



FACULTY OF LAW
Lund University

Dewi Novirianti

Indonesian Law and Policy on Rape:
Paralegals and Access to Justice for
Rape Victims

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Supervisor: Dr. Christina Johnsson

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Summary

This thesis discusses two cases of rape against adolescent girls that happened in Cianjur, West Java, and Lombok, West Nusa Tenggara in Indonesia. First of all, the thesis evaluates the availability of the legal framework in the area of rape in Indonesia that ensures the victims rights with regard to rape. It will look at whether Indonesia has ratified relevant international human rights instrument with regard to rape, whether the legal framework in the area of rape has adhered to the international human rights standard, and if there is the possibility to submit complaint and get it examined. Secondly, the thesis examines if the victim rights of rape are accessible and whether the relevant services and mechanisms are secured for the rape victims without any kind of discrimination. It will investigate if non-discriminatory access to judicial mechanisms and services are secured, whether physical, economic, and social obstacles are being eliminated, and if the access to information and education is available. The thesis demonstrates that the accessibility of the rights of victims rape were due to the fruitful combinations of the effective supports of legal officers and judiciary, the provisions of children rights protection law, and the support of intermediary or paralegal during the case handling.

Preface

In writing this thesis, there were a number of persons who have provided invaluable supports.

First of all, I would like to thank DR Christina Johnsson for the inspiring human rights indicators within the wonderfully written ‘Gender Justice Best Practices’ Report and for the support during the supervision of this thesis. I am also really grateful for the role of DR Ida Elizabeth Koch, the reader and examiner of my thesis.

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Jakarta, End of August 2010.

Dewi Novirianti

Abbreviations

| | |
|------------------|---|
| IAHR | The Inter-America system of Human Rights |
| IACHR | Inter-American Commission of Human Rights |
| CAT | Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment |
| CEDAW | International Convention on the Elimination of All Forms of Discrimination against Women |
| CRPA | Children Rights Protection Act |
| ECHR | European Convention of Human Rights |
| ECtHR | European Court of Human Rights |
| CESCR | The monitoring body of CESCR |
| Committee | |
| CRC | The monitoring body of Children Rights Convention |
| Committee | |
| FhH | Female-headed Household |
| GR | General Recommendation |
| GBP | Gender Justice Best Practices Report |
| HIV | Human Immunodeficiency Virus |
| HRC | Human Rights Committee or the monitoring body of the ICCPR |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICERD | International Convention on the Elimination of All Forms of Racial Discrimination |
| ICLP | Indonesian Criminal Law Procedure |
| ICMW | International Convention on the Rights of Migrant Workers and Members of their Families |
| ICRPD | International Convention on the Rights of Persons with Disabilities |
| IDV | Indonesian Domestic Law |
| IPC | Indonesian Penal Code |
| KDP | <i>Kecamatan</i> Development Program |
| LPA | <i>Lembaga Perlindungan Anak</i> or Children Rights Protection Organization |
| LPSK | <i>Lembaga Perlindungan Saksi dan Koran</i> or Victims and Witness Protection Institution |
| NGO | Non Governmental Organization |
| PEKKA | <i>Perempuan Kepala Keluarga</i> or Female-headed Household Organization |
| RPK | <i>Ruang Pelayanan Khusus</i> of Women's Police Desk |
| SOP | Standard Operating Procedure |
| SUSENAS | <i>Sensus Ekonomi Nasional</i> or The National Economics Census Data of Indonesia |
| UN | The United Nation |
| UNDP | United Nation Development Program |

| | |
|------------------------------|------------------------------|
| WCC | Women's Crisis Centre |
| WLE | Women's Legal Empowerment |
| Women's Committee | The monitoring body of CEDAW |

1. Introduction

1.1. The Cases and the Paralegals

This thesis discusses two cases of gender-based violence that were gathered from a field study during the summer time in 2008. The gender-based violence against two girls happened in two households in *Sukatani* village, *Cianjur*, and North *Kuripan* village, West *Nusa Tenggara*. The victims were Weni (15 years) and Sita (15 years) who live in *Sukatani* and North *Kuripan* respectively. Both girls were scared and confused after a serial of unwanted sexual contacts occurred to them. Weni's step-mom and a female-neighbour whom Weni told her story did not immediately take Weni's incident seriously. Meanwhile, Sita's pregnancy that changed her body shape merely led her relatives inquired who caused her pregnancy. Not too many villagers believed the fathers of two girls were the perpetrators of the sexual coercion. When Weni and Sita were questioned by the neighbours and family members concerning their dreadful experience of rape, both girls could only cry. At that moment, no one intended to offer help for Weni and Sita, and worse, both girls must face the discouraging reactions from most villagers. Most villagers considered Weni and Sita experience were a taboo for their villages. Thus, villagers did not only blame the perpetrators, but they also accused that the girls had instigated the serial of rapes. "Both the father and the daughter are insane!" said some villagers in North *Kuripan*.

This thesis examines the extent to which paralegals, children organization, social workers, and female police officer played roles in order to make the judicial process more accessible for both victims of violence. By discussing the two cases of rape, this thesis looks at the implementation of international women's rights norms in the grassroots level or villages. The works of Sally E Merry assists this thesis to analyze the roles of intermediaries to translate human rights norms to local context between the different sets of cultural understanding of gender, violence, and justice¹.

¹ Sally Engle Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (The University of Chicago Press, Chicago and London, 2006a), Sally Engle Merry, 'New legal Realism and the Ethnography of Transnational Law', 31:4, *Law & Social Inquiry* (Fall 2006b), pp. 975-995, Sally Engle Merry, 'Transnational Human Rights

The social context within which the two rape cases occurred such as cultural norms surrounding the gender roles, parent-child relationship, the economic conditions of the families in villages have influenced the rapes to happen. Likewise, the experience of the countries of South Africa and Namibia demonstrate that girls are rendered vulnerable to sexual abuse because of the dominant patriarchal ideology or the high status of men, with respect to girl children, that reduced girls' ability to refuse sexual advances². In the same vein, both communities in *Sukatani* and North *Kuripan* seemed reluctant to provide supports for Weni and Sita. The stories of rape that were eventually disclosed and became the daily topic in *Sukatani* had provoked some infuriated youth villagers to beat up Weni's father, the perpetrator. While in North *Kuripan* some angry male villagers looted the house of Sita and the father. By the helps of female paralegal in *Sukatani* and a children organization at *Mataram*, the capital city of West *Nusa Tenggara*, both Weni and Sita were able to face the situation.

Field study identified some reasons that impeded both girls' victims to access justice in cases of rape, both at the stage of cases reporting to state justice system and in the case handling process. First and foremost, villagers in *Sukatani* and North *Kuripan* have mostly considered incest – rape perpetrated by fathers to daughters, as documented in the cases is taboo to be raised in public. This hindered the reporting process to the police, since most of villagers and the family of the perpetrators disagreed with idea to report their own family members to the police. When the cases were reported to the police, community were mostly blaming the victims, even though the perpetrator submitted incriminating admission to the police. These occurred in the two rape cases documented, and it will be discussed further below. Secondly, the legal knowledge and capacity of the victims, Weni and Sita, women's villagers and villagers are weak. In the two cases, Weni and Sita understand that injustices have occurred to them, yet, they do

and Local Activism: Mapping the Middle', in Caroline M Sage and Michael Woolcock (eds.), *The World Bank Legal Review: Law, Equity, and Development Volume 2* (The World Bank, Washington DC, 2006c), pp. 185-214.

² R. Jawkes, L. Penn-Kekana, and H. Rose-Junius, "If they rape me, I can't blame them": Reflections on gender and in the social context of child rape in South Africa and Namibia', 61, *Social Science and Medicine* (2005), pp.1809-1820.

not know what to do. This reality is in line with a recent survey highlighted that even though the women's legal knowledge in villages are sufficient, their capacity to access justice is inadequate³. Finally, law and policy that relates to rape cases in Indonesia is generally ineffective let alone able to deliver justice for women's victims of violence. Rape case handling in state justice system is problematic and critical mainly at the reporting stage. However, the law on children rights protection provides more opportunity for girls victims of violence to access justice.

Therefore, the interventions and supports from various intermediaries in the two cases became an option to help encourage these girls' victims to report the case. Some villagers and relatives in the two cases accompany girls' victims of violence to report the cases as well. As the cases have captured, the intermediaries including the paralegal helped girls' victims of violence to access justice by referring the case to the third party such as hamlet and village heads or accompany them to the police stations. The services of paralegal and local organization to assist girls' rights enforcement in local setting are one of the approaches to translate human rights concerning violence against women⁴. By following the framework of Felstiner on the emergence and transformation of disputes, the thesis captures the story of Weni and Sita when they were naming, blaming, and claiming throughout the case handling process⁵. The two cases indicate that the works of intermediaries are critical in supporting the girls' victims to convey their grievances mainly in the early stage of the cases. As both cases indicate, the early stages of naming, blaming, and claiming are significant due to the high risk of attrition they demonstrate and the range of behaviour they encompass that is greater than in the later stage of dispute⁶.

Gender-based violence, indeed, became one of the most socially tolerable human rights violations. The 2009 report of Indonesian National Commission against Women or *Komisi Anti Kekerasan terhadap*

³ Please see in Women's Legal Empowerment Baseline Survey in <http://www.justiceforthe poor.or.id> both in English and Indonesian versions.

⁴ Merry, *supra* note 1, p. 138.

⁵ William LF Felstiner, R.L. Abel, and A. Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...', 15:3/4, *Law and Society Review*, pp. 631-654.

⁶ *Ibid.*, p. 636.

Perempuan (thereafter *Komnas Perempuan*) highlights the increasing numbers of girls' victims of sexual abuse each year⁷. Worldwide, it has been estimated that one of five women will be a victim of rape or attempted rape⁸; one in three women will have been beaten, coerced into sex or otherwise abused usually by a family member or an acquaintance⁹. Younger women and adolescent girls are particularly vulnerable to gender-based violence. Almost 50 percent of sexual assault worldwide are against girls 15 years or younger¹⁰.

Violence against women clearly constitutes human rights violation. Despite substantial evidence and reports of gender-based violence however international law system and the United Nation (UN) have been reluctant to acknowledge it as official issues¹¹. The eight core human rights treaties do not explicitly prohibit violence against women, and in particular, no binding international treaty address specifically on the issue¹². This has created grey area of women's rights protection that left some of it unregulated¹³. For this omission, the UN body in this case human rights treaties bodies or

⁷ Please see the complete report of 2009 Annual Report of Komnas Perempuan at <http://www.komnasperempuan.or.id/2010/03/catatan-ktp-tahun-2009/> accessed by 25 April 2010.

⁸ UN Millenium Project, *Investing in Development Goals: A Practical Plan to Achieve the Millenium Development Goals: Overview, Report to the Secretary General* (Earthscan, Virginia, 2005).

⁹ The World Bank, *Engendering Development: Through Gender Equality and Rights, Resources, and Voices* (Oxford University Press, New York and Washington DC, 2001), pp. 33, 35, 74, and 99.

¹⁰ 'A Role for Men in Gender Equality Fight', 11(165): 6, *IPS UN Journal* (13 September 2004).

¹¹ Please see the analysis of an article by Alice Edwards, *Violence against Women as Sex Discrimination: Evaluating the Policy and Practice of the UN Human Rights Treaty Bodies* (2008).

¹² The core human rights treaties are the International Covenant on Civil and Political Rights (ICCPR) 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965, the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984, the Convention on the Rights of the Child (CRC) 1989, the International Convention on the Rights of Migrant Workers and Members of their Families (ICMW) 1990, and the International Convention on the Rights of Persons with Disabilities (ICRPD) 2006. Most of these treaties do deal with particular forms of violence that may be perpetrated against women or girls.

¹³ International Legal Assistance Consortium (ILAC) and Raoul Wallenberg Institute (RWI), *Gender Justice Best Practices Haiti 10-11 September 2007, Report Commissioned by the International Legal Assistance Consortium upon Request by the Haitian Ministry of Women's Affairs and Women's Rights, presented at a seminar in Haiti* (RWI, Lund University, 2007) p. 13.

committees that are in charge in monitoring treaty implementation of states parties have been integrating gender-based violence by making gendered interpretation towards the existing provisions. These treaty bodies have authority to issue guidelines either as General Comments or General Recommendations. They highlighted the connections between violence against women and fulfilment of another rights and freedom prominently on equality and discrimination¹⁴. The CEDAW Committee nevertheless produced the most comprehensive guidelines on the issue concerned¹⁵. The tasks of special rapporteur on violence against women, its cases and consequences have also contributed relevant guidelines and recommendation to prevent and combat violence against women in the area of rape¹⁶.

Indonesia has ratified the International Convention of the Elimination of All Forms of Discrimination against Women or CEDAW and the International Convention of the Rights of the Child by 13 September 1984 and 5 September 1990 respectively. Since then, only a few of national bylaws that related to gender-based violence including sexual violence against girls were enacted. Generally, access to justice system in Indonesia focused to protect the defendant's rights, and in violence against women cases, the system tends to focus on perpetrator's rights protection. The rights of women's victims of rape are silent in the Indonesia Penal Code¹⁷ (IPC) and Indonesia Criminal Law Procedure¹⁸ (ICLP). The main provisions on rape are included in the Indonesian Penal Code (IPC) or *Kitab Undang-undang Hukum Pidana* (KUHP). Yet, the rape against girl child is outlined under the Indonesian Children Rights Protection Act (CRPA) or *Undang-undang* No.23/2002. Some policies concerning services for women and

¹⁴ *Ibid.*, p.24.

¹⁵ CEDAW, General Recommendation No.19, *Violence against women*, 11th session (1992), A/47/38 at 1(1993), Reprinted in Compilation of General Comments and general Recommendations Adopted by Human Rights Treaty Bodies, U.N Doc.HRI/GEN/1/Rev.6 at 243(2003).

¹⁶ Please see various reports that were drafted, proposed, and submitted by Radhika Coomaraswamy and Yakin Erturk the first and second Special Rapporteur on Violence against Women (SRVAW).

¹⁷ Law No.1 Year 1946 on The Indonesia Penal Code, for English version please see http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=IDN&p_classification=01.04&p_origin=SUBJECT

¹⁸ Law No.8 Year 1981 on Indonesia Criminal Law Procedure (ICLP).

children's victims of violence were established under the police institutions and in many relevant government institutions.

1.2. Objective

The thesis intends to evaluate the capacity of Weni and Sita, both victims of violence in dealing with legal problems they faced. Likewise, the thesis identifies the obstacles that Weni and Sita experienced in the legal context when they were seeking remedy. The thesis will examine the roles of the intermediaries in this case female paralegal, a children organization, social worker, and female police officer to assist the girls' victims of violence in dealing with obstacles they faced throughout the judicial process. The thesis will outline the relevant international woman's rights norms, binding and non-binding instruments, on the issues of gender-based violence by referring to the report of Gender Justice Best Practices (thereafter GBP report)¹⁹. The good practices of the countries of Canada, South Africa, and Spain in the field of rape have been considered by the GBP report. The thesis will discuss further the experience of the three countries and the indicators of human rights that were developed by GBP report.

The availability of the Indonesian legal framework in the field of gender-based violence and girl child sexual abused and some policies concerning victims of violence services and mechanism that adhere to GBP's human rights indicators will be surveyed and discussed in this thesis. Using the two cases of rape against adolescent girls in Sukatani and North Kuripan, the thesis examines the relevant laws including services and mechanisms are accessible for women and children victims of violence. Most importantly, the thesis discusses the extent to which the intermediaries ensured that both Weni and Sita were able to access relevant services and mechanisms without any kinds of discrimination.

¹⁹ ILAC and RWI, *supra note* 13.

1.3. Terminology and Delimitation

1.3.1. Terminology

1.3.1.1. Gender-based Violence and Rape

Gender gender-based violence is violence that directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the convention, regardless of whether those provisions expressly mention violence²⁰.

Rape is recognized as one of violence against women that happened in public sphere or general community as mentioned in article 2 of Declaration on the Elimination of Violence against Women:

Violence against women shall be understood to encompass, but not be limited to, the following: ...

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution²¹.

Radhika Coomaraswamy, the first special rapporteur on violence against women, defined rape as an intrusion into the most private and intimate parts of a woman's body, as well as an assault on the core of her self²².

1.3.1.2. Defining Access to Justice

The United Nation Development Program (UNDP) defined access to justice as:

“Access by people, in particular from poor and disadvantaged groups to fair, effective and accountable mechanisms for the protection of rights, control abuse of power and resolution of conflicts. This includes the ability of people to seek and obtain a remedy through formal and informal justice systems, and the ability to seek and exercise influence of law-making and law-implementing processes and institutions.”²³

This definition is comprehensive, covering law, policy and implementation. The UNDP definition assists this thesis to identify five key components for the victims, Weni and Sita, to reach the objective of access to justice that consist of (1) the relevant normative legal framework (rules, procedures,

²⁰ CEDAW, General Recommendation No.19, A/47/38, para.6.

²¹ General Assembly, A/RES/48, 104, 23 February 1994.

²² Para 19, E/CN.4/1997/47.

²³ The World Bank, *A Framework for Strengthening Access to Justice in Indonesia* (the World Bank, Jakarta, 2007) pp. 1-2.

actors and institutions) in the area of rape to promote both victims access to justice; (2) legal awareness of the victims concerning the law, rights, obligations and how to access channels to resolve grievances; (3) access of both victims to appropriate forums in order that the disadvantaged can translate their legal awareness into action; (4) effective administration of justice through formal institutions and informal mechanisms in the area of rape; (5) monitoring and oversight to promote transparency and accountability within the previous four areas²⁴.

The meaning of access to justice and injustice is interpretative and contextual. Social scientists identified that each form of trouble, problem, personal and social dislocation can be interpreted differently. Therefore, issues that may seem unfair for Weni and Sita, it may be unharmed from most of villagers' perspective²⁵. This thesis will utilize the definition of access to justice to map out how the rights of Weni and Sita were fulfilled when both girls went through access to justice path.

1.3.1.3. The Definition of Intermediary and Paralegal

Sally Engle Merry defined intermediary as the middle-persons or actors who translate global idea such as international women's rights norms into local situations and retranslate local ideas into global frameworks. According to Merry, intermediaries are national political elites, human rights lawyers, feminist activists and movement leaders, social workers, and other social service providers. In this thesis, intermediaries include community-based paralegals who were recruited by a Jakarta-based women's organization, a children organization, social worker, female police officers. These intermediaries played roles as accompaniers for both victims during the case reporting to the police, negotiators to the prosecutors and the judiciaries.

Literally, in law and legal term, a paralegal defines as someone without a law license who performs routine tasks requiring some knowledge

²⁴ Please see Bappenas, PSPK-UGM, UNDP, *Justice for All? An Assessment of Access to Justice in Five Provinces of Indonesia*, (UNDP Jakarta, January 2007) p. 42 and Tim Koopmans, *Court and Political Institutions, Comparative View* (Cambridge University Press, Cambridge, 2003) pp. 233-239.

²⁵ Felstiner, *supra* note 5, pp. 633-634.

of the law and procedures²⁶. In a more simple term, paralegals that provide justice services are laypeople with basic training in law and formal government who assist poor and otherwise disempowered communities to remedy breaches of fundamental rights and freedoms²⁷. However, women's paralegals in this thesis defines as female villagers who are selected and recruited by women's organization, particularly under PEKKA organization, and do not have legal education and background but receive serial of trainings relevant to the activities to increase women's villagers access to justice. The trainings aim to provide women's paralegals with knowledge to deliver community legal education and assistant to women's villagers with the cases. These paralegals received funding from these women's organizations for paying transportations and necessary cost for the purpose of community and women's villagers rights awareness and case handling.

In the documented cases of rape, female paralegal mostly referred villagers to urgently deliver assistant from the legal institutions. Their contribution to the case handling are varied, but mainly they accompany victims to contact third parties such as hamlet or village head and local religious leader or directly report violence against women cases to the nearest police station. If the case is reported to the police, paralegals keep monitor the case handling in the prosecutors office as well as accompany women's victims of violence in court hearings. In most cases, women's paralegals also take care of miscellaneous cost arise from the case handling. In many cases, paralegals have been actively conducting rights awareness in order to increase villagers' consciousness of human rights values.

The more prominent the paralegal position in the village, the more people requested helps and supports from them. Of the cases documented, most women paralegals already hold previous distinguished position in their village such as midwives, primary school teachers, and village-head wives. They work to serve the community thoughtfully, therefore positive feedbacks and responses from the villagers and the victims of violence are

²⁶ US Legal Definition in <http://definitions.uslegal.com/p/paralegal/> accessed on 22 November 2008.

²⁷ Vivek Maru, "Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide", 31 *The Yale Journal of International Law* (2006) p. 429.

attributed to them. Weni affirmed that “.... It was lucky that *Ibu*²⁸ Nining (female paralegal in *Sukatani*) accompanied me during the case reporting, since no relatives were with me during the investigation in the police station in that evening.”

1.3.2. *Delimitation*

The focus of this thesis is the experience of two adolescent girls in *Cianjur* and West *Nusa Tenggara* in seeking remedies at local level namely since the cases occurred in the villages of *Sukatani* and North *Kuripan* up until the case was brought to the court at district level. It will solely focus on the case handling through formal justice system on rape cases that were reported to the police. Yet, in Indonesian villages, normally cases either civil or crime are referred to local leaders before they proceed with formal justice mechanism²⁹, but it will not be analyzed in detail in this thesis. Apart from analyzing the cases, this thesis will seize some relevant points of law, policy and implementation in the area of rape. The various roles of intermediaries along the case handling process happen to be the realm of this thesis.

1.4. **Methodology: Field Study and Human Rights Indicators**

1.4.1. *Field Study*

In order to understand the works of legal officers (police officers and prosecutors) and judiciary (judges) as well as paralegals in the villages in case handling of gender-based violence, I have done case study in two areas in *Cianjur* district, West java province and West *Lombok* district, West *Nusa Tenggara* province in Indonesia. During the field works, I gathered two cases of rape occurred in *Sukatani* village in *Canjur*, and in north *Kuripan* village in West *Nusa Tenggara*.

To understand the situation in the villages and for the purpose of case study, I interviewed villagers and the local leaders in *Sukatani* and north *Kuripan*, the paralegals, and local activists in both villages. I particularly met, visited and interviewed the two survivors, Weni and Sita,

²⁸ It is an Indonesian word means mother.

²⁹ Please see, *inter alia*, the World Bank, *Village Justice in Indonesia: Case Studies on Access to Justice, Village Democracy and Governance* (the World Bank Office, Jakarta, 2004) and the World Bank, *Forging the Middle Ground* (the World Bank Office, Jakarta, May 2008).

and the two perpetrators, Asep and Mudi, a couple of times and in different places to collect direct quotes and stories from the first hands. I interviewed Weni and Sita's family members and relatives, the police officers, prosecutors, and judges who handled the cases. The companions of both cases such as children organization in Lombok and women's organization in Cianjur were interviewed as well.

1.4.2. *Human Rights Indicators*

To evaluate legal framework and legal institutions in the cases of rape this thesis utilizes the human rights indicators stemmed from GBP report³⁰ as the methodology. The GBP report utilizes international human rights standards in the arena of gender justice to define best practices. GBP report defined best practices as a practice that represents significant steps toward the realization of the rights in question and that demonstrates the state's willingness and commitment to the full implementation of international human rights standards³¹. The best practices depend on the law (legislations) and policy, and the context in which they operate.

To establish best practices in the area of gender justice, GBP report developed a set of human rights indicator as a tool for measuring the degree of implementation of human rights in a particular country. GBP report gathered the international human rights standards on rape such as treaties, and other binding instruments as well as CEDAW reports and concluding comments. In this case, human rights indicators were developed to survey the laws and relevant policies as well as measures of implementation for the full realization of human rights in the field of rape. The thesis utilizes the human rights indicators to locate good examples of laws and practices regarding gender best practices in the area of rape in Indonesia. In other words, human rights indicators are particularly suited to identify remaining gaps between human rights obligations and reality in the area of rape³².

The GBP report makes use of four principal indicators relate to how available, accessible, acceptable, and adaptable a human right is for

³⁰ The report was commissioned by International Legal Assistance Consortium (ILAC) and Raoul Wallenberg Institute (RWI) both are organizations based Sweden, upon a request by the Haitian Ministry of Women's Affairs and Women's Rights.

³¹ ILAC and RWI, *supra* note 13, p.14.

³² *Ibid.*, pp. 14-15.

individuals in a state³³. The indicators below are applied to survey the best practices in countries of Canada, South Africa and Spain for rape³⁴:

| Human Rights Indicators and Sub-indicators of Rape³⁵ | |
|---|--|
| Available Does the Indonesian Legal Framework ensure the availability of the rights of victims of rape? | Ratification of international and regional human rights instruments |
| | Legal framework in line with international standard |
| | Possibility to lodge complaints and have them examined |
| Accessible Are the rights of victims of rape accessible? Are the relevant services and mechanisms secured for both victims of rape without discrimination of any kind? | Non-discriminatory access to judicial mechanisms and services |
| | Physical, economic, social and other barriers are removed |
| | Access to information and education |
| Acceptable Is the quality of implementation, including relevant services and mechanism in the area of rape in Indonesia, ensured? | Quality of judicial mechanisms |
| | Cultural acceptability |
| Adaptable Is there a broader perspective on the realization of the rights of victims of rape in Indonesia, i.e. are they coupled with ongoing policy-making, integration, evaluation and education? | A comprehensive national strategy on violence against women and rape that is subject to regular evaluation |
| | No contradiction between rights and other legislation |
| | Continuous education of affected actors on current rights and standards |

Given the scope of the sources gathered during the field works, this thesis is only using the first two indicators namely the availability and the accessibility of legal framework and legal institutions in relation to rape

³³ These four A's were initially developed by Katarina Tomasevski, the former UN Special Rapporteur on the rights to education. *Please see* Katarina Tomasevski, 'Indicator' in Asbjorn Eide, Catarina Krause and Allan Rosas (eds.), *Economic, Social and Cultural Rights: Textbook Second Revised Edition* (Kluwer Law International, The Hague, 2001) pp. 531-544.

³⁴ ILAC and RWI, *supra* note 13, pp. 61-69.

³⁵ The table is taken from GBP report at ILAC and RWI, *supra* note 13, p. 15.

cases in Indonesia. These two indicators will be used by this thesis to look at the enforcement of the rights of victims of rape in both cases.

As well as the four principal human rights indicators above, GBP report also developed sub-indicators in the areas of rape. The more detailed sub-indicators will be discussed in the second chapter of this thesis.

1.5. Outline

Chapter One. This part is to introduce the cases of rape and briefly narrates how the intermediaries or paralegals intervened the cases and assisted girls' victims of violence in case handling. Relevant definitions in the international human rights norms and national legal standards, in a nutshell, are described in this chapter. The usage of terminologies and the delimitation of cases, theories and concepts of access to justice are part of this chapter as well. On top of that, the description of methodology that stemmed from the Gender Best Practice (GBP) report is the main part of the first chapter.

Chapter Two. This chapter aims to explain the international and regional human rights standards on gender-based violence. It will discuss the minimum criteria of rape in international human rights framework. This part also discusses the good example from the countries of South Africa, Canada, and Spain in the area of rape that are taken, partly, from the GBP report. Finally, this part will discuss best practices and human rights indicators that is particularly proposed by the GBP report and utilized by this thesis as a method to assist the analysis.

Chapter Three. This chapter will discuss the availability of national laws and policies in relation to rape cases and service providers for victims of rape in Indonesia. The main component of this chapter is the roles of legal institutions and the legal implication of the rape elements under the Indonesian Penal Code in the case handling. It will indicate the strong and weak points of both legal institutions and the national bylaws in the area of rape. It will begin by the discussion of the elements of rape under the Indonesian Penal Law, the Indonesian Domestic Violence Law and the Children Rights Protection Law. The chapter will also discuss the roles of

legal institutions and their initiative in dealing with cases of rape and gender-based violence in general. The rights of victims and service providers included in various laws and policies in Indonesia are also examined in this chapter.

Chapter Four. This chapter will illustrate, in the more detailed manner, the two cases of rape that were gathered in villages in West Java and West Nusa Tenggara. It will examine the capacity of the two victims of rape to access justice. The roles and responses of legal institutions and the roles of intermediaries in assisting girls victims of violence in the overall case handling will be the main part of this chapter. This part will also provide the picture of how legal framework and services are accessible for victims of rape and whether the relevant services and mechanisms are secured for both victims of rape in this thesis without discrimination of any kinds.

Chapter Five. This chapter contains the conclusion of the overall discussion in the thesis. This chapter will put forward the evaluation of the Indonesia legal framework in the area of rape. It will underline the strength and the weaknesses of Indonesian legal framework in rape including the availability of services and mechanism. Finally, it will put forward the accessibility of victims rights and what makes it possible.

2. International Human Rights Standards and Best Practices in the Area of Rape

2.1. Introduction

Worldwide statistics of violence against women and girls³⁶ have yet to encourage the UN and the nation states to develop and agree on an international treaty that particularly addresses gender-based violence. Therefore, in vindicating the rights of women's and girls' victims of rape, international community makes use of various sources of international binding and non-binding instruments that unsystematically indicate rights in the areas of rape. Some international human rights treaties that invite feminist critiques³⁷ have laid down gender-neutral provisions that can be used for numerous women's rights advocacy in the issue of rape. General recommendations and concluding observations produced by the monitoring bodies such as the CEDAW or Women's committee, the Committee Against Torture (CAT), and the committee on Economic, Social, and Cultural rights (CESCR Committee) emphasized the linkage between rape and the fulfilment of another rights, among others, the provisions of equality, torture, and health³⁸. Besides, the Women's committee emphasized that the integrity and dignity of women's victims of rape should be respected³⁹. Many reports and scholars, however, acknowledged that the CEDAW committee has developed the most elaborated guidelines on gender-based

³⁶ Official crimes statistics documented that in India 6,882 women were killed in 2002 as a result of violence related to demands of dowry –the payment of cash or goods by the bride's family to the groom's family. The UN Population Fund (UNFPA) has estimated 5,000 women are murdered by their family members each year worldwide in 'honour killing' –crimes against women in the name of safeguarding 'honour' within the family or the community. In 2000, around 520,000 people were killed as a result of interpersonal violence in that including sexual violence³⁶. Available data suggest that in some countries one in four women report sexual violence by an intimate partner, and up to one-third of girls report sexual initiation. Hundreds of thousands more are forced into prostitutions or subjected to violence in other settings, such as schools, workplaces and health-care institution.

³⁷ Please see Alice Edwards, 'The 'Feminizing' of Torture under International Human Rights Law', 19 *Leiden Journal of International Law* (2006) pp.349-391; Clare McGlynn, 'Rape as 'Torture'? Catherine Mackinnon and Questions of Feminist Strategy', 16 *Feminist Legal Study* (2008) pp.71-85.

³⁸ ILAC and RWI, *supra* note 13, p. 26.

³⁹ CEDAW, General Recommendation no.19, Violence against Women, A/47/38(1992) Para. 24 (b).

violence. Apart from that, the Committee of the Rights of the Child (CRC) outlined some fundamental principles to protect and provide accessible judiciary for adolescence girls' victims of sexual abused⁴⁰.

To provide international standard in the area of rape, GBP report helps this thesis to locate the rights in questions. GBP report outlined relevant rights in the issue of rape such as non-discrimination and equality, equality before the law, right to the highest attainable standard of physical and mental health, right to life, right to be free from torture and inhuman or degrading treatment, right to security and liberty of persons, right to equality in the family, right to housing and judicial rights⁴¹. This chapter, however, will only focus to discuss some of the most relevant rights in the area of rape namely non-discrimination and equality, health, and torture. This discussion leads to the development of minimum criteria for national legislation on the issues of rape.

Therefore this chapter, in a nutshell, will identify the international human rights law that have responded to the reality of violence against women and particularly rape. This chapter will identify numerous General Comments and Concluding Observation as well as jurisprudences produced by the monitoring bodies under the CEDAW, the Convention against Torture (CAT), the Convention of Economic, Social and Cultural Rights, and the Convention of the Rights of the Child (CRC) in the areas that are relevant with gender-based violence in particular sexual-abused against women's and girls' victims of violence. This chapter will discuss minimum criteria for national legislation and some appropriate measures in the field of rape that adhere to international human rights standards as it was developed by the GBP report⁴². These minimum criteria will also be utilized to investigate national legislation that aimed at identifying best practices in three countries that were taken into consideration in the GBP report. Therefore, this thesis will discuss and provide overview of best practices in the countries of Canada, South Africa, and Spain in the field of rape

⁴⁰ CRC, General Comment No.4, *Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 33rd session, CRC/GC/2003/4.

⁴¹ ILAC and RWI, *supra* note 13, p. 25.

⁴² ILAC and RWI, *supra* note 13, pp. 26-27.

particularly on legal definition of rape, the possibilities to report the crime to the legal institutions, rights of rape victims throughout the judicial proceeding, and the assistant and support services to female victims of rape⁴³. A list of criteria to survey law and policy in the field of rape according to the international human rights standards is presented in the last part of this chapter that will be utilized by this thesis as a method to assist the analysis. It will help to examine chapter three on the national laws and policy in Indonesia concerning rape.

2.2. International and Regional Human Rights Standards on Gender-based Violence

2.2.1. International Standards on Gender-based Violence

2.2.1.1. Gender-based Violence and the Issue of Equality

The principle of non-discrimination or equality became the robust foundation in developing definition of gender-based violence under the international human rights framework. In the unavailability of international treaty on gender-based violence, women's committee helped to develop a quite comprehensive standard through its prominent General Recommendation (GR) No.19 on Violence against Women that says:

The definition of discrimination includes gender-based violence that is directed against a woman because she is woman or that affects women disproportionately. It includes acts of physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.⁴⁴

This GR No.19 outlines a quite comprehensive guideline on gender-based violence. It clearly defined that gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. The Women's Committee emphasized the close connection between discrimination against women, gender-based violence, and violation of human rights and fundamental freedoms that filling the major gaps of gender-based violence issues in the

⁴³ ILAC and RWI, *supra* note 13, pp. 61-69.

⁴⁴ CEDAW, General Recommendation no.19, Violence against Women, A/47/38(1992).

convention⁴⁵. Furthermore, the General Recommendation No.19 has really altered the Women's convention from a treaty of anti discrimination against women to a gender-based violence treaty⁴⁶.

Some other human rights monitoring bodies such as the Committee on Economic, Social, Cultural Rights (CESCR) and Human Rights Committee (HRC) have been using similar approach to define the linkage between sex discrimination and gender-based violence. The two monitoring bodies acknowledged the linkage between gender-based violence and non-discrimination principle. For example, the CESCR defined:

Gender-based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social, and cultural rights, on a basis of equality. State parties must take appropriate measures to eliminate violence against men and women and act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors⁴⁷.

The HRC obliged state party to pay attention to women's victims of rape in that legal rights and protection of women's victims should not be determined by her sexual life⁴⁸. The approach of these human rights monitoring bodies in making connection between equality and gender-based violence have created obligation to state party of the convention to prevent and eliminate gender-based violence to occur in their country.

2.2.1.2. Gender-based Violence and the Prohibition of Torture

Initially, the issue of torture in the context of international human rights law received many critical comments from the feminists. This is because torture traditionally is accepted as prohibited under the international law that involves male perpetrator and victim⁴⁹. But the feminist critiques on the issues of torture did not consider the evolving interpretation of many relevant rights in the area of gender-based violence adopted by various international and regional human rights bodies. As can be seen, the key

⁴⁵ Please see CEDAW, General Recommendation No.19, A/47/38, and 15 years p.1 and Edwards, *supra* note 11, pp. 27 and 28.

⁴⁶ Please see Edwards, *supra* note 11.

⁴⁷ ICESCR, General Comment No.16 (2004), article 3: the Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, UN Doc. E/C.12/2005/3, para.27.

⁴⁸ Please see CCPR, General Comment No.28: Article 3 (The Equality of Rights Between Men and Women), CCPR/C/21/Rev.1/Add.10, para. 21.

⁴⁹ Edwards, *supra* note 11.

feminist critiques in the 1980s and 1990s are currently reflected in commentary and jurisprudence of many international and regional human rights bodies⁵⁰.

The prominent example of this commentary is the interpretation of article 7 of the International Convention on Civil and Political Rights (ICCPR) regarding the traditional construction of torture. In the context of article 7 of ICCPR, the HRC has criticized high incidence of violence against women including domestic violence and rape⁵¹. The Human Rights Committee also mentioned the need for states to adopt legislation for criminalizing marital rape and provide assistance for victims of sexual violence. To reach this purpose, under article 7 of the ICCPR the HRC released comments and concluding observations that obliged state party to ensure justice system that incorporate support for women's victims of violence such as shelters and offer material and psychological relief for the victims⁵². In the General Comment No.28 on the equality rights between women and men, the HRC incorporated article 7 although superficially in that the General Comment indicates the breaches of article 7 include domestic violence and rape⁵³.

Through the concluding observation and recommendation of the country of Togo and Guatemala, the Convention against Torture showed their concerns concerning extensive acts of sexual violence against women including while in the detention and during the investigation and judicial processes⁵⁴. On the issue of torture, the CEDAW committee considered the issue falls under the meaning of gender-based violence in the article 1 of the CEDAW⁵⁵. Unfortunately, it does not relate directly to both notions of torture under article 7 ICCPR and the meaning of torture under the CAT. It seems the Children Rights Convention is the only human rights treaty outside the CAT that mentioned the prohibition of torture and its relation

⁵⁰ Edwards, *supra* note 11.

⁵¹ *Please* HRC Report, UN Doc. A/59/40 (2004) (Vol. I) for example: Sri Lanka, para. 20; Colombia, para. 14; Germany, para. 14; Lithuania, para. 9.

⁵² *Please* HRC Report, UN Doc. A/59/40 (2004) (Vol. I) for example: Hungary, para. 10.

⁵³ HRC, *supra* note 12.

⁵⁴ ILAC and RWI, *supra* note 13, p. 26.

⁵⁵ *Please see* CEDAW, General Recommendation No.19, A/47/38, para. 7.

with sexual abused that the children might experience from their parents and the legal guardian. In the General Recommendation No.8, the CRC Committee mentioned the relation of article 9 and 37 of the CRC. Article 37 of the CRC states that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”. The CRC committee contended that this article 37 of the CRC has extended and complemented by article 19 (1) of the CRC that says:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Furthermore, the CRC committee highlighted these two articles in the General Recommendation No.8 by saying that there is no ambiguity that “all forms of physical or mental violence” does not leave room for any level legalized violence against children⁵⁶.

2.1.3. Gender-based Violence and the Right to Health

Apart from torture, the issue of health has mostly discussed in the context of gender-based violence. The issue of health is often related to the service providers for women and girls’ victims of violence. The three human rights monitoring bodies namely the CEDAW Committee, the CESCR Committee, and the CRC Committee have been making the clear link between the rights to health and the issues of sexual violence. The women’s committee has included: “the right to the highest standard attainable of physical and mental health” as one of the rights that are ensured under the meaning of article 1 of the CEDAW. Furthermore, the women’s committee underlined that gender-based violence will put women’s health at risks⁵⁷.

The CESCR Committee seemed providing the most comprehensive protection of the rights to health through article 12 of the convention⁵⁸. The CESCR General Comment No. 14 ensured that the right to health contains

⁵⁶ Please see the CRC, General Comment No.8, CRC/C/GC/8 (2006), para. 18.

⁵⁷ Please see CEDAW, General Recommendation No.19, A/47/38, para. 19.

⁵⁸ Article 12 (1) CESCR states that “The state parties to the present covenant recognize the enjoyment of the highest attainable standard of physical and mental health”.

both freedoms and entitlements including the right to be free from torture⁵⁹. The CESCR through this General Comment imposed the obligation of the states in the context of right to health that consisting of obligations to prevent violence, to protect women against violence and to prosecute the perpetrators⁶⁰. These monitoring bodies highlighted that the healthcare service provider should be trained in order to get familiar with gender-based violence issue⁶¹. On the health issue, the CRC committee specifically addresses the adolescence health. The CRC committee imposes state party to pay particular attention to their adolescence so that they are protected from all forms of violence, abuse, neglect, violence and exploitation that affect their age of group⁶². On top of that, the CRC committee ensured the availability of public health facilities and the accessibility of these facilities without any discrimination for the adolescence⁶³.

2.2.2. *Regional Human Rights Standards on Gender-based Violence*

Under the European Court system, the case law has emphasized the obligation of the states to respond to sexual crimes⁶⁴. Through some cases, the ECtHR confirmed that sexual crimes and abuses have been determined to fall within the scope of torture and inhuman and degrading treatment⁶⁵.

In the case of *M.C. v. Bulgaria*, the European Court of Human Rights determined that the lack of consent and not the use of violence or force are the elements of the crime of rape⁶⁶. Within the same case, the requirement of evidence of physical resistance of the victims would not be accepted by the ECtHR. The state in this case law is required to investigate

⁵⁹ Please see the ECSCR, General Comment No.4, E/C.12/2000/4 (11 August 2000), para. 8.

⁶⁰ ILAC and RWI, *supra* note 13, p. 26.

⁶¹ Please see CEDAW, General Recommendation No. 24, *Women and Health*, 20th session (1999), paras. 12, 15, 18 and 31; the CESCR, General Comment No. 14, *The Right to the Highest Attainable Standard of Health*, E/C.12/2000/4, paras. 3, 21, 35, 36 and 51.

⁶² Please see CRC, General Comment No. 4, *Adolescence health and development in the context of the Convention on the Rights of the Child*, CRC/GC/2003/4 (2003), para. 2, 6, and 12.

⁶³ *Ibid.*, para. 41.

⁶⁴ Please see cases that are referred by the GBP report such as of *X and Y v. the Netherlands* (1985); *E and others v. the United Kingdom* (2002); *M.C. v. Bulgaria* (2004).

⁶⁵ Please see *Aydin v. Turkey* (1997), paras. 83 and 86, *E and others v. the United Kingdom* (2002); *M.C. v. Bulgaria* (2004).

⁶⁶ Please see the case of *M.C. v. Bulgaria* (2004) Judgment of European Court of Human Rights, 4 December 2004, para 163.

rape allegations in order to meet the ‘due diligence’ standard⁶⁷. Furthermore, the right to privacy under the ECHR imposes positive obligation of state parties to protect a person’s physical and moral integrity including her or his sexual life⁶⁸.

The Inter-American system of Human Rights (IAHR) has similar good practice with the European counterpart in the areas of gender-based violence including rape. The Inter-American System Commission of Human Rights (IACHR) has obviously ruled that sexual abuse constitutes a violation of article 5 of the IAHR⁶⁹. In some cases, the Inter-American Court of Human Rights ruled rape and sexual abuse violate the right to humane treatment, personal liberty, privacy, fair trial, judicial protection and the rights of the child⁷⁰. On the issue of torture, even though the American Convention on Human Rights does not create a definition of torture for the purpose of article 5, the commission stated that the definition has been elaborated in the Inter-American Convention and Punish Torture 1985⁷¹. In case law of *Raquel Marti de Mejia v. Peru*, the commission stated both the physical and mental suffering caused by the act of rape against the applicant. The commission stated that rape causes a woman to suffer ‘public punishment’:

The fact of being made the subject of abuse of this nature (rape) also causes a psychological trauma that results, on the one hand, from having been humiliated and victimized, on the other hand, from suffering the condemnation of the members of their community if they report what has been done to them⁷².

⁶⁷ *Ibid*, para. 166.

⁶⁸ Please see the case of *X and Y v. the Netherlands* (1985), para. 22-23 as it was referred by the GBP report.

⁶⁹ Article 5 (2) of the American Convention of Human Rights states that “no one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. All persons deprived of liberty shall be treated with respect for the inherent dignity of the human persons.

⁷⁰ ILAC and RWI, *supra* note 13, p. 28.

⁷¹ Please see *Edwards*, *supra* note 11, p. 383 and see also OAS Treaty Series No. 67, Doc. OEA/Ser.L.V/II. 82 doc. 6 rev. I, at 83 (1992).

⁷² *Raquel Marti de Mejia v. Peru*, Case 10. 970, Report No. 5/96, IACHR, OEA/Ser.L/V/II. 91 Doc. 7, at 157 (1996).

2.3. Rape in International Human Rights Law Framework

2.3.1. Legislation on Gender-based Violence

The general recommendation or comments and concluding observations that have produced by the UN Human Rights monitoring bodies discussed above helped this thesis to outline minimum criteria of national legislation that adhere to the international human rights standard in the area of rape⁷³. The GBP report developed a list of minimum criteria for the national legislation in the field of rape that came out of the discussion above:

- The definition of rape is based on the lack of consent and not the use of violence or force or coercion

In the concluding observation of Czech Republic⁷⁴ and Estonia⁷⁵, the CEDAW committee urged “the state party should define the crime of rape as sexual intercourse without consent.” Meanwhile, in the element of rape that was developed by the ECHR, rape is based on the lack of consent and not the use of violence or force or coercion⁷⁶.

- Rape within marriage is criminalized

In the interpretation of article 7 of ICCPR, the Human Rights Committee imposed state party to adopt legislation for criminalizing marital rape. Likewise, the HRC recommends Azerbaijan to take effective measure to combat violence against women including marital rape⁷⁷. While in the concluding observation of Malaysia the CEDAW committee concerned with the reluctant of the government to criminalize marital rape⁷⁸.

- Incest is defined as specific crime

CEDAW committee in the concluding observation of Japan concerned that the issue of “incest is not defined explicitly as a crime under the

⁷³ ILAC and RWI, *supra note* 11, pp. 89-90.

⁷⁴ Please see CEDAW, Concluding Observations, Czech Republic, A/57/38, part III (2002), paras. 95-96.

⁷⁵ Please see CEDAW, Concluding Observations, Estonia, A/57/38, part I (2002), para. 98.

⁷⁶ Please see *M.C. v. Bulgaria* as it was also referred by the GBP report.

⁷⁷ Please see CCPR, Concluding Observations, Azerbaijan, A/57/40 vol. I (2002), para. 17.

⁷⁸ Please see CEDAW, Concluding Comments, Malaysia, CEDAW/C/MYS/CO/2 (2006), para. 21.

Penal Code but is dealt with indirectly under a number of different penal provisions.”⁷⁹

- The law treats sexually exploited persons as victims and not as offenders
The CRC committee obliges state party to ensure that they treated the adolescence that has been sexually exploited, in order to be treated as victims and not as offenders⁸⁰.

- Sentences are not too lenient.

In several concluding recommendations, the CEDAW committee expressed their concerns that some states such as Iceland, Czech Republic, Japan that the sentences for the perpetrator of sexual violence including rape in the current Penal code is too lenient⁸¹.

- No discriminatory mitigating circumstances, such as defence of honour or reduced sentences if the rapist marries the raped women.

The CEDAW mentioned that state party should have “measure that are necessary to overcome family violence that should include legislation to remove the defence or honour in regard to the assault or murder of a female family member.”⁸²

- Sexual crimes and offences are defined as crimes of violence against persons and not as crimes against morality.

In the concluding observation for Belgium, the CEDAW committee “expressed their concern that Belgium’s law does not define sexual crime as a human rights violation and classifies sexual abuse as a crime of morality rather than as a violent crime.”⁸³

- The investigation of gender-based crimes should be mandatory i.e. these crimes should constitute public offences.

⁷⁹ Please see CEDAW, Concluding Observation, Japan, CEDAW/C/JPN/CO/6, para 33.

⁸⁰ Please see CRC, General Comments, CRC/GC/2003/4 (1 July 2003), para. 37.

⁸¹ Please see CEDAW, Concluding Observations, Czech Republic, A/57/38, part III (2002), para. 95; CEDAW, Concluding Observations, Iceland, A/57/38, part I (2002), paras. 245-246; CEDAW, Concluding Observations, Japan, A/58/38, part II (2003), para. 361 as it was referred also by the GBP report.

⁸² CEDAW, General Recommendation No.19, A/47/38, para. 24 (r) (ii).

⁸³ Please see CEDAW, Concluding Observations, Belgium, A/57/38, part II (2002), para. 151.

A good example of this point is that the 1998 revision of the Penal Code of Portugal that made violence against women a public offence, and this is rendered police investigation of these kinds offences mandatory⁸⁴.

2.3.2. *Other Measures*

The legislative measures discussed above are deemed insufficient to help realize the rights of women and girls' victims of rape. Therefore, in order for women's and girls' victims of rape to be able to access justice and get the remedy, the General Comments and the Concluding Observation provide guideline on another appropriate measures that should be taken by states. These measures include⁸⁵:

- Public awareness raising including gender sensitive training of all public officials.
- Support services mechanism for victims both psychological and medical assistance, effective complaint mechanisms (state and non-state), and civil remedy.
- Attitude and discriminative treatments towards women's victims of violence that impeded women's equality such as prejudices, practices, and stereotypes should be removed.
- Judicial mechanism and procedure should be gender and child sensitive.
- Evidence and the evaluation of evidence.

2.4. **Best Practices: South Africa, Canada, and Spain**

By using the human rights indicator as the method, the GBP report has surveyed best practices of law and institutions in the area of sexual violence in three countries namely Canada, South Africa, and Spain⁸⁶. The three countries demonstrated good examples in combating sexual violence albeit they have different background of social and economic situation as well as religion and legal culture. This part will identify good examples of legal statutes and institutions in the three countries in the area of rape.

⁸⁴ Please see CEDAW, Concluding Observations, Portugal, A/57/38, part I (2002), para. 320.

⁸⁵ ILAC and RWI, *supra* note 13, p. 27.

⁸⁶ ILAC and RWI, *supra* note 13, pp. 61-69.

2.4.1. *The Legal Definition and Elements of Rape*

Defining rape and establish the element of rape are important from the perspective of the victims, since it will provide the extent to which the protection for the victims are provided. The elements that constitute rape covers the rules of consent, the age of the victims, the resistance of the victims, whether rape includes marital rape, the degree of violence, and evidence⁸⁷. This section will present good examples of these elements of rape that exist in Canada, South Africa, and Spain. Due to the problem of language, this thesis will mainly look at best practices in Canada and South Africa.

In the three countries, rape and another sexual violence are considered as public offences. The terms of legal definition of rape is gender neutral. Therefore, the provision of rape in the three countries is applied for men and women equally. South Africa uses the legal term of rape and not ‘sexual assault’ or ‘sexual aggression’ as other countries use. South Africa defined Rape as:

A person who unlawfully and intentionally commits an act which causes penetration to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person, or any act which causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act, is guilty of the offence of rape⁸⁸.

‘Lack of consent’ is the main element of rape definition whether it expresses directly or indirectly. Criminal law in Canada defines ‘consent’ as “the voluntary agreement of the complainant to engage in the sexual activity in question.”⁸⁹ The element of ‘lack of consent’, however, does not appear or is mentioned clearly in each definition of rape. In South Africa, the lack of consent implies in the terms of ‘coercive circumstances’ such as ‘use of force’, ‘abuse of power’, and ‘threat of harm’⁹⁰. In some countries, the article of rape provides list of a number of condition in which a victim is ‘legally incapable to provide consent’ due to, mainly, age, mentally

⁸⁷ ILAC and RWI, *supra* note 13, pp. 61-63.

⁸⁸ Article 2 South Africa Sexual Offence Bill.

⁸⁹ Article 278 and 279 on Sexual Assault in Canada.

⁹⁰ Article 2 (3) South Africa Sexual Bill.

impaired person, under the influence of any medicine, drug or alcohol⁹¹. Furthermore, ‘the lack of resistance’ sometimes implies to replace ‘the lack of consent’ in many rape cases. In some rape cases in Canada, the prosecutor was tasked to prove that the accused was careless as to the victim’s lack of consent⁹².

The degree of violence within the rape definition in the observed countries affects the classification of the offence and the sentencing. Criminal law in Canada determined imprisonment for the sexual offence between 10 and 14 years or for life. This sentencing indicates the gravity of the offence for example “everyone who commits a sexual assault is guilty of an indictable offence and is liable to imprisonment for a term not less than ten years” or; “if a restricted firearm or prohibited firearm is used in the commission of the offence” is liable to imprisonment for a term not exceeding 14 years and minimum punishment of imprisonment for a term of the case of a first offence, five years.”⁹³

In the three countries, sexual offence against a person under a certain age or children is deemed a crime regardless of the consent of the person. The age limits are varied, for example South Africa has determined a person below 12 years age is considered incapable to appreciate a nature of a sexual act. However, not every country defined kinds of sexual acts. Legal cases in Canada stated that “circumstances of a sexual nature, such that sexual integrity of the victim is violated.”⁹⁴ In addition, marital rape is obviously a crime in all country observed. Therefore, marriage or other sentimental relationship cannot be used as the defence of the accused of rape.

In the evaluation of evidence, Canadian Criminal Law highlighted that corroboration or reputation are not admissible to prove a sexual violation to happen. Meanwhile, the Sexual Offence Bill in South Africa

⁹¹ Please see for example Article 2(5) Sexual Bill in South Africa.

⁹² Canada: see Supreme Court judgements, R v. M. (1994), 89 C.C.C. (3d) 96 (S.C.C.), and R. v. Ewanchuk (1999), 131 C.C.C. (3d) 481, para. 31. Canada: R. v. Ewanchuk (1999), 131 C.C.C. (3d) 48 (S.C.C.), para. 42 as it was referred by ILAC and RWI, *supra* note 13, p. 62.

⁹³ Please see Article 272 on Sexual Assault in Canada.

⁹⁴ Please see Canada: Supreme Court, R. v. Chase, [1987] 2 S.C.R. 293, para. 302 as it was quoted by the GBP report.

mention “a court must not call for corroboration evidence solely on account of the fact that the witness is the complainant of a sexual offence.”⁹⁵ Therefore, the unavailability of a witness to the sexual offence not impedes a convicting judgment⁹⁶. Spain makes possible of civil responsibility of sexual offence that comprises of restitution, reparation for material damages and compensation for mental and physical injuries⁹⁷.

2.4.2. *Institutions and Procedures*

Police, prosecutors, and courts have critical position in providing justice for the victims of rape. A special unit for sexual offence and guideline to handle rape cases under the police and prosecutors are the methods to increase the effectiveness of their services for each victim of rape. National database under the police will also support the prevention effort for future sexual violence to repeat by the same sexual offenders. The gender sensitivity and sufficient knowledge of judges are particularly important to determine the fair judgment of a rape case.

In most rape and sexual violence cases police has a critical roles to define whether a victim would decide to submit her or his complaints and report their experience. Therefore, the treatment of a police officer towards a victim of rape will influence whether the victim wants to cooperate to reveal the story of sexual offence. To reach this end, some countries, *inter alia*, Canada and Spain created a special unit to deal with sexual offence cases such police aggression unit or sexual crime unit⁹⁸. In addition to these special units and to enhance the professionalism of police officer South Africa police force has developed a special guideline in the handling of sexual offences⁹⁹. For the victims’ interests, an accessible information guideline for victims of sexual assault should be available at the police station. The guidelines should contain sufficient information of the victims’ rights and the possibility for the victims to have an accompaniment when giving statements in the language that the victims understand. For example the Solicitor General in Canada published ‘Information Guide for Victims

⁹⁵ Please see Article 18 Sexual Offence Bill in South Africa.

⁹⁶ ILAC and RWI, *supra* note 13, p. 63.

⁹⁷ Article 109-126 Penal Code Spain.

⁹⁸ ILAC and RWI, *supra* note 13, p. 63.

⁹⁹ ILAC and RWI, *supra* note 13, p. 64.

of Sexual Assault'¹⁰⁰. To avoid the repeating sexual offences by same offenders, a national database that is maintained under the police station should be established such as the one that was established under the 'Sex Offender Information Registration Act' in Canada¹⁰¹.

In the same vein, prosecutor office should create a sexual offence unit under the national prosecuting authority. In South Africa, the mandate of this kind of unit includes coordinating policy in handling sexual offence cases, capacity building, and gender training for the prosecutor. During the case handling, prosecutor should discuss with the victims on the judicial hearing preparation, and explain the situation that might happen during the trial. The guideline also provides directive on how the prosecutors should treat the victims in order to avoid further trauma.

The sufficient knowledge and understanding about a sexual offence of the judge panel might be the most critical part of a rape trial. Another strategy is the specialized court and specialized judges on the issues of sexual violence such as South Africa. This may provide opportunity for court to allow victims of rape to testify in the friendly environment. For this purpose, court can collaborate with the one-stop crisis centre.

2.4.3. *The Rights of Rape Victims*

For a victim of rape, a trial may become a dreadful experience for her or him since they should retell their painful stories before the court. Therefore, the protection of the victims' rights in this context is essential to make the victims feel more comfortable in facing the trial. Canada and South Africa have created strategy to reduce the intimidation and secondary victimization to happen during the judicial hearings. Criminal legal system in Canada and South Africa make a victim possible to testify outside of a courtroom¹⁰². In South Africa in particular, a vulnerable victim even may testify through a third person to avoid intimidating questions. Even though trials generally are being held in public, judges may exclude the public to view the proceeding including prohibit the media to publish the identity of the

¹⁰⁰ Please see <https://www.solgps.alberta.ca/Pages/default.aspx>

¹⁰¹ Please see <http://www.parl.gc.ca/37/3/parlbus/chambus/house/bills/summaries/c16-e.pdf>

¹⁰² Please see Canada Criminal Code (486.2) and at Article 15(4) South Africa Sexual Offence Bill.

victims. Because of certain factors such as the under-aged victims, the disability of the victims either mentally or physically the law is able to demand Judges to provide a certain protection for the witnesses¹⁰³.

For the protection of victims' rights, Canada in particular has amended their Criminal law in order to promote respect of the constitutional rights of the victims of sexual offence. Under the 'rape shield' provisions the sexual history of the victims is not allowed to be contested as evidence if it will influence the judges and jurors views towards the victims credibility. Therefore, these provisions will protect personal records of the victims of rape from the defence of the accused. Through the Victims Bill of Rights, Canada established a formal mechanism against the justice system. This is only possible for the most serious crimes including sexual assault with the use of weapon an aggravated sexual assault.

2.4.4. *Support Services and Mechanisms*

In the case of sexual violence, the roles and the accessibility of service providers for the victims are important for the recovery of the victims. These type of services are usually provided by the state or non-state institutions such as women's independent organization. GBP report identify several mechanisms to support persons subjected to rape or sexual offence that are mostly provided for domestic violence victims but also relevant for rape victims. It covers:

- Multidisciplinary support centres

It is a service centre whereas several services such as psychological, legal, and another supports are provided under a one-roof system. In many countries, it is common now that state provides a one-roof service providers system. A joint initiative of governmental departments in South Africa has formed a care centre model called *Thuthuzela* that means to care or comfort. This centre is operating in the hospital environment that provides several services such as health-care, police services, and counselling under one-roof system. This centre has close cooperation with the court and prosecution authority in rape and sexual offence cases. The *Thuthuzela* model has successfully reduced the

¹⁰³ *Ibid.*

investigation time, increased the conviction rates, and reduced the secondary victimization of rape victims¹⁰⁴.

Likewise, Canada created a multidisciplinary community-based sexual assault support centres. Most of these centres are non-governmental institutions initiatives although some of them are funded by the state. This centre provides, among others, drop-in or phone counselling; support and information for the survivor's partners, friends and family; workshops; referral resources; advocacy for the victims of sexual assault¹⁰⁵.

- Health care

In the context of rape cases a health care centre is needed to prevent pregnancy, sexually transmitted diseases, and HIV occur to the victims. Therefore, a special section for sexual assault victims should be created under the public health care system to provide services for the victims of rape. This special health care section can be staffed with physicians, nurses and psychologists to meet the necessity of the victims. Sexual assault section under the health care provider aims to support the victims of violence in the reporting of the case, to secure the evidence, and to avoid the victims to get the secondary victimization during the case investigation.

For example, in Canada the staffs of this kind of healthcare provider can accompany the victims in giving testimony at the police station or arrange the police to visit the healthcare provider to receive the report from the victims¹⁰⁶. A sexual assault evidence kit should be available in the health care centre. The kit aims to secure the evidence in case the victims are reluctant to report the sexual offence to the police. To support the services, South Africa developed a healthcare protocol for the public healthcare provider for victims of sexual abused, domestic violence, and gender-based violence. This provider manage several issues concerning victims or rape such as the health care should be equipped by female and male staffs so that a female victims of rape

¹⁰⁴ Please see www.unicef.org/southafrica/hiv_aids_998.html.

¹⁰⁵ Please see <http://www.casac.ca/english/home.htm>.

¹⁰⁶ Please see <http://www.uofaweb.ualberta.ca/SAC/pdfs/Reporting.PDF>.

would examine female victims who were raped or abused, the clinics should maintain close relationship with the police station, clinic's staff treat a rape victims confidentially, and provide some information that are needed by the victims.

Governments should ensure that the victims of rape are able to access health services. To do this, the scheme of public healthcare insurance could cover this kind of services such as those happen in Canada: Criminal Injuries Compensation Board ¹⁰⁷.

- Legal assistance

Free legal assistance ensures the rights of the rape victims to have equal access to the criminal justice system. The victims of rape are in need of legal advice and representation before, during, and after the judicial hearings of her or his case. Some countries provide direct or indirect free and state-funded legal aid. In Canada, the legal aid program attached to the court, and it aims at enhancing the understanding and participation of the victims and the witnesses in the trial¹⁰⁸.

- Access to information

Canada has good practices in disseminating information regarding various services available for the victims of sexual violence. NGOs in collaboration with the government of Canada conduct information dissemination and consider a specific need of the population. For example special information program was developed for persons with disability, and the information was given in languages other than English or French¹⁰⁹.

- Financial assistance

Both countries of Spain and Canada created accessible scheme for victims of sexual violence for any financial expenses caused after the crime. This scheme was created at the central or regional level of the state so that the schemes are accessible for the victims. The scheme covers lost income, transportation cost, vocational training and physical

¹⁰⁷ Please see <http://www.cicb.gov.on.ca/en/index.htm>.

¹⁰⁸ Please see *supra* note 13, p. 68.

¹⁰⁹ *Ibid.*

injury. The dependants of the victims are eligible for the supports as well.

2.5. Minimum Criteria of Law and Policy in the Area of Rape

The discussion of the international standards of human rights and best practices in some countries on the issue of rape have provided this thesis with a list of minimum criteria¹¹⁰. These minimum criteria can be used to examine whether a particular country has law and policy on rape that complied with international standard of human rights. This thesis would like to utilize this list of recommendation to examine whether the law and policy on rape in Indonesia meets these criteria through the lenses of two rape cases discussed in this thesis.

- Legal definition and Criminalization
 1. Legal definitions of rape and other sexual offences are gender neutral.
 2. Sexual offences are treated equally whether occurring within or outside a sentimental relationship.
 3. Rape and other sexual offences are public offences.
 4. The definition of sexual offences is, directly or indirectly, based on the lack of consent.
 5. The sexual act is defined broadly and penetration is prerequisite.
 6. Consent is not implied by lack of resistance.
 7. Corroborating evidence is not required for conviction.
 8. Specific age limits, under which consent is presumed to be lacking, protect young persons.
 9. There is a possibility to obtain financial compensation within the criminal trial.
- Institutions (Police, prosecutor, judges) and Procedures
 1. Specialized police units, with female and male police officers, handle cases of sexual offences.
 2. National police guidelines detail how receiving police officers shall proceed in sexual offence cases.

¹¹⁰ Please see supra note 13, pp. 89-90.

3. Survivors are able to report a sexual offence in their own language.
 4. It is possible to file an anonymous complaint for the police records.
 5. A national database of sex offenders is established.
 6. Sexual offences units are established within the national prosecuting authority.
 7. All judges are trained on the nature and implications of sexual offences.
 8. Specialized court sessions are created to deal adequately with sexual offences.
- Rights of Complainant in Court Proceeding
 1. Evidentiary rules generally bar evidence on the survivor's sexual history and reputation.
 2. Protective measures, such as the use of screens and hearings behind closed doors, ensure that the survivor is protected against secondary victimization during trial.
 - Assistant to Persons Subjected to Rape and Sexual Offence
 1. Multi-disciplinary support centres facilitate access to all relevant services.
 2. Specialized sections dealing with sexual offences are established within the national healthcare system.
 3. Survivors of sexual abuse are always examined by healthcare staff of their own sex.
 4. All rape survivors offered emergency free emergency contraception, antiretroviral treatment and antibiotics against sexually transmitted disease.
 5. National healthcare protocols make special provision on how to treat survivors of sexual abuse, including for example the collection of evidence and psychological treatment.
 6. A sexual assault evidence kit is available to survivors of sexual offences.
 7. Free legal assistance is available in various languages.
 8. Financial cost arising out of the crime are reimbursed by the state.

9. Information to rape survivors is easily available in various languages.
 10. Awareness-raising campaigns are launched in various media formats and languages.
- Policy Framework
 1. National action plans and policies dealing with violence against women and/or crime prevention addresses rape and other sexual offences.

3. Indonesian Laws and Policies on Rape

3.1. Introduction

This chapter will discuss the Indonesian laws and policies in the areas of rape. Using the list of standards and best practices that were developed by the GBP report and were discussed in chapter two of this thesis, this chapter will examine whether the Indonesian legal framework ensure the availability of the rights of the rape victims and complied with the international human rights standards in the field of rape. This chapter does not aim to measure the implementation of human rights on the area of rape in Indonesia. Instead, it will review the extent to which the laws and policies in the field of rape has complied with the international human rights standards.

Most provisions of rape and sexual violence in Indonesia are mostly included in the Indonesian Penal Code (IPC)¹¹¹, yet it does not cover rape against adolescence girls. Rape against adolescence girl is incorporated in the Law No.23/2002 on Children Rights Protection. Since 2004, marital rape and another types of sexual offence within a household context are regulated in the Indonesian domestic violence law¹¹². On the procedures of women's victims of rape protection in the judicial process, the law of victims and witness protection stipulates certain procedure to protect women's victims of sexual violence within and outside of court¹¹³. Meanwhile, the Indonesian Human Rights Court Law contains articles that cover criminal procedure for the legal institutions and judiciary in dealing with gross violation of human rights cases that encompasses rape¹¹⁴.

With regards to gender-based violence, through numerous national campaign women's organizations demand for the better services for the victims of sexual assault. In fact, it has encouraged legal institutions and many government institutions at national and local level to create various service providers across the country. Yet, the Indonesian Police Force seems

¹¹¹ Rape is included under Chapter IV on 'Crimes against Decency' in the Indonesian Penal Code.

¹¹² Article 8 of the Indonesian Domestic Violence Law No.23 Year 2004.

¹¹³ Law No.13 Year 2006 on the Victim and Witness Protection.

¹¹⁴ Article 9(g) of the Human Rights Court Law No. 26 Year 2000.

the only legal institutions that quite progressively provide services for women's and children's (including girls) victims for any sexual offence occur within and outside of household. The police institution enacted legal basis and produced guidelines of services for women's and children victims of sexual violence.

**Indonesian Laws in relation to Rape and Sexual Violence
(Under the Indonesian Constitution)**

The Indonesian Penal Code
The Indonesian Human Rights Law (2000)
The Children Rights Protection Law (2002)
The Indonesian Domestic Violence Law (2004)

A National Commission on Violence against Women or *Komnas Perempuan* was established as a government responds towards the high incidents of sexual violence happened during the May riot in 1998¹¹⁵. In 2002, the President of Indonesia has released an instruction for government and legal institution to strengthen the enforcement of women's rights in many development sectors¹¹⁶. As a result, among others, the centre of gender and women's studies were formed under public university in many provinces in Indonesia and women's empowerment units were created under each local government authority at provincial and district level. The amended Indonesian constitution generally is silent on the subject of women's right. The wording in its section on human rights is gender neutral including the wording of the guarantee of 'equality before the law' and 'prohibition of torture'. The only law that is guiding the non-discrimination principle is the law that authorized the ratification of CEDAW by the government of Indonesia¹¹⁷.

This chapter will discuss the provisions of rape under the IPC and Children Rights Protection act as the source of legal documents concerning rape in Indonesia. In the next section, this chapter will discuss the legal institutions namely the police force and the national prosecuting authority in

¹¹⁵ Komnas Perempuan was established by Presidential Decree No.181 Year 1998 and renewed by the Presidential Regulation No.65 Year 2005.

¹¹⁶ The Indonesian Presidential Instruction No.9 Year 2002 on Gender Mainstreaming.

¹¹⁷ Law No.7 Year 1984 on the CEDAW ratification.

dealing rape and sexual violence. This will look at what kind of policies that are available under these two institutions in the area of rape and sexual violence. The roles of the judiciary (court) in the hearings of rape cases will also be discussed in this chapter. In addition to these topics of discussion, the rights of victims of rape under the law and policies in relation to rape will be explored further. Last but not least is the service provider and mechanism to protect women's victims of violence will be the final part to be analyzed. In certain points, when discussing the issues of rape especially in relation to policies to enhance the protection of victims of rape, one cannot separate it with the issue of domestic violence. This situation cannot be avoided since many government and non-government funded service providers prioritize to serve domestic violence victims and their family.

3.2. Rape and Incest in the Indonesian Penal Code

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| <p style="text-align: center;">CHAPTER IV¹¹⁸ Crimes against Decency ...</p> <p style="text-align: center;">Article 285</p> <p>Any person who by using force or threat of forces a woman to have sexual intercourse with him out of marriage, shall, being guilty of rape, be punished by a maximum imprisonment of twelve years.</p> <p style="text-align: center;">Article 286</p> <p>Any person who out of marriage has carnal knowledge of a woman whom he knows that she is unconscious or helpless, shall be punished by a maximum imprisonment of nine years.</p> <p style="text-align: center;">Article 287</p> <p>(1) Any person who out of marriage has carnal knowledge of a woman whom he knows or reasonably should presume that she has not yet reached the age of fifteen years or, if it is not obvious from her age, that she is not yet marriageable, shall be punished by a maximum imprisonment of nine years.</p> <p>(2) A prosecution shall be instituted only by complaint, unless the woman has not yet reached the age of twelve years or one of the cases of articles 291 and 294 is present.</p> <p style="text-align: center;">...</p> <p style="text-align: center;">Article 290</p> <p>By a maximum imprisonment of seven years shall be punished:</p> <p>(1) Any person who commits obscene acts with someone who he knows that she is unconscious or helpless.</p> <p>(2) Any person who commits obscene acts with someone who he knows or reasonably should presume that he has not yet reached the age of fifteen years or, if it is not</p> |
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¹¹⁸ This is the official English version of Indonesian Penal Code (IPC) that is authorized and edited by the Directorate General of Law and Legislation the Indonesian Ministry of Justice.

obvious from her age, not yet marriageable.

Article 291

- (1) If one of the crimes described in article 286,287,289 and 290 results in a serious physical injury, a maximum imprisonment of twelve years shall be imposed.
- (2) If one of the crimes described in article 285, 286, 287, 289 and 290 results in death, a maximum imprisonment of fifteen years shall be imposed.

...

Article 294

- (1) Any person who commits any obscene act with his under age child, step-child or foster-child, his pupil, a minor entrusted to his care, education or vigilance or his under age servant or subordinate, shall be punished by a maximum imprisonment of seven years.
- (2) By the same punishment will be punished:
 - 1st, the official who..... its any obscene act with a person who is officially Him or has been entrusted or recommended to his....
 - 2nd-ly, the executive, physician, teacher, official, overseer or attendant at a prison, labour institution of the country, educational institution, orphanage, hospital, lunatic asylum or charity institution, who commits any obscene act with a person admitted thereto.

3.2.1. *The Definition of Rape*

The provision and definition of rape in the IPC is placed under the chapter of ‘crimes against decency’ together with another regulations concerning morality aspects such as the prohibition of the transaction and traffics of pornographic materials, the disseminating or offering appliances for abortion and to prevent pregnancy, and adultery or extra-marital sexual relation. The articles of sexual offence and rape should be placed under the ‘crimes against persons’ and not under the chapter against the decency. If the rape article is being placed under the chapter against the decency, it will mainly address the ‘morality’ of the women’s victim of rape. The courts often found it important to establish the moral ‘purity’ or ‘impurity’ of a woman who was the victim of rape, rather than whether a rape had actually taken place¹¹⁹.

The IPC clearly mentioned that the definition of rape solely addresses the rape occurs to women and committed by men outside a marriage relationship, thus the definition is not gender neutral. This rape definition has invited critique, *inter alia*, from R. Soesilo that said “the creator of this definition did not consider female perpetrator that might

¹¹⁹ Nursyahbani Katjasungkana, ‘Gender and Law Reform in Indonesia: Overcoming Entrenched Barriers’, in Tim Lindsey (ed.), *Indonesia: Law and Society* (The Federation Press, NSW, 2008) p. 485.

coerce the opposite sex to have unwanted sexual contact with her”. It apparently was not aiming to protect male victims of rape, but the notion of this criticism is to avoid women from getting pregnant due to this rape experience¹²⁰.

Another element of this rape definition is that in order to be qualified as rape, the definition requires a ‘carnal knowledge’ or penetration as the valid evidence. One of the most critical issues under this definition, rape under the IPC is generally having an ‘adult female-face’ since it solely addresses adult woman and ignore the male and the children under the age of 12 as the victims of rape. Meanwhile, the girls’ victims of rape under the age of 15 should submit a formal complaint to get their cases prosecuted.

‘Consent’, as the most important element within the definition of rape is not mentioned directly throughout the section of rape within the IPC. ‘Consent’ implies when rape perpetrator is using force or threat of force or if rape was committed against unconscious or helpless women. In most cases, these threats or force are required to occur in establishing rape and if these preconditions are unavailable it cannot be qualified as rape and the crime will be considered as adultery in which the sentencing is shallow. In addition and as it is included in the article 287(1) a statutory rape¹²¹ is considered as part of the rape definitions but a formal complaint is necessary.

3.2.2. *Rape within Marriage*

The definition of rape does not include rape in the marriage or marital rape. Until the Indonesian Domestic Violence was enacted, for some decades women’s activists in Indonesia have done numerous advocacies on the idea of marital rape. In most of these women’s group campaigns, they made connection between the gender biased of the Indonesian marriage law and the marital rape in a marriage.

The Indonesian marriage law has created the unequal position between wives and husbands in which it determines “husbands are the head

¹²⁰ R. Soesilo, *Kitab Undang-undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal* (Politea, Bogor, 1996) pp. 210-211.

¹²¹ Statutory rape is illegal sexual activity between two people when it would otherwise be legal if not for their age. Please see http://www.sexlaws.org/what_is_statutory_rape accessed 12 May 2010.

of household”¹²². Given the unequal power and position between men and women within the marriage institutions, women’s organizations and women’s activists in Indonesia considered marital rape would have happened in this situation. Women’s groups seek the way to include marital rape through the recently enacted domestic violence law in Indonesia. Marital rape is not qualified as rape in the IPC. Although the Indonesian Domestic Violence (IDV) Law defined it as sexual violence in household context, a wife rarely reported the husband because of sexual violence¹²³.

3.2.3. *Incest under the IPC*

The rape definition under the IPC does not include incest as a category of rape. ‘Incest’ is generally defined as the crime of sexual contact with a blood relative usually including a parent, child, sibling, grandparent or grandchild¹²⁴. As mentioned, rape under the IPC does not include rape against children or adolescence girls under 12 years old. The IPC’s article 294 on incest or sexual violence against children in which the perpetrator is her parent or guardian only qualifies this crime as obscenity. The perpetrator of this crime as mentioned under the IPC article 294 includes father and male teachers. Before the law of children rights protection was enacted, these IPC incest articles became a ‘trash bin’ for any kind of sexual coercion committed by the fathers to the children. Once after the children rights protection act was enacted in 2002, rape against children has been considered as an element of crime. Children protection law that will be discussed further below has added up and broadened rape definition under the IPC.

¹²² Please see article 31(3) the Indonesian Marriage Law No.1 Year 1974.

¹²³ These are the interviews with the police officers in Brebes, Central Java province and in Lombok, West Nusa Tenggara Province.

¹²⁴ Please see <http://www.duhaime.org/LegalDictionary/I/Incest.aspx> is visited 13 May 2010. The Punishment of Incest Act in England defined ‘incest’ as “any male person who has a carnal knowledge with a female person, who is to his knowledge is grand-daughter, daughter, sister or mother”.

3.3. Sexual Offence under the Indonesian Domestic Violence Law

By September 2004, the Indonesian Domestic Violence (IDV) Law was enacted. Through this law, the articles of domestic violence under the Indonesian Penal Code have been elaborated further. Domestic violence defined as violence against persons, especially women that caused physical, sexual, psychological misery, and suffering as well as negligence of households including threat of coercion and deprivation of somebody's freedom against the law in the household context¹²⁵. By this law, violence occurred to wives, husbands, children, women, men, boys and girls in the private spheres shall be qualified as domestic violence.

The IDV defined marital rape as sexual violence in a household context, but rarely a marital rape is reported to the police. Therefore, one would not be surprised if until now no court proceedings happened on marital rape cases. The Indonesian Domestic Violence law does not, however, consider the domestic relations of those in cohabitation. In reality, the police who received complaints from the victims of domestic violence often requested the victims to show their marriage certificate in order the reported cases are being considered as domestic violence¹²⁶. Indeed, police considered that only couples within the context of marriage could report domestic violence to the state justice system.

The main problem of the IDV law is that this law using the terminology of 'household' instead of 'domestic violence' throughout the provisions. This misconception has created problems in case handling. For example, in a case study whereas the victim of domestic violence was a maid in a household and the perpetrator was the employer, the police officer and prosecutor kept questioning if the maid constantly lived within this household, otherwise it could not be qualified as domestic violence¹²⁷.

¹²⁵ Art. 1(1) Law No.23 Year 2004 on Domestic Violence.

¹²⁶ The data stemmed from the domestic violence cases occurred in Brebes, Central Java province and Lombok, West Nusa Tenggara Province in Indonesia.

¹²⁷ The case occurred in Lombok, West Nusa Tenggara Province.

3.4. Rape in Children Rights Protection Act

A decade after Indonesia ratified the International Convention on the Children Rights in the 1990 the government of Indonesia passed a law on children rights protection¹²⁸. The Children Rights Protection Act clearly ensures the principles of non-discrimination and best interests of the child. The law covers the rights of children in the areas of civil and political and in the areas of economic, social, and cultural. In the context of civil and political, the law guaranteed that the children are free from any kinds of ill treatment, torture, and inhuman punishments¹²⁹. The law guarantees every child should be free from any kinds of sexual violence.

Overall, the law has strengthened the prohibition of sexual violence against children that are previously ruled by the Indonesian Penal Code. The IPC, as discussed, does not rule and made prohibition of sexual violence in the households or incest. The law of children rights protection clearly prohibits any kinds of sexual contact against children including rape. Article 81 of the law states, “Anybody who intentionally did violence or threat against children for rape will be punished by maximum 15 years and minimum 13 years of imprisonment and should pay maximum USD 30,000 and minimum USD 6,000 of fine”.

Many children organizations conveyed their appreciation towards this law and deemed that this children protection law is a breakthrough of cases of sexual offence against girls and children generally. It is true that without this law, a sexual offence or rape against girls that was committed by their fathers would merely be considered as obscenity. The two cases that are discussing in this thesis also were successfully handled by using the articles of prohibition of sexual offence within the law of children rights protection. This law also provides mechanism to enhance the rights of children in Indonesia through the establishment of the Indonesian Commission on Children Rights Protection.

¹²⁸ Please see <http://treaties.un.org/> .

¹²⁹ Please see Article 16, Law No.23 Year 2002 on the Children Rights Protection.

3.5. Police, Prosecutors, and Court in Indonesia

3.5.1. Police

The Victim Unit for Women and Children were developed in the police station all over Indonesia. It aims at providing services for women and children protection on cases of, *inter alia*, human trafficking, people smuggling, domestic violence, sexual violence including rape and sexual harassment¹³⁰. This unit resides at the level of districts and cities across the country¹³¹. The mandate and task of this unit covers providing services and legal protection, conduct crime investigation, and networking and coordinating with relevant institutions. However, a national police guideline in sexual violence case handling that can support services provided under these women and children's unit is not yet enacted. Therefore, this unit might not be really responsive towards the victims of sexual violence. For example, the current policy on the victim unit does not mention that it must provide rape kit.

On top of that, there is no possibility that the victims of violence reported their complaint to the police with their own languages. Using local language in reporting sexual violence cases would be accepted if only the police officers understand the language well. Women's victims of violence are also not possible to report the complaint unanimously to the police. No legal basis that is available for these issues of language and unanimously reporting. A national database of crime incidents and rate is established according to the law, but no database of sexual violence and sexual offenders is maintained under this database system.

3.5.2. Prosecutors

Differ from the police force, the national prosecuting office in Indonesia does not have a comprehensive notion and policy to serve and treat the victims of rape. On rape cases and sexual violence the policy of national prosecutor office focuses to increase the gender perspective and sensitivity of the prosecutors across Indonesia. Addressing personal ability of

¹³⁰ Please see Article 6(3) of the Regulation of Indonesia Police Chief No.10 Year 2007 on the organization and structure of Services Unit for Women and Children under the Indonesian Police organization structure.

¹³¹ This is obliged by the Indonesian Domestic Violence Law No.23 Year 2004.

prosecutor to handle gender-based violence does not affect the prosecuting authority institutionally. Because the effective prosecution of gender-based violence is based on the gender sensitivity of the prosecutors themselves.

To increase the knowledge of prosecutors, the prosecutor office in collaboration with the Gender Study Centre under the University of Indonesia inserted the topics of gender issues in the prosecutors' training curricula. On top of that, some women's organizations including the National Commission on Violence against Women held gender trainings for prosecutors at national and at local level. Apart from increasing the gender knowledge of prosecutors, the national prosecutor office intends to focus on rape cases that occurred together with other crimes. In 1996 the national prosecutor office in Indonesia released a letter for the prosecutors across Indonesia in order to pay attention on rape cases and suggested the prosecutors to aggravate the punishment of the rape perpetrators¹³². A decade afterwards the national prosecuting authority released another decree to establish a gender focal point at national level and its network in the regions¹³³. In relation to other serious crimes and trans-national crimes, between 1994 and 2007 the national prosecutor office released numerous decrees and letters that encouraged and invited all prosecutors and the district prosecutors' office to pay attention on violence against women and trafficking in women and children¹³⁴.

Albeit various initiatives and policies on gender focal points these initiatives however are insufficient due to for example it does not touch upon the direct interest and needs of the rape victims of proper services during the trial. Besides, no monitoring system is available and developed by the prosecutor authority towards the treatment and attitudes of prosecutors when treating women and girls victims of rape. During the trial or the judicial hearings, the women and girls' victims of rape are actually

¹³² In 1996, B-409/ES/8/1996 the chief of National Prosecutors Office in Indonesia encouraged all prosecutors across archipelago to pay attention to rape cases.

¹³³ Through both decrees: Kep-099/A/JA/09/2008 and Kep-100/A/JA/09/2008, the chief of National Prosecutors Office in Indonesia is supporting and facilitating the work of gender focal points under the prosecutor office in the capital city of Jakarta level and at the district level all over Indonesia.

¹³⁴ Please see <http://focalpointgender.kejaksaan.go.id/profil.aspx> visited 15 May 2010.

under the ‘responsibility’ of prosecutor office. The prosecutor office therefore should ensure that the victims of rape are able to provide the testimony freely and without any feelings of threat. A unit to serve women and girls’ victims of violence under the prosecutor office in each district is a must to ensure the victims of violence to make sure they will give testimony in court. Women’s organizations that provide legal aid for women’s victims of rape are usually in need of prosecutors’ supports for the women victims of rape because judges do not always allow these organizations to accompany women victims of rape during the court hearings.

3.5.3. *Courts*

Apparently, there are many quite good decisions towards rape cases against girls. For example severe punishments were given for perpetrators of rape against girls by the courts. Of many interviews done to these judges, they acknowledged that their knowledge on gender issues and sensitivity as well as the issues of rape were received from gender trainings organized by women’s organizations¹³⁵. From the perspective of women’s victims, the handling of rape cases in courts are progressing, but institutional changes and reforms occurred very slowly. For example, no special court for sexual offences cases and special mechanism in dealing with women’s victims of rape during the trial.

Currently, a special court mechanism for children is provided by law, but it is solely to facilitate children as perpetrator and not as the victims¹³⁶. Therefore, when it comes to children as victims of violence, the court and Judges are rather awkward in dealing with them. Judges, prosecutors and police officers acknowledged that they received training from women’s non-government organizations and women’s legal aid randomly. A Judge in Weni case has also acknowledged the benefits of his knowledge from attending a gender training provided by a women’s organization some years back.

¹³⁵ Some Judges in Cianjur District in Jawa Barat Province and Brebes District in Jawa Tengah Province who were interviewed during the field study acknowledged that they received training from women’s NGOs.

¹³⁶ Law No. 3 Year 1997 on Children Trial.

The formal efforts to reduce secondary victimization of the sexual violence victims in courts are not yet effectively done. This might happen since, for example, no special procedure to protect the victims in court when they should submit their direct testimonies. In the situation by which no special procedure for victims of sexual assault, the accompaniments of social workers and paralegals for victims of rape became the only method to assist rape victims during the case handling process.

As a police officer and a judge in Cianjur District have admitted, they do need additional training to improve their skills to generally increase their capacity to handle victims and cases of sexual violence. This is particularly useful when there is no assistant from female police officers from the nearest women's police desk for women and girls victims of sexual violence. The cases studied actually revealed that judges, prosecutors, and police officers who received gender training treated the victims better¹³⁷.

3.6. The Rights of the Victims

Generally, access to justice system in Indonesia focuses to protect the defendants' rights, and in violence against women cases, the system tends to focus on the perpetrator's rights protection. The rights of women's victims of rape and domestic violence are silent in the Indonesian Penal Code¹³⁸ (IPC) and the Indonesian Criminal Law Procedure¹³⁹ (ICLP). The IPC is an inheritance from the colonial and the ICP was drafted under the *Soeharto* era, the authoritarian government that was toppled in 1998 after 30 years ruling in Indonesia. Thus, when the criminal procedure was enacted, it was praised as the breakthrough¹⁴⁰ to protect defendants' rights under the old regime. It is only in the year of 2004, when the Indonesian Domestic Violence (IDV) law was passed, women's victims' rights are being considered significant.

¹³⁷ Weni's rape case, generally, provide these views.

¹³⁸ Law No.1 Year 1946 on The Indonesia Penal Code, for English version *please see* http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=IDN&p_classification=01.04&p_origin=SUBJECT

¹³⁹ Law No.8 Year 1981 on Indonesia Criminal Procedure (ICP).

¹⁴⁰ *Please see* <http://www.hukumonline.com/detail.asp?id=15621&cl=Kolom>, this article is in Indonesian.

3.6.1. *Victims' Rights Protection under the Indonesian Domestic Violence Law*

The Indonesia Domestic Violence Law is the first law that outlines the domestic violence victims' rights and supports the legal accompaniment of victims of sexual violence in courts and during the investigations. It is widely acknowledged as a breakthrough for the rights protection towards women's victims of sexual violence. For the first time, victims' rights are considered in a written legislation, since the law included temporary protection for victims of domestic violence. Also, the most distinctive provisions in IDV compared to the IPC have been laid down in the evidence and witness provisions¹⁴¹. The IDV provides a quite comprehensive list of victims' rights protection and kinds of assistance for victims in cases of domestic violence. Article 10 of the Indonesian Domestic Violence Law provides:

The victim shall be entitled to get:

- a. protection of the family, police, district attorney office, a court, advocate, social institution, or another party either temporary or based on the ruling on protection instruction of a court;
- b. health service in accordance with medical need;
- c. special handling related to confidentiality of the victim;
- d. counter parting by a social worker and a legal aid worker at each examination process level in accordance with the stipulations of laws and regulations; and
- e. spiritual guidance service.

The evidentiary rules in the IPC are silent about whether the victims' sexual history and reputation should be considered. Most of the time, however, the investigators (police), prosecutors, and even the Judges considered these both evidences in many rape cases mainly rape cases happened to (adult) women. Worse, the evidentiary rules under the Indonesia Criminal Procedure outlined that single evidence cannot be qualified as acceptable evidence, in other words, valid evidence should comprise of at least by two evidences¹⁴². The single evidence caused many rape cases occurred to women victims of rape were difficult to proceed to the court hearings. The outcome of physical examination of women victims of rape was often difficult to be accepted by the police and prosecutors.

¹⁴¹ It is stated, particularly, in art. 16 of the Indonesia Domestic Violence Law.

¹⁴² Please see article 183 on the Indonesia Criminal Law Procedure or UU No.81 Year 1981.

In many cases, sexual history of female adult victims was mostly taken into account in rape cases. The sexual history of female adult victims of rape generally is being used to qualify if a woman victim is categorized as victim and whether the case can proceed to court. The prosecutors whose task it is to evaluate the crime evidence and should continue the case to court has to return the case files to the investigators (police) if the evidence is unacceptable. The prosecutor demanded the police to collect evidence in order to reach the threshold of rape provision in IPC. As a result, many rape cases were terminated at the level of investigation at the police station. In contrary, evidence of girls victims of sexual violence are more acceptable and in many cases the perpetrator received high sentences. Two cases of rape that are discussed in this thesis confirmed this situation. The girls' victims who have no previous sexual records and were considered trustworthy made the legal officers were compassionate in dealing with these cases.

In the two cases that are documented and discussed in this thesis, the judges expressed their difficulty to deal with women's victims of sexual violence, especially if the victims are minor and children with disability. In a rape case in which the victim is a girl with disability, the Judge frankly admitted that they have difficulty to communicate and questioning the victim. "Disabled victims gave unclear answers when we asked question," said a judge. However, roles of women's paralegals from the local women's organization that accompany the victims and their family throughout the case handling, helped bridging the communication between Judges and victim as well as with another witnesses. The roles of women's paralegals are significant in the court hearings since they speak local language, while Judges are usually originally from another part of province and do not have ability to speak local language. Women's paralegals are usually the victim's neighbour, thus, the victims would feel comfortable and not reluctant when they have to answer questions in court.

In the same vein, Judges also complained on the unavailability of counsellors and legal aid for women's complainants and defendants. The lack of special courtroom and facilities for minor victims of violence

became the obstacles of the court sessions, and delayed the court proceeding as well. In cases documented, victims and perpetrators, whose some of them are the victims' fathers and employer, were sitting and placed at the same courtroom. Consequently, Judges were in difficulty to excavate the information from the victims.

3.7. National Policies on Services and Mechanism: Assistant to Victims

Currently, the Indonesian Domestic Violence Law outlines the most comprehensive services that should be available for the victims of domestic violence. According to the IDV, the national and local levels of the government of Indonesia should make these services available for all domestic violence victims. Although the rights and protection in the IDV are basically provided for the victims of domestic violence, the services however are accessible for any women and children's victims of crimes including rape. The IDV has obviously strengthened service providers that were established to serve women and children victims of violence. Women's organizations at national and local level developed the initiatives to create service providers either independently or by the support of relevant government ministries.

Article 13

To organize service for the victim, the government and the regional government in accordance with their respective functions and duties may make these efforts:

- a. provision of special service room at a police station;
- b. provision of officials, health personnel, social workers, and spiritual mentors;
- c. preparation and development of service program cooperation system and mechanism involving a party that is easily accessible to the victim; and
- d. provision of protection for counterpart, witness, family, and friend of the victim.

Starting more than a decade ago, service providers for women's victims of violence were established by women's organization in many big cities in Indonesia including in the capital city of Jakarta. Indeed, most of these initiatives came from the civil society sides both independent organizations that work on advocacy on gender-based violence issues or legal aid and religious-based women's organization such as from Moslems, Christians, and Buddhist community. Anyhow, these initiatives had inspired legal institutions mainly the Indonesian police force to develop a women's

police desk within the police station across the country. Similar kind of services under the hospitals was formed that provide multidisciplinary services consisting of psychological, medical, and legal services under one-roof services.

Social and legal assistance as documented in the cases are mostly initiated by an independent women's organisation directly or indirectly, women's paralegal and local activist such as midwives who are stationed in villages. Women's organizations, for example, provide legal and social assistance by providing shelter and recruiting women's villagers as women's paralegals to provide direct services in the grass root. Provided the funding for this activity is from international donor organizations¹⁴³, their roles are not sustainable. The government should be able to provide more sustainable funding and supports for this kind of services.

3.7.1. *Women's Police Desk*

The creation of Women's Police Desk or *Ruang Pelayanan Khusus* (RPK) in the year of 1999 under the police station across the country was the first legal institution-type of service provider for gender-based violence. The RPK was apparently established after serial of rapes occurred in May's riot 1998 in Jakarta. The strong demands from civil society organizations, women's organizations, and community leaders to the government of Indonesia to respond the riots has led to the development of a pilot RPK service in Jakarta. The 2007 National Police Chief decree does not say very clear on type of services that a PPA unit should provide. It generally says the RPK functions to provide legal protection, conduct the case investigation, and do the coordination and networking with relevant government institution.

In relation to its function, the RPK mandates cover the protection of women and children victims of numerous crimes such as human trafficking, people smuggling, domestic violence, sexual offence (rape, sexual harassment, obscenity), and victim and witness protection in relation to these crimes. In executing their tasks, the RPK is mostly networking with

¹⁴³ Most of women's organizations in Indonesia get their activities funded by international organizations such as USAID (United State Aid Agency), AUSAID (Australia Aid Agency), and CIDA (Canada Aid Agency) as well as Scandinavian Countries agencies.

another women's legal aid and service providers that belong to government or non-government institutions. In most cases, RPKs have close connection with hospital to make the medical examination for the victims to be done timely. For example in giving temporary protection for women's victims of domestic violence, RPK referred the victims to shelters that were managed by social ministry of local government at provincial or district level. In some cases and if it is needed at all, RPK collaborates with psychologists in psychiatric hospitals to provide psychological advice for the victims before the victims go through or during the case handling process at the judiciary.

Considering no particular budgets are allocated for the RPK, the facility that is available under the RPK is varied and it depends on the discretion of the chief of the police stations. In some RPKs in big cities, facilities that are relevant with the victims needs such as a comfortable room complete with the bed and toilet for women's victims and their children are available to enable the victims to report the incidents. A children playground is also available for example in some RPK in Jakarta, Banda Aceh, and Surabaya, the big cities in Indonesia. In smaller cities and the more remote areas, the RPKs provide only a special desk to receive reports from women complainants.

The roles of RPK in proving supports and special treatment for women's victims of violence has been widely recognized by women's organizations, another government institutions, and community generally. The only criticism is that albeit the standards which RPKs should comply with, not all facilities are provided by each RPK and many police officers residing in RPKs have adequate knowledge and gender sensitivity to deal with the issues of gender-based violence reported by women's victims of violence. Also, RPK does not have facility and equipment to assist women's victim of rape.

3.7.2. *Integrated Women's Crisis Centre*

Following the creation of RPK, a joint government institutions initiative established multi-disciplinary support centre for women and girls' victims of violence. In 2002, the Ministry of Women's Empowerment, the Health Ministry, the Social Ministry, and the Indonesia Police Force agreed to

develop an integrated services for women's victims of violence under the public and the police hospital across the country¹⁴⁴. The aim of this integrated services is to deliver services for women's victims of violence that is accessible, comfortable, and safe; effective and efficient for victims' services and; ensure fair access and legal certainty¹⁴⁵. The common agreement mandates the public hospitals and police hospitals at provincial and district level to provide a temporary and special room for the women's victims of violence including sexual violence to receive medical and psychological treatments¹⁴⁶. In relation to these services social workers, lawyers, and police officer shall work together to assist the victims during the investigation process¹⁴⁷.

The joint agreement on the integrated Women's Crisis Centre (WCC) determined the division of tasks among the four institutions ('joint agreement'). The ministry of women's empowerment focuses on the dissemination information of these integrated services and make sure that the establishment of shelters for women's victims of violence are available and collaborate with the hospitals. The ministry of health is in charge of the recruitment of a number of staffs in the hospitals to serve women's victims of violence. Ministry of health's task is also to develop guideline and standard operating procedure for services that can be referred by the integrated services staffs. The supports of women's organizations and non-government organizations for these multidisciplinary services will be maintained by the social ministry. The police force should prepare the staffs for the services under the police hospitals and prepare women's police officers under the RPK to accompany women's victims until the judicial process.

A pilot of these services was launched under the national public hospital in Jakarta and some police hospitals inside and outside of Jakarta. It

¹⁴⁴ The Common Agreement on 23 October 2002 between the Ministry of Women's Empowerment (14/MenPP/Dep.V/X/ 2002), the Ministry of Health (1329/MENKES/SKB/x/2002), the Ministry of Social (75/HUK/2002), and the National Police Force (B/3048/X/2002).

¹⁴⁵ Article 2 of the Common Agreement.

¹⁴⁶ Article 3 and 4 of the Common Agreement.

¹⁴⁷ Article 7 and 8 of the Common Agreement.

provides psychologist, lawyer, police officers, and social workers under one-roof system within the hospital management. A number of independent evaluations towards these integrated services were done by women's organizations. The criticism of women's organizations was mainly due to the quality of these services for women victims. Even though these services generally are quite effective in giving services for the domestic violence, it should improve their services for rape victims.

Yet, the integration WCC is not under the national health care system. Thus there is no national healthcare protocol and no sexual assault evidence kit. Consequently, this integrated system cannot be accessed in each public hospital in each province let alone at the district level. The cost arising from the case is not reimbursed by the state¹⁴⁸. Free legal aid and financial assistance were mostly provided by the women's NGOs. Information and awareness raising campaigns were actively conducted by the Ministry Women of Empowerment and women's organizations.

3.7.3. *Interim Protection under the IDV*

On the protective measures, the IDV already provides mechanism to protect women's and children victims of domestic violence for the first 24 hours and the next seven days. But the law should detail it in a Standard Operating Procedure (SOP) which is unavailable until now. The unavailability of this SOP may cause that no protective measures are filed to court. The Unit of Women and Children under the police force claimed they already provide protective measures by collaborating with women's organization and local government agencies that have shelters to accommodate the victims and their family temporarily. The law says when giving the first 24 hours interim protection, the police should report to the court in order to get the court ruling. However, some District Courts such as in Cianjur and Brebes confirmed that they have never been receiving requests of temporary protection order either from the police station or from the victims of domestic violence. Thus, it is a little bit difficult to confirm whether the temporary order under the IDV law is effective let alone giving an evaluation on it.

¹⁴⁸ Case studies taken from the field indicated this fact.

3.7.4. *Victim and Witness Protection*

To support the criminal trial, the Law No.13/2006 on Victims and Witness Protection provides a comprehensive protection for witness and victims of crimes in the overall stages of judicial hearings. Although historically this law emerged from the idea to provide protection for women's victims of violence the law indicates the protection is provided for every victim and witness who needs special protection since they have to submit their witnesses or oral evidence regarding the case. The law argues that since article 50 until 68 of the Indonesian Criminal Procedure (ICP) only rules the protection of the defendants during the trial the law to protect victims and witnesses is needed.

The Law No.13/2006 provides quite comprehensive entitlements of the victims and witnesses during the trial such as the right to get proper information and to obtain translator, to obtain legal advice, and to get living expenses during trial and up to the protection is terminated. To access these rights, the Witness and Victims Protection Agency or *Lembaga Perlindungan Saksi dan Korban* (LPSK) should make decision on which types of protection should be prepared for the applicants. If the witnesses and or victims are in serious threat they can give testimony without being present in the court upon the judge's approvals or give testimony in writing that is presented before an authorized official.

LPSK is currently seeking the right method to handle women's victims of violence who are in need of special protection from LPSK. In 23 May 2010, LPSK and Komnas Perempuan signed a Memorandum of Understanding (MoU) to develop an appropriate system to handle women's victims of violence. Komnas Perempuan confirmed that no women's victims or witnesses of gender-based violence cases are handled by LPSK until now. Therefore, it is difficult to evaluate if the system to protect victims and witnesses of LPSK is really effective and fruitful for women's victims and witnesses.

4. Case Profiles

4.1. Introduction

Weni (15 years) and Sita (15 years) are adolescence girls who live with their poor family in villages in West Java and West Nusa Tenggara Province. Both girls lived with their fathers and other family members. Weni's mom died some years back, and she lived with her step-mom and her father who earned the living as a tailor in the village. The step-mom who worked as the domestic helper in another household quite far from her village was rarely at home. Instead of taking care of the children, the father raped Weni a couple of times and threatened her if she dared to tell to others. Similar situation happened to Sita who lived only with the father and a younger sister. Sita's mom passed away and her elder brother and sister migrated to Bali to earn a better living. Similar with Weni's experience, Sita's father raped her a couple of time, and worse it caused Sita pregnant.

For both girls who graduated from elementary schools, they do not know how to deal with their experience. They had no ideas how to seek assistance. The neighbours and friends whom the girls told the stories merely repeating the girls dreadful stories to another neighbours that eventually created social turmoil in their villages. Most villagers in both villages considered the girls experience as 'taboos' and blamed the victims and the perpetrators. In Weni's village, most youth villagers intended to use their 'own law' by trying to beat her father. While in village where Sita lived, villagers tried to loot her house and yelling at Sita and the father that both of them are crazy.

The chaotic situations in both villages had caused local village leaders to take initiatives to comfort villagers. Sita's and Weni's fathers were taken to village head house and were being interrogated about the sexual assaults. Each girl was taken care of differently. Weni might have been luckier since a female paralegal was actively working in her village. The paralegal in collaboration with village police, village midwife, and village head arranged to send the perpetrator to the nearest police station and transferred Weni to a local hospital to get the medical evidence taken.

Without having a paralegal available, Sita was taken to government-owned safe house at the district level and her father was sent to the police station for further investigation. A local children organization supported Sita and provided services that Sita needed. Paralegal and local activists served as intermediaries between different sets of cultural understandings of gender, violence, and justice¹⁴⁹.

The two cases discussed in this thesis will provide a quite complete picture of responses from villagers at the grassroots and the legal institutions and judiciaries towards the victims and the perpetrators of sexual violence against girls. This chapter will begin by examining the capacity of Sita and Weni in facing the cases. It will discuss the responses of villagers when the cases were finally disclosed and how the intermediaries served to help Weni and Sita to access justice in villages and when the cases were heard in courts. Secondly, this chapter will examine whether the rights of the victims' rape are accessible and whether the relevant services and mechanisms are secured for both victims of rape without discrimination.

4.2. The Cases

| Survivors | Perpetrators | Indictment | Verdict | Accompaniment |
|--|----------------------------------|------------|----------|---|
| Weni (15 years) Cianjur, West Java | Asep (37 years) Weni's father | 14 years | 10 years | Accessible at village and case reporting at the police station. Inaccessible in court hearings and post verdict. |
| Sita (15 years) Lombok, West Nusa Tenggara | Mudi (60 years) Sita's father | 8 years | 5 years | Inaccessible at village and case reporting at the police station. Yet, it was accessible at the court hearings and post court decision. |

¹⁴⁹ Merry, *supra note* 1, p. 2.

4.2.1. *Rape against Weni*

It was 14 February evening 2006. Weni was feeling strange when her father prepared a bowl of noodle soup for her. Without any suspicion, Weni sipped the noodle soup instantly although deep in her heart she wondered why the soup tasted a little bit bitter. Right after the bowl is empty, she felt pretty much sleepy and she went to bed. In the middle of that night she knew that her father entered her room and raped her. The father forced her to shut up, and he went back to his room. The next morning, Weni just thought she could not believe that she was being coerced sexually by her own father. She just hoped it would not happen again, and decided to lock her bedroom in the evenings. Unfortunately, at 27 March 2006 Weni forgot to lock the bedroom. Again, the father forced her sexually and threatened to beat her with a broomstick if she refused. Same thing happened by 11 April 2006, and again Weni did not brave enough to fight against the father¹⁵⁰.

The third experience of sexual violence has made Weni to break her silence. Weni started to repeat her experience to her closest female neighbour, Iyet. Yet, what she got was one-sided of hope since her father denied the allegation. It caused Weni to keep herself in her room and cried for days until she did not get her monthly period for some times. Her worried has generated more attentions from the neighbourhood. Her best friend and another female villagers tried to seek help from the vicinity head and local religious leaders for Weni. As a result, the youth villagers tended to deal with this problem with 'their own way'. Some angry youth villagers who just finished Friday prayer decided to question Weni's father directly. It is not uncommon in Indonesia villages that villagers took their own way to punish the perpetrator like Asep, Weni's father. Usually villagers beat the perpetrator badly, some of them even died. Similar thing would occur to Weni's father. This time he was lucky. When Asep eventually confessed to some youth villagers that he raped Weni and showed where he perpetrated the sexual violence, Asep was then taken to the village head house.

A brief meeting between local community heads and a police officer held at village head house while the angry villagers were waiting outside.

¹⁵⁰ Interview with Weni during the field work in summer time 2008.

Village policeman took and brought Asep to the police station at Cimacan, the nearest sub-district. Meanwhile, a villager reported the case to a village paralegal, bu Nining. She immediately took and accompanied Weni to hospital to undertake medical evidence for the purpose of case investigation. By the accompaniment of bu Nining, Weni submitted her testimony about her rape case to the police in that evening. During the case investigation, bu Nining did not only help Weni but she also facilitated another witnesses in the village to visit the police station.

Bu Nining with another local activist contacted the local prosecuting office in order to get information and to monitor how police station and prosecuting office in Cianjur district worked together to proceed Weni's case to the court hearings. Outside the court hearings, bu Nining assisted Weni and her family who received threat from Asep or Weni's father's family. Asep's family did not believe that he raped Weni. One of Asep's relative was quite confident that money would help Asep to stay away from the 'legal trap'. "The money will determine whether Asep shall be in jail for this case," said Asep's relative. At the same time, a rumour developed in the village in that Weni is not a 'good girl'. Strangely, a local youth villager was forced to marry Weni and was accused that this guy was the perpetrator and not Asep. This guy and his family visited and seek bu Nining's help to mitigate the problem. "Our family is very much confused with the rumour, and Asep's family came to us and offered some money to force him to marry Weni," said the guy's parents.

In short, the court hearings were finally held in a quite lengthy process. One of the judges admitted that the perpetrator has denied the allegation in court. However, "he cannot deny the evidence and the witness of the victim," explained a Judge. Asep was accused to conduct sexual violence against his own child and was sentenced for ten years in jail. In the middle of the court hearings, Weni left her village and worked as domestic worker in Jakarta. She was pleased and seemed satisfied when noticed that her father would be in jail for ten years. Weni said, "I want to go back to my village and learn to be a tailor."

4.2.2. *Rape against Sita*

Sita lived in Kuripan village with a younger half sister and with her father, Mudi, in a pretty much simple house. The first sexual violence occurred in one Friday in 2005 after the moslem Friday praying. Mudi threatened Sita that he would not give her food and money and even to kill her if she told other people on what the father did. Afterwards, the sexual violence occurred to Sita almost every Friday until her father found out that Sita was pregnant. Mudi tried very hard to abort Sita's pregnancy by encourage her to drink soda mixed with local alcohol drink that ones believed would avoid pregnancy to continue. But it did not happen. Sita's belly was getting bigger and worrying Mudi. He asked Sita to move to another family's house in the east of the island, but Sita refused the suggestion. In the meantime, the news of Sita's pregnancy because of the father was spreading over the village.

Having seen Sita's belly, her female relatives were curious to ask who caused Sita's pregnancy. Sita refused some names mentioned by her relatives. Only when her relative accused her father, Sita could only cry. Sita kept staying at home since Mudi did not allow her to communicate with the neighbours and the relatives. A relative of Sita interrogated and asked who had made her pregnant. Sita kept denying that she pregnant let alone acknowledged that the father caused it. Sita always remembered her father's threats, and it made her refuse her relative's accusation that her father forced her sexually and caused the pregnancy.

Now most of relatives who lived close to Sita's house knew what actually happened with Sita and also knew the perpetrator. They decided to bring the case to the local religious leader and another local leader in the village. These leaders summoned Mudi and brought him to the police station. Meanwhile, youth and angry villagers were getting uncontrolled. They yelled at Mudi and Sita in front of the house of Mudi. Villagers thought that what happened between Mudi and Sita were a taboo. It is not only taboo for both victim and perpetrator. But most villagers considered it is taboo for everyone in the village. Villagers also blamed Sita and wondered why Sita did not fight against the father when he forced her sexually. Villagers concluded the sexual violence was not a kind of rape, but

it was a consented sexual relation. Villagers want Mudi and Sita to leave their village forever.

When the case was processed and Mudi was detained, two social workers from local government office visited Sita and took her to the shelter. Mudi was tried efficiently in a very short time. He was accused to rape his daughter and got five years imprisonment. The judge panel considered Mudi is already in old age and during the trial Mudi showed his cooperation to make the hearing more efficient.

4.3. Case Handling: Response and Supports of Legal Institutions

4.3.1. The Police

In the case of Sita and Weni, the police officers generally worked well. The police stations in Cianjur and in Lombok (NTB) received and processed both cases effectively. Even though no special facility for women and children is available under the two police stations, yet the police officers served the victims well. They received the medical examination test as the medical evidence of Sita's and Weni's case. Both perpetrators conveyed their confessions quickly. Initially Asep, Weni's father, kept denying what he did in the police station however finally he submitted his confession. Both cases were processed under the duration allowed by the criminal procedure. The police also collaborated with the local prosecuting office in determining the indictment of the case. Some companions were allowed to be in the police stations with the victims during the investigation.

According to the law, each police station should have a special room and services for women and children victims of violence¹⁵¹. The police station in Cimaacan district, Cianjur, does not have victims unit and they even do not have a woman's police officer stationed at the office at all. Therefore, only male police officer received report from Weni and took Weni's statement for the purpose of case investigation. When Weni officially reported the case to the police, she was accompanied by Nining the paralegal. Beforehand, Weni was taken to hospital to conduct medical examination for the purpose of medical evidence. The police officer

¹⁵¹ Please see The Indonesian Domestic Violence Law and Police Force Circulation Letter.

accepted the report of Weni in that evening. A male police officer took Weni's statement while the paralegal accompany Weni. The report taking process happened quite some time in the police station. When the overall process finished that night Weni went to one of her relatives considering no shelter and safe house under police station in Cimacan, Weni went to her relative's house. This is to avoid the threat from her father family who were unhappy with legal process of the case.

In fact, dealing with Asep the perpetrator of Weni's case was not easy at all. The police acknowledged that they need some days to encourage Asep to provide the confession. Several male police officers who have particular skills to gather confessions from a rape perpetrator was in charged to face Asep. A police officer acknowledged that they worked pretty hard for some days to get Asep's confession. This case finally was ready and the case file was sent to the prosecuting office timely. Since Weni is an under-aged girl, the police applied article 81 of the Indonesia Children Protection Law on sexual violence against children and article 290 of the Indonesian Penal Code considering the perpetrator is the father of the victim.

The case was handled by the police station in Cimacan quite effectively although they have limited facilities. The unavailability of victims unit under the police station was substituted by the roles of paralegal who already has good relation with the police in Cimacan. A male police officer who has been actively monitoring the village neighbourhood in Weni's village has good relation with the local leaders in the village. This led to an effective collaboration between the police institutions and village leaders when Weni's case happened. The police received effective supports from local leaders and villagers in handling the perpetrator. For example even though the local leaders mediated the victim and the perpetrator families, the local leaders supported the police to take the perpetrator to the police and the case was handled by the state mechanism.

The police station in Lombok Barat in Sita's case also does not have a victim unit and women's police officers as well. But Sita was lucky since in Mataram, the capital city of West Nusa Tenggara Barat, an integrated services for victims of violence has already been established under the

social and welfare local government unit (the *dinas*). As discussed in chapter three, this kind of services involved the police victims unit, psychologist, medical workers (doctor), and religious leaders. Therefore, when a local children organization noticed that Sita had a case, this organization sent its worker to get the police victim's unit involved in the case. The head of the police station referred Sita to the hospital to get a medical examination for the purpose investigation. Sita was accompanied by the social worker from the *dinas* during the investigation in the police station. While Sita was in the shelter, she received supports and services from psychologist and social accompanier. Psychologist often visited Sita to check her condition and to empower her in order to face the situation.

Indeed, the collaboration between the social workers and the police officers helped the case to be filed to the prosecuting office on time. Sita cannot access the police victim's unit under the integrated services because this service is being placed at the provincial level. The police station at the district of Lombok Barat located not really far from the integrated services. Nevertheless, the bureaucracy impeded Sita's rights to access this victims' unit under the police station. Sita's case was handled by three assigned male police officers at Lombok Barat police station. Police victims' unit can only be accessed during the court hearing. Woman's police officer works under the integrated services accompanied Sita during the trial. It will be discussed later.

4.3.2. *The Prosecuting Agency*

Similar with the police, the Prosecuting Agency performed well in the case of Sita and Weni. The prosecuting agency applied the law on children protection, rape, and incest under the Indonesian Penal Code in both cases. In Cianjur and in Lombok Barat, the prosecuting agency coordinated well with the police in conducting investigation and collecting evidence. They indicted the defendants with high imprisonment and sufficient evidence. This is due to the internal policy in the prosecuting agency that obliges the prosecutors to aggravate the punishment of the rape perpetrator. Yet, the high indictments for the perpetrators are not in line with the response and services of the prosecuting agencies for the victims of violence such as

Weni and Sita. The prosecutors who were involved in the cases indicated their concerns for the cases but no concrete supports were provided for the victims of gender-based violence.

A female prosecutor was assigned to handle Weni case in Cianjur. As said, she proposed a high sentence for Asep, the perpetrator in Weni case. This prosecutor was really pleased when her proposal to sentence Asep with high imprisonment was accepted by the Prosecuting agency at the provincial level¹⁵². The paralegal in Cianjur also acknowledged the positive response of the prosecutors. Paralegal and local activist could discuss the situation of the victims with the prosecutor. Unfortunately no victims of sexual violence unit was established under the prosecuting agency. Thus, the individual concerns of the prosecutor do not really contribute to the recovery process of Weni. The prosecutor indicted Asep with the article 81 of sexual violence against children under the law No.23/2002 on Children Rights Protection. Because of the status of Asep is the father of Weni, article 290 of incest under the Indonesian Penal Code was applied under the indictment. In the indictment document, the prosecutor proposed Asep to receive 14 years imprisonment.

By similar proposal, the prosecutor in Sita case in Lombok Barat indicted Mudi with eight years imprisonment. The prosecutor in Lombok Barat also applied the article 81 of Children protection law on sexual violence against children. Interestingly, prosecutor indicted Mudi with article 285 on rape although Sita was under-aged girl. As discussed in previous chapter, according to Indonesian Penal Code the using of force and threat are required in order to be qualified as rape. In many cases, it takes a lot of efforts to collect the evidence of a rape case. At least two evidences should be submitted to court according to the Indonesian Criminal Law procedure. Prosecutor proposed 8 years of imprisonment for Mudi in Sita case.

¹⁵² Under the Indonesia legal system, in preparing an indictment a prosecutor at the district level should propose an indictment plan to the prosecuting agency at the provincial level. In many places in Indonesia, the prosecutors usually proposed a high punishment in the indictment for cases of rape against girls.

In an interview, prosecutors in Sita and Weni case had indicated their seriousness and their deep concern to the victims. “May be because I have a daughter then I always indict the perpetrator of rape against girls with high imprisonment,” said the prosecutor in Weni case. Both prosecutors were also committed to propose a high imprisonment for the defendants. From the perspective of the victims, the concerns of prosecutors were not properly indicated without any special treatment and services for the victims.

4.3.3. *Court Hearing*

The panel judges in Weni case acknowledged that they worked quite hard to get the confession of Asep. Therefore the court hearings of Weni case occurred in seventeen sessions. In Sita case, her father requested a clemency from the judges and the hearing only happened in three sessions. Asep and Mudi finally received ten and five years of imprisonment respectively.

Asep kept changing his statements and deny the crimes he committed during the court hearing. Consequently, the judges often should recess and postponed the hearings. The judges did allow the accompaniers or paralegals to join Weni in court. Nining, the paralegal, said that no legal basis for the paralegal to be in court with the victims of violence. In reality it cannot be denied that Weni needs the accompaniment of paralegal because many times Asep threatened her in Court. Although the Judges warned Asep not threatened Weni in courtroom, yet outside the courtroom Asep’s families scolded her.

Weni acknowledged that the Judges helped her by asking questions that Weni was familiar with. Judges asked Weni with uncomplicated or legal-termed questions. Most of Judges’ questions focused on the chronology of the case. None of Judges questions made Weni uncomfortable as Weni acknowledged. The Judges attitudes have truly helped Weni who did not have paralegal or accompanier close to her. Ten years imprisonment was given to Asep. It is four years lower than the indictment submitted by the prosecutor. For Weni who left her village and worked as domestic helper in a household in Jakarta, it made her quite

relieved. She only smiled when she learned that her father would be at least ten years in jail.

Another story in court appeared differently in Sita case. Although the court hearings only happened three times, yet it was enough to provide another torture for Sita. Nothing particular happened in the first hearing due to Mudi gave the confession and even asked for a clemency. However, Mudi family such as Mudi's younger brother who witnessed the hearing abused Sita verbally. He scolded her and blamed Sita as the source of the problem. "You are whore! Because of you my brother would be in jail," said Mudi's relative using the local language.

Apparently, a social worker from the Dinas in court but he was not allowed to enter the courtroom by the Judges. Therefore, Sita should face an intimidating situation. A female police officer who was assigned under the integrated services tried to negotiate with the Judges in order to get access to be in court. The fruitful negotiation between the court registrar and the female police officer had allowed an accompanier to be in court for Sita. The accompanier that is the female police officer herself proposed to Judge to place Mudi outside the courtroom when Sita gave her testimony for the case. The collaboration work between the social worker and the female police officer had made Sita felt comfortable to sit and talk during the trial.

The sentence released for Mudi was much less than the indictment. He was only sentenced for 5 years since the court considered that Mudi was already old. He was sixty years old when he appeared in court. Also, Mudi gave a direct confession and made the hearing less complicated. Interestingly, one of Judges considerations was that Mudi was too poor to afford to marry another wife. Thus he could not channel his sexual desires¹⁵³.

¹⁵³ The considerations of the panel judges in the court verdict and the interview of a female police officer in Mataram, West Nusa Tenggara.

4.4. The Intervention: Roles of Intermediaries

4.4.1. PEKKA: Female-headed Household Empowerment Programme

The name of PEKKA organization was actually emerged from a programme that was initiated by the World Bank in Indonesia. The World Bank and the Government of Indonesia considered that there is a segment of government aid target under one of the World Bank programme that is not yet included. *Kecamatan*¹⁵⁴ Development Programme (KDP)¹⁵⁵ is a nationwide government programme that reached the lowest governmental structures. KDP was not covering the widow groups as their targets, and Indonesia has many post-conflict areas in which the number of widows is significantly high. Emerged from this notion, in the year of 2000, Komnas Perempuan and the current director of PEKKA organization created a programme that aimed to empower female-headed household and not necessarily widows.

The National Economics Census Data of Indonesia (SUSENAS) 2007 indicated that the number of households that are headed by female reached 13.60 per cent or approximately six million households that comprised more than 30 million citizens. Each year, and in particular compared to the year 2001 data when this PEKKA organization commenced its activities the percentage of FhH in Indonesia is increasing 0.1 per cent in average. FhH are generally poor and in fact they are the poorest of the poor in the segment of society in Indonesia. Most of PEKKA members are the survivors of violence, mostly are domestic violence survivors. The groups of Female-headed Household (FhH) are established in villages in eight provinces across the country. FhH or PEKKA membership consisting of those poor FhH who have responsibilities as breadwinner, household manager, and decision maker. The PEKKA members usually divorced women, widows, single or unmarried women, housewives whose husbands are permanently ill or having disabilities, married women that were left by their husbands with no clear legal status. Its members indicated that the aged group of PEKKA members is between 20 and 60 years old, more than 38.8 % are illiterate and do not go to school. They must take care of up to 6

¹⁵⁴ *Kecamatan* is an Indonesian word for 'sub-district'.

¹⁵⁵ Please see www.ppk.or.id and www.worldbank.org/id/kdp both were accessed 25 November 2009.

dependents and mostly work as farm-labourer or another informal sectors including small traders in that their daily income reached less than USD two per day¹⁵⁶.

This PEKKA programme aimed to strengthen female-headed household, and it is to improve FhH welfare, to facilitate FhH to access justice and various local sources, to increase the participation of FhH in local development, and to raise their rights and legal awareness as well as to empower them in order to have control of their life and able to involve in the decision making process either in family or in their own community. To reach this end, PEKKA organization recruited and installed community organizers who sit, mostly, at district level. They recruit PEKKA members, created FhH groups at village level, networking with local government apparatus, facilitating various empowerment training, and another grass root activity. The core activity of PEKKA groups, however, mostly on economic empowerment and small-scale credit facility that managed by the members themselves.

4.4.2. *Women's Legal Empowerment and the Roles of Paralegal in the Village*

The case chronology above indicated that the challenge of the case handling were not only from the legal institutions and the bylaws but also from the community or villagers and the victims themselves. The response of villagers in both villages where Sita and Weni lived was quite similar. Villagers tended to blame Sita and Weni in that both of them contributed to the rape occurred to them. Yet, in Weni case the response of villagers was slightly different. At the moment the Sita case was disclosed a women's legal empowerment was conducted by PEKKA organization and a paralegal was employed at Sita's village. Therefore, in the middle of village chaos due to some youth villagers who tried to loot Asep's house. Other villagers referred Sita to bu Nining, the paralegal at the village, in order to get assistance. Meanwhile, Sita received assistant from social workers of the local dinas when the case was already reported to the police.

¹⁵⁶ Please see http://www.pekka.or.id/8/index.php?option=com_content&view=category&layout=blog&id=52&Itemid=91&lang=en accessed 26 November 2009.

Women's Legal Empowerment (WLE) is a program implemented by PEKKA, a Jakarta-based women's organization in Indonesian villages including in Cianjur¹⁵⁷. This WLE aimed at increasing women's access to justice in Indonesian villages. It provides women and villagers with legal information through informal group discussion or conversations between the paralegal and local leaders in the village. This legal empowerment activity has generally increased villagers' knowledge and made the villagers more familiar with human rights norms including domestic violence issues. The roles of local intermediary or paralegal that provided and facilitated village discussion on women's legal issues in this context are important for villagers. Thus, when villagers have questions or need assistants in many women's legal cases villagers are able to ask paralegal.

For the purpose of the WLE program, a paralegal was recruited and served villagers in Cianjur. Bu Nining, the paralegal, was a prominent female villager. She was the head of a village women's organization, she was also the cadre of an integrated services post for mother and children at village level, and informal female village leader as well. Bu Nining was really well known in the village, and villagers noticed her position as 'legal cadre' or paralegal. Her prominent position made it easy for Nining to get support from the community when she would like to hold a village informal discussion on women's rights issues. Since she was actively involved in village meetings she has more chances to disseminate ideas on women's rights among the villager leaders. Bu Nining has a good and effective relationship with another community focal points in the village such as village-head, hamlet-heads, and vicinity-heads. Bu Nining also has good networks with the police officers, and midwives as well as health officers in the sub-district community health centre.

These networks helped bu Nining when she should accompany Weni to report the case to the police. As discussed above, bu Nining accompanied Weni during the police investigation and the court hearings. Bu Nining took and accompanied Weni to hospital for the medical examination and to do the reporting in the police station. Weni acknowledged that bu Nining was

¹⁵⁷ See www.pekka.or.id

really helpful since none of Weni's families accompanied her during the case reporting. "I was lucky that bu Nining accompanied me at all time during the case reporting," said Weni who should stay in the police station until four o'clock in the morning. In the unavailability of women's victims unit under the police station in Cianjur, bu Nining played roles as 'female police officer'. She took care of Weni and facilitated villagers to submit their witnesses in the police station.

A completely different situation and treatment occurred to Sita in her village in Lombok. At the village level no local activist was available for Sita. Only a couple of Sita's relatives were with Sita but they did not understand what to do with the case. Meanwhile, the villagers became savage. In one night when most villagers knew the case, villagers started to shout angrily to Weni and Sita. They blamed both Sita and Mudi, "the father and the daughter are insane!" shout some youth villagers. Some youth villagers who were starting very angry tried to loot Mudi and Sita's house. In this critical situation, Mudi was taken to the village head house. To avoid further violent, Mudi was transferred to the nearest police station for investigation. While Mudi was detained, Sita stayed in a relative house temporarily. Sita only received the accompaniment and social services when the case was reported to the police station.

4.4.3. *Victims Accompaniment in Case Handling*

The support for Sita was begun when the hamlet head reported the case to the sub-district head. The wife of the sub-district head knows quite well the director of Children Rights Protection organization or *Lembaga Perlindungan Anak* (LPA) that is based at the provincial capital. She informed the LPA director about the case. In the next day, two social workers of LPA visited Sita to get first-hands information. In the second visit, three social workers from a social welfare unit or *dinas sosial* (dinas) at the local government paid a visit to Sita and her aunt. This time, the social workers took Sita to the dinas' shelter in Mataram, the capital city of West Nusa Tenggara province.

Initially LPA would like to accommodate Sita in its shelter. Considering Sita's pregnancy, she cannot stay in LPA shelter because no

one would be able to take care of her. She was then being referred to the dinas. Yet the problem does not come to an end. Indeed, dinas in theory has an integrated service provider yet this service does not have a shelter for women's victims of violence. This caused the dinas to accommodate Sita in the elderly house belonging to the dinas. Sita was really depressed in this shelter. In the first month, Sita could only cry and kept herself in the bedroom. Anytime she went back to the shelter from police investigation, she pulled her blanket and covered her overall body. Only the friendship and the patience of the elderly women changed her attitude. Thus she started to talk to the psychologist and the social workers that visited her.

The judicial hearings in Sita case actually occurred quite shortly. Yet, it was a truly dreadful experience for Sita. No one accompany Sita in the first trial. Another witnesses appeared in court were merely the family of Mudi. Most of Mudi's family did not want the case was brought in court. Therefore, it was not surprising that if they scolded Sita and some of them yelled at Sita. "Because of you whore! My brother would be in jail!" yelled Mudi's brother to Sita. At that moment, a social worker was actually in court but he was not allowed to enter the courtroom. Without an accompanier, Sita faced intimidation from Mudi's relatives alone. Learning from this experience, in the second hearing a social worker and a female police officer negotiated with the judge in order to get access to the courtroom. The situation was much better when Sita was with the social worker and police officer. They suggested to the judge panel to order Mudi stay out of the courtroom when Sita gave her testimony. The accompaniers tried to make Sita more comfortable to give the testimony. This kind of feminist social services¹⁵⁸ had truly contributed to the more effective case handling in court.

Weni had different experience in court, yet she received effective supports in reporting stage in the police. No paralegals or accompaniers were in court with Weni. In the beginning of the trial, bu Nining and another paralegal from PEKKA organization requested the judges panel to have

¹⁵⁸ Sally Engle Merry, 'New legal Realism and the Ethnography of Transnational Law', 31:4, *Law & Social Inquiry* (Fall 2006b), p. 984.

permission to accompany Weni. The chief of judge's panel refused the paralegal demands. The judge said, "I do not see legal reason to allow the accompaniers to be in court with the victim." Bu Nining argued that the newly enacted Indonesian domestic violence law provides legal basis that allows an accompanier to be in courtroom, yet the judges insisted in contrary. However, the judges acknowledged that they provided more protection for Weni in court. Such as Judges protected Weni from Asep and Asep's family anger. Judges tried to gather testimony with the way that comforted Weni. Since the paralegal was also busy with another community empowerment activity they did not really have time to observe the court. Thus, until the end of the trial both paralegals only appeared a couple of time in court.

4.4.4. *Post cases*

In post cases or after the court verdict is being released often became the critical situation for victims of violence including in the case of Weni and Sita. In post case, Weni had almost been forgotten. She stayed with another relative in the same village during the trial. Before the verdict was released Sita went to Jakarta and worked as a domestic helper in a relatively poor area very close to Jakarta bay. She looked unhappy with the work since she did not receive salaries during the six months she stayed in the employer household. Weni should take care of three little children at a quite small house. When she was told that her father received ten years in prison Weni looked very happy. She was keen to get back to the village and learned how to be a tailor like her father. Yet, she did not know who was going to take care of her. Her nice aunty left for Saudi Arabia already and worked as a domestic worker like herself.

Sita might be luckier than Weni. During the trial, Sita stayed in the dinas or government shelter. Therefore, she could stay in the shelter for the longer period by which the social workers under the dinas or under the LPA could provide services for Sita. Sita gave birth a month before the verdict released. Sita did not want to see the baby let alone breastfeed the boy infant. "I do not want to see him, and I do not want to breastfeed him," refused Sita when the first time she was offered to touch her boy. To avoid

Sita from doing things violently to the boy, Sita was transferred back to the shelter. While her baby stayed one week more in hospital.

Finally a couple adopted Sita's baby compensated Sita properly. The head of LPA, ibu Muji decided to take care of Sita herself. Sita was sent to the tailor training centre in Mataram. Sita Was very happy with this support, and she said she did not want to back to her village. "I want to move to Java or stay here in Mataram," said Sita firmly.

5. Conclusion

This thesis looks at how two girl victims of violence were seeking justice and how the paralegal and intermediaries assisted Weni and Sita. By using the human rights indicators that were developed by the GBP report, this thesis revisited the best practices of Canada, South Africa, and Spain that were included by the GBP report in developing the minimum criteria. Chapter three examined the availability of the Indonesian legal framework and legal institution in the area of rape. Chapter four investigates whether the relevant mechanism and services for the victims of rape are accessible without any kinds of discrimination. This part indicates the conclusions established from previous chapters. It will conclude how the legal framework and legal institutions in Indonesia are accessible for victim of rape and to what extent the intermediaries assisted the victims to make it accessible.

5.1. The Legal Framework in the Area of Rape

Using the human rights indicators developed by the GBP, chapter two of this thesis put forward the best practices of law and policy in the area or rape in country of Canada, South Africa, and Spain. The three countries' best practices can be seen, among others, from the adopted definition of rape as public offence, the gender-neutral definition of rape, the requirement of consent, and the statutory rape. Also, there is a national database of the perpetrators in place in the three countries, and the state ensured that the police officers treated the victims of rape well. Albeit the support services and mechanisms in the three countries mostly provided by the (women's) NGOs yet the government provides sustainable support such as in Canada.

Meanwhile, the Indonesian legal framework generally provides law and policy to handle rape occurred to women and girls adolescence. Chapter three discussed some negative implication of the rape article towards women victims of rape. In addition, the rape article under the Indonesian Penal Code (IPC) does not include rape against children or girls. Before the law on children rights protection was enacted, if a girl was being raped it

would merely be categorized as obscenity. Weni and Sita cases demonstrated that the children rights protection has encouraged the judiciary to make the imprisonment for the defendants in both cases quite high. Yet the question is to what extent the victim rights were really accessible during the case handling and in post court decision.

5.2. The Accessibility of Victims Rights

As discussed, multidisciplinary supports or services for women and girls victims of violence established under the national law and policy yet it has some critical problems. First of all, this multidisciplinary supports or Integrated Women's Crisis Centre (integrated WCC) is established mainly to support women victims of domestic violence. Thus, it does not properly respond to the victims of rape for example an integrated WCC does not provide a rape kit for the victim or counselling for rape victim. Secondly, integrated WCC reside at the provincial capital city. Sita might be luckier since the police station where she reported the case is situated quite close to the integrated WCC. Therefore, it can be said its services were quite accessible for Sita.

Meanwhile, the victims' unit under the police stations is unavailable in both places. Even though the Indonesian Domestic Violence obliges each police station to provide a unit for women's and children victims of violence. The small percentage of female police officers across Indonesia do not make the establishment of women's victims in all police stations possible. As discussed above, to get a victim unit established at least a female police officer should be recruited in each police station. Generally, a victim unit under a police station cannot serve the rape victims well because it mainly provides assistant for domestic violence victims. It does not have counselling and another methods to deal with rape victims.

The prosecuting office and court do not have policy to establish a victim unit for women and children. Prosecuting office only has a gender focal point and a circulation letter that encourages prosecutors across the country to pay attention to rape cases and aggravate the punishment. This letter implies that no institutional support under the prosecuting agency is in

place to serve women and children victims of sexual violence. In Weni case, the panel judges clearly refused the paralegal to be present in courtroom. Meanwhile, in Sita case, the panel judges only allowed the social workers to be in courtroom after a female police officer negotiated with the court registrar. This created problems when the case was processed under the prosecuting agency and in trial due to the unavailability of victims unit under the prosecuting agency and the court. Albeit the national policy provides multidisciplinary supports for women victims of violence, yet this supports only available in some provincial capital city in Indonesia. Multidisciplinary supports should be placed under a hospital and required institutional support from each legal and non-legal institution that involved.

The two cases discussed in this thesis indicated the law of children rights protection has increased the sentence and imprisonment of sexual violence defendants against the children. Albeit this improvement, the girls victims protection are not yet a priority. Indeed the police, the prosecuting agency, and the panel Judges demonstrated their ‘concerns’ and ‘sensitivity’ towards Sita and Weni. These kinds of concerns are not enough. To enforce rape victim rights effectively, there should be a concrete institutional support under the police, the prosecuting agency, and the court.

5.3. The Prominent Position of Paralegals

The discussion in chapter four shows that the intermediary such as the women’s paralegal, children organization, and social workers has important position to increase victim rights enforcement. First of all, the paralegal role is important to balance the ‘power relation’ between the weak position of the victims and the community or villagers and the legal institutions. Bu Nining, the paralegal in Cianjur, assisted Weni to report the case to the police and facilitated the villagers to submit their witnesses to the police. Albeit failed, the paralegals negotiated with the court to accompany Weni in courtroom. Secondly, the paralegals supported girl victims of violence to access another relevant services and mechanisms for victims of violence.

Apparently Sita and Weni understand the sexual coercion done by the fathers as injustice. They refused the fathers acts but they did not brave

enough to fight since their father threatened them. However, Weni and Sita do not know how to access justice let alone get the remedy. They were only seeking helps by telling their experience to the neighbours and relatives. While both girls thought that they would get supports from villagers yet what happened was the other way around. They were blamed and humiliated by the most villagers. The intervention of paralegals had made Sita and Weni's access to justice more possible.

As discussed in Sita case, the relevant services and mechanism for women victims of violence under the multidisciplinary supports are available. Yet, this integrated WCC cannot be accessible without the intervention of the intermediary viz. social workers from the LPA. LPA functioned as an intermediary to encourage the integrated WCC provided support for Sita during the trial and in post court decision.

To conclude, Weni and Sita faced many obstacles in seeking justice during the case handling process. This thesis demonstrates that the accessibility of the victims rights were due to the fruitful combinations of the effective supports of legal officers and judiciary, the provisions of children rights protection law, and the support of intermediary or paralegal during the case handling.

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