World Health Organization, 2002), p. 149. available at http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf, accessed September 28, 2016.

⁷² Bela Annisa, "Penafsiran Unsur"

⁷³ *Ibid.*

the victim.

B. Judicial Reasoning on Force or Threat of Force in the U.S.

In *Rusk v. State*, the judge decided that force is the fundamental element of rape crime. The defendant was acquitted by the judge because there was a lack of evidence supporting an element of force.⁷⁴ The victim was invited to come into the perpetrator's house while she was driving him home. After arriving at his house, the perpetrator took the car key so the victim could not drive away. Then, she decided to respond to his invitation by coming into his house even though she had refused it before. Inside the house, the perpetrator pulled her to the bed, took off her clothes, and raped her.

The judge stated that the victim could not prove her resistance or struggle. Therefore, the sexual intercourse was viewed by the judge as voluntary. The judge also considered the fact that the victim did not yell to indicate that she did not consent. Moreover, the judge also considered a slight choke and frightening look were not sufficient reason for the victim's fear that she claimed led to an inability to resist the actions of the defendant.⁷⁵ The judge's opinion referred to *Hazel v State*, which required proving the element of force to determine that the perpetrator was guilty.⁷⁶ The resistance of the victim arguably proves that the victim is forced to engage in sexual intercourse.

Judge Willner dissented from the majority opinion by arguing about verbal resistance or refusal. He claimed that the victim's failure to resist or run was justifiable because she was unfamiliar with the perpetrator's neighborhood, and the perpetrator possessed her car key. Wilner, interestingly, cited research that only 12.7% of rape victims physically resist. Most victims do not resist out of fear of physical injury and being beaten by the perpetrator. There are studies showing that 71% of rape victims received physical injuries because they fought back, and 40% of those were hospitalized.⁷⁷

In *Commonwealth v. Berkowitz*, an element of forcible compulsion was also required by a judge to successfully convict the perpetrator of rape.⁷⁸ The victim verbally resisted saying "no" to the perpetrator. The judge, however, considered that verbal resistance was not sufficient because it did not meet the standard set by *Commonwealth v. Rhodes*. In that case, there are several standards to determine compulsion, such

*[1] the respective ages of the victim and the accused; [2] the respective mental and physical conditions of the victim and the accused; [3] the atmosphere and physical setting in which the incident was alleged to have taken place; [4] the extent to which the accused may have been in a position of authority, domination or custodial control over the victim; and [5] whether the victim was under duress.*⁷⁹

⁷⁴ *Rusk v. State* 43 Md. App. 476 (1979), <http://law.justia.com/cases/maryland/court-of-special-appeals/1979/1249-september-term-1978-0.html>, accessed September 26, 2016. *see also*, Cynthia Lee & Angela Haris, *Criminal Law: Cases and Materials* (St. Paul: West, 2005). This book discussed all U.S. cases that are explained in this chapter.

⁷⁵ *Ibid.*

⁷⁶ *Hazel v. State* 221 Md. 464 (1960), http://www.leagle.com/decision/1960685221Md464_1625/HAZEL%20v.%20STATE, accessed September 30, 2016.

⁷⁷ *Ibid.*

⁷⁸ *Com. v. Berkowitz*, 415 Pa. Superior Ct. 505 (1992), 609 A.2d 1338, <http://law.justia.com/cases/pennsylvania/superior-court/1992/415-pa-super-505-0.html>, accessed September 29, 2016.

⁷⁹ *See Commonwealth v. Rhodes*, 510 A.2d 1217, 1224-26 (Pa. 1986), in Rosemar y J. Scalo, *What Does*

In 1992, the New Jersey Supreme Court judges had a more progressive perspective regarding the element of force in a rape case. They held that any sexual intercourse without the victim's consent is rape, in *New Jersey in the Interest of M.T.S.*⁸⁰ This decision recognizes verbal resistance as non-consent of the victim. Moreover, the victim's behavior could provide a measure of her resistance to engage sexual intercourse.⁸¹ The judge also realized that rape crime mostly occurs with someone who is close to the victim, in which case they rarely use force to initiate sexual intercourse.⁸²

IV. LEARNING FROM U.S. RAPE SHIELD LAW

The criminal justice system, ideally, gives the victim a role in the criminal process to support law enforcement in investigating and prosecuting the perpetrator.⁸³ The victim can report a crime to police; thus a person who commits a crime can be arrested to guarantee a safe society. Moreover, a victim's testimony should be heard to expose the facts of a crime so the judge can establish the facts-based truth (*kebenaran materil*). Unfortunately, those rights potentially affect the negative side.⁸⁴ Muladi recognizes that the defendant or its defense counsel might savage the victim.⁸⁵ The victim is also likely to bear the "risk of secondary victimization."⁸⁶

Above, I described two important circumstances that lead to unfair prejudice in prosecuting sexual assault cases. These are a woman's (1) sexual history; and (2) absence of resistance, which brings disadvantages upon the victim. This situation dissuades the victim from reporting rape crime because of being "afraid of being retraumatized by the legal system."⁸⁷ Consequently, rape has become "one of the most underreported and under-prosecuted of crimes."⁸⁸

Law enforcement representatives and the defendant (or his counsel) also frequently scrutinized the victim's credibility in U.S. cases. Then, in 1975, rape shield law was enacted to address those problems.⁸⁹ Fundamentally, rape shield law excludes the victim's previous sexual history from court because it is not relevant to prove the occurrence of rape.⁹⁰ At that time, the reform of rape law was only regulated in Michigan, which was claimed as "the most important model for reform."⁹¹

No Mean in Pennsylvania - The Pennsylvania Supreme Court 's Interpretation of

Rape and the Effectiveness of the Legislature's Response, 40 Vill. L. Rev. 193 (1995), p. 203, <http://digitalcommons.law.villanova.edu/vlr/vol40/iss1/4>, accessed September 28, 2016.

⁸⁰ State Of New Jersey In The Interest of M.T.S. 129 N.J. 422 (1992), <http://law.justia.com/cases/new-jersey/supreme-court/1992/129-n-j-422-1.html>, accessed September 28, 2016.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Muladi called this as "The Procedural Rights Model" of the victim, see. Muladi, "Perlindungan Korban Melalui Proses Pidanaan [The Protection of the Victim through Penalization Process]," in *Pidana dan Pemidanaan [Criminal Law and Penalization]*, Muladi and Barda Nawawi Arif (Bandung: Alumni 2000), p. 85.

⁸⁴ *Ibid.*, p. 87

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Meg Garvin, Alison Wilinon and Sarah LeClair, "Excluding Evidence of Specific Sexual Acts between the Victim and Defendant under Rape Shield," *VAW Bulletin* (Sept. 2010): 2.

⁸⁸ *Ibid.*

⁸⁹ Richard Klein, "An Analysis of Thirty-five years of Rape Reform: A Frustrating Search for Fundamental Fairness," *Akron Law Review* 41 (2008): 991.

⁹⁰ Garvin, Wilinon and LeClair, "Excluding Evidence"

⁹¹ Jeanne C. Marsh Et Al, *Rape And The Limits of Law Reform*, 11-23 (1982); Cassia Spohn & Julie Horney, *Rape Law Reform: A Grassroots Revolution And Its Impact*, 17- 23 (1992); Vivian Berger, *Man's Trial*

Subsequently, Michigan's rape shield law became a model for reforming rape law across the U.S.⁹² In 1977, North Carolina followed Michigan in excluding the victim's past sexual behavior in a rape case.⁹³ Currently, rape shield law is adopted by all states and by the federal government after 20 years since its enactment.⁹⁴ Rape shield law does not only apply in the U.S. but also in several other countries. Canada, for example, passed rape shield law in 1982 even though its scope was later narrowed in 1991.⁹⁵ A Canadian High Court judge decided that the victim's past sexual history could only be excluded as evidence to the judge's discretion.⁹⁶ This model, of permitting the judge's discretion when deciding whether to exclude past sexual history, has also been applied in Ireland since 1981.⁹⁷

A. Rape Shield Law Feature

Rape shield law would ideally address two biases: sexual history and proof of resistance, which frequently creep into the criminal process in Indonesia. In the U.S., several states have reformed their law progressively, such as Michigan and Pennsylvania.⁹⁸ Both states removed the requirement for proof of resistance, in order to protect the victim's interest. In rape crime, the perpetrator does not always use force; thus proof of the resistance of the victim is rarely available. Proof of resistance is arguably absent in rapes where the victim has been intoxicated. A victim might not resist because of fears for her survival.⁹⁹

There are four classifications of rape shield law according to Harriet Galvin.¹⁰⁰ First, rape shield law as influenced by the Michigan model that eliminated the prior sexual history of the victim from evidence. This could be admissible as evidence only if the defendant makes an offer of proof at an *in camera* hearing.¹⁰¹ Before determining the admissibility of evidence, a judge will examine the evidence without the presence of

Woman's Tribulation: Rape Cases In The Courtroom, 77 Colum. L Rev. 1, 7-10; Leigh Bienen, *Rape III-National Developments In Rape Reform Legislation*, 6 Women's Rts. L Rep. 171, 172-76 (1980), in Cassia C. Spohn and Julie Horney, "The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases," *Journal of Criminal Law and Criminology* 86 (1995-1996): 861.

⁹² Stacy Futter and Walter R. Mebane Jr. "The Effects of Rape Law Reform on Rape Case Processing," *Berkeley Women's Law Journal* 16 (2001): 72.

⁹³ Jeff Welty, "Special Evidentiary Issues In Sexual Assault Cases: The Rape Shield Law And Evidence of Prior Sexual Misconduct by The Defendant," *Administration of Justice Bulletin* 04 (2009).

⁹⁴ Hogan, "Law Reform Efforts: Rape and sexual assault in United States of America," <http://www.im-powr.org/content/law-reform-efforts-rape-and-sexual-assault-united-states-america#sthash.oSMQ3S8N.dpuf>, accessed September 26, 2016.

⁹⁵ Tamar Lewin, "Canadian High Court Narrows Rape Shield Law," *New York Times*, August 23, 1991, <http://www.nytimes.com/1991/08/23/news/canadian-high-court-narrows-rape-shield-law.html>, accessed September 26, 2016.

⁹⁶ *Ibid.*

⁹⁷ Section 3(2) (b) of the Criminal Law (Rape) Act 1981 as amended, in Rape Crisis Network Ireland, "Previous Sexual History Evidence and Separate Legal Representation," *RCNI Position Paper*, May 2012, <http://www.rcni.ie/wp-content/uploads/RCNIPreviousSexualHistorySLRPositionPaperMay12.pdf>, p. 8, accessed

⁹⁸ David P. Bryden and Sonja Lengnick, "Rape in the Criminal Justice System," *Journal of Criminal Law and Criminology* 87 (1996-1997): 1225-26.

⁹⁹ See *Rusk vs. State* (1979).

¹⁰⁰ Frank Tuerheimer, "A Reassessment and Redefinition of Rape Shield Laws," *Ohio State Law Journal* 50, no. 5 (1989): 1245-1274.

¹⁰¹ *Ibid.*

the parties. After being determined as admissible evidence, the parties could look at the evidence.¹⁰²

Second, the Arkansas type of rape shield law does not ban accounts of the victim's past sexual history.¹⁰³ The evidence, regarding past sexual history, needs to be determined by a judge at an *in camera* hearing.

Third, federal rape shield law does not disregard a previous sexual history between the victim and defendant for proving consent. Moreover, a victim's past sexual history with others is also admissible to show that "... physical evidence of sexual assault is not attributable to the defendant."¹⁰⁴

Fourth, there is the California model, which determines that a victim's sexual behavior relates to their credibility such that possible acts of false reporting have to be taken into account, and so the victim's sexual history is admissible as evidence, but the issue of proving consent is inadmissible.¹⁰⁵ The inclusion of the victim's sexual history as a means to attack the victim's credibility was criticized as "... ambiguous and [it was] feared that the exception would swallow the rule."¹⁰⁶

B. The Implementation of Rape Shield Law

Following the implementation of rape shield law in the U. S., certain interesting consequences are worth considering to learn from the U.S. experience. The proponents of rape shield law argued that it would encourage more victims to report rape because they would no longer fear having their sexual history exposed to the public.¹⁰⁷ Ronet Bachman and Raymond Paternoster found those arguments convincing by examining NCVS' violent crime victimization data from 1973 to 1990.¹⁰⁸ They state that "... there was a 28% increase in rape victims who reported to the police from 1980 to 1990."¹⁰⁹ Rape shield law also aims to convict more rapists because it excludes several pieces of evidence that potentially acquit perpetrators such as the victim's previous sexual history and lack of resistance.¹¹⁰ Since 1981, there has been a 200% increase of arrested rapists who were imprisoned.¹¹¹

Those findings have been supported by Cassia C. Spohn & Jule Horney who also examined the trial reports of rape crime before and after rape-reform periods.¹¹² They examined trial records from 1970 to 1984 in six jurisdictions in Detroit.¹¹³ They reported that there was a 17.6% to 24.4% increase in rape cases handled by

¹⁰² Garvin, Wilinson and LeClair, "Excluding Evidence"

¹⁰³ Tuerkheimer, "A Reassessment and Redefinition," pp. 1248-1249.

¹⁰⁴ *Ibid.*, p. 1249.

¹⁰⁵ *Ibid.*, p. 1250.

¹⁰⁶ E. McDermott III, "California Rape Evidence Reform: An Analysis of Senate Bill 1678," *Hasting Law Journal* 26 (1974) in Katharina Jehle, "Legislating 'Legitimate' Victims: How the 'Jailhouse Exclusion' Denies Inmates in the Protection of California's Rape Shield Statute," *Stanford Journal of Criminal Law and Policy* 3 (2006): 65.

¹⁰⁷ Ronet Bachman and Raymon Paternoster, "A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?" *Journal of Criminal Law & Criminology* 84 (1993): 560.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, p. 566.

¹¹⁰ *Ibid.*, pp. 567-568.

¹¹¹ *Ibid.*

¹¹² Spohn & Horney, "Rape Law Reform," pp. 874-876.

¹¹³ *Ibid.*

the court.¹¹⁴ Regarding conviction rates, their report also supported Bachman and Paternoster finding that there was a significant change in conviction rate on rape crime, from 16.7% to 50.0%.¹¹⁵

The victim, however, is still potentially attacked by the defense attorney at court regarding the truthfulness or untruthfulness of a witness.¹¹⁶ In rape cases, the only witness is often the victim.¹¹⁷ As Chief Justice Sir Matthew Hale popularly stated in 1680 “[rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.”¹¹⁸

A victim’s credibility would be at stake if she had made a false allegation against the suspect in the past. Moreover, a victim who recanted her complaint would have her credibility undermined.¹¹⁹ Brett explains two reasons that construct this perception; *first*, the public views false allegations as a recurring issue that should be addressed in a trial, and *second*, some jurisdictions acknowledge a recantation as evidence because of the presumption as it was a false allegation, it led the victim to recant her claim.¹²⁰

Nevertheless, the reason that the victim has recanted her report is not only down to it being a false accusation or as a result of insufficient evidence, but also out of the fear of being raped for a second time at trial.¹²¹ A victim’s credibility was discredited not only in the U. S., but also in Scotland, where defense lawyers “... simply want to destroy a complainant.”¹²² Brett, therefore, proposes the amendment of rape shield law, especially in examining false allegation. She suggests the following:

*[i]n evaluating whether the defense has demonstrated the falsity of an accusation by clear and convincing evidence, the trial judge should not treat evidence that the victim has recanted a prior accusation as per se evidence of the accusation’s falsity. Instead, in making the falsity determination, the trial judge should weigh recantation evidence alongside other evidence that tends to demonstrate the truth or falsity of the accusation.*¹²³

Currently, DNA evidence is widely used to minimize the risk of false accusation, especially in a rape case. DNA testing is the most advanced technology being used in the criminal justice system because it is the most valid and reliable form of evidence.¹²⁴ DNA testing replaced traditional forensics; for instance, hair comparison, and blood typing (also called serology). Despite the fact that more than one person could have the same DNA, the matched probability is still higher than the previous technology. For instance, hair comparison relies on an analyst’s argument and it could be different

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ Christopher Bopst, “Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform,” *Legislative Reform: Journal of Legislation* 24, iss. 1 (1998).

¹¹⁷ *Ibid.*, p. 137.

¹¹⁸ Matthew Hale, *The History of the Pleas of the Crown* 635 (London: Professional Books Limited, 1971) in Brett Erin Applegate, “Prior (False?) Accusations: Reforming Rape Shields to Reflects the Dynamics of Sexual Assault,” *Lewis & Clark Law Review* 17, no. 3 (2013): 902.

¹¹⁹ *Ibid.*, p. 904.

¹²⁰ *Ibid.*

¹²¹ Laura Bates, “A crime upon a crime: Rape, Victim-Blaming, and Stigma,” August 16, 2012, <http://www.womenundersiegeproject.org/blog/entry/a-crime-upon-a-crime-rape-victim-blaming-and-stigma>, accessed September 29, 2016.

¹²² Leanne M. Bain, “The Failures of ‘Shield Legislation’: Sexual History Evidence, Feminism and the Law,” *Aberdeen Student Law Review* 1 (2010): 104.

¹²³ Applegate, “Prior (False?) Accusations,” p 920.

¹²⁴ Garret, *Op. Cit.*, pp. 84-89.

from one analyst to another.¹²⁵ Furthermore, serology could be invalid because “many millions of people might also share [same] blood type.”¹²⁶

DNA testing was first used to release a wrongfully convicted person in 1989.¹²⁷ This was Gary Dotson who had been convicted of aggravated kidnapping and rape. He was sentenced between 25 to 50 years of imprisonment in July 1979. That conviction was made because of a victim’s false testimony who told law enforcement that Gary Dotson raped her although she had had consensual intercourse with her boyfriend. The victim said that she had lied about her testimony several years later. However, the judge refused to hold a new trial. Afterward, Dotson asked the court for post-conviction DNA testing, and the court granted it. The post-conviction DNA testing trial proved that Dotson was innocent.¹²⁸

The reliability and validity of DNA inspired many other innocent people, and law enforcement agencies, to use it in the criminal justice system. DNA evidence brought significant reform to the U.S. criminal justice system, especially in evidence rulings.¹²⁹ Similarly to Dotson, 344 people have been exonerated because of DNA test.¹³⁰ Moreover, 148 actual perpetrators could be convicted because of DNA testing.¹³¹ DNA evidence should be utilized to increase the probability in proving a perpetrator’s guilt where several items of prejudicial evidence such as a victim’s previous sexual history and proof of resistance had been excluded.

V. CONCLUSION

Prejudicial evidence such as a victim’s previous sexual history and lack of resistance has brought injustice upon rape victims. Such prejudices are still considered as credible evidence to acquit a defendant, or used as justification to give a lenient sentence. And yet the victim will be humiliated by the defense counsel or law enforcement representatives regarding both of these types of prejudicial evidence. They experience impartiality at trial, which potentially stops other victims from reporting a crime because they know that the criminal process is traumatizing. This situation arguably puts women in a more dangerous position in society because sexual predators are left free to roam.

The U. S. has responded to this unfair system by enacting rape shield law since 1975. This law protects rape victims by excluding from court a victim’s sexual history and by not requiring proof of resistance. The exclusionary rule about that evidence resulted in increasing the number of victims who reported rape. In addition, the rate of convictions in rape crime also increased. Across the U. S., however, there are some differences in how rape shield law is regulated, especially concerning what evidence can be excluded, and what process is to be taken to eliminate that evidence from consideration.

¹²⁵ *Ibid.*, pp. 86.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, p. 88.

¹²⁸ Rob Warden, “Gary Dotson: The rape that wasn’t — the nation’s first DNA exoneration,” Bluhm Legal Clinic, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/gary-dotson.html>, accessed September 26, 2016.

¹²⁹ Beatrice Schiffer & Christophe Champod, *Judicial Error and Forensic Science: Pondering the Contribution of DNA Evidence*, in *Wrongful Conviction: International Perspectives On Miscarriages Of Justice* 36, (C. Ronald Huff & Martin Kiliyas ed, 2008).

¹³⁰ Innocence Project, <http://www.innocenceproject.org/>, accessed September 26, 2016.

¹³¹ *Ibid.*

In contrast, where rape shield law was criticized it was claimed that it would encourage wrongful convictions consequent to false allegations of rape. Some states order that a victim's history of false accusation cannot be excluded from trial, so as to ensure a fair hearing. Moreover, DNA testing is widely used by law enforcement agencies to prove the perpetrator's guilt. DNA testing is also useful to minimize the risk of wrongful conviction after a false allegation is made.

In the future, a discussion of Indonesian regulations on forms of evidence, based on the Indonesian Criminal Procedure (KUHP), should be written. In this Procedure, the judge convicts someone as guilty on the basis of two pieces of evidence. There is concern among law scholars that should the prejudicial evidence be excluded it will only create another problem for the victim because the judge would hardly meet the minimum requirement of evidence. There is also a debate about the judge's impartiality in considering and deciding cases.

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