

Criminal Law and Gender Inequality

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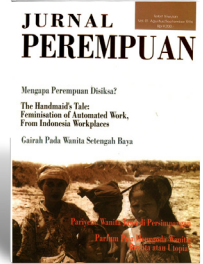
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Criminal Law and Gender Inequality

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)**

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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

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

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Abstract

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

Introduction

"...the correlation between development and increasing criminality could not be accepted as principle...development was not criminogenic per se, but could be come such if a) it was not rationally planned, b) disregarded cultural and moral values and c) did not include integrated social defence strategies." (Sixth United Nation Congress on the Prevention of Crime and the Treatment of Offenders 1980, h. 42)

The Draft Law on the Penal Code was first initiated in 1963, meaning that counting to the present day, a revision of the Criminal Code has been conducted for practically 55 years. The Criminal Code has been used as a positive law in Indonesia since it was legalized in the Netherlands in 1918. As a colonial state, Indonesia used the same law. After 1945, the Criminal Code was passed into law that remained in force after Indonesia became independent through Law Number 1 Year 1946 on the Rule of Criminal Law. The urgency of an update has three reasons described in the draft of the Criminal Code Draft, covering philosophical foundations, sociological foundations and juridical foundations.

The philosophical foundation departs from the pride of being an independent nation that is supposed to have its own Criminal Code, not the result of colonial inheritance. The sociological foundation implies that

criminal law can follow the development of existing values in society and be able to answer the challenges of the development of new crimes. Finally, the juridical foundation can be interpreted as an update of legislation to be aligned based on the hierarchy of legislation that has been established. Indeed the three foundations above have been very appropriate to be the reason for the change of the Criminal Code, but in practice the articles of change do not necessarily carry the same spirit with the three foundations. These articles will be discussed in this paper.

The Draft Law on the Elimination of Sexual Violence (RUU PKS) and the Criminal Code Bill (RUU KUHP) both race to be ratified by the Parliament, as both are included in the 2018 national legislation (prolegnas) program. The PKS Bill comes from the DPR initiative, while the Criminal Code Bill is a government proposal (<http://wikidpr.org/ruu/prolegnas-priority-2018>). Both of them intersect about the regulation of the articles of protection of women. The PKS Bill is expected to be more specialist than the Criminal Code Bill on the protection of women and children victims of sexual violence. The National Commission on Violence against Women (Komnas Perempuan) separates women's violence in three broad categories, personal/domestic violence, community and state level. Komnas Perempuan defines violence

in the private sphere as a form of violence in which victims and perpetrators are in a love relationship, which includes violence against wives and girlfriends (Komnas Perempuan 2017, p. 22). In the private sector, violence in courtship is the second highest occurrence after violence against the wife. The number of violations in courtship reaches above 1,000 cases each year. In 2017, Komnas Perempuan recorded 1,873 cases (Komnas Perempuan 2018, p. 1), in 2016 of 2,171 cases (Komnas Perempuan 2017, p. 1), in 2015 there were 2,734 cases (Komnas Perempuan 2016, p. 19), and in 2014 1,784 cases (Komnas Perempuan 2015, p. 16). Lastly, violence in courtship in 2013 exceeded 2,507 (Komnas Perempuan 2014, p. 12) cases of violence. The government and the House of Representatives (DPR) have used these figures as a matter of urgency to be regulated both as a preventive and eradication effort.

Through the Criminal Code Bill, the government tries to include articles to combat violence in courtship, one of which is contained in Article 447 of the Fourth Section on Adultery CHAPTER XVI on Criminal Acts in the Draft Law of the Criminal Code in the version of March 8, 2018. They are as follows:

- (1) A man who has intercourse with a woman as referred to in Article 446 paragraph (1) letter e with her consent because the promise of marriage, but then subsequently doesn't uphold his promise shall be imprisoned for a maximum of 4 (four) years or a maximum of Category III penalties.
- (2) In the case of a crime as referred to in paragraph (1) resulting in pregnancy, and the man is not willing to marry or there is a barrier to marriage which is known according to the laws and regulations in the field of marriage, he shall be imprisoned for a maximum of 5 (five) years or to a fine as high as determined in category IV.
- (3) In the case of women, as referred to in paragraph (1) and paragraph (2) as victims of a promise to be married, the provisions as intended in Article 446 paragraph (1) letter e shall not apply.

In the above article, it appears that the government wants to impose a punishment to men who have intercourse with women – with the approval of the women because they are promised marriage. At first glance, the above article is the answer to the high number of violence cases in courtship as reported and documented by Komnas Perempuan. But in another article, Article 446 of the Criminal Code Draft in the section and the same chapter with the above article, it is said that:

- (1) Sentenced for adultery with a maximum imprisonment of 5 (five) years:
 - a. Men who are legally bound through marriage and have intercourse with a woman other than their wives;
 - b. Women who are legally bound through marriage and have intercourse with a man other than their husbands;
 - c. Men who are not legally bound through marriage and have intercourse with a woman even though they know that the woman is married;
 - d. Women who are not legally bound through marriage and have intercourse with a man even though they know that the man is married;
 - e. Men and women who are both not legally bound through marriage and have intercourse.
- (2) Criminal acts referred to in paragraph (1) shall not be prosecuted except on the complaint of a husband, wife, parent, or child.
- (3) The complaints referred to in paragraph (2) shall not apply to the provisions of Article 26 and Article 27.
- (4) Complaints may be withdrawn while the court hearing has not yet begun.

The two articles above will be discussed in the formulation of the problem, which consists of two main questions. First, how is the extension of the adultery article contained in the Criminal Code Bill? Second, what implications does it have for women victims? The nature of this research is normative juridical by using a feminist legal theory approach as well as critical victimology. The method used examines review literature on legislation and legal principles.

The Concept of Adultery in the Criminal Code and Criminal Code Draft

According to the Indonesian dictionary, adultery means:

- 1) The act of copulation between men and women who are not bound by marital relations, 2) the act of association of a married man with a woman who is not his wife, or a married woman with a man who is not her husband.

Adultery itself has been regulated in the Criminal Code, namely in Article 284 of the Criminal Code, which reads as follows:

- (1) Threatened with imprisonment of not more than 9 (nine) months.
 - No-1. a. A married man who commits adultery, knowing that the 27 BW article applies to him.

- b. A married woman who commits adultery.
- No-2.
- a. A man who participates in the act, even though it is known that the guilty party married.
 - b. An unmarried woman who participates in the act when it was known to her, that the guilty party was married and the 27 BW article applies to her.
- (2) There will be no prosecution unless there are complaints of affected spouses, and if applicable to Article 27 BW, within three months, a divorce or separation follows for that very reason.
- (3) This complaint shall not apply to articles 72, 73 and 75.
- (4) Complaints may be withdrawn as long as the proceedings in court have not yet begun.

Prodjodikoro refers to the article above as "something illogical" (Prodjodikoro 2012, p. 117). According to him, the article does not reflect the same justice between women and men. Only men who submit to Article 27 BW alone can be snared, while for women there aren't any specific prerequisites like for the men. Article 27 BW itself regulates the classification of the population, subject to the article are only two groups, Europe and China. So the passage cannot be imposed on men other than men who belong to the European and Chinese groups. Prodjodikoro even mentions that Muslim men must be subject to the article because there is no longer a reason to commit adultery due to the permissibility of polygamy in Islam (Prodjodikoro 2012).

The article on adultery in the Criminal Code is also a legacy of the Dutch Criminal Code, which refers to Roman law. This article in Roman Law is imposed on women only, because women at the time had a lower position than men. If a wife has intercourse with another man, it is regarded as an act that harms the husband's right to demand allegiance from his wife in marriage. The provisions of the article are followed by the French Penal Code, which sees women as having an unequal standing before the law. But in its development, the Law of the Catholic Church, which says that both men and women are both capable to commit adultery, then corrected the inequality of the position. The law of the Catholic Church views adultery as "*in breuk op de heilige band van het huwelijk*" or blasphemy of the sacred bond of marriage (Lamintang 1990, pp. 90-92).

The definition of adultery was then included in the formulation of Article 340-344 *Crimineel Wetboek voor het Koninkrijk Holland*, and became Article 284 of the Indonesian Criminal Code. Lamintang refers to

Bemmelen and Hattum, who said that the passage of adultery should not only be imposed on married men and women, but unmarried men and women should also be subjected to this article. The purpose was not only to keep the marital bond, but also to maintain the origin of the offspring, not to mention the fact that the act is very close to sin (Lamintang 1990, pp. 94-96). But in the Netherlands itself today, the article of adultery has been abolished. Meanwhile, Marpaung has another opinion that refutes the opinion of Lamintang above. According to him, if the aim of the inclusion of adultery crime in the Criminal Code is to protect marital bond, then without the need to prosecute, husband and wife can propose a divorce without going through adultery crime process. Thus, accordingly, the article of adultery is a useless chapter. The second reason, Marpaung agrees that the understanding of human rights has expanded to include the right to enjoy sexual intercourse between two adults. This should be sufficient to remove the article of adultery in the formulation of the Criminal Code (Marpaung 1996, p. 42).

The article on adultery naturally caused controversy from the beginning of its formation, in contrast to other conventional crimes such as murder, theft, forgery and embezzlement. This can be seen from the formulation of articles categorized as complaints that can be withdrawn before the trial, and the fact that the complainant can only a husband or wife, not other family members. Historically, complaints of offenses arose in criminal law because the legislators felt the victim possibly suffers more if public interest takes precedence, so that the legislators gave more authority to the victim than the public interest by complaining or not complaining about the act which has harmed the victim (Remmelink 2003, pp. 418-419). The article on adultery is an absolute complaint offense, ie a case will never be processed if there are no complaints from the aggrieved parties, nor all parties involved in such offenses must be prosecuted, whether committed or ordered.

The Criminal Code Bill extends the criminal act of adultery by adding several articles, namely:

1. Adultery is no longer defined only for husband and wife or one party bound in marital relations, but it is also imposed on men and women who are not bound in marriage (Article 446 paragraph (1) letter e of the Criminal Code Bill).
2. Men who have intercourse with women and promise them to get married, but then fail to do so, can be criminally prosecuted (Article 447 of the Criminal Code Draft).

3. The imposition of criminal sanctions for men and women living together like married couples outside marriage (Article 448 of the Criminal Code Draft).

The expansion of adultery in the Criminal Code Bill means that it is no longer the same concept as the English word for adultery. The expansion more precisely leads to the concept of the word fornication. In the Black's Law Dictionary, fornication is described as "*Unlawful sexual intercourse between two unmarried persons*" (Black's Law Dictionary 1968, p. 781), which is in line with Article 446 paragraph (1) letter e of the Criminal Code Bill. So it seems there has been a shift in the meaning of language in the concept of adultery, which will impact the discussion of the next article of Article 447 of the Criminal Code Bill.

All of the above additions are an absolute complaint offense. Appreciation should go to the efforts of women's rights groups as well as Komnas Perempuan that both succeeded in making the third point above as offense complaint. In the draft of the Criminal Code on February 12, 2018 it was an ordinary offense, until in its development it was changed that all criminal acts of adultery in the Criminal Code Bill are offense complaints.

The Position of Women from the Perspective of Feminist Legal Theory

Feminist Legal Theory is based on the view of the feminist movement that throughout history, law has been an instrument to perpetuate the position of women under the subordination of men. The history written by men has created a bias in the concept of human nature, gender potential and ability, and in the setting of society. By declaring manhood as the norm, womanhood is a deviation from the norm; it is hegemony in the concept and strengthening of patriarchal laws and powers. The view by Davies (cited in Savitri 2006, p. 56) is based on several facts, first, that law and theory of law are empirically male territory, because they are the ones who write law and the theories of law.

Secondly, the law and the consequences of law are a reflection of masculine values. As a result the law seems to speak only to men in the dominant culture, but does not speak on behalf of women or other marginalized groups. This can be seen from the judges' rulings on sexual violence cases in women with low sanctional tendencies, assuming that the victim participates in the action, by denying the victim's perception. Third, traditionally, legal theory is patriarchal because it often contains something that describes the general character of the law in which the law is not really neutral and often used by people

who have the experience and the power to pressure others, including women. The law tends to side with the group where the ideology and culture originated from, for example in marriage law, divorce, rape according to the concept of the Criminal Code, and others.

Feminist legal theory also rejects the concept of legal neutrality that presupposes impartiality on one side or class. In practice, the concept of legal neutrality and objectivity has proven to justify the marginalization of women and other minority groups. This is because the law only legitimizes patriarchal "truths" about the prevailing norms of male and female relationships in society. The objectivity of law can only be achieved if the polarity and the feminine masculine dichotomy are removed.

The Perspective of Critical Criminology and Victimology

So far, the criminology approach has always been used as sharp analysis to look at crime from the standpoint of the offender. One of them is critical criminology. In critical criminology, the crime perpetrated by the offender is not only due to the perpetrator's self, but rather to the class, ethnic, patriarchal endemic relations. According to Hagan, critical criminology includes five main types of theoretical approaches: labeling theory, conflict theory, feminist point of view, new critical and radical approaches (Hagan 2015, p. 266).

Critical Criminology covers perspectives that challenge the basic assumptions of mainstream (conventional) criminology. Inciardi (cited in Hagan 2015, p. 253) describes critical criminology as:

This perspective is new and radical in terms of excluding traditional or mainstream criminological emphasis on the nature and etiology of criminal behavior; it is called conflict-oriented or critical because it focuses more fully on cultural values and differences, social conflict of racism, and sexism as a source of crime and irregularities in contemporary society; and it is said to be marxist because some of its figures are of the view that law and, by itself, the crime and structure of the interaction of individuals and groups in favor of legal codes derive from the ordinances in which the relations of production and economy are exercised. (Hagan 2015, p. 253)

Here are the general characteristics of critical criminology, namely: (1) Crime is a label attached to behavior, usually the behavior of the most powerless individuals in society. (2) The more powerful groups in society control the labeling process in order to protect their interests. (3) Using a conflict model instead of using a consensus model to explain the criminalization process.

(4) Critical criminology also reveals that crime is a rational response to unequal societal conditions.

Critical criticism and critical victimology have similar views on the causes of crime, but the subjects of both studies are different. Criminology speaks of the perpetrator, while victimology rests on the analysis of the victim. Critical criminology and critical victimology focus on the social structures that make up the two individuals. This paper will use a critical victimology approach to the articles of protection of women on the act of adultery in the Criminal Code Draft.

The development of critical victimology does not appear in the study of law, preceded by a positivistic victimology approach. Positivistic victimology according to Miers is seen as an attempt to identify factors in certain criminal acts that cause casualties. The focus of the study is on the role of victims in the occurrence of crime, especially on conventional crime. Critical victimology goes far back, and not only focuses on the role of the victim but also on the background that remains unseen (go behind our back), including the working process of the law (Miers cited in Indah 2014, pp. 9-17).

Mawby and Walklate express the same; a critical victimology approach is a view that sees the victim's development over time. This approach attempts to analyze the broader causes of crime from the perspective of the victim. Critical victimology finds that crime does not only arise because of the participation of the victims, but also on the social structure that causes a person to become a victim of crime. Critical victimology developed along with the development of the American women's movement, therefore some thoughts on critical victimology were influenced by this movement (Mawby & Walklate 1994, pp. 17-21).

According to critical victimology, it is both economic structure and patriarchy that tend to be exploitative causes for a person to become a potential victim. The economic system and repression, resulting in women not having enough knowledge to survive in the development of the times, cause women to be in a vulnerable condition as a target of crime. In regard to sexual violence, women are weakened by a patriarchal system that views women as repressed and constrained by their gender. Women with disabilities are the maximum representation of unfair social structures in viewing and treating those criteria. Meanwhile, patriarchy produces an imbalance of gender relation, giving birth to injustice to women (Fakih 2013, p. 12). Critical victimology in the scope of its analysis no longer place the victim's personality as the cause of the crime, but looks at other factors beyond the victim that can make a person weak and potentially become the victim of a crime. Giddens (quoted in Mawby & Walklate 1994, p. 20) says that:

A critical victimology informed by these ideas problematizes both the law and the role of the state, and place both conceptual empirical questions raised by feminist movement at the centre of agenda ... and demand that account is taken of the recessive relationship between agency and structure.
(Mawby & Walklate 1994, h. 20)

It can be argued that critical victimology sees that the process of casualties is the result of an unjust and repressive structure. This approach also assumes that the state, namely the government and the authorities, can also create various victimization of its people.

From both of the above views, the terms criminogenic and victimogenic appeared. Criminogenic is understood as the causal factor of crime arising from self-perpetrators of criminal acts, while victimogenic is considered the opposite, namely the factor in the victims themselves that is seen as triggering a crime. The difference in the two views above affects the regulation of both the rights of the perpetrator and the victim's rights in the criminal law in a country.

Between Protection and Criminalization of Women

Barda Nawawi discloses criminal penalties (criminal law policy) consisting of two aspects, penal policy, which is using criminal law and non-penal policy or using facilities outside of criminal law (Nawawi 2008, p. 5). According to Mulder, penal policy (cited in Barda 2008, pp. 27-29) has three stages, namely the formulation stage, the application stage and the execution stage. The drafting of the Criminal Code Draft is included in the formulation stage. This paper will only discuss the formulation stage because the Criminal Code Draft is still in the form of a draft law. Broadly speaking, Muladi and Barda Nawawi say that the making of legislation containing criminal sanctions should consist of three main thoughts, firstly, planning what actions will be addressed because of the dangerous nature of the act, both dangerous for individuals and for the community. Second, planning what sanctions will be given to the perpetrators of criminal acts. Thirdly, the procedure or mechanism of the enforcement system of the two points above (Muladi & Nawawi 2010, pp. 198).

Based on the stages of the drafting of the above legislation, the first concerning the actions prohibited or recommended in the formulation of the article. The substance of article 447 of the Criminal Code Draft has been included in the act, which must be prevented and overcome. Komnas Perempuan notes that reported dating violence annually reaches over 1,000 cases, but

none of the legal instruments govern this matter. Article 447 Paragraphs (1) and (2) of the Criminal Code Draft were originally established to protect women who gave consent or consent to intercourse because they were given a promise to be married by men. If intercourse causes the woman to become pregnant and the man does not want to marry her or there is an obstacle to marry her, then the punishment is exacerbated. Lawmakers have used a critical victimology approach in the preparation of Article 447 of the Criminal Code Bill. The article has a good gender perspective that there is an imbalance of power relations between men and women in dating relationships, including when deciding to have sex outside of marriage. The article also implies that there are still many women who are deceived by the promise of men until they are willing to have sexual intercourse.

According to Barda Nawawi, this article should not be included in the chapter on the criminal act of adultery, because the nature of prohibited acts and protected legal interests are different from other articles in the chapter on the crime of adultery (Nawawi 2008, p. 226). This article should be included in a criminal act against the body, to emphasize the evil nature of the perpetrator exploiting the body and its effect on the female victim. The article appears to have been gender equitable by placing the needs of women with low bargaining positions on men when deciding whether or not to have sex outside of marriage. However, the previous article, Article 446 paragraph (1) letter e, states that adultery can occur with unmarried men and women. Although later, Article 447 paragraph (3) mentions that article 447 of the Criminal Code Bill does not apply to Article 446 paragraph (1) letter e of the Criminal Code Bill.

Secondly, concerning the sanctions that are included in the formulation of the article: theoretically, the inclusion of sanctions in a clause is based on the circumstances of the offender and depends on the crime committed. In practice, it will result in inconsistency of criminal punishment on each individual. Inconsistency of criminal punishment itself is highly avoided in criminal law, because it will create a sense of injustice in society. Therefore, it is the legislator who is obliged to reduce the inconsistency, which is then set forth in the legislation. This is achieved by using an indeterminate sentence system when it comes to the imposition of criminal sanctions. This system provides the maximum and minimum criminal margin that can be imposed by the judge. The House of Representatives has the duty to establish the limit of sentencing, while the court determines the level of sentencing. Article 447 of the Criminal Code Draft

does not include a minimum penalty, only stipulates a maximum of four years imprisonment for perpetrators using deceit, whereas if the victim is known to become pregnant, the maximum sentence shall be reduced to five years imprisonment. This causes the judge to have a very mild penalty, even under the prosecutor's charge. The sense of justice for the victim will be "injured" when the sanctions imposed in reality do not match the victim's losses. A minimum is a criminal sanction for the victim's sense of justice.

Third is the enforcement of the article. Can law enforcement officials enforce Article 447 of the Criminal Code Draft Law? There are three different possibilities in this discussion. First, when the victim reports a case with Article 447 of the Criminal Code Draft in the police, then the victim will be questioned, suspected and even snared with article 446 of the Criminal Code Bill. The victim is accused of committing adultery in accordance with article 446 of the Criminal Code Bill. The expansion of the article of adultery in the Criminal Code draft that ensnares men and women who engage in sexual intercourse outside marriage makes the victims fear reporting the case. This stands in contrast to sexual harassment or rape, where the victim did not want it to happen. Law enforcement officers who still have a patriarchal perspective will see Article 447 of the Criminal Code Bill as an indicator that women also want the same thing, even though the consent arises because of deceit and trickery. The interesting thing about Article 446 of the Criminal Code Draft is that only wives, husbands, parents and children are entitled to file complaints. The crime of adultery as stated in Article 446 paragraph (1) letter e, can only be reported by parents, because in general men and women who are not married relationships often do not have children. Adultery as described by Marpaung above should not be included in the Criminal Code, if you look at the development of science, technology and life in general of the nation.

Second, the victims in Article 447 of the Criminal Code Draft must consider how to prove their allegations against the perpetrator of the promise of marriage before the intercourse. Although in criminal law, the investigator collects the evidence and the public prosecutor conducts the proofing process in court, the first party to be questioned is the victim. The victim should be able to show that the offender has made a promise to the victim and then denied it. On the other hand, the victim must also prove that the desire for intercourse arose because of the promise made, and not because of "*an sich*" (*actual*) desire of the victim. Separating the

two different intentions is highly dependent on the interpretation of the investigator, in this case the police. What if the perpetrator only expresses the promise to the victim alone, and no one else hears? In the criminal law in accordance with Article 183 of the Criminal Procedure Code (Criminal Procedure Code), the proof must at least consist of two evidences. The evidence itself is set limitatively in the Criminal Procedure Code, consisting of witness statements, expert information, letters, instructions and explanation of the defendant. If there is only the victim's information without any supporting evidence, it will not be processed. Lack of evidence will result in a third consequence.

The aforementioned third consequence is that the perpetrator or the perpetrator's family may report the victim on charges of defamation, which the lawmakers have inserted in article 471 of the Criminal Code Bill. This article may ensnare anyone who perceives to strike a person's honor or good name either orally, in writing or in pictures with a maximum imprisonment of one year and a minimum of six months. The advantage of Article 471 of this Criminal Code Bill is the fact that this article is a normal offense, meaning it will not be revoked if it is processed. This is different from Article 447 of the Criminal Code Bill, which is a complaint offense so it can be revoked. If so, what are the implications of these two facts? When the case of adultery can be revoked and the perpetrator is free, the case of defamation by the female victim against the perpetrator's self is still being processed. The following is the contents of Article 471 of the Criminal Code Bill:

- (1) Any person who orally attacks the honor or reputation of another person by way of alleging a thing, with the intention that it is publicly known, shall be punished for defamation, with a maximum imprisonment of 9 (nine) months or a maximum fine of Category II.
- (2) If the acts referred to in paragraph (1) shall be done through writing or broadcasting images, displayed or posted in public places, the person is liable for written defamation with a maximum imprisonment of 1 (one) year 6 (six) months or the highest of Category II.
- (3) It is not a criminal offense if the acts referred to in paragraph (1) and paragraph (2) are conducted for public interest or because of self-defense.

Unfavorable legislation can be both criminogenic and victimogenic, although in addition there are other factors such as the implementation of inconsistent laws and the attitudes or behavior of law enforcement officials in handling a criminal case (Sahetapy 1982, p.

282). Middendorf (cited in Hart 1971, p. 22) states that the overall effectiveness of criminal justice relies on three interrelated factors, namely (1) good legislation, (2) quick and certain enforcement and (3) moderate and uniform sentencing. Article 447 of the Criminal Code Draft under the sociological foundation is very appropriate to be included in the Criminal Code Bill, but other articles in the Criminal Code Bill make Article 447 of the Criminal Code Draft not enforceable, instead, they can even become a criminalizing factor for women victims.

Conclusion

Adagium in legal science that upholds equality before the law is the result of another legal adagium, namely that everyone considered knowing the law (legal fictie) take other, more marginalized positions, including women. Similarly, the formulation of Article 447 of the Indonesian Criminal Code Act to protect women victims can actually become criminogenic factors that can change the position of women victims to become perpetrators of criminal acts. This is due to the extension factor of the definition of adultery in the Criminal Code Draft and still emerges in the defamation article in the Criminal Code Draft. Women victims are threatened to be reported back by the perpetrators using the two articles if the case is as stated in Article 447 of the Criminal Code Bill. In order for Article 447 of the Criminal Code Law to be enforceable, it is necessary to extend the definition of fornication in Article 446 paragraph (1) letter e, whereas Article 471 of the Criminal Code Bill doesn't need not to be included in the Criminal Code RUU. In addition, the provision of criminal sanctions in the formulation of Article 447 of the Criminal Code Bill, which has no minimum limit, can also injure the victims' sense of justice if the perpetrator is subjected to very light criminal sanctions. Lawmakers should be careful in formulating protection articles for women victims; otherwise it will be like a double-edged knife that will actually hurt the victim.

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