


# Artikel 6

## Construction Law for the Crime of Sexual Harassment in Indonesia: Beyond the Basics of Criminal Law

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## Construction Law for the Crime of Sexual Harassment in Indonesia: Beyond the Basics of Criminal Law

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### Abstract

Sexual Harassment in Indonesian is defined as sexual harassment, which often occurs in society. This kind of condition can be carried out by the community directly or indirectly, physically or verbally, towards the victim. Sexual harassment is an act of a sexual nature that makes the victim feel uncomfortable and disadvantaged, so legal action needs to be taken to take action against the perpetrator. Because there are so many forms of sexual harassment, it seems necessary to examine which acts of sexual harassment qualify as criminal acts according to positive criminal law in Indonesia. In this research, the formulation of the problem raised concerns about how the legal construction of sexual harassment is in criminal law in Indonesia. This research uses a normative juridical method that will analyze acts of sexual harassment that are associated with elements of criminal acts based on criminal law in Indonesia, both based on the Criminal Code and in connection with other related laws and regulations.

**Keywords:** sexual harassment; sexual; criminal acts

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## Introduction

Sexual Harassment is a term for acts of sexual harassment that occur in society (Ardiansyah et al., 2023). Sexual harassment has a different meaning from sexual violence. Sexual violence is any act that humiliates, insults, attacks, and/or other acts against the body related to sexuality by force without consent (Ardiansyah et al., 2023 Khristianti & Tantri, 2021; Pane & Nurisman, 2022). Meanwhile, sexual harassment is a sexual act through physical or non-physical touch targeting the victim's sexual organs and sexuality (Effendi, 2019). Usually acts of sexual violence start from sexual harassment (Luktiandi Putratama et al., 2023), so society needs to understand that this can happen anywhere and be experienced by anyone.

Further, there are forms of sexual harassment that need to be known so that people will understand if they experience this condition. The first form of sexual harassment is physical, sexual harassment (Suprihatin & Muhaiminul Azis, 2020). As the name suggests, *physical* or physical, the form of behavior sexual *harassment* this one relates to physical touch. The perpetrator will not hesitate to touch the victim physically, whether on the hair, hands, feet, or waist. It's even worse if the perpetrator touches private body organs, such as the chest, buttocks, and genitals. The perpetrator's actions were undoubtedly carried out without the victim's consent. Usually, physical touching starts with the perpetrator's interest in the victim. The perpetrator may spend time looking at the body shape of the potential victim. Physical touching then occurs when the perpetrator can no longer restrain excessive sexual desire. If left unchecked, this condition can make the perpetrator reckless and commit sexual violence against the victim, such as sexual abuse and rape.

The second form of sexual harassment is verbal sexual harassment (Fatura, 2019). This type of verbal sexual harassment is often found in various cases of sexual harassment on social media. Based on the Sexual Harassment in Public Spaces survey conducted in 2019, 64% of 38,755 women and 11% of 28,403 men answered that 60% of the total respondents experienced verbal or verbal harassment, 24% experienced touching, and 15% indicated harassment. visuals such as flirting or staring (Farisa & Meliana, 2019).

For example, someone who wears sexy clothes or wears a bikini, and then there is someone who writes sensual comments. Like commenting on how sexy the bikini outfit is, commenting on how exposed the chest is, and so on. People sometimes think these comments sound like jokes. The two statements above are forms of verbal sexual harassment that need to be known. The victim has the right to be firm and even angry, to the point of urging the person making the remarks not to comment on matters involving sexuality.

The third type of sexual harassment, namely non-verbal sexual harassment (Prasmadena et al., 2021), is usually an action sexual *harassment* What often happens is whistling. For example, someone is passing by a group of men, and then the group of men gives whistles and lyrics with lustful looks. Even if they are in the reckless category, the perpetrator dares to send pornographic content.

Sexual harassment can be carried out directly or indirectly, physically or verbally. Acts of sexual harassment are carried out directly, for example, when a woman passes by, someone whistles at the victim's body or looks at the victim with a lustful face. Meanwhile, sexual harassment is indirectly carried out through social media. Current technological developments impact people's access to information from various online media (Bondestam

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& Lundqvist, 2020; Reed et al., 2019). Apart from that, access to information, including communication between people, is mostly done online.

Nowadays, it is easier for anyone to access information and express themselves in cyberspace. Children, teenagers, and adults can open social media whenever and wherever they like. An example of sexual harassment via social media is, for example, someone who posts a photo of himself and then someone makes comments with a sexual nature, for example, inviting him to sleep or other comments that lead to sexual behavior. Many people do not realize that this act includes sexual harassment, which is basically detrimental and makes someone uncomfortable because of what is done to them. The acts of sexual harassment that often occur are physical, and this is something that often happens in society, for example, pinching the buttocks, touching the breasts, groping the genitals, and other forms of action. Meanwhile, verbally, acts of harassment can take the form of jokes, comments, or innuendos of a sexual nature. For example, someone is walking and then teased with sexual jokes. This could be said to be sexual harassment of the victim.

The meaning of the criminal act of sexual harassment has been widely studied by researchers, such as the meaning of symbolic violence in verbal sexual harassment (Prasmadena et al., 2021), the study of the criminal act of sexual harassment in the criminal law aspect (Fatura, 2019), and the explanation of the problems of sexual violence (Hairi, 2016). Thus, seeing such conditions, the author is interested in raising the theme of sexual harassment by limiting the problem to the form of construction of the criminal act of sexual harassment in positive criminal law in Indonesia.

## Methods

Normative juridical research methods are used by researching legal products, namely regulations, by considering societal events relevant to this research problem. occurs in the community environment (sonata, 2014). The legal materials used in this normative research include statutory regulations, books, work agreements, and other legal documents. (Soekanto & Mamudji, 2004) The approach method used in this research includes 1) The statutory approach, namely a method of analyzing statutory regulations (Marzuki, 2007); 2) the Conceptual approach, namely a method of studying and understanding legal concepts (Ibrahim, 2007). The technique used for analysis is using an interpretation system, such as grammatical interpretation and systematic interpretation.

## Discussion and Result

Sexual harassment has a very wide scope, various forms, verbal and written, physical and non-physical, starting from verbal expressions (indecent comments, sexual jokes and so on) to physical forms (poking, touching, fondling, hugging and so on), showing pornographic/dirty images, indecent attacks and coercion such as: forcing to kiss or hug, threatening to make things difficult for the woman or refusing to provide sexual services, even rape. This often happens, and there is even a graphic increase in sexual harassment (Kartika & Najemi, 2020). One of them is in Indonesia, which is an emergency country for sexual harassment which threatens society. This has become a global societal problem, especially for women (Rosigno,

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2019). This harassment often occurs to women with verbal and non-verbal harassment. Various forms of harassment, and verbal and physical inappropriate treatment are a problem that interferes with human rights. In fact, this often happens in public, on the streets, malls, public transportation, markets, and even in the community, which includes verbal harassment. This treatment exists disturbing the victim's comfort, disrupting the victim's human rights. In general, there are five types of sexual harassment, namely (Ridha, 2020):

1. Physical harassment is unwanted touching leads to sexual acts such as kissing, patting, hugging, pinching, stroking, massaging the nape of the neck, touching the body or other physical touch.
2. Verbal harassment is unwanted verbal remarks/comments about a person's private life or body parts or appearance, including jokes and comments sexually charged.
3. Non-verbal/gestural harassment is body language and/or sexual body movements, repeated glances, lustful staring at the body, gesturing with the fingers, licking the lips, or other things (Hardies, 2019).
4. Visual harassment is showing pornographic material in the form of photos, posters, cartoon images, screensavers, or others, or harassment via email, SMS, and other media (Xu & Zhang, 2022).
5. Psychological/emotional harassment is continuous and unwanted requests and invitations, unexpected date invitations, insults, or insults of a sexual nature (Korolevskaia & Yampolskaya, 2022).

Men and women face sexual harassment in various forms, ranging from comments with sexual connotations and hidden physical contact (holding and touching certain body parts) to overt advances and sexual attacks. Sexual harassment is sexual advances that are unwanted by the recipient, where these advances take various forms, whether subtle, rough, overt, physical, or verbal, and are unidirectional. Common forms of sexual harassment are verbal and physical teasing, where verbal harassment is more common than physical. Sexual harassment includes verbal harassment such as, unwanted sexual advances, continuous sexual jokes or messages, continuous asking for dates even though they have been rejected, insulting or degrading messages, suggestive or obscene comments, sexist remarks regarding clothing, body, female clothing or sexual activity, requests for sexual favors expressed by indirect or overt threats. Sexual harassment can be carried out anywhere and under certain conditions. Female victims of sexual harassment can come from every race, age, characteristic, marital status, social class, education, occupation, workplace, and income.

One form of sexual harassment that is carried out non-physically is catcalling. This act of catcalling is not only limited to calling and whistling but there are even

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27 limitations to the act of catcalling, which really has the potential to constitute a criminal act and requires special regulations such as sexual comments and commenting on body shape. , trying to seduce women with sweet words to the point of being sexual and showing their vital organs continuously. This act disturbs a person's human rights, a crime of decency that is always considered normal in society. In fact, the act of catcalling makes a person feel afraid to leave the house and does not feel safe, comfortable, and peaceful. The consequences of this act have a significant impact on a person's psychological, mental, and fulfillment of human rights and social realization, so there is a need for follow-up with special regulations. However, in reality, when this happened, only a few responded, and law enforcers did not even respond when it was reported. It was clear that it was a crime of morality. The fact is that those who are victims of verbal harassment (catcalling) are afraid to report it because there is a lack of response from the public and even law enforcement, and there is no legal certainty. Usually, the victims of catcalling are women, but it can also be men, as well as gays, who are the objects of catcalling themselves. And also the ones who are most often the victims. This act of catcalling is carried out by women (Kartika & Najemi, 2020).

14 Before the existence of Law No. 12 of 2022 concerning criminal acts of sexual violence, law enforcement officers could ensnare perpetrators of criminal acts of sexual violence using articles in the Criminal Code, namely regarding the articles of sexual abuse and rape if committed physically. Still, law enforcement officers can also ensnare them using article 281 of the Criminal Code and article 315, of which article 281 reads, "Surely punished by a maximum imprisonment of two years and eight months or a maximum fine of four thousand five hundred rupiahs: 1. Any person who deliberately and openly violates decency; 2. Whoever deliberately and in front of others is there against his will, violates morality. Apart from that, Article 315 of the Criminal Code is every intentional insult in the form of defamation or written defamation committed against a person, either in public orally or in writing, or in front of the person himself orally or in action, or a letter sent or received to him. , threatened for light insult with a maximum sentence of four months and two weeks or a maximum sentence of four thousand five hundred thousand rupiah (Nurahlin, 2022).

49 As explained above, Articles 281 and 315 of the Criminal Code are sufficient to explain that verbal sexual harassment can be imposed on anyone who is the perpetrator. Bearing in mind that an important element of sexual harassment is that something violates morality and that it is done against one's will. Therefore, it is enough to ensnare perpetrators of verbal sexual harassment (Fatura, 2019).

13 In Law no. 12 of 2022 concerning the Crime of Sexual Violence There are four breakthrough points in the Sexual Violence Crime Law, including (1) apart from qualifying the type of Sexual Violence Crime, there are also other criminal acts which are expressly declared as Sexual Violence Crimes as regulated in other statutory

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provisions. ; (2) comprehensive procedural legal regulations are starting from the stages of investigation, prosecution, and examination in court while still paying attention to and upholding human rights, honor, and without intimidation; (3) The victim's right to treatment, protection and recovery from the occurrence of a crime of sexual violence is an obligation of the state and is carried out in accordance with the condition and needs of the victim; (4) Cases of criminal acts of sexual violence cannot be resolved outside the judicial process, except for child perpetrators (Nurisman, 2022).

Article 4 (1) The Sexual Violence Crime Law has criminalized nine forms of sexual violence, namely: (1) non-physical sexual harassment; (2) physical sexual harassment; (3) forced contraception; (4) forced sterilization; (5) forced marriage; (6) sexual torture; (7) sexual exploitation; (8) sexual slavery; and (9) electronic-based sexual violence. The criminalization of the nine forms of criminal acts of sexual violence is a new breakthrough to fill the void in criminal law to tackle the problem of sexual violence. This arrangement becomes a compass for the Indonesian State in taking steps to overcome criminal acts of sexual violence, starting from prevention and treatment to recovery of victims of criminal acts of sexual violence. Apart from that, the presence of the Sexual Violence Crime Law complements and perfects various similar regulations, which were previously regulated partially and scattered in several laws and regulations. Then, because the Sexual Violence Crime Law regulates special norms for TPKS issues, this law has a particular nature (*lex specialis*) regarding various laws and regulations that have been in force. Its preparation is in accordance with national legal politics. It is aimed at realizing national ideals, namely the welfare and security of society in general and citizens who are vulnerable to becoming victims of sexual violence in particular.

Meanwhile, paragraph (2) states that apart from criminal acts of sexual violence, as referred to in paragraph (1), criminal acts of sexual violence also include:

- a. rape;
- b. obscene acts;
- c. sexual intercourse with children, obscene acts against children, and/or sexual exploitation of children;
- d. an act that violates morality that is against the will of the Victim;
- e. pornography involving children or pornography that explicitly contains violence and sexual exploitation;
- f. forced prostitution;
- g. the crime of trafficking in persons aimed at sexual exploitation;
- h. sexual violence in the domestic sphere;
- i. the crime of money laundering, the original crime of which is the Crime of Sexual Violence; And

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- 18 j. other criminal acts that are expressly declared as Crimes of Sexual Violence as regulated in the provisions of the laws and regulations.

16 To date, some laws and regulations regulate several forms of sexual violence, but their form and scope are minimal. The available laws and regulations are not yet fully able to respond to the facts of sexual violence that occur and develop in society. 25 Investigations, prosecutions, and trials in court regarding cases of sexual violence also still do not pay attention to the rights of victims and tend to blame the victims. Apart from that, prevention efforts and community involvement are still needed to create an environment free from sexual violence. 48 Therefore, a particular law is needed regarding the crime of sexual violence, which can provide material and formal legal basis at the same time so that it can guarantee legal certainty and meet the legal needs of society. 13 13

36 As a criminal act, countermeasures are needed so that this criminal act can be minimized or even eliminated in social life. In this regard, there is a criminal law policy effort that becomes a crime prevention tool that can be carried out using 2 approaches, namely the penal approach and the non-penal approach. Penal Approach (Criminal Law) means the application of criminal law, namely if someone commits a criminal act, then there is a procedure for handling it up to the imposition of sanctions in the form of criminal and/or action. 38 Efforts to overcome crime through punishment 50 focus more on the repressive nature, namely in the form of suppression, eradication, 20 and crushing after the crime occurs. In implementing crime control using legal channels, the realization of criminal sanctions can be seen as a process that includes three stages, namely (Nurisman, 2022):

1. formulation stage by the legislator (criminal determination)
2. the stage of awarding or imposing a sentence by the court
3. stage of criminal execution by criminal execution authorities

53 Within the framework of a unified process, the first policy stage can be said to be the legislative policy stage, where this stage is usually referred to as the "imposing criminal in abstracto" stage. In contrast, the second and third stages are usually called "providing criminal penalties in concreto." Viewed as a process of law enforcement mechanism, the three stages are expected to form an interrelated chain in one unified system. Of the three stages, the most important subject matter to be studied is the first stage, namely regarding the stages of criminal determination by law, which includes criminal acts committed, accountability for criminal acts committed and the penalties imposed for criminal acts committed. The aim of the policy of determining a criminal sanction cannot be separated from the aim of criminal politics in the overall sense, namely, the protection of society to achieve welfare. This stage of determination is a

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stage of careful planning regarding action policies that must be carried out in terms of punishment if a violation occurs.

Relating the problem of giving this punishment to the development of crime, the problem must be returned to the concept of the rationality of the crime prevention policy mechanism itself, meaning that every problem that arises in connection with the development of crime must be examined in the policies of giving punishment that have been running so far, whether they have been implemented in accordance with a rational policy. Every plan contains a policy for selecting and determining various criminal alternatives. It also contains the meaning that the selection is carried out based on rational considerations. If the criminal measure is oriented towards criminal objectives as stated above, then it is in accordance with the formulation of Article 2 paragraph 1 of the Criminal Code. The latest is that punishment is said to be effective if:

- a. can prevent criminal acts from being committed
- b. can guide the convict to become a good and useful person, and
- c. can remove stains caused by criminal acts.

As explained above, criminal policy is essentially a rational effort by society to overcome crime. The relationship between criminal policy and conditional punishment here can be understood that with the reform of the criminal law, which includes reorientation and reform of criminal sanctions, it must be an appropriate countermeasure. is integrated; that is, it is not only seen in criminal law reform but can also be seen from the criminal policy side.

In cases of sexual harassment, actions to overcome criminal acts can be taken, which can be carried out using a penal approach and a non-penal approach. The penal approach here is carried out by using criminal law as a resolution process for criminal acts. One penal approach that can be seen is the existence of Law No. 12 of 2022 concerning the Crime of Sexual Violence, where articles have been regulated that have criminalized an act that is categorized as a criminal act.

This second countermeasure uses a non-penal approach (non-criminal law), namely efforts in the form of coaching and/or other non-formal education efforts. The non-penal approach focuses more on preventive properties in the form of prevention, deterrence, and control before crime occurs, bearing in mind that efforts to overcome crime through non-penal channels are more of a preventive measure for the occurrence of crime. Hence, the main target is to deal with the conducive factors that cause crime to occur. These conducive factors, among others, focus on social problems that can directly or indirectly give rise to crime.

Various problems that often arise in the stages of crime prevention policies are the issue of formulation/formulating authority. The problem is not only the extent to which (state) criminal law regulates and limits a person's rights or authority in acting

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but also the extent to which criminal law regulates and limits the authority of officials or state apparatus in imposing or imposing criminal (criminal) sanctions. So far, there has been no national sentencing pattern (reference, guideline, or guideline for creating or compiling legislation containing a criminal-sanctions system) at the legislative policy stage (formulating/formulation). There are also no national sentencing guidelines (for judges to impose or implement punishment) at the judicial policy stage (applicative). So, in legislative practice, there is a diversity of patterns in determining the type of sanction (crime/action), the system for formulating sanctions, the amount/duration of sanctions, and the pattern of weighting/mitigating sanctions.

## Conclusion

The crime of sexual violence is a form of crime that often occurs in society, whether committed physically or non-physically. Before the enactment of Law No. 12 of 2022 concerning Criminal Acts of Sexual Violence, there is no certainty regarding law enforcement for criminal acts of non-physical sexual violence in particular. Law no. 12 of 2022 concerning the Crime of Sexual Violence is complementary to Indonesian criminal law instruments used to enforce the law against criminal acts of sexual violence. The presence of the Criminal Act of Sexual Violence Law will answer the challenges of law enforcement for the Crime of Sexual Violence because it has become a forum for every aspect of overcoming criminal acts of sexual violence, starting from efforts to prevent, handle, to efforts to recover Victims of Crimes of Sexual Violence. Next Law No. 12 of 2022 concerning Crimes of Sexual Violence provides legal protection to TPKS victims systemically. Starting from the legal substance aspect with compensation, restitution, medical assistance and psychosocial rehabilitation, personal protection, and receiving legal assistance during the law enforcement process.

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