

Comparative of The Law Enforcement Systems for Rape Against Women in Indonesia and India

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Abstract

The aim of this research is to understand the legal system between Indonesia and India and what preventive measures are in place for the high rate of crimes involving the rape of women. Even though it is clear what the forms and types of punishment in both countries are based on the Criminal Code, with the increasing number of rapes what are the steps for courts and judges to pass sentences on perpetrators of rape and efforts to prevent them. The urgency of this writing and research is to answer how the English and Roman legal systems compare. The research method used is normative (Legal Research) and other data sources, namely primary legal sources listed such as Law Number 39 of 1999, Law Number 65 of 2005, Law Number 12 of 2022, Indonesian Criminal Code, Indian Criminal Code, Indian National Commission Act 1990, Indian Criminal Law Amendment 2013 and Indian Criminal Law Amendment 2018. The novelty of this research is the explanation of enforcement with differences in rape legal systems. The results of this research are that the enforcement of rape law in Indonesia is that judges are not bound by anything and anyone in handing down decisions (Inquisitorial) and are based on the Criminal Code (Codification), whereas India takes previous judges' decisions in similar cases in higher courts (Precedent) with presenting several legal experts (Doctrine) and making the Criminal Code a source of law (Statute). Indonesia's preventive efforts include establishing the National Commission on Violence Against Women and passing the TPKS Law. Meanwhile, the Indian state formed a National Commission for women with the involvement of Indian women activists to fight rape.

Keywords: Civil Law; Common Law; Law Enforcement; Rape; Women;

Abstrak

Tujuan penelitian ini guna mengetahui sistem hukum antara Indonesia dan India serta upaya preventif apa yang dilakukan terhadap tingginya angka kejahatan yang melibatkan pemerkosaan terhadap perempuan. Meski sudah jelas apa bentuk dan jenis hukuman di kedua negara berdasarkan KUHP, namun dengan semakin banyaknya kasus perkosaan bagaimana langkah pengadilan dan hakim dalam menjatuhkan hukuman terhadap pelaku perkosaan dan upaya pencegahannya. Urgensi penulisan dan penelitian ini adalah untuk menjawab perbandingan sistem hukum Inggris dan Romawi. Metode penelitian yang digunakan adalah Normatif (Penelitian Hukum) dan sumber data lainnya yaitu sumber hukum primer yang tercantum seperti UU Nomor 39 Tahun 1999, UU Nomor 65 Tahun 2005, UU Nomor 12 Tahun 2022, KUHP Indonesia, KUHP India, UU Komisi Nasional India 1990, Amandemen Hukum Pidana India 2013 dan Amandemen Hukum Pidana India 2018. Kebaruan penelitian ini adalah penjelasan penegakan hukum dengan perbedaan sistem hukum pemerkosaan. Hasil dari penelitian ini adalah penegakan hukum perkosaan di Indonesia adalah hakim tidak terikat pada apapun dan siapapun dalam menjatuhkan putusan (Inkuisitorial) dan berpedoman pada KUHP (Kodifikasi), sedangkan India mengambil putusan hakim terdahulu secara inkuisitorial. Kasus serupa di pengadilan yang lebih tinggi (Preseden) dengan megadarra beberapa ahli hukum

(Doktrin) dan menjadikan KUHP sebagai sumber hukum (Statute). Upaya preventif yang dilakukan Indonesia antara lain dengan membentuk Komisi Nasional Anti Kekerasan Terhadap Perempuan dan mengesahkan UU TPKS. Sementara itu, negara bagian India membentuk Komisi Nasional Perempuan dengan melibatkan aktivis perempuan India untuk melawan pemerkosaan.

Keywords: Civil Law; Common Law; Penegakan Hukum; Pemerkosaan; Wanita;



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A. INTRODUCTION

A woman is defined as a person or human being with the characteristics of having a vagina, being able to menstruate, giving birth to children, and breastfeeding. Another definition of a woman is someone who is in charge or considered primary and expert.¹ Women who are victims of sexual violence, for example, rape which causes the victim to experience trauma, which in terms is Post Traumatic Stress Disorder (PTSD), which in the end the victim is afraid to tell or even report what the victim experienced, either because it was threatened by the perpetrator or it affected the victim's mental state.² Physical violence and psychological violence are very different, where physical violence only affects the victim's physical body, which is marked by wounds or bruises. Meanwhile, sexual violence has an impact on both, namely the presence of physical injuries in the victim's vital areas, while the psychological or mental impact is characterized by violence because basically there are threats and coercion from the perpetrator of sexual violence.³

Based on the BPS report, crimes against morality in Indonesia in 2020-2021 decreased by 14.07% and in 2021-2022 decreased by 26.57%. In India, NCRB report crimes against women with rape in 2020-2021 increased by 11.46% and in 2021-2022 decreased by 0.508%.

The number of women published by the Central Statistics Agency or abbreviated as Central Statistics Agency in 2023 for the period 2022 is 135.75 million people with a total population of 274.20 million people in 2022.⁴ Likewise, in the 2011 census, women were 48.5%, estimated to increase by 48.8% with a total population of 152.2 million people in 2036 in India, as reported by the Ministry of Statistics and Program Implementation.⁵

The research conducted by Kasera focuses on explaining the development of the 1983 Indian Criminal Code to the amendments to the 2013 Criminal Code after the Nirbhaya case.

¹Susi Yuliawati, "Perempuan atau Wanita? Perbandingan Berbasis Korpus tentang Leksikon Berbias Gender," *Paradigma, Jurnal Kajian Budaya* 8, no. 1 (July 31, 2018): 53, <https://doi.org/10.17510/paradigma.v8i1.227>.

²Thuong Sabrina, "15 Bentuk Kekerasan Seksual Sebuah Pengenalan" (Komnas Perempuan, 2020), <https://komnasperempuan.go.id/download-file/415>.

³Debby Pratiwi Surbakti et al., "Bentuk Perlindungan Bagi Perempuan yang Dipekerjakan Sebagai Pekerja Seks Komersil (PSK)," *DE LEGA LATA: Jurnal Ilmu Hukum* 5, no. 2 (July 20, 2020): 115–23, <https://doi.org/10.30596/dll.v5i2.3571>.

⁴Badan Pusat Statistik, "2022 Perempuan dan Laki-Laki di Indonesia" (Jakarta: Badan Pusat Statistik, 2022), <https://www.bps.go.id/id/publication/2022/12/16/a37fb493455d772274cc2314/perempuan-dan-laki-laki-di-indonesia-2022.html>.

⁵Ministry of Statistics and Programme Implementation, "Women and Men 2022" (New Delhi: Ministry of Statistics and Programme Implementation, 2022), <https://mospi.gov.in/publication/women-men-india-2022>.

This research concludes that the law is not gender neutral.⁶ Priyanka's research focuses on the lack of law enforcement and forms of protection for perpetrators of rape against men, originating from the 1860 Indian Penal Code to the 2018 amendments to the Penal Code which is more targeted towards women. This research is similar to Kasera's research, except that Priyanka looks at comparative laws for different genders, while Kasera shows the development of rape law in India since 1983.⁷ Lastly, Purwati's research carried out a comparison of the Criminal Code laws between Indonesia and India regarding rape. The result is that the Indian Criminal Code is more complex than the Indonesian Criminal Code. And what these three studies have in common is that they explain that the Indian Criminal Code is non-gendered regarding rape, which only describes men as perpetrators.⁸

This research provides answers to how the role of judges in different legal systems provides punishment. This research is updated to answer comparisons of law enforcement with different legal systems along with efforts made by the state to reduce the number of rapes in Indonesia and India. The aim of this research is to find out in detail how the law on rape against women is enforced between the Civil Law (Indonesia) and Common Law (India) legal systems and to find out the preventive efforts of both countries in cases of rape against women.

B. METHOD

The author examines this problem using normative legal research methods, which can be defined as research into statutory regulations, whether hierarchical or regulatory relationships. Normative legal research is conducted through library materials (Legal Research), which is part of secondary data such as books, journals, dictionaries, websites, and data. The author's primary legal sources include Regulation Number 39 of 1999, Regulation Number 65 of 2005, Law Number 12 of 2022, the Indonesian Penal Code, the Indian Penal Code, the 1990 Indian National Commission Law, The Criminal Law Amendment Act 2018 and the Indian Criminal Law Amendments 2013. Normative legal research in general is research that is based on legal materials or sources such as hierarchical legal regulations, court decisions and decrees, and is obtained from books, journals, dictionaries, websites, Google Scholar or legal principles as well as legal theories put forward by experts law. The researcher categorizes this research into comparative legal research which literally adds to general knowledge or insight into positive law where the researcher compares the legal system of one country with other countries, namely Indonesia and India according to Soerjono Soekanto and Sri Mamudji in the scope of normative legal research.⁹

⁶ Pamini Kasera, "A Historical Analysis of Rape Laws in India," *SSRN Electronic Journal*, 2020, <https://doi.org/10.2139/ssrn.3619807>.

⁷ Singh Priyanka and Dixit Anjali, "Comparative Study of Rape Legislation for Men and Women in India," *International Journal For Multidisciplinary Research* 5, no. 6 (December 4, 2023): 9914, <https://doi.org/10.36948/ijfmr.2023.v05i06.9914>.

⁸ Yayi Purwati, Kuswardani Kuswardani, and Arief Budiono, "Comparison of the Rape Law in the Indonesian Penal Code and the Indian Penal Code:" (International Conference on Community Empowerment and Engagement (ICCEE 2021), Surakarta, Indonesia, 2022), <https://doi.org/10.2991/assehr.k.220501.019>.

⁹ Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020), <http://eprints.unram.ac.id/20305/1/Metode%20Penelitian%20Hukum.pdf>.

C. RESULTS AND DISCUSSIONS

1. Law Enforcement on Rape against Women

Human rights are part of the 1945 Constitution that need to be respected, protected and fulfilled. This is a form of state guarantee that includes violence against women. This internationally agreed guarantee is in the Convention on the Elimination of all forms of Discrimination Against Women.¹⁰ Indonesia participated in ratifying the convention in Law Number 7 of 1984 which agreed to commit to adapting to the articles in CEDAW. Likewise, India ratified CEDAW in 1993 to overcome the gender gap for the first time. The state's compliance with CEDAW is voluntary which is also followed by the courts which are guided by the agreement in cases of gender equality and religious freedom.¹¹

The crime of sexual violence is regulated in the Regulation of the Republic of Indonesia Number 12 of 2022. The crime of sexual violence is all acts under in article 1 of Regulation Number 12 of 2022.¹² Rape is part of sexual violence which is defined by physical force with penetration either in vagina or anus or other parts of the body.¹³ Meanwhile, rape is also part of crimes against women.

Patriarchal culture is literally a social system and practice where men dominate, exploiting and oppressing women.¹⁴ Patriarchy refers more to psychological violence, honor and dignity, for example in the form of death threats, verbal harassment, cyber bullying and rape. In Indonesia, patriarchal culture dominates by perpetuating women's inferiority in front of men.¹⁵ Heriyanto's research, which combines patriarchy culture regarding gender equality in Indonesian politics, concludes that the challenges of facing patriarchy culture will continue to be strongly started from the perspective and mindset of the Indonesian people, always interpreting that women have a different level from men, the state participates in maintaining patriarchal thinking such as laws that favor women but deepen the gap between the gender.¹⁶ The new generation has the doctrine that men must receive priority resources in any sector. In India, the index of patriarchy practices from 28 states and 2 territorial units, the state of Meghalaya, is the lowest and the state of Haryana is the highest.¹⁷

¹⁰Riki Zulfiko, "Paradigma Seksual Consent Dalam Pembaharuan Tindak Pidana Kekerasan Seksual," *Pagaruyuang Law Journal* 5, no. 2 (February 1, 2022): 104–22, <https://doi.org/10.31869/plj.v5i2.3151>.

¹¹Meghna Sabharwal, "Rising Gender Inequities in India: The Case of Authoritarian Patriarchy*," *Journal of Social Equity and Public Administration* 1, no. 1 (2023): 70, <https://doi.org/10.24926/jsepa.v1i1.4929>.

¹²"Undang-Undang Nomor 12 Tahun 2022" (2022), <https://peraturan.bpk.go.id/Details/207944/uu-no-12-tahun-2022>.

¹³Swati Singh, "Rape vs Patriarchy : A Sociological Analysis," *Society and Culture Development in India* 1, no. 2 (2021): 192, www.arfjournals.com.

¹⁴Abhishek Singh et al., "Development of the India Patriarchy Index: Validation and Testing of Temporal and Spatial Patterning," *Social Indicators Research* 159, no. 1 (January 2022): 351–77, <https://doi.org/10.1007/s11205-021-02752-1>.

¹⁵Heriyanto Heriyanto, "Patriarchal Culture, Theology and State Hegemony in Issues of Gender Equality in Indonesian Politics," in *Proceedings of the International Conference Social - Humanities in Maritime and Border Area (SHIMBA 2023)*, ed. Azhari Setiawan et al., vol. 799, Advances in Social Science, Education and Humanities Research (Paris: Atlantis Press SARL, 2023), 11–15, https://doi.org/10.2991/978-2-38476-150-0_3.

¹⁶Ibid., p.14.

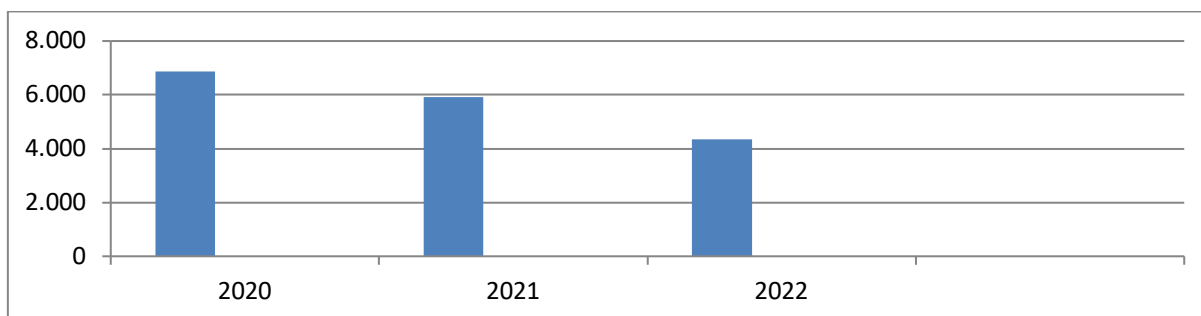
¹⁷Singh, Op.Cit, p.365

In Indonesia, based on the publication of the Central Statistics Agency on crime from 2020 to 2022, crimes against decency including rape and sexual immorality decreased in 2020 by 6.872¹⁸ in 2021 by 5.905¹⁹ and in 2022 there is 4.336.²⁰

Table 1. Crimes against morality based on data from the Central Bureau of Criminal Statistics in Indonesia 2020 – 2022

YEARS	NUMBER OF CASES OF CRIMES AGAINST DECENCY IN INDONESIA
2020	6.872
2021	5.905
2022	4,336

In this table, showed a decrease in numbers from 2020-2022, The Central Bureau of Criminal Statistics 2020 – 2022.



In India, cases of rape against women are much more numerous, with the period from 2020 to 2022 experiencing an increase in 2021 as published by the National Crime Records Bureau of India. In 2020 there were 28.046,²¹ in 2021 there were 31.677,²² and in 2022 there were 31.516.²³

Table 2. Crimes against women with rape cases based on data from the NCRB of India for 2020 – 2022

YEARS	NUMBER OF CRIMES AGAINST WOMEN (RAPE) CASES IN INDIA
2020	28.046
2021	31.677
2022	31.516

In this table, showed an increase in numbers from 2020-2021 and a decrease in 2021-2022, National Crime Records Bureau of India 2020 – 2022.

¹⁸Badan Pusat Statistik, “Statistik Kriminal 2021” (Jakarta: Badan Pusat Statistik, 2021), <https://www.bps.go.id/id/publication/2021/12/15/8d1bc84d2055e99feed39986/statistik-kriminal-2021.html>.

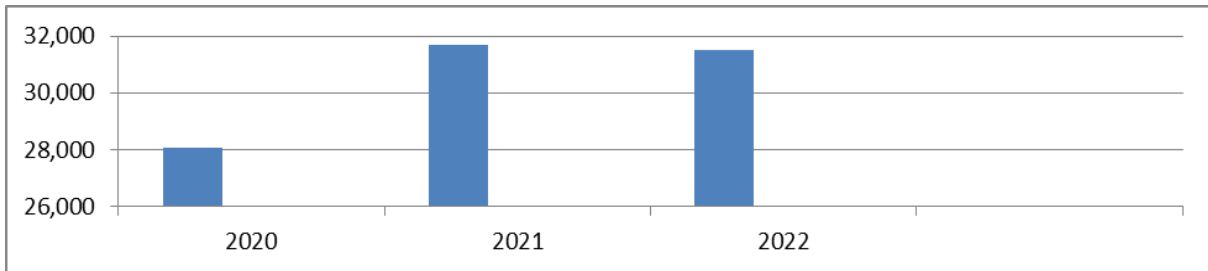
¹⁹Badan Pusat Statistik, “Statistik Kriminal 2022” (Jakarta: Badan Pusat Statistik, 2022), <https://www.bps.go.id/id/publication/2022/11/30/4022d3351bf3a05aa6198065/statistik-kriminal-2022.html>.

²⁰Badan Pusat Statistik, “Statistik Kriminal 2023” (Jakarta: Badan Pusat Statistik, 2023), <https://www.bps.go.id/id/publication/2023/12/12/5edba2b0fe5429a0f232c736/statistik-kriminal-2023.html>.

²¹National Crime Records Bureau, “Crime in India 2020” (New Delhi: National Crime Records Bureau, 2021), <https://ncrb.gov.in/en/crime-in-india-table-addtional-table-and-chapter-contents>.

²²National Crime Records Bureau, “Crime in India 2021” (New Delhi: National Crime Records Bureau, 2022), <https://ncrb.gov.in/en/crime-in-india-table-addtional-table-and-chapter-contents>.

²³National Crime Records Bureau, “Crime in India 2022” (New Delhi: National Crime Records Bureau, 2023), <https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/1701607577CrimeinIndia2022Book1.pdf>.



The meaning of system is rooted in the Greek word "systema" which by definition is a whole made up of various parts.²⁴ The two countries, Indonesia and India, have and use different legal systems, where Indonesia used the Civil Law (Continental Europe) while India the Common Law (Anglo Saxon). The civil law system grew and developed during ancient Rome based on the incorporation of the Corpus Juris Civilis (codification and basis of law) by the emperor Justinianus.²⁵ There are 3 characteristics of the civil law legal system, including codification, judges are not bound by existing decisions so that the law becomes the benchmark or source of law (principle of precedent) and the judiciary is inquisitorial in nature. First, codification occurred in two countries, including Germany and France. This codification was made as a reference for several other countries in Europe such as Spain, Belgium, Italy, Greece and the Netherlands. secondly, precedents or where judges originate from laws follow the differences in legislative, executive and judicial powers which interpret one's powers as independent from each other. The civil law system provides an opportunity for judges to decide on a case without reviewing previous judges' decisions so that the law becomes the judge's benchmark in deciding cases. third, the inquisitorial justice system, meaning that the judge's role is to decide cases based on facts in looking at the defendant's evidence.²⁶

The meaning Common Law developed in England around the 11th century and was then adopted in the United States (Anglo-American), New Zealand, Australia, Canada, and countries that are part of the Commonwealth. The main characteristic of the general legal system is that it does not create legislation but rather based on previous case law. Basically, previous decisions issued by the judiciary (cassation level court) must be obeyed in similar cases in the future by respecting precedents.²⁷ Sources of law in the common law system include judge's decisions (jurisprudence), laws (statues), customs, opinions of legal experts (doctrine) and reason. judge's decision. The judge's decision will be the decision of the judge after him. This is based on the fact that if the court declares a legal position, then the decision will be applied to the same case in the future. on the other hand, the common law system also recognizes statutory regulations (legislation/statute law) with parliament as the authority that has the right to draft laws. The legal source of reason is a form of legal effort that is appropriate and fair if no other source of law can be found so that it can be sourced from human reason and reason. There are 3 types of characteristics of the common law legal system, the first is jurisprudence, the second is the doctrine of stare decisis and the third is the adversary system. first, jurisprudence. Common law is a product of English law that developed and was not influenced by Roman law. Civil law and common law recognize jurisprudence, but the difference between civil law countries is that judges are not required to adhere to previous judges' decisions. secondly, the stare decisis (stare decisis et quieta non

²⁴ Wahyudi Kumorotomo, Fajar Nurhardianto, and Inu Kencana Syafii, "Perbandingan Sistem Hukum Civil Law Dan Common Law Dalam Penerapan Yurisprudensi Ditinjau Dari Politik Hukum" 2 (2022): 1028.

²⁵ MD Shodiq, *Perbandingan Sistem Hukum* (Solok, 2023).

²⁶ Gozali, D. S., *Pengantar Perbandingan Sistem Hukum (Civil Law, Common Law, dan Hukum Adat)* (Bandung: Nusa Media, 2020), <https://repositori.uin-suka.ac.id/bitstream/handle/123456789/32302/perbandingan%20hukum%20rev%203.pdf?sequence=1&isAllowed=y>.

²⁷ Kumorotomo, Op.Cit, p.1029

move) which we call the doctrine of "precedent" where the judge is bound to apply the current decision to the decision of a previous judge with a similar case record. If there is an error in using the doctrine of stare decisis in a case, it is called overruling precedent or distinguishing precedent. third, the adversary system is a situation where each lawyer faces each other to win. If a jury is needed to resolve the case, the judge orders the jury to make a decision.²⁸ Common law recognizes the court as having a jury present. The definition of a jury based on the Cambridge Dictionary is a group of people who are selected based on law and have the power to decide questions based on facts and return a verdict to them.²⁹ The Indian jury trial provisions are contained in CHAPTER XXIII Article 322 concerning the regulation of trials for offenses and in Article 232 concerning the regulation of how to form a jury to try the defendant. The jury system was first known in India in the cities of Mumbai, Kolkata and Chennai.³⁰ The jury system was a system brought to Indian courts by British lawyers and jurists.³¹ However, in the end it failed where the jury was deemed not fair as expected, as in the case of Ramanugrah Singh against The King Emperor, where in the end the judge appealed to the high court because he did not agree with the jury's decision. This system continued until the Nanavati case was reported in local media and caused concerns about jury trials. The Law Commission of India recommended abolishing jury trials in 1958-1969 which was contained in the Criminal Procedure Code until precisely in 1974 it underwent changes and revisions and now the entire state of India is only tried by one judge. The role of the Jury in India is only for court trials regarding Persian marriages.³² There are several other reasons that led to the abolition of the jury system in India, such as taking a long time for the jury to present evidence, making arguments which were then considered burdensome by overburdened courts and incurring greater costs borne by the state.³³ Another reason put forward by James said that jury trials in India were abolished because juries in India at that time were considered stupid, illiterate and corrupt so they were considered not the right and suitable people to be jurors.³⁴

a. Law Enforcement in Indonesia

Table 4 : Rape Law Enforcement based on Indonesian Penal Code

Criminal Elements	Section	Criminal Threats	Additional Penalty	Section
If there is coercion and rape against a woman	Section 285	Sentenced to a maximum of 12 years in prison	If it causes death, the maximum penalty is 15 years in prison	Section 291 Clause 2

This table shows the main article, namely article 285 regarding the punishment for rape and article 291 paragraph 2 which is an additional penalty if it causes death.³⁵

Section 285 contained in book II CHAPTER XIV crimes against morality of the Penal Code is said to be rape if there is coercion and violence by the perpetrator against the victim. The crime of rape

²⁸ Gozali, Op.Cit. h. 139-150

²⁹ Cambridge University Press, "Definition of Jury," accessed June 13, 2024, <https://dictionary.cambridge.org/dictionary/english/jury>.

³⁰ Shaun Star and Arindam Bharadwaj, "Trial by Jury in Australia and India," *Comparative Reflection on the Constitutional Model of India and Australia*, 2020, 6.7.

³¹ Ibid., p. 6.9.

³² Ibid., p. 6.9-6.10.

³³ Ibid., p. 6.11.

³⁴ James, J., "Not The Right People': Why Jury Trials Were Abolished in India," 2020, <https://www.sociolegalreview.com/post/not-the-right-people-why-jury-trials-were-abolished-in-india>.

³⁵ Andi Hamzah, *KUHP dan KUHP* (Jakarta: Rineka Cipta, 2016).

often occurs among victims such as children, girls, adult women, groups who are physically and mentally weak. Lack of sensitivity to family and people around them from external threats.³⁶

The resolution of rape cases is said to be complicated at the investigation, prosecution and decision stages. Difficulties during the evidentiary process include the lack of presenting eye witnesses in front of the judge due to incidents of rape or molestation.³⁷ The process of handling cases in court with rape cases where the victim is a woman, judges or other law enforcers carry out a form of stereotyping by asking about the victim's history such as whether the victim was still a virgin or not and then other questions such as the victim's clothing or what style was used when raping the victim.³⁸ This means that the judge violated the code of ethics based on PERMA No. 3 of 2017.³⁹ In rape, it is certain that there was deliberate intent by the perpetrator, where the public prosecutor must clearly provide proof that the perpetrator violated Section 285 of the Penal Code.⁴⁰ Another law that describes women as having the right to special protection, namely section 49 clause 2 and 3 in Law Number 39 of 1999 which states that women have the right to be protected with special protection by the state in carrying out their profession which is considered to threaten the safety and health of women's reproductive organs. This special right is based on reproductive organs that are guaranteed to be protected by law.⁴¹

Taking as an example the case of judge's decision number 151/Pid.B/2020/PN Kot.⁴² In essence, based on the Investigation Report by the police, the defendant fulfills the elements of Article 285 of the Criminal Code for anyone who commits violence by force with a woman which is considered rape with a maximum sentence of 12 years in prison. In the chronology, the defendant was named Slamet Mahminudin bin Nur Samin, along with two other witnesses, namely Herman and Hanafi, who went fishing in Pringsewu Regency, Lampung Province. The defendant saw the victim witness walking in the rice fields where the defendant attacked her by smothering the victim witness from behind until she fell to the ground and raped the victim witness. The victim's witness said the incident caused her trauma.

In giving trial, the judge gave a reduced prison sentence accompanied by mitigating elements such as the defendant being polite and cooperative during the trial, the defendant had never been convicted before, the defendant was aware that he was tempted by lust and the defendant was the backbone of the family. The element that aggravated the defendant was that the defendant caused the victim to be traumatized by the incident, which in the end the judge decided and sentenced the defendant to six years in prison along with the facts and evidence presented at the trial. The author sees suitability with the civil law system, namely the principles of precedent and inquisitorial. The principle of precedent in this case example is that the judge relies on the Criminal Code as a source of law in deciding cases and the inquisitorial principle where the judge gives a decision based on facts accompanied by legal evidence so that there are mitigating and aggravating sentences. The judge's

³⁶ Jamaludin, Rodliyah, and Pancaningrum, "Perlindungan Hukum Bagi Korban Tindak Pidana Pemerkosaan Perspektif Viktimologi Dalam Sistem Peradilan Pidana," *Jurnal Kertha Semaya* 9, no. 12 (2021): 2429, <https://doi.org/10.24843/KS.2021.v09.i12.p14>.

³⁷ Rinto Sibarani et al., "Kajian Hukum Terhadap Korban Pemerkosaan: Perspektif Hukum di Indonesia" 1, no. 1 (2021).

³⁸ Bestha Inastan Ashila et al., *Pedoman Pendamping Perempuan Berhadapan Dengan Hukum* (Depok: Badan Pembangunan Internasional Amerika Serikat (USAID), 2019), <https://mappifhui.org/wp-content/uploads/2019/08/Booklate-MaPPI-Revisi-Final-06.pdf>.

³⁹ *Ibid.*, p.24.

⁴⁰ Baiyinit, "Pertimbangan Hakim Atas Tindak Pidana Pemerkosaan Dengan Kekerasan Terhadap Perempuan Berdasarkan Pasal 285 KUHP" 3, no. 4 (2023).

⁴¹ Pemerintah Pusat Indonesia, "Undang-Undang Nomor 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi," 31 § (n.d.).

⁴² "Putusan_151_pid.B_2020_pn_kot.Pdf," n.d.

consideration is a determination of the realization of the judge's decision which contains justice and legal certainty (*ex aequo et bono*).⁴³ Overall, there are 3 elements of conformity including codification. The codification referred to here is a set or collection of rules contained in one book, namely the Criminal Code. Then there is the principle of precedent where judges are bound by the law to make decisions where the Criminal Code is the source of law. Finally, the most prominent suitability is that the judge decides the case based on the defendant's facts and evidence so that it becomes the judge's decision to lighten or aggravate the sentence.

b. Law Enforcement in India

Table 4 : Rape Law Enforcement based on Indian Penal Code

Types of Crime	Under 12 Years Old	Age 12 – 16 Years Old	Over 16 Years Old
Rape	The minimum prison sentence is 20 years. The sentence can be extended to life imprisonment or the death penalty	The minimum prison sentence is 20 years. The sentence can be extended to life	The minimum prison sentence is 10 years. The sentence can be extended to life
Gang Rape	The penalty is life imprisonment or the death penalty	The penalty is life imprisonment	The minimum prison sentence is 20 years. The sentence can be extended to life

Table 4, showed the Criminal Punishment for Rape under Indian Penal Code 1860 Amendment 2018.⁴⁴ This concluded that law enforcement against rape with the death penalty is classified based on age range.⁴⁵ Law enforcement against rape in India applies the death penalty based on age and criminal elements. The death penalty is imposed if the victim is gang raped and the victim is under 12 years old.

The Indian Penal Code 1860 section number 375, a man who intentionally and with force it said to be rape if insert penis into a woman's vagina.⁴⁶ Taking an example of a rape case in India, named case of Nirbhaya who was a victim of gang rape in the city of Delhi in 2012. The author took one of the court documents of the perpetrator of gang rape, chronologically the victim witness, 23 years old, a paramedic student. Who became a victim on the evening of December 16 2012. Nirbhaya at that time was with her male friend who was returning from the cinema and boarded a bus at the Munirka bus stop in New Delhi. It turned out that the bus that Nirbhaya was on was the bus that contained 6 rapists. This incident left the victim Nirbhaya with excessive trauma and pain, who ultimately died in Singapore after enduring treatment. In its verdict, the Indian High Court sentenced the defendants named Mukesh Singh, Pawan Gupta, Vinay Sharma, Akshay Thakur to life imprisonment with a fine of INR 5.000,00 in accordance with Article Number 376 letter D of the Indian Penal Code. During the trial, the defendant named Ram Singh committed suicide in prison and another defendant was released after rehabilitation for 3 years.⁴⁷ in a similar case in the following year, namely 2013 where a journalist

⁴³Cantika W Muhrim, Sherly Adam, and Elias Zadrach Leasa, "Pertimbangan Hukum Hakim Terhadap Kesaksian Yang Meringankan Dalam Tindak Pidana Pemerkosaan," *TATOHI: Jurnal Ilmu Hukum* 2, no. 10 (December 20, 2022): 1033, <https://doi.org/10.47268/tatohi.v2i10.1442>.

⁴⁴ Anmol Jain, "Unfounded Developments in the Indian Rape Laws," *SSRN Electronic Journal*, 2019, <https://doi.org/10.2139/ssrn.3766149>.

⁴⁵ "The Criminal Law Amendment Act 2018" (2018), https://www.mha.gov.in/sites/default/files/2023-02/CSdivTheCriminalLawAct_27022023.pdf.

⁴⁶ Ministry of Law and Justice, "Criminal Law Amendment Act 2013" (2013), <https://www.iitk.ac.in/wc/data/TheCriminalLaw.pdf>.

⁴⁷ "In the Supreme Court of India," n.d.

was sexually raped group at Shakti Mills, Maharashtra State with a total of 4 perpetrators including Vijay Mohan Jadhav, Siraj Rehmat Khan, Mohd. Kasim Mohd. Hasim Shaikh and Mohd. Salim Abdul Kuddus Ansari was declared the perpetrator of rape in accordance with 376 letter D of the Indian Penal Code and sentenced to life imprisonment. The following is the content of Article 376 letter D of the Indian Penal Code: Women who are raped by one or more than one group, are considered to have committed the crime of rape with a serious prison sentence of at least twenty years and can be extended to life imprisonment. Siraj Rehmat Khan and Mohammad Ashfaque Shaikh were only involved in the Indian ITE Law (The Information Technology Act). This trial was held in 2014.⁴⁸

The author connects this case based on the Indian legal system, namely Common Law. For example, this case is in accordance with the term enforcement carried out based on the previous judge's decision. The Shakti Mills case includes a rape case in Delhi (Nirbhaya) on page 2 which originates from the 2013 Criminal Law Amendment Bill, which was drafted by the Indian parliament (Lok Sabha) in accordance with the principle of doctrine which makes laws related to rape increasingly broad and complex. Then the Nirbhaya case was trial in the Indian supreme court, which in *stare decisis* or other terms is a precedent principle that must follow the decision of the Supreme Court and similar cases. It is increasingly clear that the entirety of the trial is based on elaborations and variations of various judgments of the Supreme Court of India so the judge gave a decision to the four defendants. Another compatibility in the Shakti Mills case is based on the Statue. Then the law used is Article 376 D of the Indian Penal Code concerning gang rape with a minimum prison sentence of 20 years and can be extended to life imprisonment.

The difference between the two legal systems that are enforced is that Indonesia uses Article 285 of the Penal Code which is a form of codification and is a legal source for determining punishment which is left entirely to the judge accompanied by case facts, evidence and witnesses in court. India, with its legal system, still uses the Penal Code as its source of law, even though there were amendments in 2013 and 2018, where enforcement is more complex with differences in age, number of perpetrators and the punishment given, such as the death penalty. The supreme court is a reference for lower courts such as district courts and high courts, where judges also look at previous similar cases that were tried in the supreme court (precedents).

2. State Preventive Efforts to Minimize the Occurrence of Rape against Women

a. Indonesia

Regulation Number 12 of 2022 concerning Criminal Acts of Sexual Violence or abbreviated as the TPKS Law is one of the government's efforts to minimize cases of rape in which this occurs is part of sexual violence. The TPKS Law as a whole regulates:

- 1) Prevention of sexual violence;
- 2) Handling, protection and recovery of victims;
- 3) Implementation of law enforcement and rehabilitation of perpetrators;
- 4) Realization of an environment free from sexual violence;
- 5) Provide guarantees of no sexual violence.

In terms of prevention, this is contained in CHAPTER VII, namely Prevention, Coordination and Monitoring. In article 79 paragraph 1, the central government and regional governments have an obligation to prevent sexual violence. There needs to be coordination and monitoring by the governor, regent or mayor by carrying out planning, services, evaluation and reporting. Monitoring is carried out by the minister, National Commission on Violence Against Women, National Commission on Human Rights, Child Protection and Disabilities. The overall point is that society also needs to contribute to

⁴⁸ "In the High Court of Judicature at Bombay Criminal Appellate Jurisdiction Confirmation Case No. 2 of 2014," n.d.

preventing sexual violence as a whole.⁴⁹ The roles and duties of state institutions, government and regional governments to prevent sexual violence are contained in the TPKS Law. This is outside the Criminal Code because it is not part of a criminal act.⁵⁰

In this case, the establishment of a presidential regulation with Law Number 65 of 2005.⁵¹ concerning the National Commission on Anti-Violence Against Women which replaced Law Number 181 of 1998.⁵² Article 2 of the National Commission on Violence Against Women has the following objectives:

- 1) Development towards eliminating violence against women and upholding human rights in Indonesia;
- 2) Increasing efforts to prevent and overcome forms of violence against women and also protect women's human rights.

From the explanation above, the state's efforts to minimize the occurrence of rape against women have resulted in the role of the National Women's Commission also dominating. The drafting of the TPKS Law provides clarity on the regulate legal protection for victims of sexual violence both physically and mentally.

b. India

The feminist movement in India first started in the 1970s through cases such as Rameeza Bee and Mathura. The efforts made by Indian women in that era were this movement focused on planning laws, as well as dealing with the issue of agreeing on the burden of proof in security procedures. Request to change the word "consent" to "free from consent". As a result, the committee rejected the 1980 amendment bill with the definitions of planning and consent remaining and only the addition of the criminal offense category of fraud with sexual violence.⁵³ The law intends to only recognize penile penetration of the vagina, this has led feminists in India to demand reform of the verma committee in order to gain legal recognition and all forms of protection from sexual offenses that are not contained in the law. Take for example the case in Delhi where one of the perpetrators injured the victim's vagina with an iron rod, which is not considered cunning. For decades, Indian feminists have waged a struggle over expanding the definition of planning beyond just penile penetration.⁵⁴ In this period there were four organizations that had an influence on issues such as violence against women, disappearance of girls and other issues. The organizations in question include the National Commission for Women (New Delhi), the Joint Program for Women (Delhi), the National Council for Women (Pune), Times For Women (Delhi) and the Association of Self-Employed Women.⁵⁵ Trial delays in all states in India are due to a lack of professional judges and also too many cases registered in court.⁵⁶

⁴⁹ Undang-Undang Nomor 12 Tahun 2022.

⁵⁰ Irda Nur Khumaeroh, "Kebijakan Hukum Pidana Terhadap Perkembangan Tindak Pidana Kekerasan Seksual yang Bertujuan Menciptakan Keadilan Gender," *Jurnal Hukum Indonesia* 2, no. 2 (April 27, 2023): 53–59, <https://doi.org/10.58344/jhi.v2i2.14>.

⁵¹ "Perpres Nomor 65 Tahun 2005" (2005), <https://peraturan.bpk.go.id/Details/42592/perpres-no-65-tahun-2005>.

⁵² "Keppres No. 181 Tahun 1998" (1998), <https://peraturan.bpk.go.id/Details/59464/keppres-no-181-tahun-1998>.

⁵³ Kalika Mehta and Avantika Tiwari, "Between Sexual Violence and Autonomy: Rethinking the Engagement of the Indian Women's Movement with Criminal Law," *German Law Journal* 22, no. 5 (August 2021): 860–77, <https://doi.org/10.1017/glj.2021.40>.

⁵⁴ Preeti Pratishruti Dash, "Rape Adjudication in India in the Aftermath of Criminal Law Amendment Act, 2013: Findings from Trial Courts of Delhi," *Indian Law Review* 4, no. 2 (May 3, 2020): 244–66, <https://doi.org/10.1080/24730580.2020.1768774>.

⁵⁵ Rouf Bhat and Mohd Wani, "Development of Women's Movement in India: A Historical Perspective," *Temida* 25, no. 1 (2022): 93–109, <https://doi.org/10.2298/TEM2201093B>.

⁵⁶ Jain, M., "Why The Pending Cases Are Increasing Year By Year In India?," 2024, <https://www.legalserviceindia.com/legal/article-13171-why-the-pending-cases-are-increasing-year-by-year-in-india-.html#:~:text=The%20only%20reason%20behind%20pendency,of%20judges.>

The commission of women in india based national area also has the functions contained in chapter 3 of the under Indian National Commission Act 1990 Number 20 of 1990 including:

- 1) Investigate, examine all of related to the protection of women based on the laws and Constitution;
- 2) Attend the central government with consistency every year or at other times determined by the commission and report on the implementation of protection;
- 3) Make reports and recommendations for effective implementation of security efforts in any state;
- 4) Handle cases that violate the laws or constitution relating to women with the authorities;
- 5) Examining complaints related to matters such as deprivation of women's rights, not implementing laws aimed at protecting women, non-compliance with decisions and policies aimed at hindering welfare and assistance to women and dealing with problems that arise with the authorities;
- 6) Conduct special investigative studies on the problem of discrimination and cruelty against women and create strategies to overcome this;
- 7) Carry out promotions in the form of education in all fields and find out obstacles to their progress such as lack of residential access, inadequate technology, basic services so as to increase their productivity;
- 8) Participate and provide advice on women's socio-economic development planning;
- 9) Evaluate progress in women's development in any state;
- 10) Inspect and order inspections in prisons, detention centers, correctional institutions or similar places where women are detained who are handed over to the competent authorities for recovery measures;
- 11) Carrying out funding litigation involving issues that affect women;
- 12) Make periodic reports submitted to the government regarding all matters regarding the difficulties faced by women;
- 13) Other matters that can be referred to by the central government.⁵⁷

D. CONCLUSION

First, the author found that the two countries, Indonesia and India, use different legal systems in enforcing laws regarding rape cases. Law enforcement using the civil law system is considered faster and fairer. The judge has the right to decide the case with aggravating or mitigating sentences for the defendant accompanied by the facts and evidence presented. Form of codification with legal sources of the Penal Code as well. The judge's considerations in adjudicating are considered more rational. The common law system requires a lot of time by looking at the decisions of higher judges with similar cases in the past (precedents) which are similar sourced from the Indian Penal Code and require the opinion of legal experts (doctrine). This provides different views and will certainly take longer in the adjudication process. Second, efforts by each country to minimize this are that Indonesia has a special law, namely the TPKS Law, whose function is to protect victims of sexual violence, while law enforcement remains based on the Penal Code. The formation of the National Commission on Violence Against Women by presidential decree is also part of preventing sexual violence against women in Indonesia. In India, a form of prevention is the establishment of a national commission for

⁵⁷ "The National Commission for Women Act 1990" (1990), <https://wcd.nic.in/sites/default/files/nwact.pdf>.

women in India which was formed in 1990 whose role is to protect, participate, examine and handle all matters related to women in order to implement existing regulations.

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