

Criminal Law and Gender Inequality

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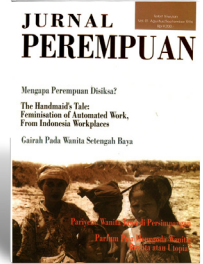
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Criminal Law and Gender Inequality

The 1998 reformation is often seen as a momentum for the improvement of the systems of life and nationhood. This becomes evident in the reform agenda, which was voiced at the time. We certainly remember that the reformation of the law was one of the points in the reform agenda. Now, 20 years later, we see that the efforts of the women's movement to integrate the rights of women victims of gender-based violence in a variety of regulations have manifested in a number of laws, such as the Human Rights Act, the Law on the Elimination of Domestic Violence, the Law on the Protection of Witnesses and Victims and the Law on the Elimination of Trafficking People. In early 2018, the Draft Law on Penal Code (RUU KUHP) has reached the final stage of discussions since the idea of revision was first initiated in 1963 and its formulation happened during the 1980s. The re-formulation of the Criminal Code, which is the basis of and framework for enforcing criminal law system in Indonesia, is expected to create justice for all citizens.

But several representatives of civil society have criticized the Criminal Code Bill, which is being discussed by the government and the House of Representatives, and even proceeded to reject it. The criticism and rejection, for one, focus on a rule that has the potential to criminalize every citizen, particularly women, children, indigenous people and marginalized groups. The criticism and refusal by civil society shows that there is something wrong with the revision process of the Criminal Code Bill. If the law is intended as a tool to regulate the citizens' behavior and create justice, then it should depart from the experience of all citizens. It shouldn't only represent the interests of half the people or a certain group of citizens.

Meanwhile, the criminal law draft under discussion just ignores the interests of women and marginalized groups. This is most evident in chapters governing morality, such as articles on adultery, rape, lewd acts, trafficking of women and children, access to contraceptive information and services, and abortion. The articles are essentially related to the body's authority and female sexuality, so that the voice and experience of women should be considered. The placement of articles on sexual violence such as rape, sexual abuse and trafficking of women and children in the moral chapter will obscure the nature of the offense and reduce it to a matter of violation of morality and public decency—while we actually look at a form of attack on the body and crimes against human dignity. In addition, the regulation of the sexual behavior of citizens with gender, class, ethnic and faith-based moral standards potentially criminalizes vulnerable

groups. On the other hand, the existence of a pro-women law does not guarantee the revision of the Criminal Code to result in gender equality.

Indeed, feminist lawyers have voiced criticism of the law since several decades ago. They criticize the neutrality of the law that is deemed incapable of recognizing women's experiences as protecting the interests of women. The ideology of legal neutrality is insensitive to the fact that differences exist in society. The principle of equality and legal protection that is said to be neutral is actually based on the standard of male values. This is because the law was originally created to govern the affairs of the public sphere, and in history, men dominated the public domain. Thus the law only recognizes the experience in the public domain, meaning the experience of men. With regard to criminal law, feminist jurists expose discrimination in criminal law against women who become defendants. They also highlight the inability of criminal law to provide protection for victims of sexual violence. Furthermore, they find that even criminal law rules that are not directly related to gender distinctions are also based on assumptions about gender. As a result, while appearing gender-neutral, the formulation and application of criminal law in fact discriminates against women or reinforces stereotypes about the behavior of women and men.

In the context of the revision of the Criminal Code, which allegedly ignores the voices, experiences as well as the interests of women and marginalized groups, it is important to conduct a study of criminal law and gender inequality. The studies and research published in this edition of JP show some important issues in the current Criminal Code practice, where the Criminal Code fails to protect women against the threat of gender-based violence, and instead becomes the means of controlling women's freedom and reproduces gender inequality. Women victims and women who face obstacles to access legal identities are potentially criminalized. In addition, the research on the application of the article of fornication indicates that the article is not able to provide justice and fulfill the rights of women victims. Meanwhile, the draft law on criminal law has not been fully oriented towards the interests of the victims. To that end, as a process of reflection over the 20 years of the journey of the ideals of legal reform and in response to the current deliberation process of the KHUP Bill, JP97 Vol. 23 No. 2 on Criminal Law and Gender Inequality is expected to open the perspective of policymakers and be considered in the revision of the Criminal Code. **(Anita Dhewy)**

Sri Wiyanti Eddyono (Faculty of Law Universitas Gadjah Mada, Yogyakarta 55281, Indonesia)

Criminal Code Draft and Protection for Victims of Gender-Based Violence

DDC: 305

Jurnal Perempuan, Vol. 23 No. 2, May 2018, pp. 55-65, 2 table, 14 ref.

This paper analyzes whether the Criminal Code Draft is oriented towards the interests and protection of the rights of victims, especially women victims of gender-based violence. This paper uses juridical or normative research methods, through analysis on the articles in the Criminal Code Draft. The analytical framework used in this study is feminist legal theory that puts law as a political product and often neglects the interests of women victims of different forms of violence. This paper finds that the main orientation of the Criminal Code Draft is towards the interests of the perpetrator and the community, but not explicitly towards the victim's interests. It is assumed that with reference to public interest, it has been victim-oriented. The victim is still seen as the party that helps to reveal the case, not as the party that has suffered and that needs protection and reparation. The responsibility of the perpetrator also tends to meet the interests of sense of community justice, not the victim. In addition, some of the regulatory articles on criminal offenses still contain problems because the Criminal Code Bill prefers to compile several laws outside the Criminal Code but does not revise articles based on the experiences of the victims that are difficult to implement, such as dealing with PKDRT (domestic violence). Furthermore, there are still articles that victimize victims by criminalizing those who are actually victims of gender-based violence.

Keywords: Criminal Code Draft, gender-based violence, victims rights, criminal law system

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Formulation of Article 488 of the Indonesian Criminal Code Draft: A Portrait of Failure in Construing the Problem of Women's Access to Legal Identity

DDC: 305

Jurnal Perempuan, Vol. 23 No. 2, May 2018, pp. 67-74, 13 ref.

The Draft of the Indonesian Criminal Code has provoked a debate, especially with regard to the articles under the scope of morality. The formulation of Article 488 has the potential to create new problems for women, especially women who have obstacles in accessing legal identity. This Article 488 is a reflection of the failure of jurists to formulate laws, in understanding women's experience in relation to their access to the right to obtain legal identity, especially in the context of their relationships. The criminal law is not the answer to all problems. This paper is compiled using data obtained from field study related to the handling of cases of violence against women under customary law, carried out by the authors and the team from Legal and Community Studies Fields in 2015, 2016 and 2017 in Eastern Indonesia; as well as data on legal and non-legal text analysis. The overall method and analysis of research findings uses feminist legal studies and feminist legal theories.

Keywords: legal identity, legal analysis of feminist perspective, women's experience

Laili Nur Anisah (Jejer Wadon, Banyudono, Boyolali, Jawa Tengah, 57373, Indonesia)

Fornication as a Criminal Conduct in the Criminal Code Draft: Legal Protection Versus Criminalization Against Women

DDC: 305

Jurnal Perempuan, Vol. 23 No. 2, May 2018, pp. 75-82, 22 ref.

On 14 February 2018 the Draft of the Criminal Code (RUU KUHP) was adjourned for an undetermined time as several articles were deemed to be problematic. One of them is the criminal act of adultery. A new article states that a man, who has intercourse with a woman by promising a marriage but later denies it can be convicted, is also included in the criminal act of adultery. The article is formulated to protect the interests of women; on the other hand the article can also be a criminogenic factor that can make women victims turn into perpetrators of criminal acts. This paper examines the position of women among the protection articles and articles that threaten the criminalization of women. This paper is a normative juridical study by using literature reviews to find the problem and solving it. As a result, protection articles for women can be a factor that criminalizes women victims, and therefore they need to be carefully formulated so that the goals do not shift.

Keywords: Criminal Code Draft, fornication, courtship violence, criminogenic, victimogenic, enforcement

Ajeng Kamaratih-Desjardins (Metro TV, Jakarta 11520, Indonesia)

'Measuring' Adultery in Article 284 of the Criminal Code

DDC: 305

Jurnal Perempuan, Vol. 23 No. 2, May 2018, pp. 83-91, 23 ref.

After the resolution about the petition of extending the meaning of adultery was rampantly discussed within the community, Article 284 KUHP is still an interesting article to be reviewed. The diverse Indonesian community demands that a number of applied regulations have to be as fair as possible and become legal protection for all layers of society, including the regulations on crimes of morality. There is a different understanding about violating decency and morality within various community groups, which causes the article in the Crime on Morality section, especially in adultery cases, to marginalize some groups of the community. There are indeed some groups that might potentially become victims of adultery cases if the meaning of adultery is to be broadened. Furthermore, in its application, Article 284 of the Criminal Code makes the line between morality and crime very thin. This research was conducted by using the approach of feminist legal theory, by reviewing legal texts to gain an understanding on how sexuality and imagination about the woman victim is projected by law.

Keywords: law, human rights, criminalization, victim, criminal code

Mariana Amiruddin (National Committee Against Violence Against Women, Jakarta 10310, Indonesia)

Fornication as Criminal Act, Women's Vulnerability and the Stigma Against Women's Movement

DDC: 305

Jurnal Perempuan, Vol. 23 No. 2, May 2018, pp. 93-100, 8 image, 7 ref.

This paper explains how criminal code of zina (adultery/ fornication) criminalizes women victims of sexual violence. The data of Komnas Perempuan's annual records and direct complaints from the victims illustrate that women's personal relationships are particularly vulnerable to violence. The theories of feminism are used as an analytical tool of women's lives and their problems in the private sphere, including in terms of sexual relationships and love, whether married or not. This paper concludes with the challenge of the stigma of the feminist movement, which is considered to be opposed to morality and religion – and this is not happening in Indonesia only.

Keywords: fornication, Criminal Code Draft, feminism, personal relations, sexual relations, sexual violence

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Women Facing Legal Cases: Reflection on the Use of Articles 284 and 285 of the Indonesian Criminal Code from the Experiences of their Legal Counselor

DDC: 305

Jurnal Perempuan, Vol. 23 No. 2, May 2018, pp. 101-110, 11 ref.

This paper raises the narrative of the experience from legal counselors who have accompanied women victim in cases related to article 284 of the Criminal Code on adultery and article 285 of the Criminal Code on rape. In an interview with the author, four female public lawyers share their experiences including challenges and obstacles they encountered while advocating cases of adultery and rape. Reports that weren't accepted, a slow-running legal process or even a halt in the middle of the process, and facing the attitude of sexism towards victims and public lawyers are some of the obstacles and challenges experienced by the legal counselors of women victims. The interviewees could clearly see that the criminal law is still not on the side of women and has not provided justice for women. They directly saw and experienced the difficulty of the legal process regarding the article of adultery and rape. Using feminist legal theory, this paper finds that laws that do not yet have a gender perspective or side with women are major obstacles to the fulfillment of women victims rights.

Keywords: criminal law, legal counselor, women victim, experience, adultery, rape

Formulation of Article 488 of the Indonesian Criminal Code Draft: A Portrait of Failure in Construing the Problem of Women's Access to Legal Identity

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Abstract

The Draft of the Indonesian Criminal Code has provoked a debate, especially with regard to the articles under the scope of morality. The formulation of Article 488 has the potential to create new problems for women, especially women who have obstacles in accessing legal identity. This Article 488 is a reflection of the failure of jurists to formulate laws, in understanding women's experience in relation to their access to the right to obtain legal identity, especially in the context of their relationships. The criminal law is not the answer to all problems. This paper is compiled using data obtained from field study related to the handling of cases of violence against women under customary law, carried out by the authors and the team from Legal and Community Studies Fields in 2015, 2016 and 2017 in Eastern Indonesia; as well as data on legal and non-legal text analysis. The overall method and analysis of research findings uses feminist legal studies and feminist legal theories.

Keywords: legal identity, legal analysis of feminist perspective, women's experience

Introduction

Since Indonesia has been in the post-1998 reform era, various legal development efforts have been implemented in order to encourage the creation of an Indonesian state based on the rule of law, based on Pancasila democracy, with governments that adhere to good governance principles. Among the legal development efforts is the formulation of the Criminal Code Bill in order to build a justice law for the people of Indonesia. Indeed, the criminal law in Indonesia, which is largely contained in the Criminal Code (KUHP) has been renewed. The history of the presence of criminal law in Indonesia is very long. Criminal law has been used by the authorities to regulate public affairs from the time of Dharmawangsa, followed by the presence of VOC trade associations, the Japanese colonial period, until the independence of Indonesia (Zulmiati 2016).

Currently, there is a process of reformulating Indonesian criminal law contained in the book of the Criminal Code. For scholars and law faculty students, the Criminal Code is seen as the main pillar in studying Indonesian criminal law. For law enforcement officials, the Criminal Code has the same meaning. One of the usual jokes among the law students of the 90s was, "Go

to bed with the Criminal Code as your pillow to make you enlightened." So powerful! But due to the cultural and economic changes in society, the Criminal Code is deemed no longer capable to fulfill the needs of the Indonesian people. The process of reformulating the substance within the body of the Criminal Code has taken place since the 1980s, and is still ongoing until today.

Several inputs were added to the formulation of the Criminal Code Draft - the latest is a draft version of February 2018. Among these inputs, there are formulations of articles that stirred debate among the public, especially the articles related to morality. So far, the (old) articles of the Criminal Code in the field of morality, from the perspective of feminist legal studies, are seen as failing to accommodate women's experience and tend to cause injustice to women, especially victims. For example, the formulation of articles on sexual violence that requires physical coercion, whereas from the experience of women, not all coercion involve aspects of physical violence in order to cause fear and intimidation, thus making women victims subject to the will of the perpetrator. Coercion sometimes only comes with a certain blink of the eye and/or tone of voice (Estrich 1996; Nafi et al. 2016).

Initially, when there was an attempt to reformulate the articles on sexual violence against women (and children), it was welcomed by women's movement activists. From the point of view of the study of feminist law, the articles on sexual violence were actually misplaced under the heading of the Chapter of Morality because sexual violence is not merely a violation of morality, but is a crime against the body and soul of its victims. Efforts to reformulate the Criminal Code are certainly welcomed by sympathizers of the women's movement and child protection. But what exactly will be the impact for women?

Apparently, the next step of the journey includes chapters that mean moving backwards for women. There are several article formulations that will actually harm women; articles that will put women back into a position of being an object, as "the other". But not all the seemingly reverse chapter formulations will be discussed in this paper. Analysis of the articles regulating adultery or same-sex relationships, for example, have already been widely discussed by the other proponents of women's movement in a neat and critical way. In this paper, I will focus on one important article related to women, which is re-formulated in the Criminal Code Bill. The article is Article 488.

This paper is a critical and reflective analysis of the problems that will emerge as consequence of the formulation of Article 488 of the Criminal Code Bill. The article contains the perception that sexual relations between women and men are required to be in a legal or legal territory, recognized by the state. What then becomes very significant to discuss is the following question: what does a relationship mean in the legal context? In addition, does the arrangement on the context of the legality of relations between women and men accommodate the highly distinctive and diverse conditions and experiences of women (in accordance with cultural, religious and belief context, socio-economic status, etc.) in Indonesia?

The discussion of Article 488 of the Draft of the Criminal Code Draft is conducted using feminist legal studies. In the framework of the feminist legal perspective, there are several questions that will be asked when the researcher faces a legal product. Here are some of these questions:

- What is the philosophy being used when formulating a new legal product?
- How is this philosophy then translated by the formulator of legal products into the text of law?
- How does the state position women and men in legal products?

- What are the consequences if the position of women and men are regulated by the state?
- Is the position placement beneficial or harmful to either sex or gender?
- Furthermore, what kind of power relations are created through such positioning?
- How do law enforcement officers apply to the rule of law, especially with regard to gender and gender issues?
- What are the implications of the meaning on the implementation of a rule of law in the field, especially those relating to the issue of relations between men and women?

The material of this paper itself was obtained – apart from the text analysis of legislation and draft of legislation – from the results of field research that has been carried out by the author in some areas. These field findings are legal cases experienced by women in areas such as Kupang, Atambua, Sumba, Labuan Bajo and Rote in East Nusa Tenggara. These legal cases occurred between 2015 and 2017 when researchers conducted research activities with the Legal and Community Studies team in the area in order to collect data on "Settlement of Cases of Violence against Women in the Customary Law Mechanism". Several cases from the field findings are presented in this paper as reflective examples.

The legal cases that are exemplified in addition to the findings of the research mentioned above are also findings from the results of research conducted by the author herself when preparing for her dissertation. The research was conducted in the years 2008-2013 in the area of Bogor, West Java. The focus of the research is on the issue of women's access in these areas to legal identity and their implications for the feasibility of women receiving social assistance and legal protection facilities from the State (Nurtjahyo 2014). Legal cases that illustrate the empirical experience of women in this paper are collected through various steps. First, through interviews with women who were willing to share their valuable insights, consisting of housewives, market traders, teachers, as well as employees in the local government. Second, cases are also collected through interviews with traditional community leaders, law enforcement officials, local government and religious leaders. Third, through involved participation.

Special notes have to be made on the data collection through involved participation. When living in people's homes, usually the research team will come across events that indicate the occurrence of domestic violence. Women

who are neighbors of a family where violence takes place will gladly explain that the victims need help. Because they are considered to be authoritative or connected with the higher authorities, researchers are expected to provide help or solutions that the neighbors cannot provide for the victims. When neighbors help the victims, it is often followed by conflicts between the perpetrator and the helpful neighbor. This often happens when the incident occurs in the context of a community where social relationships are still very close, and it is considered to disrupt the comfortable life of the neighbors. After the research team has spent some time living together in the neighborhood and providing help through consultation and referrals to the nearest legal aid agency, the team experienced some inconvenience because it was considered as "interfering in other people's affairs". This creates a dilemma for the team in general and the author in particular, both methodologically and ethically.

The Formulation of Article 488 of the Criminal Code Draft

In the criminal code draft, article 488, as per February 2018, the formulation is as follows:

"Any person living together like a married couple outside of marriage shall be punished with a maximum imprisonment of 1 (one) year or a criminal fine of at most category II."

Records show that there are two alternative proposals related to the amendment of this article. The first alternative contains a proposal that the article should be deleted. The second alternative contains a proposal consisting of four paragraphs. As quoted below, the paragraphs read:

- (1) Any person living together like a married couple outside of marriage shall be liable to a maximum imprisonment of 6 (six) months or a maximum fine of category II.
- (2) The criminal act as referred to in Paragraph (1) shall not be prosecuted except when there is a complaint by the biological parents.
- (3) The complaints referred to in Paragraph (2) shall not apply to the provisions of Article 27 and Article 31.
- (4) Complaints may be withdrawn while the court hearing has not yet begun.

From the above explanation (which can be observed in the National Alliance for Reform of the Criminal Code's website/Aliansi Nasional Reformasi KUHP), Article 488 specifically discusses the relationship between men and women who live under one roof but in the eyes of

the state are considered unmarried. Furthermore, since it is based on Academic Manuscripts compiled by the National Legal Development Board (Badan Pembinaan Hukum Nasional/BPHN) in 2015, the scope of morality is not only related to the issue of sexual violence but also the norm of modesty in society; therefore, this article is essentially formulated as a way to prevent men and women living together without the bond of marriage. The interpretation of 'without legitimate ties' is lawful in the eyes of the state, which is exercised according to religious law (as recognized by the state) and recorded or documented according to state law. Without the fulfillment of these two conditions, the act of living together is considered to violate the sense of decency and propriety in the community.

The issue of modesty and propriety is in fact very fluid and contextual in society. According to Blomley, putting beautiful flowers in a used shower bucket and placing them on a sidewalk in a public area is a very sweet thing to do for some people (Blomley 2005). However, for some other members of the community, it causes frowns and even criticism, because they feel that it is impolite to put things in the public domain that should remain in the private sphere. It was just about putting down the shower bucket—as Blomley's research finds. What about the relationship between women and men? It is certainly more complex and cannot be separated from the roots of cultural values in society. Wait a minute! Decency derived from the root of cultural values in society, doesn't it?

It should be remembered that cultural values, including the value of morality, are very diverse. This diversity in the Indonesian context is formed because Indonesian society itself is very diverse. The adopted cultural values also vary. Things that are considered to violate morality in the eyes of certain groups of people, do not necessarily violate the norms of decency for other community groups. The act of imposing moral standards of a group to another group is an attempt to measure an action using very ethnocentric standards. Trying to force societies rich with diversity to become uniquely subject to a single cultural value will certainly lead to new problems.

Not only does it create new problems, but again in the effort of the submission, it is important to remember that women are again victimized. It is important to try to understand the context of relations between men and women, that a relationship is considered legitimate, motivated by cultural values. Not only by the value set by the state in the form of law. It is also important to try to understand that women's experiences are different.

Legal Failure in Accommodating Women's Experience: The Empirical Context

In the formulation of the draft of Article 488, criminal penalties are imposed both to men and women found living together without legitimate ties. At a glance, the article appears objective (as is the rule of law in general). However, there are some things that are not accommodated in the article, especially those related to women's experience. Based on field findings during our research in several regions in Indonesia, it shows that women's experience varies depending on cultural, social, economic, political, geographical, and many other elements. Nevertheless, there are points of commonality when women talk about the experience of dealing with violence and obstacles in accessing their rights. However, women – based on their backgrounds – interpret the experiences differently, and some later even dismiss them.

Women's experiences are often not accommodated in the formulation of laws whose process is in the hands of the authorities in terms of both politics and knowledge (from a mainstream perspective). This is also the case in the formulation of Article 488. The legal experts behind it fail to understand that women have different experiences (Bartky 2005; Irianto 2015). When a clause is applied, the results to be obtained may also differ between women and men. Article 488 formulated in the draft of the Criminal Code Draft is incapable of understanding that women are often in a power relationship that is unfavorable to them, making it difficult to ask her partner to formalize marital relationships. The issue of cultural context also fails to be understood by this article. Some of the research findings we have conducted show some of the experiences of women who can place them as "threatened with imprisonment under the provisions of Article 488" solely because of the cultural and natural conditions that make them constrained in accessing their legal identity, in particular to document their marriages according to state law.

Firstly, in some groups of society, marriages occur through customs that are not registered under state law and/or are not carried out according to religious law, often referred to as the official religion of the state. Actually there has been a marriage according to the beliefs held by these community groups. However, the recording mechanisms outside the registering by the state with reference to the six religions referred to as the official religions are not available. Meanwhile, as stated in Law No. 1 of 1974, it is necessary to record such marriages. The consequences that the women face are conditions

where, in the eyes of the state, the marriage has not yet happened. This faith-based marriage potentially did not happen. Thus, couples who got married based on their beliefs will be "netted" by the formulation of Article 488 if they fail to show documentary evidence as the basis of identification that the couple is married. This happened for example in some cases faced by the adherents of the Sunda Wiwitan belief.

The non-recognition of marriage based on faith affects the status of the wife of civil servants (PNS) as the recipient of allowance. In a study conducted by Jojor Siahaan in 2016, a student of the Faculty of Law of the University of Indonesia, there was a case where the legal wife of a civil servant could not receive family allowance because she couldn't show the proof of marriage from the Office of Religious Affairs (KUA). As Jojor writes in his thesis, women often cannot access her rights as a civil servant's wife. However, Jojor's informant also said that the dues of Dharma Wanita (organization consisting of the wives of civil servants) are still billed to the affected (Siahaan 2017).

Second, the issue of the status of male and female relation that is not considered valid in the eyes of the state can also occur due to customary traditions. In certain societies, the requirements in local customs to carry out marriage are quite hefty, both financially and psychologically. In some areas in Eastern Indonesia for example, to be able to marry according to the custom, a dowry with a fairly expensive amount must be provided. If the requirement of the dowry cannot be fulfilled, then the marriage will not take place, neither according to the custom nor in a religious ceremony. As a strategy for such marriages to be approved by customary traditions, men and women often live together until the birth of their offspring before they can carry out the religious and customary marriage. Within their families, the couple is considered married, even though there hasn't been a customary ceremony yet because the indigenous elders will show mercy and then give their blessing to the couple and pronounce them married in custom (and religion) even though they weren't able to fulfill the requirement of a dowry.

When I was doing research in East Nusa Tenggara, particularly in Atambua and Rote, there were many such cases: couples that lived together under such conditions, until they were old and had many grandchildren. They explained that this happened because there are no funds to organize a traditional ceremony. In one case in Rote, where we did research in 2017, some women who have had children in a situation like this shared their

experience with me. They told me that because of the family's financial situation, they did not dare to propose marriage. They accept the situation. Testimonies about marriage in churches or registering marriages at the Population and Civil Registration Agency or the Office of Religious Affairs can result in verbal abuse and violence of men against their spouses.

If the provisions of Article 488 apply to the couples mentioned above, they would not be able to pay the fine. Finally, it is likely that the couple will go to jail. For the men, however, whose mobility is quite high moving between the islands, it will be easier to avoid punishment. The women who stay at home and go about their work around the gardens, markets, and homes will have to deal with the law enforcers who stop by their homes. It can be imagined how hard the fates of women would be if Article 488 came into effect. In the private sphere, they are beaten by their spouses, in the context of public spaces "beaten" by the state using criminal law.

In the case of living together without being married, where the woman has given birth to a child, it is not only herself who will receive the punishment, should Article 488 be enforced. It is important to remember that when women are sentenced to imprisonment or confinement, their children will also be victimized. The children will lose their mother. In addition, social sanctions from the environment will see the family as "law breakers". Is that really what lawmakers want to achieve?

Thirdly, in our other studies in the areas of Sumba and Bogor, there are geographical constraint factors in which a particular group of people live far away from the Office of Population and Civil Registration or far from the District Court and the Office of Religious Affairs. Consequently, these people do not register their marriage. For women in both areas, the main problem is that family matters come first. The obligation to settle administrative matters, especially those relating to legal identity, is only met if there is hope that family conditions can be improved. Based on the findings of the study, women in both areas have found it important to apply for the creation of an Identity Card (KTP) and Family Card (KK) if there is assistance by the government that requires two documents of this legal identity.

It is not only geographical conditions that make it difficult for citizens – especially women – to access their rights to legal identity. Financial constraints and a lack of knowledge when it comes to law exacerbate the conditions. The financial issue surfaced when we conducted research in the Bogor area. The women who we interviewed mostly claimed not to have a marriage

book because registering a wedding at the Office of Religious Affairs (KUA) cost is expensive. In 2008, the costs to register a wedding in KUA amounted to 750 thousand rupiah. For female factory workers in Bogor, whose daily wage is below 50 thousand rupiah a day, the cost is quite large, beyond the cost of hosting a wedding celebration.

In situations like this, it will be difficult for the citizens to register their marriage. The state in fulfilling the right of its citizens to legal identity is expected to provide assistance. State initiatives are needed in order to help citizens obtain legal identities, including documents that are evidence marriage. On the contrary though, the state actually imposes criminal sanctions on relationships that are considered "illegitimate in the eyes of the state". The issue of unregistered marriage, or the illegality of relations between men and women, should be read as "there is a need for citizens to fulfill their rights in relation to legal identity". It may also be read as "women need protection over their identity within the established relation" – instead of being read as "an act against morality that needs to be punished".

Legal Failure in Accommodating Women's Experience: A Normative Analysis

Going back to the article on morality, as discussed earlier, the so-called morality is highly contextual and fluid. There are some aspects of decency that are generally applicable. However, some also strongly refer to the cultural values of certain communities with customary law. According to Article 18 B of the amended Constitution of the Republic of Indonesia, the existence of indigenous people and tribes is recognized. Recognition of the customary law of these communities also means recognizing the existence of the cultural values of society as long as it is not contradictory to the Constitution. Thus, the issue of decency and arrangement of relations between men and women should take into account several things. First, the mandate of Article 18 B of the Constitution. Second, accommodate women's sense of justice as part of Indonesian society.

What about the Penal Code Draft, especially Article 488? From a philosophical aspect, this article posits two things. First, the (sexual) relationship between women and men should be legalized. Second, the concept of legality attached to the relationship is legality based on state law. Is there any space given to the diversity aspect in terms of marriage legislation based on customary law or local religious law and belief? The answer is rather long. This article, when enforced, will bring consequences to the problem of proof. Proof in this context means: for the

criminal not to be imposed, there must be evidence that there has been a legitimate marriage. What is the evidence of a legitimate marriage? In customary marriage cases, or local practices for coexistence due to the dwindling cost of a dowry, it will be difficult to obtain legal proof of marriage since most marriages or relationships between these women and men are not registered. But state law requires a process and documentary evidence.

In fact, there are still many relationships between women and men in communities where couples live together solely because of marriage according to their custom, without any documentation under state law. The punishment of such action as regulated in Article 488 of the Criminal Code Bill will indeed affect both men and women. However, socially, the criminal penalty will be more harmful to women. Women who have the potential to be punished will get a negative stigma from the community that she "lives in cohabitation". In addition, if the woman already has children, the situation will be even more detrimental for her, because if punishment is imposed, the women will be separated from the child who should be under her care. An existing regulation allows a mother to bring her child to a penitentiary until the age of two, but this will later lead to new problems related to child growth.

If this article is to be ratified as part of the new Penal Code, it could potentially lead to persecution – also from the community. Still fresh in our memories is the case of Tangerang, where residents persecuted a couple that was having dinner together, accusing them of being immoral. Not only that, the couple was then stripped naked and paraded; their defamation process was recorded by the individuals who had persecuted them, under the pretext of evidence. This not only violates state law, especially Law No. 39 Year 1999 on Human Rights, but also international conventions related to human rights and women's rights in particular.

The presence of this article (and other articles that fail to accommodate women's experience) in the Criminal Code Bill exists because the spirit and perceptions used in the formulation of regulatory products are class and group perceptions. Some come from the upper middle class with strong socioeconomic status, academics, adherents of religion and beliefs of the majority, plus a strong patriarchal perspective and / or perceiving the law solely produced by the state. These class and group perceptions fail to represent the experience and needs of the community, especially women and more particularly marginalized women (poor, persons with disabilities, being in the lowest status and social class, religious

minorities, ethnic minorities, racial, minority language users, minority sexual orientation, migrant workers, domestic workers, victims of trafficking, refugees, drop outs, etc.).

The Criminal Code Draft should actually bring a new spirit to protect the rights and existence of women. For example, women who are geographically constrained to register their marriages, women with a lack of knowledge about law, and women who are constrained by their social and economic status to legalize their relationship with their spouses in the eyes of the state. The formulation of Article 488 is a reflection of the failure of jurists to formulate legislation in understanding women's experience related to their access to the right to obtain legal identity. It is not easy for a woman to gain legal status over a relationship with her partner. There are common constraints such as geographic and economic aspects. However, there are also very typical constraints of women, such as the unequal power relations and control issues (due to the unequal power relations as well as the issue of customary values). Women, especially those from socially and economically marginalized groups, have constraints also associated with "legal blindness".

The legal status also does not guarantee that domestic violence does not occur. Legalization of (sexual) relations between women and men on the one hand is recognized to be little to guarantee the recognition and protection of the state of women's rights in those relations; particularly when it comes to the issue of the obligations of both parties arising from the establishment of marriage as regulated in the product of state law (Wulandari 2016). However, the legal status is not active in actual implementation, for example in the question of inheritance, where in the context of Indonesia even though women are already in a relationship that is considered "legal" in the eyes of the state, it can still happen that women and their children cannot access their rights related to inheritance (Nurtjahyo 2015). It can also happen that post-divorce, women and children cannot get their rights to alimony payments despite having proof of a broken marriage that is legal under state law (Wulandari 2016).

On the other hand, it is important to understand that the criminal law, as proposed by van Bemmelen, is the last resort in solving the problem. The question which then arises and needs to be answered critically is first and foremost this: is the formulation of criminal sanctions in Article 488 really appropriate for a couple living together, simply because they are not married in a manner regulated by state law and religious law? Secondly, does the criminal sanction formula in Article 488 have taken

into account the experience of women in various regions who often have constraints in accessing their rights in relation to legal identity, particularly with regard to their marital status? Thirdly, will imposing criminal sanctions on a couple living together promptly create welfare and order as is the purpose of the criminal law—or does it create new problems related to the emergence of injustice because of punishment?

The role of the state in cases of women and men who are in a relationship, but not registered under state law, should not be one of a punisher. Criminal punishment is not a solution either. As a comparison of how the state should behave towards unregistered relationships under the laws of this country, it is interesting to see what South Africa does, through the writings of Sharita Samuel (1999), on women whose marriages are conducted according to the rules of customary law. Samuel explains in her writings that women who are married only based on customary law obtain legal protection by the state and government in the form of recognition of the marriage. The recognition is expressed in Part 2 of the Recognition of Customary Marriage Act, 1998. South Africa, which once had a discriminatory political life because of the apartheid, respects customary law through the recognition of marriages conducted under these customary laws.

The State of Indonesia should achieve a similar breakthrough, instead of imposing criminal penalties on women who are often forced to be in a relationship that does not exist in the realm of state law. In order to protect its citizens, especially women, as stated in the Constitution of the Republic of Indonesia, Indonesia shall strive for the protection of women and also children born of relations between men and women – whether they are registered under the laws of the country or not.

Conclusion

As closing, I would like to quote the statement of a colleague, a young lawyer, shared on social media: “Commenting on the formulation of the Criminal Code draft is easy. Don't you think of the difficulties faced by the formulator?” This sentence does contain some truth. It is not easy to formulate a law that satisfies the sense of justice of all parties involved. However, even though it is not easy, it is also not impossible.

There is a way to conduct the study using a gender justice perspective. Open opportunities to have discussions with academics that have concerns and knowledge about unique women's experience and their

issues when dealing with the law. Efforts to accommodate women's experience in legislation, really depends on the intentions of legal enablers and members of the legislature, whether they will indeed fight for justice for all people including women, or simply formulate the law in the spirit of punishment (only). Women are part of Indonesian society; they are not second-class citizens and also have a voice.

If the state really respects and protects women as part of Indonesian society, Article 488 in the draft Penal Code does not need to exist. The inclusion of the article in the draft of the Criminal Code Draft will label women who are married under customary law, or even women who are unmarried but due to various social, cultural and economic conditions, as “criminal actors”. This article also provides space for discrimination against women from marginalized groups or communities who have difficulty accessing state law.

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