

# WOMEN RIGHTS FULFILLMENT AS THE VICTIM OF GROSS HUMAN RIGHTS VIOLATION: URGENCY FOR THE SEXUAL VIOLENCE ERADICATION BILL

Ani Purwanti\* & Rian Adhivira Prabowo\*\*

\* Faculty of Law, Diponegoro University, Semarang, Indonesia

\*\* Mahidol University, Thailand

---

## Article Info

Received : 11/10/2016 | Received in revised form : 4/7/2018 | Accepted : 5/28/2018

Corresponding author's e-mail : rianadhivira@gmail.com

## Abstract

*Heretofore in Indonesia, cases of gross violation of human rights have faced an indefinite stagnation of justice. Although the Indonesian government has ratified international human rights conventions and enacted its own system of human rights law, such laws have proven unable to fulfill the restoration of justice toward these victims in two particular aspects: convictions against the perpetrators and reparations for the victims. This article focuses on fulfilling the rights of women victims of past gross human rights violations. It will be based on normative legal research by which the existing laws are critically analyzed in order to expose the legal gaps which might have contributed to the inability of these laws to restore justice and the victims' well-being. Furthermore, the article stresses an urgency upon the enactment of the Sexual Violence Eradication Bill. It contends that the Sexual Violence Eradication Bill is an essential first step for the fulfillment of women victims' rights, inasmuch as the bill includes an exhaustive mechanism of penal provisions against sexual crimes under various circumstances, including as part of gross human rights violations.*

**Keywords:** Women Victims' Rights, Gross Human Rights Violation, Sexual Violence Eradication Act

## Abstrak

*Di Indonesia, kasus-kasus lampau mengenai pelanggaran berat hak asasi manusia (HAM) masih mengalami stagnasi yang tidak pasti. Meskipun pemerintah Indonesia telah meratifikasi konvensi HAM internasional dan menetapkan hukum HAM-nya sendiri, peraturan-peraturan ini tidak mampu untuk memenuhi keadilan dari para korban berdasarkan dua ketentuan; penghukuman pada pelaku dan mekanisme reparasi terhadap korban. Dari semua kasus-kasus pelanggaran HAM berat, artikel ini berfokus pada pemenuhan hak terhadap perempuan korban pelanggaran HAM berat lampau. Artikel ini didasarkan pada riset hukum normatif dimana hukum yang ada akan dianalisis secara kritis untuk melacak kesenjangan hukum yang berkontribusi pada ketidakmampuan hukum HAM di Indonesia untuk memenuhi keadilan dan kesejahteraan para korban. Selanjutnya, artikel ini menekankan urgensi terhadap penetapan Rancangan Undang-Undang Penghapusan Kekerasan Seksual yang merupakan langkah awal penting terhadap pemenuhan hak perempuan korban pelanggaran berat HAM lampau.*

**Keywords :** Hak Korban Perempuan, Pelanggaran Berat Hak Asasi Manusia, Rancangan Undang-Undang Penghapusan Kekerasan Seksual

## I. INTRODUCTION

Gross human rights violations have typically constituted a complicated criminal typology that includes political aspects during periods of regime or transitional justice. Specifically, women victims have occupied a more complicated position with regard to their social burden. This research refers to two infamous sex crimes involving severe human rights violations, namely the 1965 Indonesian massacres and the May 1998 Indonesia riots. Information regarding both tragedies was obtained from secondary data, specifically the report of The National Commission of Women, and the Tim Gabungan Pencari Fakta (TGPF) (Joint Fact Finding Team) Report of 1998), respectively. They were chosen not for the specifics of the events, but rather the precedence of sexual crimes against authoritarian regime critics, as well as in the incapacity of women's rights fulfillment and silencing them as victims of sexual crime. Both tragedies actually have political and cultural relations which will be further explained in the following paragraphs.

The explanation regarding sexual crimes or abuse is inseparable with rape as their most vulgar form and manifestation. According to Mackinnon, rape is a complicated problem related to women's body legitimacy in which there is a moral burden on women which makes them sensitively incapable of easily sharing their experience. Furthermore, Mackinnon says, rape is an element of patriarchal culture.<sup>1</sup> Nicola Lacey, like Mackinnon, opines that the law fails to appreciate women's bodies, because rape is not only related to women in the context of penetration, but also represents lame sexual culture representation.<sup>2</sup> In other words, says Carol Smart, rape in the law is a form of social disqualification of women's sexuality. Smart took the strategic position of law in giving the definition and authority of sexuality.<sup>3</sup> Based on those three feminist legal theoreticians, it can be concluded that the law as related to social hierarchy that produces the silencing of women's voices. In the present case, even though the researcher agrees that rape is not only penetration, in order to show the lack of existing laws to handle victims of past human rights violation, this research is going to confine its definition to physical rape, as the law narrowly defines it.

The 1965 tragedy remains a major unsolved crime in Indonesia. Many local and international investigators have researched the tragedy and its victims. The Truth and Reconciliation Commission formed by President Soekarno reported 78,000 death victims from the tragedy, though the head of the commission said that the true number was vastly higher. Sarwo Edhie, the first head of the commission, put the number of victims at some three million people. A moderate figure often referred to

---

<sup>1</sup> Catharine Mackinnon, *Feminism Unmodified, A discourse on Life and Law* (Cambridge: Harvard University Press, 1987), pp. 82–4. Mackinnon defines rape based on the broad scope of sexist culture which undermines women. In that context, every sexual relation is considered rape. Mackinnon says that not all of sexual intercourse is committed as a crime, but women's silencing makes sexual consensus imbalanced, leaving the relation become bias and injustice.

<sup>2</sup> Nicola Lacey, *Unspeakable Subjects, Feminist Essays in Legal and Social Theory* (Oxford: Hart Publishing, 1998), pp. 107–8. Lacey's definition of social relations can be applied to Indonesian culture, as in the social contract of women's virginity, which, on the one hand, appreciates women's bodies, but, on the other hand, imprisons women as victims and makes them silent and excluded from the society. This problem derives from the psychological burden of the victim to retell their experience and undergo procedural law. At this point, the action and special-like UPPT in the police-is meeting its urgency.

<sup>3</sup> Carol Smart, *Feminism and the Power of Law* (London & New York: Routledge, 2002), pp. 26–49. In accordance with Smart, practical law and the handling of rape cases shows how women's perspectives are often considered insignificant. The insignificance is related to their social value, which is exemplified by Smart as the dating dictum, "Women who say *no* do not necessarily mean *no*."

is five hundred thousand. With imprisonment it swells to more than a million people.<sup>4</sup>

This research is focused on the women in that figure. The *Ad Hoc* team of the National Human Rights Commission in 2012 found that rape in the post-1965 tragedy was among the most heinous human rights violations.<sup>5</sup> Somehow, the rapes were not just incidental; there was a driving force behind them, a political force. Wieringa states that the cruelties suffered by the victims of the 1965 tragedy, especially the women, started with propaganda designed by the military, who stereotyped the women as vixens of low moral character, who had incited the Lubang Buaya purge of Army generals as a campaign tool to reduce the number of Soekarno supporters.<sup>6</sup> The resulting propaganda not only affected the victims directly, but indirectly damaged the women's movement in general, which was changed by private roles.

The National Commission of Women wrote a special report about the women victims of the tragedy. It stated that women suffered pervasive and systematic human rights violations and that the crimes constituted gender-based persecution, whereby rape, violence, and sexual slavery were integral to the crime against humanity, whether by state or non-state actors. The report presented many recommendations to accommodate the rights of the victims.<sup>7</sup> Somehow, however, no significant action resulted. Because of this impasse, in 2015, the International Criminal Tribunal finally, officially reaffirmed the sexual crime of the 1965 Tragedy.

The same crimes against women occurred during the transitional New Order period (*Orde Baru*), in 1998–99. Based on those incidents, the Truth and Reconciliation Commission (*Tim Gabungan Pencari Fakta (TGPF)*) was formed to find the official facts. It should be noted that the women's movement experienced a significant setback after the downfall of President Soekarno, and negative stereotypes against women in public were pervasive.<sup>8</sup> The team divided the types of sexual abuse into several categories: rape, rape with persecution, rape attacks/tortures, and sexual harassment. According to the TRC, sexual abuse occurred in several places where Chinese were specifically targeted. The TRC also recommended that the government investigate and make restitution to the victims, but there was no significant action in

<sup>4</sup> See Robert Cribb, *The Indonesian Killings, The Killing of PKI in Java and Bali in 1965–66* (Yogyakarta: Mata Bangsa & Syarikat Indonesia, 2004); Douglas Kammen & Katherine McGregor, eds. *The Contours of Mass Violence in Indonesia, 1965–68* (Honolulu: Asian Studies Association of Australia & University of Hawaii Press, 2012); ICTJ & KontraS, *Derailed, Transitional Justice in Indonesia Since the Fall of Soeharto* (Jakarta: ICTJ-KontraS, 2011); D. Firdiansyah, Andi Nur Aziz, *Executive Summary of Severe Human Rights Violation Investigation* (Jakarta: Komnas HAM RI, n.d.).

<sup>5</sup> Statement of the National Human Rights Commission about the Investigation of Severe Human Rights Violations in 1965–1968, 23<sup>rd</sup> July 2012.

<sup>6</sup> Saskia E. Wieringa, "Sexual Politics as a Justification for Mass Murder in The Act of Killing," *Critical Asian Studies* 46, no. 1 (2014); Saskia E. Wieringa, "The Birth of the New Order State in Indonesia, Sexual Politics and Nationalism," *Journal of Women's History* 15, no. 1 (2003); Saskia E. Wieringa, *Penghancuran Gerakan Perempuan: Politik Seksual di Indonesia Pascakejatuhan PKI [The Destruction of Women's Movement: Sexual Politics in Indonesia Post-fall of the PKI]*. Yogyakarta: Galang Press, 2012. The most realistic representation is the Pancasila Sakti monument, which departs from the results of *visum et repertum* from forensic doctors regarding the deaths of generals in Lubang Buaya.

<sup>7</sup> Komnas Perempuan, *Kejahatan Terhadap Kemanusiaan Berbasis Gender, Mendengarkan Suara Perempuan Korban Peristiwa 1965 [Gender-based Crimes Against Humanity, Listening to the Women's Voices of the 1965 tragedy]*, (Jakarta: Komnas Perempuan, n.d.).

<sup>8</sup> For example, the use of communist stereotypes for Gerwani (a group related to the communist PKI party) were later attached to all women activists or women in social activities in general, especially those related to government. The rape and murder of Marsinah, a labor activist, in 1993, is one of the most prominent examples.

these cases, either.<sup>9</sup>

Both incidents showed the preponderant historical failure to seriously regard, much less prosecute, sex crime allegations. Women victims do not have proper legal access to express their personal narratives. The events show how justice is equally lame when it comes to sentencing offenders. As for what has been explained above regarding feminist law theory, women in this context suffer social and legal muzzling. Even when there is a recommended law, it cannot overcome the current failure of the legal system to accommodate the victims' rights and offender's punishment. The next part of this research will explain the rules regarding past human rights violations. It will show how existing positive law cannot fulfill women victims' rights.

## I. INDONESIAN HUMAN RIGHTS LAW REGARDING VIOLENCE AGAINST WOMEN

The Indonesian government has ratified many international human rights conventions regarding women rights, such as the International Covenant on Civil and Political Rights (ICCPR),<sup>10</sup> International Covenant on Economic, Social, and Cultural Rights (ICESCR),<sup>11</sup> and Convention on the Elimination of All-Forms of Discrimination against Women (CEDAW).<sup>12</sup> These treaties have made varying contributions to human rights law in Indonesia. Their ratifications derive from the spirit of human rights advancement, betterment of life, and democracy, thus resulting in pressures to the state to regard such pacts as constitutional obligations. They mandate the state to alleviate gender disparity, promote women's empowerment, and guarantee the enjoyment of fundamental rights without discrimination based on gender. Following their ratification, the Indonesian government is thus obliged to accommodate and enact policies and regulations for women's empowerment and the alleviation of gender disparity. Notwithstanding, the conventions have weaknesses and loopholes which may disable potential remedies for women victims of gross human rights violations.

### A. The Law No. 7/1984 on the Ratification of CEDAW

The Convention on the Elimination of All-Forms of Discrimination against Women (CEDAW) is the earliest international human rights treaty to be ratified by Indonesia. Ironically, it took place in 1984, in the era of the authoritarian New Order administration. The setting of CEDAW calls for the spirit of gender equality and the obligation of the country to constitutionally eliminate gender disparity, in order to develop women and guarantee the execution and enjoyment of their fundamental right to equal justice under the law. Based on the provisions of CEDAW, countries

---

<sup>9</sup> Ester Indah Yani Jusuf, *Kerusuhan Mei 1998 Fakta, Data & Analisa [The Riot of May 1998 Facts, Data & Analysis: Revealing the Riot of May 1998 as the Crimes Against the Humanity]* (Jakarta: Solidaritas Nusa Bangsa, 2005)

<sup>10</sup> Indonesia, *Undang-undang tentang Pengesahan International Covenant on Civil and Political Rights (Kovenan Internasional Tentang Hak-Hak Sipil dan Politik) (The Law on the Ratification of ICCPR)*, UU No. 12 tahun 2005, LN No. 119 tahun 2005, TLN No. 4558 (Law No. 12 of 2005, SG No. 119 of 2005).

<sup>11</sup> Indonesia, *Undang-undang tentang Pengesahan International Covenant on Economic, Social, and Cultural Rights (Kovenan Internasional Tentang Hak-Hak Ekonomi, Sosial, dan Budaya) (The Law on the Ratification of ICESCR)*, UU No. 11 tahun 2005, LN No. 118 tahun 2005, TLN No. 4557 (Law No. 11 of 2005, SG No. 118 of 2005).

<sup>12</sup> Indonesia, *Undang-undang tentang Pengesahan Konvensi mengenai Penghapusan Segala Bentuk Diskriminasi terhadap Wanita (Convention on the Elimination of All Forms of Discrimination Against Women)*, UU No. 7 tahun 1984, LN No. 29 tahun 1984, TLN No. 3277 (Law No. 7 of 1984, SG No. 29 of 1984).

are obliged to accommodate and attempt to advance the development of women. Meanwhile, some affirmative actions are politically regulated. But past human rights violations have not been sufficiently solved by this rule, which discrepancy will be discussed later. Since then, the only significant outcome regarding violence against women has been the inception of the National Commission on Violence against Women of Indonesia in 1999, via Presidential Order No. 181/1998. The Commission was authorized solely for its recommendation, campaign, and investigative duties. Regardless, the ratification still has limit in action as to its relation to other human rights legislations, especially the Law No. 39/1999 and the Law No. 26/2000.

### **B. International Covenant on Civil and Political Rights (ratified into the Law No. 12/2005)**

Regarding gender equality, ICCPR has exclusively stipulated an obligation for the State Parties in Article 3.<sup>13</sup> This article states that there shall be no gender-based differences regarding citizens' enjoyment of their rights. In the event of its violation—any human rights violation—Article 2 point (3) stipulates the obligation for state parties to provide effective remedies for the victims.<sup>14</sup> The article exhibits a mechanism for reparations from which the remedies are purposed for the restoration of the victim(s)' well-being.

### **C. Law No. 39/1999 (Human Rights Act) and Law No. 26/2000 Human Rights Court (Human Rights Court Act)**

Corresponding to the treaties noted above, the Indonesian government has enacted its own human rights laws through Law No. 39/1999 on Human Rights<sup>15</sup> and Law No. 26/2000 on Human Rights Court.<sup>16</sup> Other than being a legal foundation for human rights law in Indonesia, Law No. 39/1999 also mandates the initiation of a national human rights institution, which later resulted in the creation of the National Human Rights Commission of Indonesia. (NHRCI). NHRCI has a fundamental role as the preferred enforcer of human rights law. It conducts investigations and produces reports regarding Indonesian human rights violations, past or recent. Yet, Indonesia's human rights laws have a special constitutional limitation that proscribes its is stipulated in Article 28J paragraph (2) of the 1945 Indonesian Constitution (cf.

<sup>13</sup> "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

<sup>14</sup> "3. Each State Party to the present Covenant undertakes:

- a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by person acting in an official capacity;
- b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- c) To ensure that the competent authorities shall enforce such remedies when granted."

<sup>15</sup> Indonesia, *Undang-undang tentang Hak Asasi Manusia (Law on the Human Rights)*, UU No. 39 tahun 1999, LN No. 165 tahun 1999, TLN No. 3886 (Law No. 39 of 1999, SG No. 165).

<sup>16</sup> Indonesia, *Undang-undang tentang Pengadilan Hak Asasi Manusia (Law on the Human Rights Court)*, UU No. 26 tahun 2000, LN No. 208 tahun 2000, TLN No. 4026 (Law No. 26 of 2000, SG No. 208 of 2000).

footnote.<sup>17</sup> Such limitation is also stipulated in Article 73 of Law No. 39/1999.<sup>18</sup>

Meanwhile, Law No. 26/2000 on the Human Rights Court is broadly defined to include gross human rights violations that predate the law. The main purpose of the Human Rights Court Act is to establish an *ad hoc* entity, with its own jurisdiction and authority, to resolve historical cases of human rights violation. According to the Law No. 25/2000, there are two kinds of gross violation of human rights: genocide, and crimes against humanity. The corresponding commissions for human rights (National Human Rights Commission of Indonesia and National Commission on Violence Against Women) tend to refer to their recommendations of gross human rights violations as “crimes against humanity,” as stipulated in Article 9 of the Law *a quo*.<sup>19</sup>

In Law *a quo*, there are procedures for reparation of damages, and restitution of justice for the victim, as stipulated in Article 35, and further in Government Regulation No. 3/2002 on Compensation, Restitution, and Rehabilitation for Victims of Gross Violation of Human Rights. In the latter, such a victim is defined as a “...*subject, individual or group who has experienced suffering(s) of physical, mental, emotional or economic harm, or of neglect, denigration, or deprivation of basic rights as a consequence of gross violation of human rights, by which the victim’s heirs/beneficiaries are included.*” According to Law No 28/2000, the rights to compensation, restitution, and rehabilitation can only be retrieved or realized by the victims if the Human Rights Court recognizes them as stipulated in Article 35, paragraph (2). However, the concept of restorative justice requires a reciprocal action toward both offender and victim. The victim cannot be compensated for their loss of rights without the offender being present and already convicted. The court’s verdict will determine the status of the victim as legally eligible for compensation, restitution, and/or rehabilitation.

#### D. Indonesian Criminal Code

Although the Human Rights Act authorizes trial procedures for gross human

---

<sup>17</sup> “In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security, and public order in a democratic society.”

<sup>18</sup> “Rights and freedoms as stipulated in this Act shall only be limited by, and based on, laws for the sole purposes of guaranteeing recognition and respect to human rights and therewith to the basic freedoms of others, morality, social order, and national interests.”

<sup>19</sup> “Crime against humanity as stipulated in Article 7, Letter B is one of a host of acts committed as part of an escalating and systematic aggression by one who acknowledges their target(s) as civilian. The act may include:

- a. Murder;
- b. Intentional extermination;
- c. Slavery;
- d. Expulsion or forced eviction of individual or group;
- e. Deprivation of freedom or any tangible arbitrary deprivation of freedom which violates international laws
- f. Torture;
- g. Rape, sexual slavery, forced prostitution, forced pregnancy, sterilization or forced sterilization or any kind of equivalent act of sexual violence;
- h. Targeted persecution towards certain groups or communities, based on resemblances of political ideology, race, nationality, ethnicity, culture, religion, gender, or any rationale that has been universally recognized to be forbidden according to international law;
- i. Forced disappearance of people; and/or
- j. Apartheid.

rights violations, the criminal offense is still accredited to the Criminal Code, which subsumes all criminal laws that regulate the formulation of criminal offenses. In accordance with the Criminal Code, the Human Rights Court Act provides only the general formulation of an offense with additional elements of broad and systematic impact. Nevertheless, the formulation of offenses within the Human Rights Court Act are still referred to the Criminal Code, which is higher and wider in terms of authority and scope, in accordance with general legal principles. Furthermore, the Criminal Code only describes a narrow formulation of sexual violence delict. In Letters G and H of Article 9 of the Criminal Code, sexual violence is limited to rape involving vaginal penetration. The penetrative-based sexual offense is stipulated in article 285<sup>20</sup> and 286<sup>21</sup> of Criminal Code.

The narrow definitions of these articles are classified in the Criminal Code as indecency offenses or unlawful acts against morality, in which the delict only recognizes forced vaginal penetration as rape. Symbolically, this penetration-based delict of rape is a clear illustration of patriarchy.<sup>22</sup> The sexist tendency is also aggravated by the narrow definition which only recognizes physical violence, as stipulated in Article 89 of the Criminal Code.<sup>23</sup> Previously, in cases of gross human rights violations, physical injury was not the only consequence. Likewise injurious were prevailing propaganda and injustice via political and social threats from a certain regime. That could be argued if the use of Law No. 26/2000 through the *Ad Hoc* court were strictly text-based, with no intention to consider beyond-the-law facts and influences that often occur in such cases. Such intentional strictness of human rights law is what contributes to its failure to not only resolve past cases, but to also reparate its victims', especially women victims', rights of compensation, restitution, and rehabilitation for their abusive experiences.

## II. LEGAL LOOPHOLES AND NEGLECTED RIGHTS FOR WOMEN VICTIMS OF GROSS HUMAN RIGHTS VIOLATION

It has been noted that the relationship between the Human Rights Court Act and the Criminal Code contributes to the stagnation of human rights fulfillment for women victims. Add to that the limited definition of sexual violence, especially in the context of past gross violations of human rights. Mackinnon argues that due to the sexist and unequal culture, the law invariably fails to respect women's bodily experiences. This is demonstrated by the use of sheer vaginal penetration as its definition for rape, as Mackinnon noted:

*"The crime of rape—this a legal and observed, not a subjective, individual, or feminist definition—is defined around penetration. That seems to me a very male point of view on what it means to be sexually violated. And it is exactly what heterosexuality as a social institution is fixated around, the penetration of the penis into the vagina. Rape is defined according to what men think violates women, and that is the same as what they think of as the sine qua non of sex.*

<sup>20</sup> "Whoever, by force or threat of violence, forces a woman to have sexual intercourse with him shall, being guilty of rape, be punished by a maximum imprisonment of twelve years."

<sup>21</sup> "Whoever has sexual intercourse with a woman, outside of a marriage, whom he knows is unconscious or helpless, shall be punished by a maximum imprisonment of nine years."

<sup>22</sup> Niken Savitri, *HAM Perempuan: Kritik Teori Hukum Feminis terhadap KUHP [Women's Human Rights: Feminist Theory Critique against the Penal Code]* (Bandung: Refika Aditama, 2006) p. 104

<sup>23</sup> Article 89 of Criminal Code states, "The commission of violence is identified with bringing a person in a state of unconsciousness or helplessness." See the further critics in *ibid*, p. 108

*What women experience as degrading and defiling when we are raped includes as much that is distinctive to us as is our experience of sex. Someone once termed penetration a peculiarly resented aspect of rape. I do not know whether that meant it was peculiar that it was resented or that it was resented with heightened peculiarity. Women who have been raped often do resent having been penetrated. But that is not all there is to what was intrusive or expropriative of woman's sexual wholeness.<sup>24</sup>*

As a comparison, the International Criminal Tribunal for Rwanda (ICTR) took some progressive steps with regard to rape, through its use of the international court for genocide. It extended the definition of sexual abuse to include not just physical rape, but also threats, intimidation, extortion and other forms of duress which prey on fear or desperation, or may constitute coercion, which became the first definition of rape in international law.<sup>25</sup>

The Rwandan experience thus defines sexual abuse in the wider sense. Sexual violence is understood in international law as a tool of certain regimes to oppress their enemies, a gross human rights violation.<sup>26</sup> In Indonesia, Article 9 Law 26/2000 does not offer a further explanation. However, the last phrase about "the equal form of abuse" can be seen as a loophole that can be used to define wider sexual abuse. The urgency comes with the burden of presenting evidence in an ad hoc human rights session. With time, it will become increasingly difficult to present witnesses or *visum et repertum* based on the Criminal-Law Procedural Code requirement.<sup>27</sup> It's more difficult because there is no significant precedent for extending the definition of sexual abuse in Indonesia's jurisprudence. It demonstrates a need for aggressive interpretation of law on behalf of the victim, and the reliance on the progressiveness of the judge in interpreting the law.

There is no recognition mechanism for women victims that can be called a legal vacuum, in which the status of the victim and the rights receiver can be gained after doing some steps as stated on Law 26/2000 which is more focused on punishment than reparations. With no legal judgment against the perpetrator, the victim cannot receive reparations. As time goes by, without fulfillment, the psychological burden on the woman victim will increase the trauma, and grow more dangerous. Testimony from Ibu Kikin in the 1965 Tribunal Court in The Hague revealed that she had hidden the psychological burden for decades. The investigation by Ita Fadia Nadia about the women victim who encountered sexual abuse also showed a severe psychological burden.<sup>28</sup> Another example is the experience of sexual abuse survivors in Rwanda in

<sup>24</sup> MacKinnon, *Feminism Unmodified*, p. 87

<sup>25</sup> The law is gained from the Jurisprudence of Prosecutor V Akayesu. The judge allowed that rape has a deep effect on the victim and the society that was equal to prosecution, and decided that Akayesu was at fault of sexual abuse towards Tutsi and Taba, and the surrounding society. See Aex Obote-Odora, "Rape and Sexual Violence in International Law: ICTR Contribution," *New England Journal of International and Comparative Law*, 12, no. 1 (2005)

<sup>26</sup> Anna Llewellyn Barstow, *War's Dirty Secret: Rape, Prostitution, and other Crimes against Women* (Cleveland: The Pilgrim Press, 2000)

<sup>27</sup> Based on Article 184 Indonesian Criminal Procedural Law, the evidence is the testimony from the witness, expert, letters, clues, and the defendant's testimony. The victim as witness should be completed with other evidences which without one the witness is not a witness. The rules regarding the evidence make meeting the qualifications for the victim difficult.

<sup>28</sup> Ita F. Nadia, *Suara Perempuan Korban Tragedi 65 [The Women's Voices of the 65 Tragedy]* (Yogyakarta: Galang Press, 2012).

which the women victims were often haunted by their past, and frightened every time the image of the rape entered their minds.<sup>29</sup>

### III. SEXUAL VIOLENCE ERADICATION BILL: URGENCY AND RELEVANCE

As previously mentioned, the inability of existing laws to accommodate and fulfill the rights of women victims of gross violation of human rights is also the failure of the Indonesian government in its responsibility to promote women's empowerment and women rights as mandated by the CEDAW and ICCPR. The current laws are insufficient. There must be a new resolution which can accommodate the needs of women victims of gross human rights violations. At this point, the Sexual Violence Eradication Bill has been parked on the legislative agenda in the Indonesian House of Representatives since the 2016 Prioritized National Legislative Program.

Here are the rationales that assert the urgency and relevance of the Sexual Violence Eradication Bill to the fulfillment of rights of women victims of past gross human rights violation:

The Sexual Violence Eradication Bill focuses on how current enforcement of the law actually promotes sexual violence, especially against women. The bill re-contextualizes the definition of sexual violence beyond the narrow concept of penetrative rape in the Criminal Code, as stipulated in Article 1 Paragraph (1) of the Sexual Violence Eradication Bill:

*"Sexual violence is any unlawful act that violates the dignity of a person, their body and/or sexuality, contributing to his/her gender discrimination, causing loss or suffering of one's physical, mental, economic, sexual, political, and social well-being."*

Moreover, the Sexual Violence Eradication Bill stipulates an exhaustive definition on sexual violence in its Article 11:

- "(1) Sexual violence includes:*
- a. Sexual harassment;<sup>30</sup>*
  - b. Sexual exploitation;<sup>31</sup>*
  - c. Forced contraception;<sup>32</sup>*
  - d. Forced abortion;<sup>33</sup>*

<sup>29</sup> D. Mukamana & A. Collins, "Rape Survivors of the Rwanda Genocide," *International Journal of Critical Psychology* 17 (2016): 154.

<sup>30</sup> Article 12 of the Bill *a quo* stipulates, "Whoever commits physical or non-physical action against another, of whose part(s) of the body attract(s) sexual desire, to whom causes intimidation, denigration, disparagement, or humiliation, shall be punished for sexual harassment."

<sup>31</sup> Article 13 of the Bill *a quo* stipulates, "Whoever, by force, threat of violence, deception, a series of lies, fake identity, or manipulation of trust, compel someone to commit sexual relations with themselves or others, or an act of exploiting the body of whomever attracts sexual desire, with an intention of benefitting him/herself or others, shall be punished for sexual exploitation."

<sup>32</sup> Article 14 of the Bill *a quo* stipulates, "Whoever controls, ceases and/or harms reproductive biological organ(s), function, and/or system of others, by force, threat of violence, deception, a series of lies, or abuse of power, to whom they may lose control of their reproductive organ(s), function(s), and/or system and/or rendering them unable to procreate, shall be punished for forced contraception."

<sup>33</sup> Article 15 of the Bill *a quo* stipulates, "Whoever coerces others to abort pregnancy by force, threat of violence, deception, a series of lies, abuse of power, or taking advantage of someone's condition who is not able to give consent, shall be punished for forced abortion."

- e. Rape;<sup>34</sup>
- f. Forced marriage;<sup>35</sup>
- g. Forced prostitution;<sup>36</sup>
- h. Sexual slavery; and<sup>37</sup>
- i. Sexual torture.<sup>38</sup>

(2) Sexual violence as stipulated in paragraph (1) include sexual violent act(s), in personal relationship, marriage, at workplace, in public during conflict, disaster, and any other particular situations.”

The Sexual Violence Eradication Bill also stipulates an exhaustive set of rights for the victims, their family(ies), and witnesses in which are; right to facilitation, right to protection, right to recovery. Article 23 of the Sexual Violence Eradication Bill stipulates the right to handling as to providing exhaustive, multi-sector, and integrated facilities to secure the victim’s safety, along with their family and personal assets, during and after the trial process for sexually violent crime. The fulfillment of this right is intended to restore, reinvigorate, and re-empower the victim and family to retake control of his/her life during and after the trial process. Thus, the right for facilitation provides the victim with services providing information, documentation, legal assistance, psychological assistance, health treatments, and facility(ies).

Moreover, the right to protection is a right of victims to receive security measures by law enforcement during and after the trial process. Otherwise, victims of sexual violence can apply for protection to the Witness and Victim Protection Agency. This security measure can also be applied to the victim’s family, relatives, community, and/or personal assets from other threats of violence. The right to protection includes access to information, restraining order(s), and identity secrecy. It also provides immunity for the victim of sexual violence from any action which discourages them to stop or halt their testimonial process. Such victim protections are applied to the protection them from discriminative or disparaging actions of law enforcements toward the victim, threat or possibility of losing their job, mutation, or restriction of access to justice, and from the consequence of cross charges victimization—either civil or criminal lawsuit—due to their witnessed testimony.

The right to recovery is a mechanism provided by corresponding facilities and

<sup>34</sup> Article 16 of the Bill *a quo* stipulates, “Whoever, by force, threat of violence, deception, a series of lies, or takes advantage of someone who is unable to give consent to commit sexual relation, shall be punished for rape.”

<sup>35</sup> Article 17 of the Bill *a quo* stipulates, “Whoever abuses power by force, threat of violence, deception, a series of lies, or other mental oppression such that someone is unable to give consent to commit marriage, shall be punished for forced marriage.”

<sup>36</sup> Article 18 of the Bill *a quo* stipulates, “Whoever by force, threat of violence, a series of lies, fake identity, or abuse of power, for the benefit of whom, compels someone to prostitute, shall be punished for forced prostitution.”

<sup>37</sup> Article 19 of the Bill *a quo* stipulates, “Whoever commits one or more sexually violent acts as stipulated in Article 13 to Article 18 to restrict someone’s movement or freedom, with a purpose to posit he/she to serve the sexual needs of whomever for a certain period, shall be punished for sexual slavery.”

<sup>38</sup> Article 20 of the Bill *a quo* stipulates, “Whoever commits one or more sexually violent as stipulated in Article 12 to Article 18, with purposes of:

- a. Obtaining information from victim(s), witness(es), or a third party; and/or
  - b. Coercing victim, witness, or of a third party to not testify; and/or
  - c. Unlawfully judging or punishing upon an act by whom or others it is suspected, in order to denigrate or humiliate his/her dignity; and/or
  - d. Other purposes attributed to discrimination,
- Shall be punished for sexual torture.”

institutions for recovery of damages, whether physical, psychological, economic, social, or cultural, and restitution of the victim. The recovery mechanism includes various facilities and assistance for medical and psychological health, access to information, legal assistance, court assistance, transportation costs, living expenses, other expenses, access to safe house, spiritual guidance, education facility, civil documentation, psychological assistance for the victim's family, and social supports.

Moreover, it is argued that the Sexual Violence Eradication Bill can convict or bring to trial, past cases of gross human rights violation(s) which involve sexual violence. The conviction is possible due to the exhaustive criteria of sexual violence—not merely rape—stipulated in the Bill which have never been stipulated in past legislations. The legitimacy of the Sexual Violence Eradication Bill in regards to criminal law at-large is also certain as the Bill stipulates exhaustive criminal procedures of investigation, burden of proof, and trial, which have been adjusted to the special needs and occasions regarding restorative justice toward the victim. Compare to aforementioned legislation regarding human rights violations such as the Human Rights Court Act, the Sexual Violence Eradication Bill is more accommodating, detailed, and legally assertive with regard to realizing restorative justice for women victims of past gross human rights violations.

#### **IV. CONCLUSION**

Throughout the analysis above, the relevance of the Sexual Violence Eradication Bill with regard to the fulfillment of the rights of women victims of gross human rights violations is self-evident. As previously mentioned, these victims were mainly suffering from degrading, humiliating, and dehumanizing actions which involved sex and gender as its object. As there is an element of rebellion against patriarchy and masculinity which were prominent in the era of the New Order, the violence that occurred against them was intended to demoralize their being as women by which the symbolic feminism was destroyed to the extent that the victims were considered unworthy of such femininity. Specifically, past cases of human rights violations in Indonesia are a form of intentional destruction of critical sexual politics, which were intended to liberate women from an oppressive patriarchal system established by the authoritarian New Order. As it is also concluded that such sexual violence is political in a way which is intended to uphold the patriarchy while oppressing women. The legalization of the Sexual Violence Eradication Bill is urgent to elevate the dignity of women in society by eliminating cultural practices of sexual violence. Therefore, the Sexual Violence Eradication Bill has an immense potential to not only restore and/or fulfill the rights of these women victims, but also to reinvigorate the gender liberation movement through which emancipation and gender equality can be achieved for the betterment of not only women, but society as a whole.

## Bibliography

### Legal Documents

- Indonesia. The 1945 Constitution of the State of the Republic Indonesia.
- Indonesia. *Undang-undang tentang Pengesahan International Covenant on Civil and Political Rights (Kovenan Internasional Tentang Hak-Hak Sipil dan Politik) (The Law on the Ratification of ICCPR)*. UU No. 12 tahun 2005, LN No. 119 tahun 2005, TLN No. 4558 (Law No. 12 of 2005, SG No. 119 of 2005).
- Indonesia. *Undang-undang tentang Pengesahan International Covenant on Economic, Social, and Cultural Rights (Kovenan Internasional Tentang Hak-Hak Ekonomi, Sosial, dan Budaya) (The Law on the Ratification of ICESCR)*. UU No. 11 tahun 2005, LN No. 118 tahun 2005, TLN No. 4557 (Law No. 11 of 2005, SG No. 118 of 2005).
- Indonesia. *Undang-undang tentang Pengadilan Hak Asasi Manusia (Law on the Human Rights Court)*. UU No. 26 tahun 2000, LN No. 208 tahun 2000, TLN No. 4026 (Law No. 26 of 2000, SG No. 208 of 2000).
- Indonesia. *Undang-undang tentang Hak Asasi Manusia (Law on the Human Rights)*. UU No. 39 tahun 1999, LN No. 165 tahun 1999, TLN No. 3886 (Law No. 39 of 1999, SG No. 165).
- Indonesia. *Undang-undang tentang Pengesahan Konvensi mengenai Penghapusan Segala Bentuk Diskriminasi terhadap Wanita (Convention on the Elimination of All Forms of Discrimination Against Women)*. UU No. 7 tahun 1984, LN No. 29 tahun 1984, TLN No. 3277 (Law No. 7 of 1984, SG No. 29 of 1984).
- Indonesia. *Undang-undang tentang Peraturan Hukum Pidana (Law on the Criminal Code)*. UU No. 1 tahun 1946 (Law No. 1 of 1946).

### Books

- Barstow, Anna Llewellyn. *War's Dirty Secret: Rape, Prostitution, and other Crimes against Women*. Cleveland: The Pilgrim Press, 2000.
- Cribb, Robert. *The Indonesian Killings, The Killing of PKI in Java and Bali in 1965-66*. Yogyakarta: Mata Bangsa & Syarikat Indonesia, 2004.
- Firdiansyah, D. and Andi Nur Aziz. *Executive Summary of Severe Human Rights Violation Investigation*. Jakarta: Komnas HAM RI, n.d.
- ICTJ and KontraS. *Derailed: Transitional Justice in Indonesia since the Fall of Soeharto*. Jakarta: ICTJ-KontraS, 2011.
- Jusuf, Ester Indah Yani. *Kerusuhan Mei 1998 Fakta, Data & Analisa [The Riot of May 1998 Facts, Data & Analysis: Revealing the Riot of May 1998 as the Crimes Against the Humanity]*. Jakarta: Solidaritas Nusa Bangsa, 2005.
- Kammen, Douglas & Katherine McGregor, eds. *The Contours of Mass Violence in Indonesia, 1965-68*. Honolulu: Asian Studies Association of Australia & University of Hawaii Press, 2012.
- Komnas Perempuan and Forum Pengada Layanan. *Naskah Akademik Rancangan Undang-Undang tentang Penghapusan Kekerasan Seksual [Academic Draft of Law of Elimination of Sexual Violence]*. Jakarta: Komisi Nasional Anti Kekerasan terhadap Perempuan, 2017.
- Komnas Perempuan. *Kejahatan Terhadap Kemanusiaan Berbasis Gender, Mendengarkan*

- Suara Perempuan Korban Peristiwa 1965 [Gender-based Crimes Against Humanity, Listening to the Women's Voices of the 1965 tragedy]*. Jakarta: Komnas Perempuan, n.d.
- Lacey, Nicola. *Unspeakable Subjects, Feminist Essays in Legal and Social Theory*. Oxford: Hart Publishing, 1998.
- Mackinnon, Catharine. *Feminism Unmodified, A discourse on Life and Law*. Massachusetts: Harvard University Press, 1987
- Nadia, Ita F. *Suara Perempuan Korban Tragedi 65 [Women's Voice of Victims of the 65 Tragedy]*. Yogyakarta: Galang Press, 2012.
- Savitri, Niken. *HAM Perempuan: Kritik Teori Hukum Feminis terhadap KUHP [Women's Human Rights: Feminist Theory Critique against the Penal Code]*. Bandung: Refika Aditama, 2006.
- Smart, Carol. *Feminism and the Power of Law*. Routledge: London & New York, 2002.
- Wieringa, Saskia E. *Penghancuran Gerakan Perempuan: Politik Seksual di Indonesia Pascakejatuhan PKI [The Destruction of Women's Movement: Sexual Politics in Indonesia Post-fall of the PKI]*. Yogyakarta: Galang Press, 2012.

### Articles

- Mukamana, D. and Anthony Collins. "Rape Survivors of the Rwandan Genocide." *International Journal of Critical Psychology* 17 (2006): 140-166.
- Wieringa, Saskia E. "Sexual Politics as a Justification for Mass Murder in The Act of Killing." *Critical Asian Studies* 46, no. 1 (2014): 195-199.
- . "The Birth of the New Order State in Indonesia: Sexual Politics and Nationalism." *Journal of Women's History* 15, no. 1 (2003): 70-91.