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## Reflections on Indonesian legal thought: Discourse on woman protection based on transcendental feminism

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### Abstract

The legal construction of the Criminal Code on rape and gender is an interesting topic to discuss because it does not provide justice for women despite the law, such as the Criminal Code, which is considered less protective. Using descriptive approach and theoretical comparison of feminism and Islamic law (transcendental), the authors discuss this theme objectively. The results of the discussion show that, first, the Criminal Code has not provided protection because its views are based on liberalism (women's freedom to determine their destiny) with a different interpretation. Second, the difference between the values of feminism in Islam and liberal and radical secular views lies in the spirit to compare masculinity and femininity, which tends to be selfish. This is in contrast to Islam which emphasizes harmonious relations and friendship.

**Keywords:** gender, feminism, rape, criminal code, transcendental

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### Introduction

Gittings, who researched the 1965 incident in Bali, said that the rape of women suspected of being affiliated with Gerwani was part of 'the big massacre' in addition to the crime of burning houses (Levene & Robert, 1999) <sup>[11]</sup>. The political event called 1965 is one of the contemporary narratives that become controversial, in addition to rereading the perpetrators of the event initiated by PKI (Indonesian Communist Party) (Notosusanto, 1968) <sup>[12]</sup>. Before the reformation, cases of mass rape occurred against ethnic Chinese women. Monika Swasti Winarmita wrote that the rape of Chinese women was caused by the politics of racism introduced by the New Order to ethnic Chinese who were considered responsible for the monetary crisis in mid-1998 (Winarmita, 2008) <sup>[30]</sup>. Two years ago, Yuyun was tragically raped and killed by 14 men in Palembang (Akbari, Anugerah Rizki *et al.*, 2016) <sup>[21]</sup>. Then, the government realized that this case was extraordinary, resulting in the issuance of PERPU (Government Regulation in Lieu of Law) No. 1 of 2016 concerning additional punishment, namely castration, leading to a controversy.

However, from a cultural perspective, it seems that Raymond A. Knight, PHD Brandeis University, in "Preventing Rape; What the Research Tell Us" in 2011 should be noted. He argues that most rapists do not act out of sexual desire but rather because of a narcissistic lust for power against women. This is a symbol of patriarchal cultural hegemony to subjugate women, control victims, and erase autonomy and humanity (Amiruddin, Mariana, 2011) <sup>[22]</sup>. Unfortunately, this patriarchal symbol seems to have gained a foothold in the Criminal Code mentioning rape as a crime of decency. This categorization is too narrow seeing the consequences for the victim. Moerti Hadi Soeroso said that the form of rape against women, including marriage, is a crime that can be categorized as gender violence (Soeroso, Moerti Hadi, 2011) <sup>[14]</sup>.

Instead of being a liberation, the law has turned into a tool of oppression for women because the laws made are genetically very patriarchal colonial laws. Berberick's study (2010) quoting Viren Swami shows that, in a patriarchal society, the inferior rights and roles of women are largely determined by the superiority of men (Berberick, Stephanie Nicholl, 2010) <sup>[23]</sup>. This is like when the Dutch East Indies government forbade Toraja women to be leaders by sending Christian missionaries, where, previously, women led in public spaces and religious rites (Mangililo, Ira D., 2014) <sup>[26]</sup>.

The patriarchal culture inspired by colonialism has its historical roots in Javanese culture which is also patriarchal. Ann Stoler saw the patriarchal culture in Java was still held up so that, during the industrial era, women were even more powerless (Stoler, Ann, 1977) <sup>[29]</sup>. Colonial patriarchy created a stratified social class at which peak was European men, followed by European women, native men, and, finally, colonized women (*liyan*). As the lowest structure, these colonized women were the victims of the oppression of a higher structure, including indigenous men. This structure still exists today, which can be seen in the subordinating proverb *dapur-sumur-kasur* (kitchen-bathroom-bedroom) in various regions in Indonesia (Ilma, Awla Akbar, 2016) <sup>[25]</sup>.

As a result, women were always in a powerless position. Mohanty in 'Under western eye' mentions that third-world women are considered by western feminists to be a group of people who have the same fate and are powerless. They are often the victims (explicitly) of political and economic systems (Mohanty, Chandra Talpade,

1984)<sup>[27]</sup>. As a third-world country, Indonesia is still developing the Dutch East Indies Colonial Law politics to enforce the legal system in the colonized country, which is maintained until now (Dimiyati, Khudzaifah, and Wardiono, Kelik, 2014)<sup>[10]</sup>. To describe the powerlessness of women, Gayatri Spivak uses the term *Subaltern*, which means *women*. They are subjects with no position in social change and cannot voice their minds (Aschroft *et al.*, 2006)<sup>[4]</sup>.

In this case, Spivak understands that their desire to speak in history was shaped by the masculine-imperialist ideological formation. Women are formed with a masculine dimension as a strategy in resisting patriarchal power. This is what women always do as historical objects (Saputra, Asep Deni, 2011)<sup>[28]</sup>.

However, during the Dutch colonial period in the archipelago, what was popularized by Spivak did not apply to Cut Nyak Dien, Cut Meuthia, and Kartini. Each had a different role. Kartini could fight the hegemony of the Netherlands with her famous writings. Moreover, Cut Nyak Dien and Cut Meuthia not only voiced out their minds but also revolted against colonialism through guerrilla warfare. Cut Nyak Dien as the 'female sultan' (*sultanah*), who came to power after her husband died, represented how masculine power did not reach the Aceh region which was previously ruled by Muslim kings.

These different patterns show how the women's movement played its role in the colonial period, especially how they were shaped by the political, legal, and cultural system in Aceh at that time. With the generally accepted view, the sultanate of Aceh was inhabited by a Muslim population who considered *jihad* against the invaders to be an individual duty to be established. The term *jihad* is not only political but also legal, including in interpreting the dignity of women. Peter Carey reports how shame caused by European residents who abused the princesses of Yogyakarta Palace had led to the Java war (Carey, Peter, 2006:2012)<sup>[6]</sup>.

If the theory of feminism which originally came from the West with the orientation of equal rights in the socio-political field, is juxtaposed with the phenomenon of *sultanah* in Aceh in the past, it can enrich the understanding of the construction of gender based on Islamic values. *Jihad*, women's leadership, and the ability to rise from adversity are views that contrast with reality. Feminism is finally interpreted unwisely. If it is related to what is happening in the archipelago, there should be a paradigm shift and orientation of feminism.

The gender paradigm shift in question is the fact that Islamic law protects women and even makes them the pioneers of change in society, and, at the right time, they can lead the change. The shift in the orientation of women to political power by using mainstreaming issues is replaced by an orientation to the ability to formulate strategies; therefore, women must play a role in education and their lives, especially in using their opinions to change various important policies regarding women with or without having to be part of the power concerning human rights.

The important point discussed in this article is a positive legal perspective in Indonesia regarding rape law. The norms in the rape law are considered to represent views on the importance of dignity and chastity of women and highlight the gender perspective which is integrated with transcendental values to describe this transcendental gender law perspective in viewing rape law.

## Research Method

This article using descriptive approach used the theoretical framework of feminism, especially about gender equality as part of human rights. This gender construction was then combined with transcendental approach, which means that the law is complemented with religion, especially Islam, to make a difference between liberal western feminism with its historical background and feminism in Islamic thought with different ways of defending through religious values.

## Results and Discussion

### 1. Acts of Rape Criminal Law Arrangements in Positive Law

Rape is defined as a crime against sexual relations with a girl or woman forcibly without her consent or, according to the law, with a girl under the age limit of consent; any sexual violence by more than one person; an act of violence and carrying by force; forcible deprivation or destruction of a city; insulting with violence or forced rape (Anwar, Yesmil and Adang, 2013)<sup>[16]</sup>. R. Sugandhi stated that rape is (a) coercion of intercourse by a man to a woman who is not his wife, (b) coercion of intercourse followed by acts or threats of violence, (c) the entry of male genitalia to female genital opening, and (d) secreting semen (Sugandhi, R. 1981)<sup>[18]</sup>.

In line with Arief Gosita (Gosita, Arif. 1987)<sup>[8]</sup>, PAF Lamintang and Djisman Samosir argue that rape is a man's act of violence or threats of violence that force a woman to have intercourse outside of marriage with him (Lamintang, PAF, and Samosir, Djisman 1983)<sup>[19]</sup>.

The views above show that rape in its form is not included in marriage, meaning that, if a wife is forced to have sexual relations with her husband, it cannot be categorized as rape but must be understood as part of forced domestic service. Likewise, if the rape is carried out with persuasion so that the woman agrees, it cannot be charged with criminal law.

It was only then that a more favorable definition for women was seen in Moerti Hadi Soeroso who stated that the form of rape against women, including marriage, is a form of crime that can be categorized as gender violence. It is a violent crime that is categorized as a form of action that violates the human rights of women. Susetawan pointed out that, first, in the vision of sexual relations, rape is a form of sexual deviation carried out with violence in the form of forcing sexual intercourse, and, secondly, rape can also be interpreted as deprivation of human rights. Rape in the macro vision is in the form of deprivation of human rights, but rape in the vision of

sexual coercion can also be interpreted as a form of deprivation of rights, such as the right to virginity, the right to be free from suffering, the right to be free from fear, and the right to be free from inhumane treatment. With the rape, the victim has felt the consequences of human rights abuse (Soeroso, Moerti Hadi, 2011) <sup>[14]</sup>.

Crime regulation with the specificity of female victims in positive law formulated in articles 285, 286, 287, 288, 289, and 297 of the Criminal Code is included in CHAPTER XIV under the title “crimes of decency or crimes against decency”. In this chapter, the article specifically formulated for rape for female victims is article 285 on rape, where the definition of violence includes only physical violence. Therefore, non-physical violence that can occur through hypnosis, for example, or other psychological influences, cannot be categorized as violence. The article specifically formulated for rape for female victims is article 285 on rape, where the definition of violence includes only physical violence.

The standard value that can minimize the number of sexual crimes/rapes is the threat of 12-years imprisonment, but, in practice, it is rarely carried out. The non-compliance with the sanctions with the existing articles results in no deterrent effect. The pattern of punishment for rappers as a process of handling the crime of rape tends to be far from the maximum limit stated in the Criminal Code (Khalaf, Abdul Wahab, 1997) <sup>[15]</sup>. Niken Savitri expressed her opinion that rappers should also be charged with molestation if it can be proven through a *visum et repertum* that there is an injury to the victim's reproductive organs so that they can be prosecuted together with a criminal act. However, in practice, this is rarely done by prosecutors and judges to the rappers, so the crime of rape is still a crime that violates morality and does not include protection for the violence experienced by the victim (Savitri, Niken, 2008) <sup>[17]</sup>.

The use of criminal sanctions through the criminal provisions of a statutory product is essentially intended to ensure that the product is adhered to and implemented properly. The existence of these criminal sanctions is to strengthen the enactment of laws and regulations. However, some categories cannot be ensnared by criminal law if the woman in question is an adult, does not have marital status, and is in a conscious state. If she is persuaded and agrees to have sexual relations, it is not considered a crime.

The current law enforcement seems to be still oriented to procedural justice which places great emphasis on the aspects of regularity and only formal legal application. With such a working mechanism, if it is associated with the flow of formalism pioneered by Christopher Columbus Langdell, the main points of thought are as follows (Munir, 2005) <sup>[7]</sup>.

Formal law can achieve the same goals as substantive law; the law is made by the state so that it contains an imperative meaning; the law is a rational and scientific product of science, which is arranged logically, coherently, and systematically. Thus, this way of working has a judicial model that is formed by a juridical justice model with the following characteristics. Law has a fixed structure and is closed to the entry of other fields of science.

This model developed under the legal positivism paradigm which requires the entire judicial process to be carried out in a strict and closed manner under the control of laws and regulations that regulate the structure and implementation procedures. The administration of justice must use a strict syllogism, meaning that it has been patterned in determining the rule of law (articles relating to objective reality) as a major premise (general), objective events (real cases) as a minor premise (determined and appointed by the rule of law as a conclusion), placing the position of the act as something fundamental shown in the process of making police investigation report by investigators, prosecutors' demands/indictments, as well as determination and execution of court decisions. The execution of court decisions must always be sought to realize the contents of the law. Following this view, the law will give birth to a type of justice which is usually called procedural justice (Ali, Achmad. 2009) <sup>[1]</sup>. Judging from the legal protection for women, the form of protection for victims of crime can be provided in various ways, depending on the suffering/loss of the victim. Based on positive criminal law, the victim can claim damages or compensation for the convict (Atmasmita, Romli, 1995) <sup>[5]</sup>.

The compensation in Indonesian positive law is regulated in the Criminal Code. Implicitly, the provisions of Article 14c paragraph (1) of the Criminal Code have protected the victims of crime. It reads, “In the order referred to in Article 14a, except in the event that a fine is imposed, then together with the general condition that the person convicted will not commit a crime, the judge may make a special condition that the person convicted will compensate for the losses incurred due to the crime, in whole or in part, which will be determined by the order as well, which is less than the probationary period.”

According to the provisions of Article 14c paragraph (1) as well as Articles 14a and b of the Criminal Code, the judge can impose a sentence by stipulating special conditions for the convict to compensate the loss caused to the victim. In the Criminal Procedure Code Chapter III Concerning the Merger of Compensation Cases, Article 98s/d101, the victim can file a lawsuit regarding the crime experienced as well as the loss suffered.

By still referring to the optics of the Criminal Procedure Code, victim protection is limited, relatively imperfect, and inadequate. The victim has not received proportional attention (Sahetapi, J.E., 1987). More protection is indirect protection (Arief, Barda Nawawi, 1998) <sup>[2]</sup>. The protection of crime victims can also be seen in the provisions of Criminal Law outside the Criminal Code and Criminal Procedure Code. However, the orientation of the protection is also implicit and abstract. Strictly speaking, protection is not imperative, real, and direct. The laws in question are as follows.

- a. Law Number 7 of 1984 concerning the Ratification of the Convention on the Elimination of All Forms of Discrimination against Women
- b. Law Number 39 of 1999 concerning Human Rights

- c. Law Number 26 of 2000 concerning Human Rights Court
- d. Law Number 13 of 2006 concerning the Protection of Witnesses and Victims

Thus, the principles accommodated in the several provisions mentioned above serve as an entry point for judges to give attention and protection to the interests of victims of rape, either through the criminal justice process or through certain social care facilities, which is an absolute part to be considered to realize gender justice to protect women victims of rape.

## 2. A Shift of Gender Perspective from Liberal to Transcendental

Gender and sex are two different things. Sex is given while gender is related to the division of labor and functions formed by social construction. Women victims of war have always been part of the victims of colonialism practices. The focus of postcolonial feminism is the absolute superiority of masculine and stigma against women as 'unman' or 'sub-human' (Dimiyati & Wardiono, 2007) <sup>[24]</sup>. Colonial policies were only targeting the masculine. The post-colonial influence in the colonial narratives is still used today, which has become the object of criticism because it originates from the construction of colonialism that is not in favor of women. The subordinate position of women in western civilization which later annexed the whole world places women in the lowest position with men in colonial countries. Women were considered inferior and marginal and even became objects of exploitation. This is seen in the data disclosed by Adler in Adian Husaini (Husaini, 2013) <sup>[9]</sup>: From 1572 to 1629 near Than City in Germany, 152 people accused of witchcraft were massacred by hanging or burning alive. Of this number, only 8 were male. Sometimes, at one time, 8 or 9 women were killed. A total of 306 people, mostly women, were massacred in just 6 years in villages near Trier City. In two villages, there were only two women left. For this reason, colonialism dominated by the West has a long history of negative stigma against women. Inquisition carried out by the church in the Middle Ages made women a target. Women were considered an unman by the church. Quoting Philip J. Adler, Husaini describes the poor treatment of women in the West. Women at that time were considered the incarnation of the devil to tempt humans. This was most likely influenced by the Christian concept of Eva being tempted by Satan to get Adam into sin. Since the beginning of its creation, women have been considered imperfect.

In Lacan's psychoanalysis, the colonizers and patriarchal culture are like The Other in a mirror phase. The Other was what then became very dominant to the subject in introducing the world and all knowledge. Just like the conditions described, The Other becomes very dominant in what the subject knows. Postcolonial feminism combines postcolonial theory with feminist theory.

Practically, postcolonial feminism theory has followed a convergent evaluation path concerned with the study and defense of the "other" marginalized in the repressive structure of domination following a very similar theoretical path. This postcolonial feminist theory seeks to respond to the existing hierarchies of gender, culture, and race, and they are part of post-structuralism which rejects binary opposition to the construction of patriarchal authority and colonialism (Ilma, Awla Akbar, 2016) <sup>[25]</sup>.

Colonial feminism theory is used to trace the constructions of colonialism that exist in various factors that influence norms about rape. Postcolonialism is used as a starting point to be critical of various elements that harm indigenous interests. The link with feminism makes the segmentation narrow to the patriarchal domination which was preserved during colonialism.

The second wave of feminism, for example, assumes that rape is the result of a patriarchal structure of society. This school is a critique of the concept of rape in the previous era which considered rape as an internal factor and an external factor that has nothing to do with the patriarchal society. Patriarchal society has a dualistic analysis that divides society into two classes, namely the masculine class (with domination, hegemony, and power over others) and the feminist class (with the opposite fate). This rape is an attempt to show the 'power' of masculine society over the feminist (Westmarland, Marie Nicole, 2005) <sup>[31]</sup>.

Based on the above thought, western feminism including its radical, liberal, and postcolonial derivatives have justifications that represent what western women feel, which may not happen in the Islamic world. This view is triggered by religious doctrines that have political, social, and cultural implications (Dimiyati, *et al.*, 2020) <sup>[20]</sup>.

1. There was a view of degrading women, especially from Christian teachings. This is the main concept in naming "woman" in the west. The term *female* which means *woman* comes from the Greek word *femina*. The word *femina* comes from *fe* dan *minus*. *Fe* means *fides* (belief) or *faith* while *mina* comes from the word *minus*, which means *less*. Thus, *femina* means one with less faith. Therefore, women are naturally evil beings. Such a view has serious consequences. At that time, many women became victims of massacres because they were considered the incarnation of the devil. Many were slaughtered because they were considered witches (Husaini, 2013) <sup>[9]</sup>.
2. This made women guilty of inherited sin in western Christian civilization. Women were sinners, a curse for men, so they were politically excluded and socially considered second-class citizens.
3. This unfavorable situation led to resistance from women for gender equality or emancipation.
4. In western civilization, the position of women was automatically colonized without having to start with colonization as happened in the archipelago. The feeling of being colonized was caused by restrictions on access to education, religion, and knowledge.
5. Women in the west could be traded even by their husbands if they were married or felt bored.

In the view of Islam, the hypotheses of liberal feminism are not entirely true; men do not always try to dominate women as part of a larger sexual power. However, legal protection for women does not at all rely on strict juridical norms in detail but can be misunderstood because of the doctrine of freedom that women, like men, are free creatures and can determine their destiny.

In the construction of Islamic law, women must be protected with or without the ability to protect themselves. Therefore, Islamic law by itself protects women without any terms and conditions that can invalidate such protection. Rape and obscene acts and words that lead to obscene acts as well as various things that project sexual acts are forbidden and have religious consequences.

In the Islamic world, feminism is divided into three which have different theological foundations (Arif, Syamsuddin, 2017) [3].

1. Feminism in Islam was introduced by Muhammad Abduh (1809-1905), Hasan Turabi from Sudan, Mahmud Saltut, Sayyid Qutb, Yusuf Qardhawi, and Jamal Badawi. In Indonesia, Ahmad Dahlan was the central figure who mobilized women in this field by forming Aisyiah.
2. Liberal secular feminism in Islam, for example, was introduced by Qasim Amin. In the west, he was called the 'Father of Arab feminism'. His teachings were a passion for progress that imitated the west and at the same time called for the abandonment of religious doctrines that oppressed and shackled women like the order to wear veils, polygamy, and so on.
3. The radical feminist movements influenced the rest of the Islamic world. These movements were initiated by Fatima Mernisi from Morocco, Nawal Sadawi and Riffat Hasan from Pakistan, Taslima Nasreen from Bangladesh, Assia Djebar from Al-Jazeera, Amina Wadud, and Musdah Mulia.

In liberal and radical feminism, Islam does not pay serious attention to inheritance rights, rights of expression, and socio-political rights. This accusation is easily refuted. Inheritance in the Islamic system which does use the patrilineal route (male lineage) does not completely abolish women's inheritance rights because she inherits from another way, the husband. This is about a man's responsibility after his father dies to take care of his entire family without exception. The burden of being a parent passes from the father to the son who must bear all the costs of living for his family.

In the case of rape, Islam underlines that rapes will be severely punished. The severe punishment is a hundred lashes up to the death penalty. Therefore, in Islamic law, women are truly protected; even if non-Muslim women are later captured and enslaved by Muslims, a small mistake can be a reason to free them.

Thus, transcendental values in terms of gender in Islam as the keywords to understand human rights, especially women's rights, follow the views of Al-Quran and Hadith. This can be seen from the views of Egyptian reformers and Kyai Ahmad Dahlan emphasizing the importance of Muslim young women getting an education in schools and universities so that they know their rights and responsibilities in the development of the Islamic followers. Hasan Turabi stated that Islam also recognizes women's freedom of speech, rights in general elections, the right to attend congregational prayers, the right to participate in war, and so on. These figures, although fighting for emancipation, use Al-Quran and Hadith as the main reference. The difference between the values of feminism in Islam and liberal and radical secular views lies in the spirit to compare masculinity and femininity, which tends to be selfish. This is in contrast to Islam which emphasizes harmonious relations and friendship.

## Conclusion

Legal protection for Indonesian women is still insufficient to prevent the effect of sexual violence, namely the traumatic impact which will last forever for the victims. Many cases of rape become a reflection of us in overcoming moral diseases that often occur, but we cannot provide a deterrent effect yet on the perpetrators. Islam has arranged every aspect of human life from the smallest to the largest. Islam implements a social system that regulates the interaction between men and women, rules to cover the genitals, and prohibition to do sexual intercourse before marriage. Therefore, Islamic followers will be concerned with crimes committed by community elements and can anticipate preventing acts of sexual violence. Furthermore, Islam also applies strict sanctions against perpetrators of sexual crimes.

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