

Sexual Intercourse with a Corpse as a Crime Against Society and the Urgency of Its Regulation in the New Penal Code

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Article Process Abstract

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Murder in criminal law has been regulated in detail; however, acts committed after a murder have not been regulated as thoroughly. Thus, perpetrators are only charged with the crime of murder, even though there are other acts with different elements. For instance, mutilation, sexual intercourse with a corpse, and even cannibalism of the corpse. This paper will examine acts committed against a corpse after murder, specifically sexual intercourse with a corpse. The study focuses on the articles in the New Penal Code. The aim of this research is to understand how the New Penal Code addresses acts of sexual intercourse with a corpse after murder as a response to current human behavior developments. The research method used is normative legal research with a case approach. The results of this study reveal that the New Penal Code does not regulate sexual intercourse with a corpse, but rather focuses only on disruptions to funerals and corpses. These provisions primarily focus on corpses that have already been buried and the destruction of graves. Acts such as defiling, having intercourse with, or mutilating and eating a corpse after murder are not yet regulated. However, such acts frequently occur today. Sexual intercourse with a corpse is performed after the victim is murdered and before the victim is buried. This act can be considered different from disruptions to funerals and corpses as outlined in the New Penal Code.

Keywords: intercourse with corpses, New Penal Code, punishment

Abstrak

Pembunuhan dalam hukum pidana telah diatur secara rinci, akan tetapi perbuatan setelah pembunuhan belum diatur sedemikian rupa. Sehingga pelaku hanya dijerat pasal pembunuhan padahal ada perbuatan lain yang unsur yang berbeda. Misalnya mutilasi, persetubuhan terhadap mayat, dan bahkan memakan mayat. Tulisan ini akan mengkaji perbuatan yang dilakukan terhadap mayat setelah pembunuhan, yaitu persetubuhan terhadap mayat. Kajian dilakukan terhadap pasal-pasal dalam KUHP Baru. Tujuan dari penelitian ini adalah untuk mengetahui bagaimana KUHP Baru mengatur tentang perbuatan persetubuhan yang dilakukan terhadap mayat setelah dibunuh sebagai respon terhadap perkembangan perbuatan manusia saat ini. Metode penelitian yang digunakan adalah penelitian hukum normatif dengan pendekatan kasus. Hasil dari penelitian ini diketahui KUHP Baru tidak mengatur tentang persetubuhan terhadap mayat, melainkan hanya mengatur mengenai gangguan terhadap pemakaman dan jenazah. Pasal ini lebih fokus pada jenazah yang sudah dimakamkan dan perusakan terhadap makam tersebut. Pengaturan mengenai mayat yang dicabuli, disetubuhi ataupun dimutilasi dan dimakan setelah dibunuh belum lah diatur. Padahal perbuatan tersebut saat ini sering terjadi. Perbuatan persetubuhan terhadap mayat dilakukan setelah korban dibunuh dan sebelum korban dimakamkan. Perbuatan tersebut dapat menjadi perbuatan yang berbeda dengan gangguan terhadap pemakaman dan jenazah sebagaimana dimaksud dalam KUHP Baru.

Keywords: persetubuhan mayat, KUHP Baru, sanksi.

I. Background

Indonesian criminal law aims to protect the state, the government, society, and its citizens. Citizens protected by criminal law encompass three aspects: their life and body, their honor, and

their property. Anyone who disturbs or threatens the life and body, honor, or property of a citizen is subject to sanctions in the form of criminal penalties.¹ The state, through the criminal justice system, acts on behalf of the legal interests of the aggrieved victim.

In addition to the state, the government, and society, criminal law protection is centered on individuals who are citizens, including foreign nationals in Indonesia, as human beings who are legal subjects, from the time they are in the womb until their death.² Criminal law protection remains in effect for honor and property even after the owner has passed away. However, protection for their body and life ceases once the person has died. So far, there is no protection regarding the treatment of a corpse. Death is considered the ultimate point of suffering.³

Unlike in Indonesian law, in Islamic law and customary law, everyone is obligated to treat a corpse with respect. A corpse is still considered a legal subject that must be honored. Indonesian society shows respect for human beings from the time they are in the womb, born, and alive, until after death. Respect for the deceased is manifested in various forms, such as ceremonies and pilgrimages. This respect is not only for their spirit but also for their physical body.⁴

The new Penal Code, enacted through Law Number 1 of 2023, has so far accommodated the issue of disruptions to funerals and corpses in Articles 268-271 of Law Number 1 of 2023 on the Penal Code. Disruptions to funerals and corpses include obstructing, hindering, or disturbing access to a burial site, the transportation of a corpse, or funeral ceremonies. In addition, there is also a provision prohibiting anyone from unlawfully desecrating graves, damaging graves, or destroying or vandalizing memorial markers at graves. There is also a prohibition against taking items from a corpse, digging up, unearthing, removing, transporting, or treating a corpse that has been exhumed in an indecent manner.

The new Penal Code also regulates the prohibition against attempts to conceal someone's death or lineage by burying, hiding, transporting, or disposing of the corpse, which are also punishable offenses. Respect for the deceased also applies to the bodies of prisoners or suspects, where the state is obligated to hand over the body of the suspect to their family for burial.

In practice, it turns out that it is not only such acts that frequently occur. There are many cases where corpses or dead bodies become objects of criminal acts, such as mutilation or sexual intercourse with a corpse. These two types of acts are not criminalized by the new Penal Code. The acts in question are sexual intercourse with a corpse and taking body parts from a corpse. What is prohibited is only taking the body or body parts that have already been buried. However, a human body that is no longer alive cannot be equated with the body of an animal that is no longer useful once it is dead, which is referred to as carrion. Only fish carrion has economic value because it is still permissible to eat. The carrion of other animals no longer has economic value and thus is not a legal issue.⁵

Thus, there is a legal vacuum, particularly in criminal law, in regulating such acts. On the other hand, law enforcement officials continue to face cases and reports from the public regarding crimes against corpses, especially the act of sexual intercourse with a corpse. In the jurisdiction

¹ Walintukan Syalom, 'Batas-Batas Berlakunya Ketentuan Pidana Dalam Peraturan Perundang-Undangan Menurut Tempat (Pasal 2 Sampai 8 Kuhp) Dari Aspek Perlindungan Terhadap Warga Negara Indonesia Di Luar Negeri', *Lex Crimen*, VII.7 (2018), 70-76.

² Rahel Octora, 'Penerapan Asas Nasionalitas Pasif Dan Pemidanaan Pembantu Tindak Pidana Perdagangan Orang Dalam Rkuhp', *Kertha Patrika*, 40.3 (2018), 155 <https://doi.org/10.24843/kp.2018.v40.i03.p03>.

³ Steven Makaruku, 'Penerapan Sanksi Pidana Mati Kepada Koruptor Suatu Perbandingan Hukum Antara Indonesia Dan Cina', *Jurnal Ilmiah Fakultas Hukum Universitas Pattimura Ambon*, 22.1 (2016).

⁴ Amalia Yunia Rahmawati, 'Counter Radikalisme Melalui Pendidikan Akademis-Kultural Oleh Pemuda Bangkalan Madura Haeron', *Jurnal Tarbawi*, 11.01 (2022), 1-23.

⁵ Yatri Drastini and Doddi Yudabuntara, 'Sensitivitas Dan Spesifisitas Deteksi Daging Bangkai Ayam Broiler', *Jurnal Sain Vet*, 18.2 (2017), 34-38 <https://jurnal.ugm.ac.id/jsv/article/view/523>.

of the Riau Regional Police, there have been at least two cases of sexual intercourse with deceased individuals in 2023/2024.

Therefore, the aim of this writing is to examine the provisions regarding sexual intercourse with a corpse in the new Penal Code as a response to the development of malevolent behavior following a murder. To address this issue, there must be a change in perspective regarding sexual intercourse with a corpse, viewing it not merely as a crime against an individual, as this understanding could lead to legal deadlock. A new understanding should be adopted, viewing crimes against corpses, particularly sexual intercourse, as crimes against society. It is society that feels its sense of justice is violated because, according to the religions and customs they uphold, such acts are highly reprehensible.

Several related writings (state of the art) include Abdullah, Farakhan Maghriby, "Aspek Hukum Pidana Terhadap Pelaku Persetubuhan Terhadap Mayat Di Indonesia" (Legal Aspects of Sexual Intercourse with a Corpse in Indonesia), and the work by Deswira Pratiwi, Elza, and Gelar Ali Ahmad, "Analisis Yuridis Tindakan Perkosaan Terhadap Jenazah Di Indonesia" (Legal Analysis of Rape Against Corpses in Indonesia), published in *Novum: Jurnal Hukum*. Unlike the two articles mentioned above, this article does not stop at normative legal issues alone but also addresses the empirical facts occurring within society and strengthens the argument for the need to regulate cases of sexual intercourse with corpses from the perspective of the objectives of criminal law, with a new understanding that the act of sexual intercourse with a corpse should not be viewed as a crime against an individual but rather as a crime against society.

II. Research Methods

The research method used is normative legal research conducted through a case approach to incidents occurring in Riau Province. The cases are examined to identify the elements of sexual intercourse with a corpse, which can then be differentiated from other acts related to corpses, such as disturbances to funerals. The legal materials used include the Penal Code. Data collection techniques involve literature study and case study, with qualitative data analysis describing sexual intercourse with a corpse in the context of criminal law and the regulations of the new Penal Code.

III. Formulation of the Problem

The formulation of the problems that are the focus of this article is as follows: *First*, how are cases of sexual intercourse with a corpse resolved in practice, as seen in the jurisdiction of the Riau Regional Police? *Second*, what is the perspective of criminal law on the act of sexual intercourse with a corpse? *Third*, to what extent is the regulation of sexual intercourse with a corpse urgent in the new Penal Code?

IV. Result and Discussion

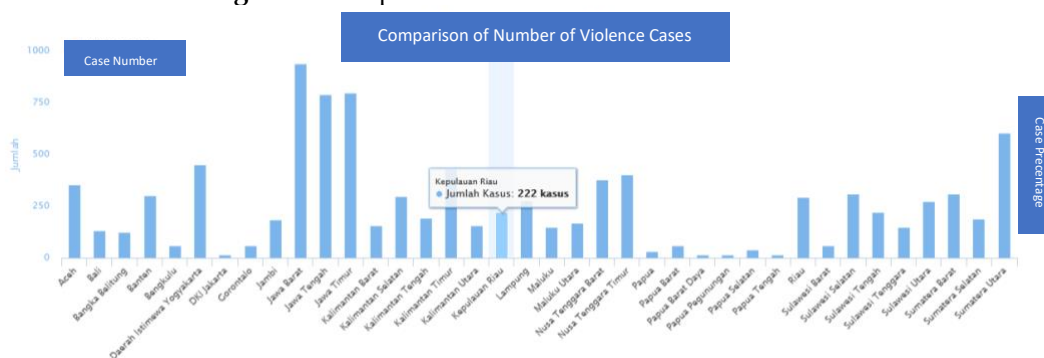
1. Resolution of Cases of Sexual Intercourse with a Corpse in Practice in the Jurisdiction of the Riau Regional Police

Sexual intercourse or the union of two bodies is often referred to as sexual relations, which, in principle, is the act of copulation performed by two human beings. However, the interpretation of this act today has become broader, as it also refers to other actions related to or replacing the

act of copulation, no longer merely referring to the meeting of male and female genitalia.⁶ In Indonesian criminal law today, the essence of prohibited sexual intercourse is intercourse without the consent of one party. Even if there is consent, that consent may be obtained through deception or if the victim is underage. It is further expanded to include situations where the victim cannot determine their own will, even if they are of legal age but are mentally impaired.⁷

According to data from the National Commission on Violence Against Women (Komnas Perempuan), in 2019 there were 431,471 cases of violence against women. This number increased by 6 percent from the previous year, which recorded 406,178 cases. In 2020, there was a decrease to 299,911 cases, representing a reduction of 31%.⁸ The comparison of sexual violence data in Indonesia according to the National Commission on Violence Against Women (Komnas Perempuan) is illustrated in the following image:

Figure 1. Comparison of the Number of Violence Cases



Source: National Commission on Violence Against Women (Komnas Perempuan)

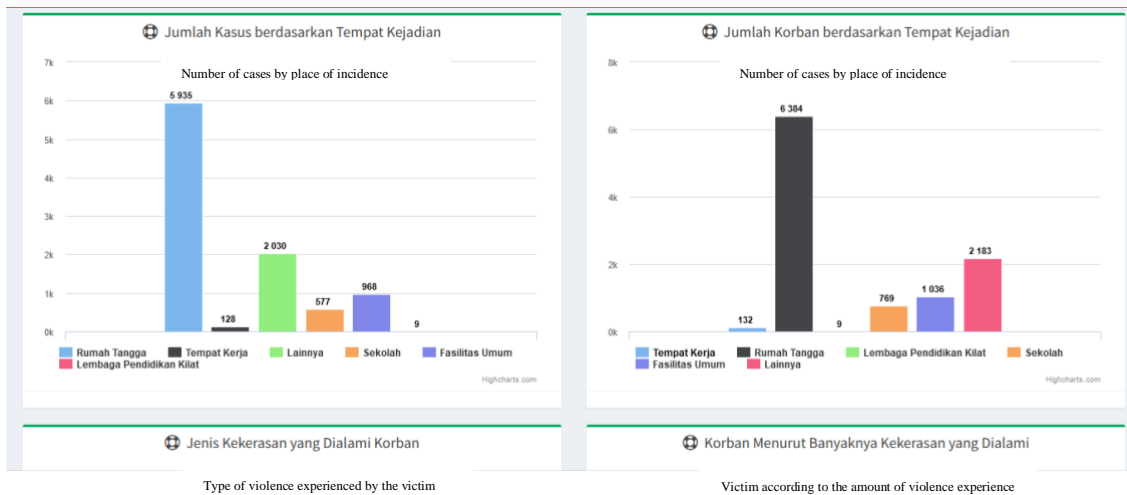
Next, regarding the location of sexual violence incidents, it is illustrated in the following image:

Figure 2. Number of Victims Based on Location of Incident

⁶ Ibnu majah and Fitri Yani, 'Analisis Perlindungan Hukum Terhadap Anak Korban Kejahatan Persetubuhan(Studi Putusan Pengadilan Negeri Medan No. 1752/Pid.Sus/2021/Pn Mdn)', *Jurnal Mimbar Ilmu Hukum (MIH)*, 1.1 (2023), 90-101 <https://kti.potensi-utama.ac.id/index.php/MIH/article/view/762>>.

⁷ Arry Wirawan, Ambon Esa, and Valentina Fibrini H, 'Tinjauan Yuridis Tindak Pidana Membujuk Anak Melakukan Persetubuhan Yang Dilakukan Oleh Anak (Studi Putusan: No. 2/Pid.Sus.Anak/2021/PN.JNP)', *Pledoi*, 1.3 (2023), 205-16.

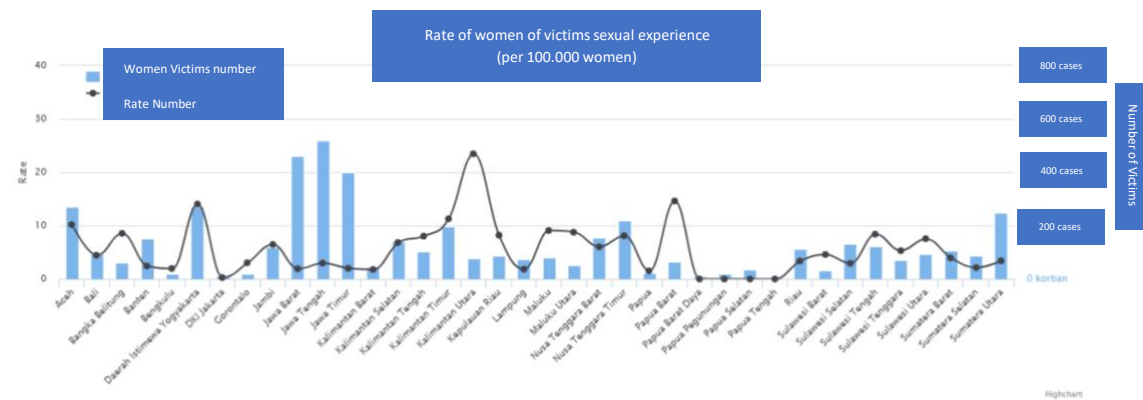
⁸ Yosephus Mainake, 'Darurat Kekerasan Seksual', *Pusat Penelitian Badan Keahlian Sekretariat Jenderal DPR R*, 2021, 2021.



Source: National Commission on Violence Against Women (Komnas Perempuan)

The number of women who have been victims of sexual violence by province can be seen in the following image:

Figure 3. Comparison of the Number of Violence Cases



Source: National Commission on Violence Against Women (Komnas Perempuan)

Indonesian criminal law views that consensual sexual intercourse between two consenting adults is not a legal issue, except under customary or religious law. If one party is married, the sexual intercourse becomes a legal matter if one partner files a complaint. Legal protection ceases for living individuals. Those who are deceased are no longer considered to require protection.

A deceased human body indeed does not have economic value, but humans are not animals, so they are two different matters. The corpse of a deceased person, whether before burial or after, still possesses a value that, according to society, must be protected sociologically by maintaining their graves and visiting them.⁹

So far, criminal law has not provided protection for corpses that are treated indecently, particularly when they are sexually violated by perpetrators. Two cases that occurred in 2023/2024 in the jurisdiction of the Riau Regional Police were cases of sexual intercourse with a

⁹ Ahmad Agus Ramdlany, 'Restorative Justice in Islamic Legal Philosophy Perspective', *International Journal of Business, Economics and Law*, 24.2 (2021), 109-17 <http://152.118.58.226>.

corpse in the Pinggir Police Station, Bengkalis Riau, and the Pasir Penyu Police Station, Indragiri Hulu. Indeed, the perpetrator's actions are not standalone acts against the corpse or body but are preceded by other actions such as violence or murder. The sexual intercourse is carried out as a subsequent act after the victim has become a corpse or has died.

Case 1:

The case that occurred in the jurisdiction of the Pasir Penyu Police Station happened on Saturday, December 23, 2023, at around 2:00 PM. It began when the perpetrator saw the victim playing with her phone behind the house. The perpetrator then exited the house and walked towards the victim. After the perpetrator met the victim, he said to her, "Stay with me at home because I'm alone." The victim replied, "Okay", and then the perpetrator and the victim walked to the perpetrator's aunt's house.

The perpetrator walked in front while the victim followed from behind. After arriving at the perpetrator's house, they both entered the house. Once inside, the perpetrator locked the door and saw the victim sitting on a chair in the living room. The perpetrator approached the victim and sat down next to her, then said, "Let's have sex" The victim replied, "I don't want to" The perpetrator then attempted to kiss the victim, but she rejected him. He tried to grab her genitals, and the victim swatted his hand away and ran towards the door. The victim grabbed her phone and said, "I want to call my dad." The perpetrator approached her and said, "Don't call your dad." He then hugged her and pushed her down so that she fell backward on the floor. The perpetrator held the victim's hands and snatched the phone from her. He then turned off the phone and threw it on the chair.

Then the perpetrator wanted to open the victim's pants and underpants but the victim resisted by raising her pants and underpants again and the victim pushed the perpetrator's body so that the victim ran again towards the cupboard near the ceramic Gucci. Then the perpetrator hugged the victim and dropped the victim's body again so that the victim fell on her back on the floor then the perpetrator sat on the victim's stomach then the perpetrator choked the victim with all his might using both hands and because the perpetrator saw that the victim's hands were still moving, the perpetrator took the ceramic Gucci that was on the right side of the perpetrator using the perpetrator's hand and the perpetrator lifted and struck the ceramic Gucci on the victim's face approximately 10 (ten times). After the perpetrator saw that the victim was no longer moving and the perpetrator was sure that she was dead, the perpetrator opened the victim's pants and underpants then the perpetrator lifted the victim's legs and pushed her forward so that her anal hole was open. Then the perpetrator inserted the perpetrator's penis into the victim's vagina and the perpetrator wiggled his hips. Because he wanted to try the feeling in the victim's butt hole, the perpetrator inserted his penis into the victim's butt hole and wiggled his hips so that the liquid from the perpetrator's penis came out. Then the perpetrator put on the victim's pants while the victim's underwear was not put on again.

Based on the facts in the statement of the perpetrator as the suspect and the visum et repertum letter number: VER/63/XII/KES.3/2023/RSB dated 28 December 2023, the suspect had intercourse with the victim after the victim died.¹⁰

Case 2:

On Saturday, 02 September 2023 at approximately 12.00 WIB at school dismissal time, at that time the perpetrator aged 13 years and 11 months had just left the class and passed the victim aged 12. The victim mocked and scattered to the child perpetrator saying "You're a monkey, you're a pig". The perpetrator remained silent and the perpetrator continued walking, while the perpetrator was walking the victim, who was walking behind the child perpetrator, was still taunting and scattering the child perpetrator until he reached the alleyway from the school, then the child perpetrator accelerated the perpetrator's walking pace.

¹⁰ Interview with J.E. Sagala, SH, Aiptu, Panit II Opsnal as Asisstant Investigator Police Sector of Pasir Penyu, 31 May 2024

The perpetrator looked back about 20 (twenty) metres and saw the victim walking home, then seeing this because the perpetrator already felt hurt the perpetrator walked quickly into the victim's house, then in the bushes on the way to his house the perpetrator hid waiting for the victim to pass. Then when the victim passed by from behind the perpetrator immediately choked her with both hands while the perpetrator pulled and dragged her into the bushes, at that time the victim screamed for her mother.

At that moment in the bushes, the perpetrator's hands slipped from the victim's neck as she attempted to break free from the chokehold. The victim managed to run away, but the perpetrator quickly chased and blocked her path from the front. The perpetrator then grabbed both of the victim's hands from the front and pulled her towards the palm tree within the bushes. At that time, the victim continued to struggle to free her hands while trying to pull the perpetrator's right hand towards her mouth. She bit the perpetrator's right hand, specifically on the middle finger, causing the perpetrator's right hand to slip away from her bite, while his left hand still held her left hand. The perpetrator then used his clenched right fist to strike the victim's face twice, causing her to fall backward with her head and body facing the perpetrator. At that point, the victim was already weak and could no longer move but was still breathing.

Then the perpetrator dragged the victim again, pulling both of her hands until they reached the base of the palm tree. The victim could no longer move but was still breathing, lying on her side with her head facing to the right. The perpetrator then noticed a round stick with a sharp tip, about 2½ meters long, near the victim's left side, approximately 1 meter away. The perpetrator picked up the round stick and held it with both hands, aiming the sharp end at the victim's head. He struck her with all his strength, and at that moment, the sharp end of the stick partially penetrated the right side of the victim's head. The perpetrator still heard the victim softly moaning. He then pulled out the stick and struck her head again with all his strength, causing the sharp end to pierce through to the ground. At that moment, the perpetrator saw that the victim was no longer alive. He then pulled the stick out and placed it on the victim's body. Then the perpetrator pulled the victim's pants together with the victim's underwear down to the victim's ankles, then the perpetrator pulled the perpetrator's pants together with the perpetrator's underwear down to the perpetrator's knees, then the perpetrator squatted with the perpetrator's knees on the ground towards the victim's private parts, then the two hands of the child perpetrator lifted the victim's legs until the victim's buttocks were lifted from the ground, Then the perpetrator inserted the child's genitals into the victim's anus/jugular 2 (two) times the perpetrator rocked in and out, then the perpetrator raised the perpetrator's pants, then the perpetrator raised the victim's pants again (the perpetrator put them back on as before), then the perpetrator went to take the perpetrator's bag which was near the palm tree towards the road out of the victim's house.¹¹

From both cases, there is a similarity in that the cases of sexual intercourse were preceded by acts of violence in the form of murder against the victim. The difference lies in the intent to commit sexual intercourse. In case 1, the perpetrator had the intention to sexually assault the victim from the beginning but was unsuccessful, leading to the murder of the victim. In contrast, in case 2, the perpetrator's initial intent was solely to kill out of hurt, and the intent to sexually assault occurred after the victim had died.

In both cases, the resolution by investigators at the two police stations was carried out using the Articles of the Child Protection Law, specifically the offense of Serious Abuse Resulting in the Death of a Minor or Premeditated Murder, or intentionally and premeditatedly taking another person's life, as stipulated in Article 80 paragraph 3 of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 on Child Protection in conjunction with Law Number 11 of 2012 on the Juvenile Criminal Justice System, or Article 340 of the Criminal Code or Article 338 of the Criminal Code.

In the jurisdiction of the Central Jakarta District Court, a case occurred that is quite similar. The perpetrator had sexual intercourse with the victim after she had died. The incident

¹¹ Interview with Sumber Horas Minggu, Brigadir Polisi Satu, Asisstant Investigator Police Sector of Pinggir, 31 May 2024

began when the victim was sitting and playing with her mobile phone when another victim, Bunga, came to borrow money from the perpetrator. The victim became angry and insulted the perpetrator. The perpetrator then entered the house while pulling the victim inside and asked her to perform masturbation on him in exchange for money, but the victim refused and insulted the perpetrator in return. Consequently, the perpetrator became enraged and slammed the victim, causing her to fall backward.

The perpetrator strangled the victim and covered her mouth with his left hand while pressing on her solar plexus with his right knee for approximately 30 minutes until the victim was unresponsive and not breathing. After confirming that the victim was motionless and not breathing, he undressed her down to her knees with the intent to have sexual intercourse. He then lifted the victim's legs and inserted his genitals into hers until he felt satisfied. Once he was done, he dragged the victim to the back of his house. Upon arriving at the back, he searched for fiber cement sheets and branches to cover the victim's body. Despite the act of necrophilia, the court found the defendant guilty based on Article 340 of the Penal Code regarding premeditated murder.¹²

A similar incident also occurred in Mojokerto. The perpetrator with the initials A admitted to having raped the victim's corpse twice. The Public Prosecutor charged the perpetrator with five alternative articles: Article 340 of the Penal Code (KUHP), Article 338 of the Penal Code, Article 80 paragraph (3) of Law No. 35 of 2014 on Child Protection, Article 365 paragraph (4) of the Penal Code, and Article 286 of the Penal Code. This case demonstrates that the Public Prosecutor was bold enough to use Article 286 of the Penal Code, which pertains to having intercourse with someone who is in a helpless state.

In principle, both cases involve concurrent criminal acts, specifically *concursum idealis* and *concursum realis*, meaning that there are multiple actions occurring simultaneously and one act violating several provisions of criminal law, namely the Child Protection Law and the Penal Code. The actions include murder and violence resulting in the death of a child. Although there are also acts of intercourse, the charge of rape cannot be applied because it does not meet the elements of rape.

Rape is defined under Article 285 as occurring when there is intercourse with a woman who is not the perpetrator's wife, accompanied by violence or the threat of violence. The object of the crime of rape is a woman who is not the perpetrator's wife, which means that the victim must still be alive. Additionally, the provisions of Article 286, which pertain to intercourse with someone who is unconscious or incapacitated, cannot be applied either. The state of incapacitation referred to in the Penal Code is when the victim is not free due to being tied up or similar circumstances. This condition is, of course, different from that of a victim who has already become a corpse.¹³

Based on the principle of legality in criminal law, criminal law can only be applied to acts that have been previously defined in law as actions that can be punished with criminal sanctions. There should be no analogy, meaning one cannot equate an act that is not clearly defined in the law. In this context, intercourse with a corpse cannot be equated with a victim who is still alive but incapacitated. So far, the extension of the interpretation of incapacitation has been limited to individuals suffering from mental retardation, as they are unable to make their own decisions even though they are of adult age; this does not apply to those who are deceased.¹⁴

One of the cases that went to court is in Case Number 1483/K/Pid/2013 at the Supreme Court. The cassation panel acknowledged that the act of raping a corpse constitutes a crime; however, in its decision, the cassation judges only sentenced the defendant for the crime of premeditated murder, without applying the provisions regarding rape or intercourse with someone who is incapacitated. Similarly, in the Central Jakarta District Court Decision Number

¹² Central Jakarta District Court Decision No. 519/Pid.B/2021/PNJkt.Pst.

¹³ Emelie Ernberg, Mikaela Magnusson, and Sara Landström, 'Prosecutors' Experiences Investigating Alleged Sexual Abuse against Pre-Schoolers', *Psychology, Crime and Law*, 26.7 (2020), 687-709 <https://doi.org/10.1080/1068316X.2019.1709639>.

¹⁴ Endrianto Bayu Setiawan and others, 'The Indonesian Criminal Law System 's Progression in Sexual Assaults Regulation', *Volkgeist*, V.2 (2022), 161-77.

519/Pid.B/2021/PN.Jkt.Pst., where a murder was accompanied by intercourse with a corpse, the judges only imposed a sentence based on Article 338 of the Penal Code.¹⁵

Based on the judgement, it can be inferred that the Supreme Court judges believe that sexual intercourse with a corpse is a crime, but is not punishable under the criminal law due to the absence of legal provisions governing it. It is also understood that criminal law should not use analogies when sentencing individuals.

2. Criminal Law Perspective on Copulation with a Corpse

Criminal Law is not only the law regulated in the Criminal Code but also includes all laws which contain criminal sanctions. The protection of criminal law both in the Criminal Code and outside the Criminal Code is subject to the principles contained in the Criminal Code.

The New Criminal Code that was born in 2023 has actually accommodated various acts of sexual violence. Rape has been expanded not only to women who are not his wife, but also to wives who are treated in an inhumane way in sexual relations. The offence of sexual intercourse has also been extended not only to people who are unconscious or helpless but also to people who are in a state of mental retardation. Rape is also extended not only to the genitals or vagina but also to all parts of the body and also not necessarily with the male genitalia but also with other instruments.

Outside of the Criminal Code, there is also the Sexual Offences Act where the consent of the victim is the parameter of whether an act is considered an offence or not. Even if the act is considered indecent but is done with the consent of the victim, it is not a criminal offence. Corpses are no longer understood as legal subjects. The law stops at protecting living legal subjects. Death is considered the highest form of suffering so that after people die, the law no longer needs to be present. If seen from the perspective of the victim as an individual, this way of thinking can be justified because what is protected by law is a living legal subject including children in the womb. However, from the perspective of the victim's family and the community, intercourse with a corpse is a taboo, dishonourable and shameful act. If the act is committed in public, the offence of decency as stipulated in Article 281 of the Criminal Code can actually be applied, namely deliberately and openly violating decency and in front of other people who are there against their will. However, what happens in the act of intercourse with a corpse is generally not done in public.¹⁶

For normal people, fucking a corpse is certainly not interesting, especially a corpse that has been dead for a long time. But for certain people, fucking a corpse, even an animal, is still interesting, and it is actually classified as a sexual disorder, especially if it is a newly dead corpse. In medical terms, the act is *necrophilia*. The term *necrophilia* is derived from the Greek 'necros' meaning corpse, and 'philia' meaning love. So, *necrophilia* is a sexual perversion where the offender enjoys having sex with dead bodies. *Necrophilia* is also known as *thanatophilia* or *necrolagnia*. The term was first coined in 1850 by Joseph Guislain, a Belgian psychiatrist. According to Joseph Guislain, various things cause this deviant behaviour, including those who are traumatised by certain things such as fear of being rejected by a partner, wanting a partner who cannot refuse them, or fear of dying.¹⁷

From the perspective of the purpose of criminal law, any treatment of corpses is not the purpose of criminal law. However, from the perspective of criminal policy, criminalising the treatment of corpses is very important and necessary. From the perspective of criminalisation policy, among other things, the act is truly hated by society, so criminalising the act of intercourse with a corpse is very necessary. In addition to being a hated act, the act is still happening and will

¹⁵ Jeane Neltje Saly and Hafidz Indra Pratama, 'Penerapan Sanksi Pidana Bagi Pelaku Tindak Pidana Pembunuhan Disertai Persetubuhan Dengan Orang Meninggal', *Jurnal Kewarganegaraan*, 7.2 (2023), 1684-92.

¹⁶ Naval Bajpai and others, 'An Empirical Examination of Elder Abuse through the Lens of Mens Rea', *Journal of Adult Protection*, 22.5 (2020), 269-97 <https://doi.org/10.1108/JAP-04-2020-0010>.

¹⁷ Farakhan Maghriby Abdullah, 'Aspek Hukum Pidana Terhadap Pelaku Persetubuhan Terhadap Mayat Di Indonesia', *Jurist-Diction*, 5.3 (2022), 847-64 <https://doi.org/10.20473/jd.v5i3.35244>.

very likely happen in the future.¹⁸ From the perspective of the legal interests of the corpse materially, a corpse can be considered as something that no longer holds value. In reality, a deceased person is buried, cremated, or treated in other ways, although in some regions and countries, corpses may be preserved for several years.¹⁹

However, in society, a corpse is not merely a material object; it holds spiritual value that cannot be easily dismissed. From a human rights perspective, a corpse is no longer viewed as possessing rights and obligations since life has ended. Nevertheless, societal values still uphold and respect the deceased. From the perspective of the perpetrator, the act of having sexual intercourse with a corpse is extremely despised by society, regarded as a disgusting and unacceptable act.²⁰ From the perspective of the object or purpose of criminal law based on the systematic framework of the Criminal Code, the entities that are intended to be protected include the state, the government, society, and individuals. Naturally, the individuals referred to here are those who are still alive.

If the approach towards the corpse is viewed as an individual, then the corpse is no longer a legal subject and thus cannot be considered a legal object that needs protection under criminal law.²¹ However, criminal law must also be viewed as a legal framework that protects the legal interests of society. Crimes such as gambling, moral offenses, pornography, narcotics, offenses against religion, and public insults are structured to safeguard the interests of the community. The act of engaging in sexual acts with a corpse and other barbaric behaviors towards corpses disrupt societal tranquility, making it appropriate and necessary to regulate such actions as offenses punishable by law. The norms prohibiting certain behaviors in criminal law should be derived from social realities that reflect the community's unwillingness to tolerate specific actions. The crime of witchcraft (*santet*) is one such example.²²

The rationale for the importance of protecting corpses has indeed been accommodated within the Criminal Code through provisions that prohibit actions such as taking items from a corpse, digging up, disinterring, taking, moving, transporting, or treating a corpse in an undignified manner. Although, from the perspective of the legal interests of the aggrieved party, a corpse no longer possesses legal interests, it is essential to understand that criminal law is not merely about protecting the interests of the harmed individuals but also about safeguarding the interests of society, as well as the state and government.²³

Indonesian law, while rooted in Western legal principles, is also deeply influenced by the moral values of society and religion. Actions that are prohibited by society and the religions practiced in Indonesia should similarly be prohibited under criminal law. The New Criminal Code effectively serves to formalize actions that are deemed undesirable by religious communities and customary societies into punishable offenses. Although sexual acts against a corpse may not directly harm living individuals, they disturb the sense of justice and morality within society and religious communities.²⁴

¹⁸ Elias Moser, 'Rights in Criminal Law in the Light of a Will Theory', *Criminal Justice Ethics*, 38.3 (2019), 176-97 <https://doi.org/10.1080/0731129X.2019.1681667>.

¹⁹ Elza Deswira Pratiwi and Gelar Ali Ahmad, 'Analisis Yuridis Tindakan Perkosaan Terhadap Jenazah Di Indonesia', *Novum : Jurnal Hukum*, 2.1 (2024), 11.

²⁰ Muhammad Setiyawan, Wahyu Beny Mukti Handayani, I. Gusti Ayu Ketut Rachmi Rustamaji, 'Relation of Pancasila Morality on Law Enforcement Officials in Guarding Criminal Law Reform in Indonesia', *Migration Letters*, 20.6 (2023).

²¹ Purwoto Purwoto, 'Efforts to Prevent Criminal Acts of Money Laundering Using Penal Policy Measures', *Indian Journal of Forensic Medicine and Toxicology*, 14.4 (2020), 3053-57 <https://doi.org/10.37506/ijfomt.v14i4.12054>.

²² Yvonne McDermott, Alexa Koenig, and Daragh Murray, 'Open Source Information's Blind Spot: Human and Machine Bias in International Criminal Investigations', *Journal of International Criminal Justice*, 19.1 (2021), 85-105 <https://doi.org/10.1093/jicj/mqab006>.

²³ Yvonne Daly and others, 'Human Rights Protections in Drawing Inferences from Criminal Suspects' Silence', *Human Rights Law Review*, 21.3 (2021), 696-723 <https://doi.org/10.1093/hrlr/ngab006>.

²⁴ Simon Butt and Simon Butt, 'Indonesia's New Criminal Code: Indigenising and Democratising Indonesian Criminal Law? Indonesia's New Criminal Code: Indigenising and Democratising Indonesian Criminal Law?', *Griffith Law Review ISSN*; 2023, VOL.2 (2023) <https://doi.org/10.1080/10383441.2023.2243772>.

Sexual acts against a corpse, from the perspective of Islamic law, are viewed as a form of zina, which refers to the fulfillment of sexual desires outside the boundaries set by sharia law. According to Islamic principles, sexual relations are only permissible within the confines of a legitimate marriage. Any form of sexual expression outside of this lawful partnership is considered a major sin, and this includes sexual acts against a corpse. If consensual adultery is criminalized under the New Criminal Code, then it stands to reason that sexual acts against a corpse should similarly be subject to criminalization.²⁵

3. The Urgency of Regulating Sexual Intercourse with Corpses in the New Penal Code

The New Penal Code carries a mission of change that accommodates various values within society. It provides protection not only to the state or its citizens but also to the government and the public. The New Criminal Code safeguards the sense of justice within the community, meaning that criminal law will impose sanctions on actions that are disapproved of by society. This aligns with the principles of criminalization, including acts classified as victimless crimes.

The regulation of sexual intercourse with corpses may not cause direct harm to living individuals, but such actions offend society's sense of justice. Unfortunately, the New Penal Code fails to accommodate this as a criminal offense. The New Penal Code does not yet regulate sexual intercourse with corpses as a specific type of crime.

In the Islamic perspective, a corpse or the body of a deceased person is believed to still have a connection with its soul. Islam holds that a lifeless human body (a corpse) can experience sensations similar to those of a living person. This view is based on a hadith narrated by the companion Abu Daud, in which a companion of the Prophet found a human bone and broke it. The Prophet then forbade this action and said, "Breaking the bone of a deceased person is like breaking it when they are alive." This indicates that Islam considers the body of a deceased person to hold the same importance as when the person was alive.²⁶ Therefore, Islam provides detailed regulations regarding the treatment of a deceased body. The corpse must be washed, shrouded, and prayed over. Even the washing process is bound by strict rules, such as not exposing the private parts to those who are not close relatives (mahram) and ensuring that the washing is done with care and respect.

Therefore, it is widely accepted in Islam that autopsy, which is primarily conducted to determine the cause of death, is prohibited. According to Al-Syinqiti's Tarjih, performing an autopsy on a Muslim body is considered illegal unless religious justification is provided. This perspective is based on the belief that Muslims are honored by Allah both in life and after death. Performing an autopsy on a Muslim corpse could delay the deceased's right to the fardhu kifayah rites, which include washing, shrouding, and burying the body. Moreover, the Prophet instructed Muslims to expedite the burial process.

In Indonesia, the Indonesian Ulema Council (*MUI*) issued Decree Number 6 of 2009 concerning "Autopsy of the Body," which takes a moderate approach. The decree allows autopsies to be performed based on proven syar'i needs, such as determining the cause of death, conducting medical research, or educating future generations. However, autopsies can only be carried out by authorized specialists and under the supervision of authorized individuals or institutions.²⁷

Types of victimless crimes include pornography, public indecency, narcotics, gambling, and others. These crimes are still considered wrong even with the consent of the victim, where the perpetrator is also the victim. The state must intervene to protect its citizens as part of its duty to safeguard them. While a corpse no longer holds legal status as a citizen, as a person's status as a legal subject exists from conception until death, death marks the end of both life and legal status

²⁵ Achmad Nurdaim, 'Tindak Pidana Zina Menurut UU No 1 Tahun 1946, UU No 1 Tahun 2023 (KUHP) Dan Hukum Islam', *Journal of Law and Nation (JOLN)*, 3.1 (2024), 1-13.

²⁶ Muhammad Hatta, 'Autopsi Ditinjau Dari Perspektif Hukum Positif Indonesia Dan Hukum Islam', 19.1 (2019), 27-51 <https://doi.org/10.18326/ijtihad.v19i1.27-51>.

²⁷ Bastiar, Azzubaily, and Iswandi, 'Bedah Mayat Ditinjau Dari Perspektif Hukum Islam (Studi Penelitian Di Provinsi Aceh)', *Legalite : Jurnal Perundang Undangan Dan Hukum Pidana Islam*, 7.1 (2022), 30-58.

as a subject. However, a corpse still retains social ties with its heirs.²⁸ Therefore, sexual intercourse with a corpse must still be regarded as a reprehensible act that offends the moral sentiments of society.

In addition to offending society's sense of justice, the physical body of a corpse, though no longer alive, is still considered important by its heirs. The grave, as the resting place of the body, is often visited and, in certain beliefs, is seen as still "alive" and sometimes equated with the living. People may continue to offer food, speak to the deceased, ask for help, and so on. In some cases, the spiritual status of the soul and the corpse is regarded as even higher in society's spiritual hierarchy. Naturally, the heirs would not tolerate their family member's corpse being treated indecently by anyone.

If such an act were to occur, it would undoubtedly provoke anger among the heirs. Many actions regulated in the Penal Code are considered punishable offenses due to concerns about the potential consequences they may cause. For example, acts like insulting an ethnic group or religion, or spreading false information, are criminalized to prevent further harmful reactions. The reason for imposing criminal penalties on these actions is to prevent subsequent harmful behavior that may arise as a result of the initial offense. Indecent treatment of a corpse is an act that not only provokes the anger of the heirs but also of the broader society. This would be especially true if the deceased was a prominent or influential figure.

Various legal provisions outside the Penal Code have provided protection for the deceased, including respecting funeral processions on public roads. Within criminal law itself, there are protections such as prohibiting the disturbance of burials, banning the sale of body parts, and prohibiting insults directed at the deceased. This indicates that, in principle, the state and the law have already provided protection to corpses or deceased individuals. If even body parts are not allowed to be sold, it suggests that legal protection for the deceased is quite similar to that for living individuals.

If body parts are protected by law, then certainly their dignity and integrity are also included. Engaging in sexual intercourse with a corpse means violating and defiling that body. Autopsies conducted for the purposes of evidence and uncovering crimes that are crucial to criminal procedural law must also be performed with care and respect, and cannot be conducted arbitrarily.²⁹

Based on the legal foundations mentioned above, the author believes that sexual intercourse with a corpse is far more reprehensible than other indecent acts that involve disrespecting a deceased person, which have already been regulated under Indonesian law. However, in accordance with the principle of criminal law that prohibits analogical reasoning, the act of sexual intercourse with a corpse cannot rely on existing criminal law provisions.³⁰

Article 271 of the New Penal Code states that anyone who unlawfully treats a corpse in an indecent manner shall be punished with imprisonment for a maximum of two years or a fine of up to category III. It is clear that the drafters of the Penal Code did not intend for this provision to include sexual intercourse with a corpse. If that had been the intention of the drafters, then sexual intercourse with a corpse would have been categorized under public order offenses rather than as part of immoral acts. The author rejects the expansion of the interpretation of Article 271 to include sexual intercourse with a corpse. Furthermore, it cannot be analogized to sexual intercourse with a person who is incapacitated.³¹

Referring to the existing legal provisions regarding actions toward corpses or deceased individuals, it indicates that, in the perspective of Indonesian law, the rights and interests of the

²⁸ Muchlas Rastra Samara Muksin and Nur Rochaeti, 'Pertimbangan Hakim Dalam Menggunakan Keterangan Ahli Kedokteran Forensik Sebagai Alat Bukti Tindak Pidana Pembunuhan', *Jurnal Pembangunan Hukum Indonesia*, 2.3 (2020), 343–58 <https://doi.org/10.14710/jjphi.v2i3.343-358>.

²⁹ Ocan Purba and Rumeida Silalahi, 'Peran Ilmu Kedokteran Forensik Dalam Pembuktian Tindak Pidana Penganiayaan', *Jurnal Retenrum*, 2.1 (2020).

³⁰ Ulfa Anaria, 'Analogy Interpretation for Renewal Criminal Justice in Indonesia', *Legality: Jurnal Ilmiah Hukum*, 28.1 (2020), 70–80 <https://doi.org/10.22219/ljih.v28i1.10604>.

³¹ Heidar Piri, 'The Application of Analogical Reasoning in International Criminal Law System; Perhaps, Don'ts', *Criminal Law Research*, 9.35 (2021), 139–69 <https://doi.org/10.22054/jclr.2021.34888.1744>.

deceased are represented by their heirs. This is evidenced by several factors, such as the fact that in cases of insult against the deceased, it is the heirs who have the right to file a complaint. Similarly, for autopsies, consent from the heirs is required. Therefore, in the case of sexual intercourse with a corpse, it is the heirs who hold the right to lodge a complaint.³²

The current issue is that the New Penal Code has been enacted and will take effect in 2026, yet it does not regulate sexual intercourse with a corpse. With the enactment of the New Penal Code, introducing a new offense of sexual intercourse with a corpse would require a revision of the code. This situation appears rather odd, as the New Penal Code has not yet come into effect, yet there is already a proposal to revise it by adding a new offense. Additionally, seeking a judicial review from the Constitutional Court would be challenging, as it is unlikely that the Court would grant such a request or create new norms.³³

The regulation of sexual intercourse with a corpse as a new crime cannot be understood solely through the lens of individual protection; it must be viewed as a crime against society. It is the community that feels its sense of justice is violated by such behavior. Society is one of the components that must indeed be protected by criminal law.³⁴

In several countries, the regulation of sexual intercourse with a corpse has been addressed, including in South Africa and England. Section 14 of the South African Penal Code states that anyone who intentionally commits a sexual act with a human corpse is guilty of necrophilia. In England, there is a prohibition against sexual penetration of a deceased person's body. In Rhode Island, it is specified that anyone who commits first-degree sexual assault on a deceased human body will be punished for the crime of necrophilia. Individuals convicted of necrophilia face imprisonment for no less than one year and no more than ten years, and may also be fined up to ten thousand dollars (\$10,000).³⁵

The regulations in several countries demonstrate that categorizing sexual intercourse with a corpse as a crime is not an arbitrary notion, making it worthy of consideration and inclusion in the New Penal Code. Criminal law in a country should be based on research findings in the field of criminology regarding the crimes occurring in society. The policy of the parliament to criminalize certain acts must, of course, be grounded in the realities of what is happening in the community.

V. Conclusion

Sexual intercourse with a corpse still occurs in Indonesia, yet criminal law does not address this act, leading to the application of other relevant articles, such as those concerning murder or sexual assault of incapacitated individuals. Given that criminal law does not recognize analogies, it is urgent to regulate sexual intercourse with a corpse as a criminal offense. The families of victims and society must be protected in this context. This act is opposed by religious communities and customary law, as it disturbs the sense of justice and morality of families and the community. Therefore, it is crucial to include specific provisions regulating sexual intercourse with a corpse in the New Penal Code. This act must be viewed as a crime against society.

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