

Criminal Law and Gender Inequality

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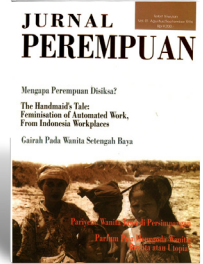
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Criminal Law and Gender Inequality

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

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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

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

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Abstract

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

Introduction

As the bill that will become the basis and the framework of criminal law enforcement in the future, the Criminal Code Bill will replace the deeply rooted criminal law system in Indonesia. Barda Nawawi Arif (2012) argues that the existing Criminal Code still contains the principles and interests of the Dutch colonial state and is more oriented towards the protection of the offender rather than the victim. The interests and rights of the victims are not at the core of Indonesian criminal law, which is based on the Criminal Code. The criminal law system, both in material legal arrangements (related to criminal offenses) and the criminal justice system tends to put a stronger emphasis on the rights of suspects, defendants and convicted persons. The protection of the victim is supposed to occur with the process of perpetrators in the criminal justice process, in which the interests of the victims are represented by law enforcers, in particular public prosecutors (Juniarto, Candrawati & Eddyono 2009). In practice, however, the victims are positioned as the party giving testimony to dismantle a criminal case, not as a victim that has experienced suffering or loss due to a criminal act.

In 2017, the number of victims of female violence reported to 237 service providers and court institutions amounted to 348,446 cases. Of the 13,384 cases

reported to partners of service providers, 71% (9,609) were domestic/personal, 26% (3,528) of violence in the community/public and 1.8% (217) of violence in the state domain (Komnas Perempuan 2018). This data increased significantly from 2016 amounting to 259,150. Meanwhile, BPS reports about 28 million Indonesian women have experienced violence (Kompas 31/10/2017). Thus there is considerable distance between the amount of violence and the amount of reported violence, indicating a problem with the criminal law system in Indonesia.

The tendency of the criminal legal system to abandon the victims has often been felt by women victims of violence (Dewan Perwakilan Daerah, Komnas Perempuan & Forum Pengada Layanan Korban 2016). Both criminal law and the mechanisms dealing with the victim have led to an increase of women victims of gender-based violence. The criminal code does not reflect the various forms of crime that are often experienced by women, and if pursued, they do not accommodate the experiences of women victims of violence, especially when it comes to sexual violence (Dewan Perwakilan Daerah, Komnas Perempuan & Forum Pengada Layanan Korban 2016).

Neglecting victim rights not only occurs in Indonesia. Since the 2000s at a global level, there have been efforts to fight for the recognition of the rights of victims in the criminal law system. The victim protection movement

seeks and insists that there has to be recognition of the rights of victims, the right to be heard and the right of their interests to be taken into account in the judicial process, including the right to be handled and a restoration process to conditions that have been damaged by criminal acts (Sri Wiyanti Eddyono et al. 2016). The right to remedy or reparations is regarded as an effort to fulfill the human rights and protection of the citizens whose main obligations lie with the state (Van Boven 2002; Supriyadi Widodo Eddyono 2016).

In Indonesia, since the reformation era, efforts to integrate the rights of women victims of gender based violence have been strengthened by the existence of various regulations, namely Law No. 39 of 1999 on Human Rights (UU HAM), Law No. 23 of 2004 on Elimination of Domestic Violence (UU PKDRT), Law No. 13 of 2006 on Witness and Victim Protection that has been revised in Law No. 31 of 2014 (Witness and Victim Protection Act), and Law No. 21 of 2007 on the Elimination of Trafficking in Persons (People's Trafficking Act). Even the Supreme Court has issued the Supreme Court Regulation No. 3 of 2017 concerning Guidance on Judgment of Women Cases against the Law, including women victims.

Sri Wiyanti Eddyono et al. (2016) analyzes that the existence of pro-gender justice rules in Indonesia is due to the strong initiation and insistence of the women's movement that mobilizes and welcomes a broader movement and is also connected with movements at an international level. However, referring to Fraser, Sri Wiyanti Eddyono et al. (2016) asserted that the efforts of gender equitable policy formulation is a lengthy effort and always get counter-actor challenges from various parties, both anti-equality and pro-status quo. There is no guarantee that the things that have been recognized in state policy are still recognized in the formulation of the next policy. The process of struggling interests will still occur in every new policy formulation. This is because the process of formulating legislation is a political process.

The existence of the Criminal Code Draft is a new challenge for women's movement and movement of justice policy change in Indonesia. The Criminal Code Bill should further enhance the hope of a pro-victim policy that has started to strengthen. Unfortunately the victim's perspective has not yet become the main orientation in the Criminal Code Bill. The Criminal Code Bill has amended several articles related to gender-based violence that had been considered discriminatory in the Criminal Code. The Criminal Code Bill incorporates criminal rules contained in the Law outside the Criminal Code such as UU PKDRT, the Law on Trafficking in

Persons, and the Law on Pornography. But the bill is more of a compilation of the various rules, not formulating laws that are more progressive and responsive to women victims. Furthermore, there are still discriminative articles on women, and not yet accommodates the experiences of women victims as described later.

Research Method

This paper analyzes the extent to which the Criminal Code draft is oriented towards the protection of victims, especially victims of gender-based violence. Furthermore, this paper intends to analyze the extent to which criminal law arrangements accommodate the experiences of women victims of gender-based violence or otherwise potentially revitalize women victims. Revictimization in the context of this paper means that the victim becomes a repeated victim. This paper is based on normative research with a feminist perspective. As a normative study then the author analyzes the legislation by looking at it as a whole, chapter by chapter. The normative study in this article emphasizes the appropriateness between general arrangements to the penalty arrangements associated with gender-based violence. The feminist perspective in this article emphasizes how to maximize the interests of women (Arckerly, Stern & True 2006). Specifically, the researcher uses a feminist framework of jurisprudence that emphasizes the importance of analyzing the extent to which legal rules accommodate women's situations and women's experiences both as victims and in dealing with the law (as perpetrators) (Walkate 2001).

To analyze the extent to which the Criminal Code is victim-oriented, in particular gender-based violence and protect the rights of victims, the researcher uses the framework of state obligations on the principle of non-discrimination and gender equality and the protection of victims of gender-based violence. Indonesia has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention) in Law no. 7 of 1984 on Ratification of CEDAW. General Recommendation No. 35 on Gender-based Violence Against Women¹ states that the underlying reason for the importance of strengthening commitment to upholding the rights of women victims of gender based violence is the erosion in the area of the ever-accommodating legal and policy framework that legitimizes gender-based violence because of gender-biased cultural values, traditions and understandings of religion at the community level, law enforcement officials, including the policy-makers (UN Committee on the Elimination of Discrimination against Women 2017). General Recommendation No. 35/2017

mentions the state's obligation to establish a legal system that provides space and protection for victims of gender-based violence and includes women who are framed as perpetrators.

In addition, there is CEDAW Committee Recommendation No. 33/2015 on Women's Access to Justice, which emphasizes the state's obligation to provide the widest possible access for women victims of justice, to protect their rights as victims, and preparing various legal measures according to the needs and conditions of the various victims (UN Committee on the Elimination of Discrimination against Women 2015). As Indonesia has ratified CEDAW, the rights of women victims as mentioned in the Recommendation needs to serve as guidance on guaranteeing the rights of victims, especially in the formulation of law and policy in Indonesia related to the rights of women victims.

The Settings of the Criminal Code Bill related to Victims of Gender-Based Violence

The Criminal Code Bill has changed from period to period, especially since the first concept emerged in 1964 (Arif 2012), including on the issue of gender-based violence. The Criminal Code Bill covers two books; the first book is on the general provisions, while the second book includes criminal acts (forbidden crime and sanctions). General provisions include, among other things, the regulation of scope, principles, purpose of crime, criminal act and purpose of crime. In relation to criminal acts, in the draft of the Criminal Code Bill as of 2 February 2018, there are at least seven chapters dealing with different forms of gender-based violence; the criminal act of deprivation of liberty, the criminal act of deprivation of life and fetus, neglect crime, criminal act against the body, the crime of human smuggling and the crime of gross human rights violation (see table 1).

Table 1. Regulations on Gender-Based Violence in the Criminal Code Draft²

Chapter on Gender-Based Violence	Type of Offense
CHAPTER XVI CRIMINAL ACTS AGAINST MORALITY	Pornography Showing the prevention of a pregnancy and abortion Adultery Lewd actions Facilitate lewd actions and intercourse Intercourse under the promise of marriage Medical treatment that can cause miscarriage
CHAPTER XVIII CRIMINAL ACT OF NEGLECT	Neglect Special regulations for mothers who desert or leave their child after birth
CHAPTER XXI CRIMINAL ACTS AGAINST ONE'S FREEDOM	Human trafficking Sexual intercourse and fornication of trafficked persons Picking up women and children
CHAPTER XXII CRIMINAL ACT OF HUMAN TRAFFICKING	Human trafficking
CHAPTER XXIII CRIMINAL ACTS AGAINST FETUSES	Special regulation for mothers who rob their children after giving birth Abortion, including women who abort their womb
CHAPTER XXIV CRIMINAL ACTS AGAINST THE BODY	Crimes against the body Domestic violence (physically, psychologically, sexually) Sexual exploitation Rape
CHAPTER XXXII CRIMINAL ACT OF POSITION	Sleeping with a person when unable to marry
CHAPTER XXXVIII SPECIAL CRIMINAL ACTS	Serious Criminal Human Rights: rape, sexual slavery, forced prostitution, forced pregnancy, sterilization, or other forms of sexual violence

Source: compiled by researcher based on her analysis of the Draft Penal Code Rules

Barda Nawawi Arief (2012) mentions that action (acts of reus), faults (mens rea) and punishment are only subsystems of the entire criminal law system. Arief emphasizes that the building of the criminal system was based on the so-called principles, the purpose of punishment, the punishment of punishment and various conceptions or general teachings. Referring to Arief, before analyzing the articles related to gender-based violence, the authors discussed first the purpose of crime, punishment rules and general teachings relevant to the perspective of victims of gender-based violence as found in book I of the Criminal Code Bill.

Criminal Objectives and Criminal Rules

In the consideration of the Criminal Code Draft, it is mentioned what the orientation of the Criminal Code Bill is, namely balancing the public interest or the state and the interests of the individual, between the protection of the perpetrator and the victim of the crime, between the elements of the act and the attitude of the mind, between legal certainty and justice. The law also stresses the balance between written law and living law in society, and between national and universal values including between human rights and the obligation to uphold the human rights. Harmonious perspectives and compromises of various interests became the press point of the bill.

The term 'the importance of protecting the victims' began to appear during the consideration of the Criminal Code Bill. However, the interests of protecting the victims are not the main pillars of the Criminal Code Bill, as seen in Article 58 of the Criminal Code Bill. The Criminal Code Bill has four purposes: (a) to prevent the commission of Criminal Acts by enforcing legal norms for the protection of the people; (b) socializing the convicted person by conducting coaching and guidance to be a good and useful person; (c) resolve conflicts caused by Criminal Acts, restore balance, and bring a sense of security and peace in society; and (d) cultivate a sense of regret and free the guilt of the convicted person.

From Article 58 it can be seen that the Criminal Code Draft is oriented towards prevention, socialization and guidance of convicts, conflict resolution, restoration of balance and creating a sense of security and peace in society. It can be concluded also that the purpose of punishment focuses on the interests and protection of the rights of the perpetrators and the interests of the wider community. The interests of the victims have not been the main focus of the Criminal Code Bill, because

the interests of the victims are considered to be part of the public interest, as mentioned in the Academic Paper Draft of the Criminal Code (2015).

General Recommendation No. 35 (2017) of the CEDAW Committee on Gender-Based Violence against Women (GR CEDAW 35 [2017]) emphasizes that gender-based violence is rooted in an ideology that puts men into a position where they have privileges towards women, social norms and masculinity. Thus men have more power, including in imposing certain gender roles and marginalizing the role of women. Gender-based violence occurs throughout the space where interactions between people happen, both in the public and in the domestic sphere. In the context of violence against women in Indonesia, Komnas Perempuan (2018) found that domestic violence is the form of violence that occurs the most, and the perpetrators are mainly men in the family circle of the victims.

The development of positive law through the Criminal Code Draft becomes an important point in the re-interpretation of the basic principles of Indonesian law and criminal justice system: justice, legal certainty and expediency. The Meaning of Justice is not merely seen in judging a person, but how the criminal law and judicial process are also noticed or seen from and by those who have been victims of crime. So far, the perspective of justice is perceived and represented by law enforcers and they are relatively ignorant of the rights of the victims. In regard to the benefits of criminal law, they are always placed on public interest, especially when the sense of security of the public is threatened. Nevertheless, the context of expediency for victims has not been considered and even repressed. Therefore, the benefits in the eyes of the law can not only be seen as benefit to the public, but should also be regarded as benefit that can be felt by the victim during the legal process.

In a patriarchal society it is very common that men who have a higher social status do the decision-making process. When the ultimate decision maker in a society is male it is very likely that the interest raised is the interests of men. The interests of women victims will be marginalized. The voice and interests of the victim may be different from the voices and interests of the men, besides the interests of the community may not necessarily represent the victim's interests.

In many cases, as Komnas Perempuan found out, women victims are subject to what the community considers to be good for them, and it is the community that determines what the victim should do. Thus putting the

victim's interest in the public interest is not appropriate. Society is not a single entity or homogeneous. Whoever represents the interests of the community needs to be questioned, especially in a patriarchal community tyranny where gender-based violence is still a serious issue. In addition, because the reality and situation of the victims is very diverse, the views of one victim may not necessarily represent another victim.

Protection of the Victim's Rights

The Witness and Victim Protection Act determines the rights that victims need to have because they play a role in the process of revealing the case as a witness and because they are affected by the case. The Witness and Victim Protection Act also provides special regulations on the rights of victims to secure protection, including restitution rights (compensation by perpetrators) and compensation (provided by the state). The right of restitution and compensation in its implementation is integrated into the litigation that requires a court decision.

The rights of women victims of gender-based violence in the criminal justice system have also been affirmed in the General Recommendation No. 33 (2015) of the CEDAW Committee on Women's Access to Justice. GR CEDAW 33 (2015) recommends the state and different parties to establish a criminal system that places the obligation to provide restitution, compensation and rehabilitation for victims. This restitution is inherent as the responsibility of the perpetrator and may also be a punishment of the perpetrator, while compensation is the responsibility of the state in the form of funds, objects or services. Furthermore, rehabilitation should be provided in the form of services provided to victims in their recovery process, as psychological, medical and other services. GR CEDAW 33 (2015) also recommends preparing funds for the adequate remuneration of victims for their suffering and harming both through criminal law and through other mechanisms. It should be noted that Indonesia has ratified CEDAW through Law No. 7 of 1984 so that the recommendation is also focused on Indonesia.

The Criminal Code Bill contains rules in relation to the rights of victims when in the context of various parties trying to prevent the trial (obstruction of justice). These rights are not affirmed as rights but as a safeguard against victims whose forms include punishment for violent persons, threats of violence or influence of the authorities or hindering of witnesses that result in the witness and the victim having no corresponding

protection in an attempt to give his or her testimony (Article 322 and Article 323). Another protection is the punishment of the party causing the witness/victim to lose his or her job for giving testimony (Article 324). In addition there are criminal penalties against non-fulfilling rights (Article 235), including providing information on the whereabouts of the victim who is under protection (Article 326).

The regulations above put pressure on the right to security protection that puts the witness/victim as the party who dismantles the case. This approach places the victim as the object of the case instead of seeing the victim as a suffering subject who must be noticed and restored because of the suffering of the perpetrator's actions. As mentioned earlier, the rights protection movement of the victims always strives for the right of the victim to get a reparation right; restoring the situation from events that occurred in the realization of the right restitution, right to rehabilitation and compensation rights. These two different approaches certainly imply further on the extent to which the perpetrators account to the victims and the state's responsibility to the victim.

The responsibility of the perpetrator towards the condition and situation of the victim at the time and after the criminal act happens not to be the main focus in the Draft Law of the Criminal Code; even the responsibility of the state directly towards the victim is somewhat floating. In the punishment guidelines and types of law the Criminal Code Draft directs the perpetrator's responsibility to the fulfillment of a sense of security within the community, not the victim. This can be seen in the criminal and action settings. Article 70 of the Draft Law on Penal Code states that criminal consists of:

- a. principal punishment;
- b. additional criminal charges; and
- c. specific criminal offenses for certain Crimes specified in the Act.

The principal punishments regulated in the Criminal Code Bill are imprisonment, cover, supervision, fines and social sanctions (Art. 71). Judging from the basic punishment types, the basic punishment is aimed at protecting the interests of the community and perpetrators, but in general is not a punishment that directly impacts the victim. Criminal penalties are not for victims but paid to the state. The only criminal oversight that potentially protects victims is related to cases of domestic violence, if the criminal is to ensure the perpetrator no longer commits his deeds to the

victim. Criminal sanctions that should be in the main crime of restitution and rehabilitation/counseling of the perpetrators are not included in the principal penalty.

In addition, the victims' rights to restitution, rehabilitation and compensation are not fully regulated in the Criminal Code Bill. The draft Penal Code regulates sanction compensation only as an additional punishment³. The laying of the sanctioned loss may be as an additional penalty, however, since the principle of additional criminal is given in accordance with the underlying penalty, the additional criminal is not an independent criminal. Further rehabilitation and counseling is also regulated in the Draft Law of the Criminal Code as a form of action that can be worn together with the principal punishment. Gender-based violence is a specific act due to an unequal gender relationship that is influenced by various factors. The handling should be different from other forms of crime. For victims of gender-based violence in any form, restitution and rehabilitation should be an inherent punishment of perpetrators or actions, which can be imposed individually or in conjunction with other types depending on the needs and sense of justice of the victim.

Criminal Acts

As mentioned earlier, the Criminal Code Draft regulates criminal offenses related to gender-based violence in at least eight chapters. It covers the placement of women as victims of criminal acts but also women as perpetrators of criminal acts. The regulations related to the position of women as victims or perpetrators are equally problematic. When it comes to women as victims, the Criminal Code Draft still has not fully accommodated the experiences of women victims. Furthermore, in the regulation as perpetrator, the Criminal Code Draft discriminatively revises the women of the perpetrators against certain types of crimes that are strongly related to their gender roles, as described next.

In general, the draft of the Criminal Code Draft on Gender Based Violence is only to compile the penal provisions of legislation without making comprehensive substantive revisions and eliminating important regulations. The legislation referred to is the Law on PKDRT, the Law on Trafficking in Persons and the Law on Pornography. This article only elaborates on specific examples related to criminal offenses that place women as victims and criminal offenses that put women in conflict with the law (convicted).

The problems that arise from the Criminal Code Bill are as follows: first, in the context of women as victims of domestic violence, the Criminal Code Bill removes the articles contained in UU PKDRT namely physical, psychological and sexual violence. In those articles there are categorizations and different sanctions between one category and another. The category of domestic violence is fairly mild, ie physical violence that does not cause disease or obstacles to continue one's job, occupation or livelihood or daily activities is met with a punishment of maximum 6 months in prison and a fine. More severe violence, violence that causes a victim illness or serious injuries, is punishable by imprisonment for a maximum of nine years or a fine. Violence that causes death is punishable by 15 years at the most. Physical violence in the normal category, with no further explanation of the indicator, is threatened with a maximum of 5 years imprisonment. In the implementation of the articles (through the application of UU PKDRT), there is a diversity of interpretations in the understanding and the reluctance of law enforcement officers to implement them (Deputi Perlindungan Hak Perempuan KPPPA 2016). Discrimination sanctions between light and heavy physical violence is relatively large, while in addition to the normal category of physical violence, there are no other criteria. In the implementation of law enforcement officers tend to encourage peaceful settlement and if brought to justice, the perpetrators are often punished with very low penalties (not more than one year prison or trial) (Eddyono 2018).

The sanctions regulation in the Law on PKDRT has been criticized, in particular because it does not include rehabilitation sanctions against perpetrators (such as therapy/anger management counseling). In the draft of the Penal Code, the regulation of sanctions in the form of rehabilitation or counseling action is contained in Article 114, but this article is an act, which can be imposed together with the principal penalty. Different actions are conceptualized with criminal sanctions, in which actions can be established by a judge without seeing if the offender is guilty or not, while criminal sanctions are granted if the perpetrator is found guilty. In cases of domestic violence (especially in mild cases), victims may find that counseling or therapy is more important to the defendant than any other punishment. However, there are also victims who expect the perpetrators to be found guilty with different types of sanctions, especially in cases of severe physical violence (Eddyono 2018). Thus, counseling or therapy should be the verdict imposed in every case of domestic violence, not only as an option. The Criminal Code Bill also issues protection against

domestic workers (PRT) from physical, psychological and sexual violence as domestic violence. The PRT protection regulation is included in the regulation on fornication as general offense.

Second, the position of women as perpetrators in criminal acts of neglect and abortion. In the Law on Domestic Violence, neglect enters as a criminal act in separate chapters. The neglect regulations include different types of neglect in personal and domestic relationships, which do not specifically refer to women as victims. The settings are genderless. This genderless setting has two sides. The first side, under equitable societal conditions, genderless arrangements should be done in an attempt for a wider non-discrimination. On the other hand, under the conditions of a still-patriarchal society, a victim-protection arrangement that is genderless may enlarge the relation gap that affects women victims more badly. Genderless arrangements can benefit the stronger parties in gender relations, ie men, who can use the law to repress women. This has been seen in the implementation of UU PKDRT, ie a husband reports his wife for abandoning the family and for leaving home, whereas the wife left because she experienced domestic violence. On the other hand, the regulations on neglect pay special attention to the child who is the victim whereas the perpetrator is the mother or father of the abandoned child (art 480). In contrast to article 480, Article 481 of the Criminal Code Act lays women as the sole perpetrator: "A mother who discards or leaves her child shortly after birth for fear of the birth of such a child is known by others."

Regulations that criminalize women or mothers are specifically included in the chapter Crime against Life and Fetus on ending children's lives, abortions and killing the fetus. Article 526 paragraph (1), states "A mother who robs the life of her child at or after birth, for fear that the child's birth will become known to another person, will be imprisoned for a maximum of 7 (seven) years for the murder of her own child". Meanwhile, Article 530 deals with women who abort or order another person to abort or terminate the pregnancy; they shall be sentenced to a maximum imprisonment of four years. The exception to this article is if a doctor performs certain medical actions in an emergency as an attempt to save the life of the expectant mother and/or her fetus.

It can be predicted that the conditions experienced by the mother who commits abuse of the child or abortion are influenced by events of gender-based violence. GR CEDAW 35 (2017) affirms that the article, which specifically places women as perpetrators because of conditions influenced by gender relations, is discriminatory against women. Because of the unequal gender relations, women often have difficulty in accessing assistance to help with what they experienced. This condition of vulnerability can lead women to take various actions, which in the eyes of the law are disgraceful and even unlawful acts. Vulnerability is increasing, and so is revictimizing, by criminalizing those who act disgraceful because they are actually victims. It becomes the state's obligation to prevent it.

In context of the regulation on abortion, Law no. 36 Year 2009 on Health (Health Act) does indeed prohibit abortion. Exceptions to abortion, however, are possible not only for medical reasons, but also in the case of rape: when a pregnancy occurs as a result of rape, which may cause psychological trauma for the rape victims (article 75 Clause 2). Thus the regulation of abortion restrictions in the Criminal Code Draft does not consider the condition of women who are victims of violence. In reality, abortion is often seen as last resort; not only by women who are victims of rape, but also victims of courtship violence (promise of marriage).

Effectiveness of Criminal Law and Settlement Arrangements Outside the Court

Although sanctioning has followed the regulations on criminal offenses, the implementation of the imposed sanctions is influenced by various factors, both juridical and non-juridical. Judicial considerations are contained in article 60 of the Criminal Code Bill. The article deals with considerations in deciding on criminal prosecution.⁴ Article 60 has considered the interest of the victim as one of the considerations for the criminal punishment imposed on the perpetrator, among others; a) the effect of the Criminal Act on the victim or the victim's family and b) the forgiveness of the victim and/or his/her family. However, Article 76 also puts pressure on not imposing imprisonment on the perpetrators/defendants (see table 2).

Table 2. Consideration does not impose the imprisonment under article 76 of the Criminal Code Draft

In the context of the victim	In the context of the perpetrator
<i>The loss and suffering of the victim is not too great;</i>	The defendant is under 18 (eighteen) or above 75 (seventy-five) years old;
<i>The defendant has paid compensation to the victim;</i>	The defendant is a first-time offender;
<i>The victim encourages or mobilizes the occurrence of the Criminal Act;</i>	The defendant is not aware that the Criminal Act committed will incur major losses;
	A crime occurs because of very strong incitement from others;
	The crime is the result of a situation that won't ever happen again;
	<i>The defendant's personality and behavior assure that he will not commit any other Criminal Act;</i>
	<i>Imprisonment will bring great harm to the defendant or his family;</i>
	Coaching outside the penitentiary is expected to be a success for the defendant
	Lighter criminal detention will not reduce the grave nature of the Criminal Act committed by the defendant;
	<i>The crime occurs among family; and/or</i>
	The crime occurs due to negligence.

Source: compiled by researcher based on her analysis of the Draft Penal Code Rules

The avoidance of imprisonment in particular applies to certain criminal acts which, among other things, are not criminal offenses “which are punishable by imprisonment of 5 (five) years or more or are threatened with specific minimum criminal or specific Criminal Act, which is very threatening, harmful to the public, or harmful to the financial or economic state” (see Section 2 of Article 76). Thus, the effort not to impose the criminal law on the defendant is only for cases that are not threatened with serious imprisonment.

In this regard, the writer’s emphasis lies in the above five conditions attached to the condition of the accused and the victim; first, when criminal offenses occur among families. Second, if the prison will cause greater suffering for the defendant and his family. Third, the personality and behavior of the defendant are convincing enough that he will not commit any other Criminal Acts. Fourth, the defendant has paid compensation to the victim. Fifth, the victims of criminal acts encourage or mobilize the occurrence of criminal acts.

Almost all gender-based violence offenses set out in Book 2 are punishable by a sentence of 5 years or more, or with special minimum penalties. Only a handful of gender-based violence is regulated by a sentence of less than 5 years, including threats of domestic violence in the form of physical violence that doesn’t result in pain or incapability to do one’s job, neglect of persons, and psychological violence. As mentioned earlier in the context of gender-based violence, most perpetrators are members of the family or have relationship with the

family. Komnas Perempuan has identified that 71% of reported cases are domestic violence (KDRT), where the offender is a husband or spouse who should have an obligation to maintain and protect their partner. If further analyzed, the perpetrators basically abuse their authority and power as head of the family. The position of the perpetrator as husband often causes a dilemma for the victim between reporting the case or remaining silent. These two conditions are completely wrong; it would be different if the perpetrator doesn’t belong to the family. It can put the victim in a more vulnerable position.

In cases of gender-based violence, perpetrators who belong to the family do generate a dilemma, not only for the victims but also for law enforcement officials who handle them. Often law enforcement officials have to consider who will support the victims and their families, if the perpetrators are in prison. This question often encourages law enforcement officers, especially the police, to seek peace between the two parties, and domestic violence is then often considered as domestic dispute rather than a criminal act (Eddyono 2018). As exemplified in several meetings discussing the implementation of UU PKDRT, many women request that the police do not go forward with the reported case, given their unpreparedness if their husbands are incarcerated, due to their economic dependence on them. According to the author, this issue has actually entered the territory of state responsibility in a broader context in the effort of women’s empowerment and in pushing for state funding plans and service systems for victims being

built by various parties. It cannot be justified that the “unwillingness of the state” is responsible for the victim, when the responsibility of the state and the perpetrator is then transferred to the victim. The victims will be in a more vulnerable condition, causing them to be re-victimized.

The above is also related to the second condition, that prison may cause greater suffering for the defendant and his family. This regulation puts great emphasis on the defendant’s situation. But it raises the question, what about the actual situation of the victims who find themselves in difficult situations? If women want the case to be terminated because of the circumstances that forced them to withdraw the complaint⁵, it indicates that the victims indeed face problems. This reasoning illustrates that the priority of punishment is oriented towards the perpetrator. It doesn’t aim to strike a balance between the interests of the victim and the perpetrator as mentioned in the preamble.

Related to the third condition, that the personality and behavior of the defendant is assuring enough that he will not commit any other Criminal Act, then one needs to ask, what exactly is the measure of personality and behavior? Is it because the defendant has a certain position in the community as a public figure? Or a certain position in government that can be an example? In the case of domestic violence, there is much experience that victims are difficult to access justice because of the position of the perpetrators who, in the eyes of law enforcement officials, are people who are not likely to commit violence. It is often difficult to process a legal case when the perpetrator is a public figure, a figure in the government or within the court institution (Komnas Perempuan 2017). Stagnant cases are not addressed, as mentioned by Komnas Perempuan (2017). Cases of economic neglect include cases that are not easily processed in court if they include those who are considered “good” or people of the community. Given these arrangements, the Criminal Code Bill legitimizes practices that are already very damaging to women victims of domestic violence.

Furthermore, in relation to the situation where the defendant does not need to be imprisoned if he has paid compensation to the victim: in addition to article 76, Article 104 confirms that the Court’s Decision may determine the payment of compensation to the victim or heir. However, it is mentioned in paragraph (2) of that article that if the compensation payment obligation is not exercised, a substitute stipulation of a criminal penalty for imprisonment is implemented. This raises more

questions: where is the victim’s right to restitution and the right to compensation, which has so far been regulated in the Witness and Victim Protection Act and has even been put into practice? The granting of the right of restitution (compensation as the perpetrator’s duty) and the right of compensation (which is the responsibility of the state) should not eliminate the punishment of the accused. In fact, the right to restitution and compensation shall be the same verdict with the imposition of imprisonment on the perpetrators.

The results of the research conducted by Komnas Perempuan and UN Women in 2017 indicate that efforts to solve cases of domestic violence from the beginning are always directed by law enforcement officers to be resolved peacefully, regardless of whether the type of violence was mild or severe. The study found that the impact of peaceful efforts, especially on severe cases, did not have a positive impact on the victims; a divorce continued, perpetrators abandoned the victims/wives and their children, and some even perpetrated the violence repeatedly (Eddyono 2018). This is not to say that there are not cases where peace can have a positive impact, but still, existing practice also suggests otherwise. It also often happens that the agreed compensation payment did not occur either. The above conditions exacerbate the situation of the victim. Therefore, the Criminal Code Bill should fence and accommodate the diversity of the victims’ situation, especially when it comes to domestic violence, and not ignore the existence of these conditions with a sense of justice for the victims, which is also dynamic.

Finally, related to the non-imposition of criminal sanctions because the victim of the criminal act encourages or mobilizes the occurrence of the Criminal Act. Theories of positivist victimology always emphasize the linkage of the perpetrator or the act of the perpetrator to the victim, where there is a role or contribution of the victim that triggers the perpetrator to commit the crime. The theory developed by Mandelson (1937) and later Wolfgang (1958) actually appears in the context of murder, either in self-defense because of domestic violence, or murder in the context of street crime. However, a positivist victimology approach is not always considered relevant to the murder case, so a radical and critical approach to radical victimology has emerged as current approach. This approach defies the positivist view that tends to blame the victim, especially in cases of gender-based violence (Walkate 2001). The biggest criticism by critical victimology really does happen in Indonesia, where law enforcement officials often blame

victims of domestic violence for what happened to them. Even attempts to report husbands are seen as undue attempts to disclose the husband's disgrace. As if a harmonious household is a household that does not have to question violence experienced by the wife. The view where the victim is blamed in the judicial process has also been corrected by the Supreme Court Regulation (PERMA) No. 3/2017, which states that the victim should not be blamed for what happened.

Conclusion

Indonesia already has laws and regulations related to the protection of victims of gender-based violence. The existing regulations have included strengthening the guarantee of victims' rights so that they can become guidance for government officials and law enforcement agencies in handling criminal cases, including crimes related to gender-based violence. The existence of various legislation protecting women victims demonstrates the pioneering efforts of criminal law that provide comprehensive protection against women victims of gender-based violence. The Criminal Code Draft is expected to form a new criminal justice system that is more responsive to the needs of victims.

In the formation of a new criminal law system in Indonesia through the Draft Penal Code, the victims' interest has already been discussed and considered but has not become a central point equivalent to the interests of the perpetrators, as evidenced by the setting of the objectives of crime and punishment. The Criminal Code Bill has raised the rights of the victims, but the placement of the victims further emphasizes the position of the victim as the party who helped reveal the case, while the rights as the party affected by the criminal act are not yet a priority. The main types of punishment still emphasize prisons and fines, not rehabilitation / counseling and restitution. Restitution is substituted for compensation. For crimes punishable not exceeding five years in prison, providing compensation to the victim may eliminate a prison sentence.

The regulation of criminal acts is still problematic, both for female victims and perpetrators. The Criminal Code Draft tends to move the available rules without revising them based on existing implementation practices. Discriminatory arrangements are still accommodated, thus revitalizing victims of gender inequality by leaving them vulnerable to criminalization. With the above findings, it is necessary to deliberate and re-formulate the objective of crime, namely punishment, which places

the interests of the victim as one of the main interests in the criminal law system. In line with that, efforts to revise articles on victims' rights and specific arrangements on the prosecution of gender-based cases are also necessary and should be in accordance with the principles of justice and nondiscrimination.

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Endnotes

- 1 The CEDAW Committee is a committee established under the CEDAW Convention, which has the power to, among other things, review the reports of States that have ratified CEDAW, including making general recommendations as a guide for countries in implementing CEDAW.
- 2 In this paper, the author only put forward certain types of criminal law only. It does not mean that other regulations are not problematic and not important. Most of the chapters are still problematic and need a more comprehensive discussion, chapter by chapter, in other papers.
- 3 Additional criminal types in article 72 of the Criminal Code Bill include: a) revocation of certain rights; b) the seizure of certain goods and / or bills; c) announcement of judge's decision; d) payment of compensation; e) revocation of certain permits; and f) fulfillment of local customary obligations or obligations under the law living in the community. Meanwhile, the actions in Article 114 paragraph (1) are: a) job training; b) rehabilitation; c) institutional care; and / or d) counseling.
- 4 Criminal considerations in article 60 include the errors of the Crime Maker, the motives and intent of committing the Criminal Act, the attitude of the Criminal Intelligence Officer, if the Criminal Act committed was planned or unplanned, the manner of conducting the Criminal Act, the attitude and actions of the offender after committing Criminal Acts, social and economic circumstances of the Criminal Offender, the influence on the future of the Criminal Offender, the influence of Criminal Acts against the victims or → relatives of the victims, the willingness of forgiveness of the victims and / or their families, and / or the legal and justice values living in the community.
- 5 The complaint applies to cases of mild physical violence, sexual assault, and light psychological violence.

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AUTHOR GUIDELINES

Jurnal Perempuan (JP) is a quarterly interdisciplinary publication in the English language that aims to circulate **original ideas in gender studies**. JP invites critical reflection on the theory and practice of feminism in the social, political, and economic context of Indonesian society. We are committed to exploring gender in its multiple forms and interrelationships.

The journal encourages practical, theoretically sound, and (when relevant) empirically rigorous manuscripts that address real-world implications of the gender gap in Indonesian contexts. Topics related to feminism can include (but are not limited to): sexuality, queer, trafficking, ecology, public policy, sustainability and environment, human and labor rights/ issues, governance, accountability and transparency, globalization, as well as ethics, and specific issues related to gender study, such as diversity, poverty, and education.

JP welcomes contributions from researchers, academia, activists, and practitioners involved in gender advocacy in any of the areas mentioned above. Manuscripts should be written so that they are comprehensible to an intelligent reader, avoiding jargon, formulas and extensive methodological treatises wherever possible. They should use examples and illustrations to highlight the ideas, concepts and practical implications of the ideas being presented. Feminist theory is important and necessary; but theory — with the empirical research and conceptual work that supports theory — needs to be balanced by integration into practices to stand the tests of time and usefulness. We want the journal to be read as much by stakeholders as by academics seeking sound research and scholarship in women's study.

JP appears annually and the contents of each issue include: editorials, peer-reviewed papers by leading writers; reviews, short stories, and poetry. A key feature of the journal is appreciation of the value of literature, fiction, and the visual narrative (works of art, such as paintings and drawings) in the study of women's issues

Submissions

To discuss ideas for contributions, please contact the Chief Editor: Anita Dhewy via anitadhewy@jurnalperempuan.com. Research papers should be between 5000-10000 words. Please make sure to include in your submission pack an **abstract outlining the title, purpose, methodology and main findings**. It is worth considering that, as your paper will be located and read online, the quality of your abstract will determine whether readers go on to access your full paper. We recommend you place particular focus on the impact of your research on further research, practice or society. What does your paper contribute? In addition, please provide up to **six descriptive keywords**.

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Headings should be short and in bold text, with a clear and consistent hierarchy. Please identify **Notes or Endnotes** with consecutive numbers, enclosed in square brackets and listed at the end of the article. **Figures** and other images should be submitted as .jpeg (.jpg) or .tif files of a high quality. Please number them consecutively with Arabic numerals and mark their intended location within the body of the text clearly. If images are not the original work of the author, it is the author's responsibility to obtain written consent from the copyright holder before using them. Authors will be asked to confirm the status of images, tables and figures in the journal submission pack. Images which are neither the authors' own work, nor are accompanied by the necessary permission, will not be published.

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