

Judicial Review of the Phrase “Without Victim Consent” in Permendikbudristek 30/2021 concerning the Prevention and Handling of Sexual Violence in University Environment

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ABSTRACT

This paper is motivated by the debate over the use of the phrase without the victim’s consent in the Ministerial Regulation of the Education, Culture, Research and Technology of the Republic of Indonesia Ministry Number 30 of 2021 concerning the Prevention and Handling of Sexual Violence in the University Environment which is considered to open opportunities and opportunities for liberation of immoral acts to occur which in turn can lead to free sex activity in the university environment. Apart from that, it has provided a free space for agreements on immoral behavior and free sexual activity to occur within tertiary institutions and has even opened opportunities for sex transactions to occur, so that sex transactions become legalized civil transactions. Therefore, using the normative juridical law research method, an attempt is made to answer the question of what material content uses the phrase without the victim’s consent in ministerial regulation, what is the concept of consent from a legal perspective, and how is the legal considerations of the Indonesia Supreme Court adjudicating this request for judicial review rights. The results are: First, The phrase without the victim’s consent is in Article 5 paragraph (2) letter b, letter f, letter g, letter h, letter j, letter l, and letter m in the ministerial regulation; Second, The concept of consent in the perspective of criminal law relates to the concept of “without coercion” as referred to in several articles of the Indonesian Criminal Code. Third, The Supreme Court gave legal considerations that the use of the phrase without the victim’s consent does not regulate consent in sexual activity (sexual consent), but the victim’s consent in the event of sexual violence.

Keywords: phrases without the consent of the victim, sexual violence, ministerial regulations

INTRODUCTION

The Minister of Education, Culture, Research and Technology of the Republic of Indonesia, Nadiem Makarim, has issued Ministerial Regulation of the Education, Culture, Research and Technology Ministry Number 30 of 2021 concerning Prevention and Handling of Sexual Violence in Higher Education Environment (“Permendikbudristek 30/2021”) which was then officially enforced from September 3, 2021. Nadiem Makarim said: “There is still a legal vacuum in universities regarding the handling and prevention of cases of sexual violence. Therefore, this ministerial regulation serves as a legal umbrella to protect victims within the tertiary institution.^[1] This regulation is issued with a philosophical, sociological and juridical basis.

First, philosophically, the issuance of this regulation is an effort to raise awareness of the government in protecting the rights of citizens from all forms of violence including sexual violence. Second, sociologically: “the increasing increase in sexual violence that occurs in the community, including universities, will directly or indirectly have an impact on less optimal implementation of the Tridharma of Higher Education and reduce the quality of education.” Third, legally speaking, that in order to prevent and deal with sexual violence in tertiary institutions, it is necessary to have arrangements that guarantee legal certainty in

preventing sexual violence in tertiary institutions.

Permendikbudristek 30/2021 are crucial regulations because at that time Indonesia was facing an emergency of sexual violence and Indonesia did not yet have adequate regulations to deal with sexual violence, especially in the university environment. This regulation was issued to fill the void in regulations regarding sexual violence in the university environment. However, it didn't take long for this rule to take effect, and the populace had to encounter one obstacle after another. There are always skewed opinions that seem to miss understanding the main purpose of this regulation and the problem is getting more serious because at that time there was a community group called the Minangkabau Alam Customary Density Institution (*Lembaga Kerapatan Adat Alam Minangkabau*) who submitted a judicial review of this regulation to the Indonesia Supreme Court. LKAAM is a traditional institution located in West Sumatra Province, whose function is to guard and preserve cultural customs in West Sumatra or in Minangkabau in general.^[2] The filing for a material review had raised concerns that this important regulation could be annulled by the Supreme Court. The Alam Minangkabau Indigenous community group objected and thought that this regulation would legalize free sex and immoral behavior. This assumption departs from article 5 which defines acts that are categorized as sexual violence by including the phrase “without the victim’s consent”.^[3]

The assumption of community groups that are against this regulation, said: “So if the victim agrees, it’s okay, so is it permissible to have sex?” This logic continues to run wild to the conclusion that this rule means that adultery is permitted. Even though this regulation specifically talks about sexual violence. Sexual activity without consent means breaking the law, not automatically all sexual activity with consent means legally permissible. Sexual activity with consent can still be punished if the conditions are met, but will be regulated by other regulations, from the Indonesian Criminal Code to the rules of the college code of ethics, for example, because the two cases have different nature of discussion, the complexity of which is difficult to formulate in a regulatory context alone.

The phrase without the victim’s consent in this ministerial regulation is considered to be contrary to Indonesian Law Number 20 of 2003 concerning the National Education System and Indonesian Act Number 12 of 2012 concerning Higher Education. Even though previously civil society had concerns about the cancellation of this regulation, in the end the Supreme Court made a decision rejecting the objection to the right to judicial review.^[4]

This concern of civil society is normal because it is considered that so far the judicial review process at the Indonesia Supreme Court has not been carried out openly to the public as was done by the Indonesia Constitutional Court, so that civil society who feel they cannot be directly involved have reasonable concerns if there is no public escort to make a decision. The Supreme Court can deviate from the public interest.

Research Questions

In this research, the writer formulate the following research questions: 1) How to use the phrase “without the consent of the victim” in the ministerial regulations? 2) How is the concept of consent utilized in the criminal law perspective? 3) What are the legal considerations of the Supreme Court adjudicating the objection process for the right to judicial review in the Supreme Court Decision Number 34 P/HUM/2022 dated April 14th, 2022?

METHOD RESEARCH

This research uses the normative legal research method with a statutory and case approach. The normative legal research method is defined as “a method of research on statutory regulations both from the point of view of the hierarchy of laws and regulations (vertical), as well as the harmonious relationship of laws and regulations (horizontal).”^[5] The method of collecting data and legal material is “the main approach in

literature research with literature is scientific research that systematically includes a collection of bibliographical materials related to research objectives; collection techniques with library methods and organizing and presenting data.”^[6]

This research will focus on Permendikbudristek 30/2021 and decisions of the Indonesia Supreme Court Number 34 P/HUM/2022 as well as other related laws, such as the national education system law, higher education law, the Indonesia criminal code, and other related regulations.

RESULTS AND DISCUSSIONS

1. Phrase Without Victim’s Consent in the Ministerial Regulation concerning the Prevention and Handling of Sexual Violence in University Environment

The purpose of the Ministerial Regulation of Education, Culture, Research and Technology Ministry Number 30 of 2021 concerning the Prevention and Handling of Sexual Violence in University Environment or this Permendikbudristek 30/2021 is stated in Article 2, which aims to: “as a guideline for University to develop policies and take action to prevent and address sexual violence related to the implementation of the *Tridharma* inside or outside the campus; and to foster a campus life that is humane, dignified, equal, inclusive, collaborative and non-violent among students, educators, educational staff and campus residents in tertiary institutions.” While what is meant by sexual violence as referred to in Article 1 number 1 is: “every act of humiliating, humiliating, harassing, and/or attacking a person’s body, and/or reproductive function, due to inequality of power and/or gender relations, which results in or can result in psychological suffering and/or physical, including those that interfere with a person’s reproductive health and lose the opportunity to carry out higher education safely and optimally.”

The realm of sexual violence includes acts committed physically, verbally, non-physically, as well as through information and communication technology. In Article 5, there are at least 21 forms of sexual violence that are expressly regulated in the regulation. Special articles that have phrases without the victim’s consent are in Article 5 paragraph (2) letters b, f, g, h, j, l, and m.

1. Article 5 paragraph (2) letter b, which reads as follows: “Sexual Violence as referred to in paragraph (1) includes: b. deliberately exposed his genitals WITHOUT THE VICTIMS’ CONSENT.”
2. Article 5 paragraph (2) letter f, which reads as follows: f. “take, record, and/or distribute photos and/or audio and/or visual recordings of victims with sexual nuances WITHOUT THE VICTIMS’ CONSENT”;
3. Article 5 paragraph (2) letter g, which reads as follows: “uploading photos of the victim’s body and/or personal information with sexual nuances WITHOUT THE VICTIMS’ CONSENT”;
4. Article 5 paragraph (2) letter h, which reads as follows: “spreading information related to the body and/or personal of the Victim with sexual nuances WITHOUT THE VICTIMS’ CONSENT”
5. Article 5 paragraph (2) letter j, which reads as follows: “Persuade, promise, offer something, or threaten the Victim to engage in sexual transactions or activities THAT THE VICTIMS DOESN’T APPROVE”;
6. Article 5 paragraph (2) letter l, which reads as follows: touching, rubbing, touching, holding, hugging, kissing and/or rubbing body parts on the victim’s body WITHOUT THE VICTIMS’ CONSENT”;

The use of this editorial phrase without the victim’s consent is deemed to be contrary to Article 3, Article 4 paragraph (1) and Article 36 paragraph (3) letters a, b, and h of Indonesian Law Number 20 of 2003 concerning the National Education System and Article 4 letter a, Article 5, Article 6 letter b, and Article 8 of the Indonesian Law Number 12 of 2012 concerning Higher Education, which basically explains that: “the purpose of education is to create people who believe and fear God Almighty. Oneness and noble character based on *Pancasila*^[7] and the 1945 Constitution of the Republic of Indonesia which are rooted in Indonesian religious and national cultural values. So thus the religious values and values of Indonesia’s

national culture are the roots of the Indonesian education system which are embodied in the National education system.”

The enactment of the use of the phrase without the victim’s consent in this Ministerial Regulation is deemed to have straddled the values contained in *Pancasila*, religion, traditional values, social values, and cultural values, which prevail in society, including values that live and develop in the midst of society.

LKAAM in its application for judicial review in essence argued: “that if scrutinized and understood carefully the use of the phrase without the victim’s consent opens opportunities and opportunities for immoral acquittals to occur which in turn can lead to free sex activities within the university. Apart from that, it has provided a free space for agreements on immoral behavior and free sexual activity to occur within tertiary institutions, and has even opened up opportunities for sex transactions to occur, so that sex transactions become legalized civil transactions. The next consequence caused by sex transactions will increase the number of pregnancies out of wedlock, this means that indirectly the enactment of the use of the phrase without the consent of the victim is an attempt to destroy the future of the nation’s young generation, those who should be able to have long and good careers. but instead had to become a housewife because she got pregnant at a young age. The increase in pregnancies outside of marriage will increase the behavior of abortion which is a crime, thus the enactment of this Ministerial Regulation will backfire on academics who place them as perpetrators of criminal acts and also have fatal consequences for health, immoral behavior and sexual activity are often associated with sexually transmitted infections.”^[8]

Not only that, another argument that was expressed was: “if there are actions that violate moral values, religious values, or actions that lead to sexual activity in the university environment with the permission or approval of both parties, then causing the act to no longer be a criminal act whose consequences cannot be subject to criminal sanctions, besides that this Ministerial Regulation seems to provide protection for perpetrators of immoral acts and sexual activity in the university environment, this clearly leads to liberalism which is contrary to the values of religion and *Pancasila*.”^[9]

2. The Concept of Consent in The Criminal Law Perspective

In a legal perspective, especially criminal law, “approval or permission is one of the important principles that form the basis for determining whether an act or action can be called a criminal act or not. An act or action is referred to as a criminal act, among other things, if the action causes misery, loss, suffering, damage to other people. However, not all actions that result in misery are called criminal acts. There are actions that cause misery, but are not included in criminal acts, that is, if there is an element of willingness or approval. In criminal law, there is a principle which states that “willingness or approval eliminates the elements of a criminal act”;

The consent or willingness referred to in law is an act that is carried out without coercion or an action whose impact is desired by both parties, including actions that have been agreed upon by both parties. “A simple example is a battle where both parties agree to compete with all the consequences they are aware of. In this case, the party that has experienced loss, misery and even death cannot demand criminal punishment, because the act is not a criminal act because there has been approval or the impact of the action has been realized. The concept of consent is related to the concept of “without coercion” as referred to in several articles in the Indonesian Criminal Code. Article 285, for example, emphasizes the existence of “forcing intercourse” to state that an act is considered rape which can be punished with a criminal penalty;^[10]

In essence, the phrase “victim consent” has been found in various definitions of sexual violence in different languages. Mc Logan, for example, defines sexual harassment as part of sexual violence with “the form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurring, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.”^[11] Mc Logan uses the phrase “unwanted” which means actions that are disliked

and hated.

An almost identical definition was put forward by the EEOC which stated that sexual violence is “..unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constituting sexual harassment when this conduct explicitly or implicitly affects an individual’s employment, unreasonably interferes with an individual’s work performance, or creates an intimidating, hostile, or offensive work environment.” [12] The EEOC uses the phrase “unwelcome” which means unwanted action. The two phrases used by the two definitions above essentially have the same meaning as the phrase contained in the Ministerial Regulation which uses the phrase “without the consent of the victim”. The phrases “unwanted”, “unwelcome”, and “without the consent of the victim” point to the same meaning, namely the choice of the victim to protect their human rights and also maintain their human dignity;

3. Legal Considerations in the Indonesian Supreme Court Decision Number 34 P/HUM/2022

The Supreme Court is of the opinion that the reason for the objection of LKAAM as the Petitioner cannot be justified, with the following considerations:

1. Article 5 paragraph (2) letters b, f, h, j, l and m which are the object of this judicial review do not regulate consent in sexual activity (sexual consent), but the consent of the victim (victim’s consent) in the event of sexual violence.
2. The phrase “without the victim’s consent” in Permendikbudristek 30/2021 is intended to protect the privacy and individual rights of victims. The phrase “without the victim’s consent” in this ministerial regulation is also: “an effort to distinguish which things can be called actions that are followed up by the Team of the Task Force for the Prevention and Handling of Sexual Violence directly or indirectly.” [13]
3. The wrong interpretation of the word “consent” makes this considered connotative and closely related to adultery. Permendikbudristek 30/2021 does not regulate consent in sexual activity (sexual consent), but the consent of the victim (victim’s consent) in incidents of sexual violence. So the assumption that the phrase “without the victim’s consent” in this ministerial regulation is “an effort to legalize adultery and free sex is an out of the blue assumption and a hasty conclusion. Because the rules regarding adultery in Indonesian law have been regulated in many other provisions such as rules prohibiting committing the crime of adultery, criminal acts of sexual harassment, child protection rules, prohibiting prostitution, and human trafficking.” [14]

4. Ministerial Regulation on Prevention and Handling of Sexual Violence in Higher Education Environment Needs to be Supported.

Permendikbudristek 30/2021 is considered sufficient because it understands the existence of power relations in an incident of sexual violence. There is a party in a dominant position that forces one side to act and results in the other party being powerless to refuse. The phrase without the victim’s consent makes it possible to identify exactly who the culprit is who the victim is. Law enforcement officers can also say: “They like each other, how come they just kept quiet at that time, that means they don’t refuse?” Finally, the victim’s demands were paralyzed because they did not resist can be interpreted as agreeing, so this phrase functions to change the “gray area” to become more black and white, underlining the victim’s powerlessness to fight back in the sexual violence that occurred. That is the heart of this ministerial regulation, meaning that if the phrase was omitted without the consent of the victim, it would be the same as revoking the life of this regulation.

Another point of objection that needs to be taken care of is the opinion that this ministerial regulation violates the values of *Pancasila*, religion and social norms. Which of the *Pancasila* precepts perpetuates violence in whatever form it takes? Regarding religious values and social norms, the concepts in this ministerial regulation support those who wish to refuse to engage in sexual activity because it conflicts with

religious norms and values. So if anyone is being straddled by this regulation it seems that it is not the values of *Pancasila* or religion but the misunderstanding of the applicant for the judicial review. Protecting this Permendikbudristek 30/2021 will protect citizens privacy and rights of the victim in the future.

CONCLUSION

1. In Article 5, there are at least 21 forms of sexual violence that are expressly regulated in the regulation. The special article which has the phrase without the consent of the victim is in Article 5 paragraph (2) letter b, letter f, letter g, letter h, letter j, letter l, and letter m, namely sexual violence includes: “intentionally showing his genitals without victim’s consent; take, record, and/or distribute photos and/or audio and/or visual recordings of victims with sexual nuances without the victim’s consent; uploading photos of the victim’s body and/or personal information with sexual nuances without the victim’s consent; disseminate information related to the victim’s body and/or personal sexual nuances without the victim’s consent; persuade, promise, offer something, or threaten the Victim to engage in sexual transactions or activities that are not approved by the victim; and touching, rubbing, touching, holding, hugging, kissing and/or rubbing body parts on the victim’s body without the victim’s consent.”
2. The concept of consent in the perspective of criminal law is “one of the important principles that forms the basis for determining whether an act or action can be called a criminal act or not. The consent or willingness referred to in law is an act that is carried out without coercion or an action whose impact is desired by both parties, including actions that have been agreed upon by both parties. The concept of consent is related to the concept of “without coercion” as mentioned in several articles of the Indonesian Criminal Code. Article 285, for example, emphasizes the existence of “forcing intercourse” to state that an act is considered as rape which can be subject to criminal penalties.
3. The Indonesia Supreme Court gave legal considerations that the use of the phrase without the victim’s consent does not regulate consent in sexual activity (sexual consent), but the victim’s consent in the event of sexual violence. The phrase “without the victim’s consent” in this Permendikbudristek 30/2021 is intended to protect the privacy and individual rights of victims. The assumption that the phrase “without the victim’s consent” in the Permendikbudristek 30/2021 is an effort to legalize adultery and free sex is an out of the blue assumption, aka a hasty conclusion. “Because the rules regarding adultery in Indonesian law have been regulated in many other provisions such as rules prohibiting committing the crime of adultery, criminal acts of sexual harassment, child protection rules, prohibiting prostitution, and human trafficking.”

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