



## The Evidential System for the Non-Physical Offense of Sexual Harassment

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### ABSTRACT

*Non-physical sexual harassment is not only about catcalls or whistling, but also includes sexual comments, commenting on body shape, flirting with affectionate words of a sexual nature, and showing vital organs constantly. Victims of verbal harassment are often frightened to report due to the lack of response from the community and law enforcement, and the lack of legal certainty. Verbal harassment victims are usually women, but can also be men or gay people. This research aims to increase the awareness of students and the public about sexual harassment cases, so that it is expected that there will be protection and resolution for cases of non-physical sexual harassment. This research uses a normative legal research method, which discusses legal principles, comparative law, legal history, and laws related to the crime of sexual harassment. The results of the analysis indicate that non-physical sexual harassment is verbal abuse in the public that can be committed by men or women by flirting, complimenting, or making sexual gestures to attract the victim's interest. Sexual harassment, both physical and non-physical (verbal), targets the sexual organs or sexuality of the victim and must be resolved so that there are no more victims. It is expected that with the Sexual Harassment Law, the process of resolving and proving cases of sexual violence can be facilitated.*

**Keywords:** Evidence, Non-physical Sexual Harassment, Women

## INTRODUCTION

Perpetrators and victims of sexual harassment can be women or men, but the majority of victims are women. Therefore, sexual harassment is often considered as violence against women. According to research by the World Health Organization (WHO), physical and sexual harassment against women has become pervasive, affecting more than a third of the global female population. This violence occurs in various places and affects all walks of life.<sup>1</sup> WHO research indicates that approximately 35% of women in the world have suffered physical and/or sexual abuse, either by their partners or other people. Almost 30% of them suffered abuse from their own partners. Meanwhile, around 7% of women experience sexual violence by other people besides their partners.<sup>2</sup> There has also been an increase in violence against women in Indonesia in the domestic sphere. Annual data from the National Commission on Violence Against Women (Komnas Perempuan) recorded 293,220 cases of violence against women in 2014. Most of this data came from 359 Religious Courts in 30 provinces, with 280,710 cases or about 96%. The remaining 12,510 cases, or about 4%, came from 191 partner organizations that sent data to *Komnas Perempuan*.<sup>3</sup> The number of cases increased compared to 2013, which amounted to around 263 thousand cases.<sup>4</sup>

A report by *Komnas Perempuan* reported that in 2014 there were 8,626 cases of violence against women in the private sphere.<sup>5</sup> 59% or 5,102 cases were violence against wives, 21% or 1,748 cases of dating violence, 10% or 843 cases of violence from ex-boyfriends, 0.7% or 53 cases of violence by ex-husbands, and 0.4% or 31 cases of violence against domestic workers. Sexual violence cases were quite high, with 2,274 cases, although not the highest. Physical violence recorded 3,410 cases, psychological violence 2,444 cases, and economic violence 496 cases.<sup>6</sup>

In addition, there were four (4) types of violence in the community sphere, which were sexual (56%); psychological (1%); physical (23%); economic (less than 1%); and other types categorized as miscellaneous (14%). Sexual violence came in several types such as: rape (1,033 cases); sexual abuse (834); sexual harassment (184); abduction of girls (46); attempted rape (12); and other sexual

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<sup>1</sup> South African Medical Research Council WHO, Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine, *Global and Regional Estimates of Violence against Women*, 2013.

<sup>2</sup> Ibid.

<sup>3</sup> Komnas Perempuan, *Kekerasan Terhadap Perempuan, Negara Segera Putus Impunitas Pelaku. Catatan Kekerasan Terhadap Perempuan Tahun 2014* (Jakarta, 2015).

<sup>4</sup> Komnas Perempuan, *Kekerasan Terhadap Perempuan Meningkat: Kebijakan Penghapusan Kekerasan Seksual Menciptakan Ruang Aman Bagi Perempuan Dan Anak Perempuan. Catatan Kekerasan Terhadap Perempuan Tahun 2019* (Jakarta, 2020).

<sup>5</sup> Ibid.

<sup>6</sup> Prianter Jaya Hairi, "Problem Kekerasan Seksual: Menelaah Arah Kebijakan Pemerintah Dalam Penanggulangannya," *Negara Hukum* 6, no. 1 (2015).

violence (74 cases).<sup>7</sup> These data are actually enough to demonstrate that the level of violence against women, especially sexual harassment, is quite high. The recent increase in sexual harassment cases proves that legal protection against sexual harassment cases in Indonesia is still weak.

The current regulation used to resolve sexual violence against women is the Criminal Code (KUHP). The criminal code usually charges perpetrators of sexual harassment and sexual intercourse. These two acts are often used by law enforcement to target perpetrators. In addition, the current legal problems are increasingly vulnerable because women are victims of these crimes. Sexual harassment does not only occur in the private sphere, but also in the family, playground, office, company, and even in universities.

Sexual harassment in Mark Yantzi's perspective is a particular form of violence that occurs due to issues of sexuality. He argues that women's perceived use as objects of sexuality is closely related to the relationship between sex and violence. Wherever there is sex, violence is almost always generated. Several acts such as rape, sexual harassment (humiliation and degradation of the other gender), girls' trafficking for prostitution, and sexual harassment by their partners are forms of sexual harassment that often occur against women.<sup>8</sup> Sexual harassment against women and girls comes in various forms and is perpetrated in different situations and contexts. The WHO World Report on Violence and Health has listed several forms of sexual violence that women can be subjected to, including marital or dating rape, unwanted sexual advances, including requesting sexual activity in return for services, and forced marriage, cohabitation, and child marriage.<sup>9</sup>

Sexual harassment against men is more common than we thought. Many of these crimes go unrecorded due to lack of documentation. Men often do not report sexual violence due to fear, confusion, guilt, shame, or social stigma. In addition, society's views on masculinity make men hesitant to speak up or report sexual violence. Society often thinks that men must be strong and unlikely to be victimized, so these cases are not widely exposed.<sup>10</sup>

Sexual harassment also happens to children, including acts of violence, rape, and exploitation in prostitution and pornography. These are serious violations of children's rights and can cause severe physical and psychological trauma. According to a 2002 WHO study, approximately 223 million children are victims of sexual violence with physical contact. As this issue is highly sensitive and often covered up, the number of victims may be higher than reported. Girls are more

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<sup>7</sup> Ibid.

<sup>8</sup> Mark Yantzi, *Sexual Offending and Restoration* (Herald Press, 1998).

<sup>9</sup> World Health Organization, *World Report on Violence and Health* (Geneva, Switzerland, 2002).

<sup>10</sup> John C. Thomas and Jonathan Kopel, "Male Victims of Sexual Assault: A Review of the Literature," *Behavioral Sciences* 13, no. 4 (April 3, 2023): 304, <https://www.mdpi.com/2076-328X/13/4/304>.

often victims of sexual violence than boys. The WHO study found that 150 million girls were victims, while male victims were around 73 million.<sup>11</sup>

Women are often victims of bullying and infringement of rights. Therefore, there needs to be a special law that protects victims in higher education. Higher education is an institution that provides education and teaching after secondary school, and is based on the culture of the Indonesian nation in a scientific manner. Sexual harassment is a term derived from the English term, and relates to inappropriate behavior between individuals of different genders, which can lead to sexual intercourse. Harassment and other sexual crimes have become a frequent problem in society.<sup>12</sup>

Based on the results of the research, sexual harassment in higher education can occur due to several factors, such as power relations, gender inequality, and opportunity. There are two ways to protect victims of sexual harassment, according to Muchsin's theory: preventive and repressive. In order to prevent this, the government has issued Minister of Education, Culture, Research and Technology Regulation No. 30/2021 on the Prevention and Handling of Sexual Harassment in Higher Education, and Law No. 12/2022 on Criminal Acts of Sexual Violence. Repressively, law enforcement is carried out to solve problems, provide victims' rights, and impose sanctions on perpetrators according to applicable regulations in Indonesia.

## LITERATURE REVIEW

In criminal court cases, most judges agree that the only thing to be pursued in a criminal case is the formal truth. Therefore, in seeking the truth, judges must adhere to the official testimony and evidence that appears at trial. This is in accordance with the principle of criminal procedure law which states that the judge is passive, which means that the judge does not determine the scope of the issues presented, but the parties to the case must determine it. In this case, the judge may not decide things that are not demanded or grant more than what is demanded (Article 178 paragraph (3) HIR). The judge only receives, reviews, and assesses the materials submitted by the parties, then makes a decision based on an assessment of these materials.<sup>13</sup>

Although judges in criminal cases seek formal truth, in practice there can be adjustments as needed. In court practice, judges must first see whether the position of the two litigants is balanced or not. This balance is seen from various

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<sup>11</sup> Ijeoma Onyinyechi Maduakolam et al., "Knowledge and Experience of Sexual Violence among Female Adolescents in Public Schools in Enugu State during the Covid-19 Pandemic," *Journal of Child Sexual Abuse* 32, no. 2 (February 17, 2023): 204–224, <https://www.tandfonline.com/doi/full/10.1080/10538712.2023.2181902>.

<sup>12</sup> Aulia Virgistasari and Anang Dony Irawan, "Pelecehan Seksual Terhadap Korban Ditinjau Dari Permendikbud Nomor 30 Tahun 2021," *MLS: Media of Law and Sharia* 3, no. 2 (2022): 107–123.

<sup>13</sup> Sudikno Mertokusumo, *Penemuan Hukum: Sebuah Pengantar* (Yogyakarta: Cahaya Atma Pustaka, 2014).

factors such as education, economy, and social status. In examining and adjudicating cases where the two parties are evenly matched, judges do seek formal truth and use a positive evidentiary system. However, in cases where the position of the two parties is not balanced or there is a large gap, the judge will dig deeper and examine the events more thoroughly. That way, it is hoped that the decision taken can fulfill a sense of justice. In current legal developments, although formal truth is still a guideline in resolving criminal cases, in theory there is a view that the application of formal truth does not have to be too rigid. In fact, there is an opinion that states that in criminal procedure law, we must seek not only formal truth but also material truth. Basically, in criminal cases, judges should stick to the formal truth. Material truth is only considered if there is a rebuttal from the opposing party. If the plaintiff presents a witness, the testimony will be linked to the suspect's witness and other evidence. So, the process indirectly tries to find the material truth.<sup>14</sup>

The fact is that commonly the evidence presented is in the form of witnesses and confessions. The application of evidence in the forms of oaths and testimony is generally the result of the judge's initiative during the trial. The evidence submitted by the parties to the case is then examined and assessed by the judge as to its evidentiary strength. In addition, the judge will further examine the evidence submitted whether it has relevance or not to the arguments or events.

Proof comes from the word "evidence" which means something that is sufficient to show the truth of an event. Proof is the act of proving. In general, proof is a process, way, or action to show the rightness or wrongness of a person in a court session. Hence, from a legal perspective, proof is an important part of criminal procedure law. This is seen from the beginning of the investigation to the judge's decision, even to other legal remedies. The process of proof becomes the main focus for all parties involved in each stage of the judicial examination, especially for judges. Basically, more proof occurs in court hearings to find the real truth about an event and provide the fairest possible decision.

Sexual harassment is any kind of sexual behavior that is done unilaterally and unwanted by the victim. This form of harassment can be in the form of sexualized speech, writing, symbols, gestures, and actions. This behavior is considered harassment if there is an element of coercion from the perpetrator, carried out with certain motivations, unwanted by the victim, and causes suffering to the victim.<sup>15</sup> Based on this definition, sexual harassment includes various forms of sexual attention or actions. This can be inappropriate comments or jokes, indecent behavior such as touching or hugging without permission, showing pornographic images, to physical attacks such as forcing kisses or hugs,

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<sup>14</sup> A Pitlo and M. Isa Arief, *Pembuktian Dan Daluwarsa Menurut Kitab Undang-Undang Hukum Perdata Belanda*, 1st ed. (Jakarta Intermasa, 1978).

<sup>15</sup> Susi Wiji Utami, "Hubungan Antara Kontrol Diri Dengan Pelecehan Seksual Pada Remaja Di Unit Kegiatan Mahasiswa Olahraga Universitas Muhammadiyah Purwokerto," 2016.

threatening the victim, or rape.<sup>16</sup> Sexual harassment against women is defined as those behaviors that disturb women, triggering fear with physical consequences. According to the academic paper of the Draft Law on the Elimination of Sexual Harassment by *Komnas Perempuan*, sexual harassment includes physical or non-physical acts aimed at the victim's sexual organs or sexuality. These actions include whistling, flirting, sexual utterances, showing pornographic materials, sexual advances, poking or touching on body parts, and sexual gestures or signals that make the victim feel uncomfortable, offended, or dehumanized, and can cause health and safety problems. Research indicates that sexual harassment often occurs in perceived safe places such as schools, colleges, student dormitories, and workplaces, perpetrated by people known to the victim such as friends, coworkers, teachers, or leaders, and partly in public places.

## RESEARCH METHODOLOGY

The research method used in this research is normative legal research which focuses on legal analysis based on applicable laws and regulations, doctrine, and relevant court decisions. This research aims to identify and examine the legal norms governing the proof of non-physical sexual violence crimes, such as verbal abuse and other acts that do not involve direct physical contact. The method involves an in-depth literature study to understand the legal concepts and principles applied in the evidentiary process in court, including an analysis of relevant laws, policies, and other legal instruments. As such, this normative research is expected to contribute to the development of a more effective and fair evidentiary system in handling cases of non-physical sexual violence.<sup>17</sup>

## RESULT AND DISCUSSION

### Legal Concept of Non-Physical Sexual Harassment

The 1945 Constitution of the Republic of Indonesia and Pancasila state that every citizen has the right to be protected from violence, including sexual harassment. Sexual harassment infringes on human rights and degrades a person's dignity. In Indonesia, catcalling is often taken for granted due to the patriarchal culture that puts men as the dominant party. Intentional actions such as verbal comments, catcalling, facial expressions, and body movements that are unwanted by the victim are forms of non-physical sexual harassment that harm the victim

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<sup>16</sup> Yonna Beatrix Salamor and Anna Maria Salamor, "Kekerasan Seksual Terhadap Perempuan (Kajian Perbandingan Indonesia-India)," *Balobe Law Journal* 2, no. 1 (April 17, 2022): 7, <https://fhukum.unpatti.ac.id/jurnal/balobe/article/view/791>.

<sup>17</sup> Binahayati Rusyidi, Antik Bintari, and Hery Wibowo, "Pengalaman Dan Pengetahuan Tentang Pelecehan Seksual: Studi Awal Di Kalangan Mahasiswa Perguruan Tinggi (Experience and Knowledge on Sexual Harassment: A Preliminary Study among Indonesian University Students)," *Share : Social Work Journal* 9, no. 1 (August 5, 2019): 75, <http://jurnal.unpad.ac.id/share/article/view/21685>.



psychologically and mentally.<sup>18</sup> Although catcalling can be frightening and uncomfortable, society and law enforcement often ignore it. Victims, who are usually women, are often terrified of reporting due to the lack of response from society and the uncertainty of the law. Therefore, there needs to be specific rules to deal with catcalling and provide better protection for victims.

*Komnas Perempuan* has reported that for 12 years (2001-2012), at least 35 women were victims of sexual harassment every day. In 2012, there were 4,336 cases of sexual violence, with 2,920 of them occurring in public places, mainly in the form of rape and sexual abuse. In 2013, the number of cases increased to 5,629, meaning that every 3 hours 2 women experienced sexual violence. Victims are generally between 13-18 years old and 25-40 years old. Sexual violence is difficult to uncover and deal with because it is often associated with the morality of society. *Komnas Perempuan* also states that there are 15 forms of sexual violence identified, but there may be other forms that have not been recognized. Sexual harassment includes physical and non-physical acts that target the victim's sexual organs, such as whistling, flirting, sexualized speech, showing pornographic material, and sexual touching or gestures that make the victim feel uncomfortable, offended, and humiliated, and can cause health and safety problems.<sup>19</sup>

Verbal sexual harassment occurs in many countries, such as France, Argentina, Portugal, Belgium and Peru, which take it seriously through criminal sanctions and fines.<sup>20</sup> Although they are often taken for granted in society, these harassments have adverse psychological impacts on the victims, such as discomfort and trauma. In Indonesia, similar cases have also occurred, such as a Russian national being harassed by a taxi driver in Mega Kuningan. Although the victim recorded and shared the incident, there was no further action. Non-physical sexual harassment can be committed by anyone and must be recognized as a criminal act that harms the victim, both psychologically and emotionally. Stereotypes that blame the victim must stop, as victims need legal protection. Sexual harassment is against human rights, and victims deserve security and protection in accordance with the law.

### **Evidential System for Non-Physical Sexual Harassment**

Sexual harassment often occurs in society in various forms, including non-physical sexual violence such as catcalling. Although it may seem trivial, catcalling has a big impact and has become a social problem. Women who are victims of catcalling often feel unsafe and have their human rights violated. This

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<sup>18</sup> Yuni Kartika and Andi Najemi, "Kebijakan Hukum Perbuatan Pelecehan Seksual (Catcalling) Dalam Perspektif Hukum Pidana," *PAMPAS: Journal of Criminal Law* 1, no. 2 (April 23, 2021): 1–21, <https://online-journal.unja.ac.id/Pampas/article/view/9114>.

<sup>19</sup> *Komnas Perempuan, 15 Bentuk Kekerasan Seksual: Sebuah Pengenalan*, 2012.

<sup>20</sup> Ida Ayu Adnyaswari Dewi, "Catcalling : Candaan, Pujian Atau Pelecehan Seksual," *Acta Comitas : Jurnal Hukum Kenotariatan* 4, no. 2 (2019): 198–212.

non-physical sexual violence can be considered a crime of decency, violates the rule of law, and affects the victim's psychology. Clear legal protection and law enforcement are needed to prevent this act.

Currently, Indonesian law does not specifically regulate non-physical sexual violence, even though these cases are increasingly troubling women. Law enforcement remains unclear, and regulations on catcalling are also lacking. To deal with this case, several articles from the Criminal Code and pornography law were used. Evidence is very important in criminal law, and Law No. 12/2022 on the Criminal Act of Sexual Violence regulates evidence. Evidence includes witness testimony, experts, letters, instructions, and testimony of the defendant.

Employees of the Ministry of Law and Human Rights, Article 24 and Article 25 of Law No. 12/2022 on Criminal Acts of Sexual Violence regulate evidence in proving cases of sexual violence. Valid evidence includes evidence regulated in criminal procedural law, electronic information or electronic documents, and evidence related to acts of sexual violence. The process of resolving criminal cases goes through three stages, namely investigation, prosecution, and examination in court. The problem is that the lack of regulations regarding non-physical sexual violence makes handling it difficult. A clear benchmark is needed to identify the act. The role of psychologists in providing evidence for case resolution is very important, but is often overlooked due to lack of strength of evidence. Victims of non-physical sexual violence must be protected and receive assistance according to the rule of law. Legal protection and sanctions for perpetrators are necessary. In case resolution, documents from psychologists should be recognized as strong evidence.

## **CONCLUSION**

Non-physical sexual harassment involves various acts that do not involve direct physical contact but are still humiliating and degrading on their own. These forms of harassment are not only limited to sexual catcalls, but also include comments with sexual connotations, inappropriate comments about one's body, flirting or teasing conveyed through words, and more extreme acts such as repeated exposure of vital organs. Victims of sexual harassment are often frightened to report their experiences, due to a lack of adequate support from the community and law enforcement officials. In addition, the uncertainty of the legal process is also a factor that prevents victims from speaking up. Although catcalling mostly affects women, it can also be perpetrated by men and gay people. In the legal context, evidences are very important to verify an incident of harassment. This can include witness testimonies, expert opinions, written documents, physical clues, and confessions from the defendants. However, the legal process often becomes difficult to proceed and provide justice for the victim without strong evidence.



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