

Constructing Women's Right to Justice in Indonesian and American Criminal Law: A Comparative Study

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Abstract: This article analyzes women's justice rights in criminal law regulation and in relation to criminal punishment. This article is a comparative study between Indonesia and America (Ecuador and Argentina). The conception of human rights is echoed in the international world, but the status of women is still experiencing injustice in the application of law. The purpose of this article is to analyze the construction of Indonesian and American criminal law in providing justice rights for women. The approach used is qualitative, library research, data sources are taken from existing criminal law literature in Indonesia and America. The approach used is a normative study that explores the norms in criminal law in the two countries. The results show that Indonesian criminal law still leaves gender bias articles, the implication is that women suffer from vulnerability in the law. Criminal law in America is also the same, although America has passed the Second Chance Act, Fair Sentencing Act, and First Step Act women and girls are more likely to get legal sanctions than men, patriarchy and skin color still seem to be high factors. Offenses such as intimate partner violence, both physical and psychological.

Keywords: America, Criminal Law, Indonesia, Justice, Women

Abstrak: Artikel ini menganalisis tentang hak keadilan perempuan dalam regulasi hukum pidana dan yang berkaitan dengan hukuman pidana. Artikel ini studi perbandingan antara negara Indonesia dan Amerika (Ekuador dan Argentina). Konsepsi hak asasi manusia digaungkan di dunia internasional, namun status perempuan hingga saat ini masih mengalami ketidakadilan dalam penerapan hukum. Tujuan artikel ini adalah menganalisis konstruksi hukum pidana Indonesia dan Amerika dalam memberikan hak keadilan untuk perempuan. Pendekatan yang digunakan adalah kualitatif, studi kajian secara kepustakaan (library research), sumber data diambil dari literatur-literatur hukum pidana yang ada di Indonesia dan Amerika. Pendekatan yang digunakan adalah studi normatif yang menggali norma-norma dalam hukum pidana di dua negara tersebut. Hasil menunjukkan bahwa hukum pidana Indonesia masih menyisakan Pasal bias gender, implikasinya perempuan mengalami kerentanan dalam hukum. Hukum pidana di Amerika juga demikian meskipun Amerika telah mengesakan Second Chance Act, Fair Sentencing Act, dan First Step Act perempuan dan anak perempuan lebih tinggi mendapatkan sanksi hukum dari pada laki-laki, patriarkhis dan warna kulit nampaknya masih menjadi faktor tinggi. Pelanggaran seperti kekerasan oleh pasangan intimnya, baik fisik maupun sikis.

Keywords: America, Criminal Law, Indonesia, Justice, Women

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Introduction

The 1948 Universal Declaration of Human Rights (UDHR) states that rights and freedoms need to be possessed by everyone without discrimination, including non-discrimination based on sex, men and women have the same degree. (Saparinah Sadli, 2000). The Indonesian Constitution also contains specific human rights provisions in Chapter XA, which consists of Articles 28 A through 28 J. (Sefriani, 2012). (Sefriani, 2012). From here there are at least two things: *First*, the general recognition of equality between men and women, regardless of gender. *Second*, it recognizes the equal rights and obligations between men and women in various fields. (Subhan, 1999). The birth of the UDHR is a reference for international countries in positioning men and women in law to have the same degree in legal regulation.

However, in legal regulations in several countries around the world, especially criminal law, men and women are seen in different positions. This difference is in the context of legal equality rights. This article analyzes the comparison of criminal law between Indonesia and the United States in the context of relations of equality and justice in law. There are fundamental differences between the criminal justice system in the United States and Indonesia which stem from the differences between the *common law* and *civil law* legal systems. Meanwhile, on the technical side, there are differences in the model of criminal procedural law that applies in the United States and Indonesia. In addition, there are also significant differences in the legal structure between the United States and Indonesia.

In Indonesia, the regulation of criminal law is regulated in the Criminal Code. Meanwhile, in the United States, there are two kinds of laws that apply side by side, namely federal *law* that applies to the entire country and *state law* that only applies in the state concerned.

The Indonesian state, in the regulation of criminal law, still has several legal provisions that are gender biased. In the article in question, the article that weakens women is regulated in the Criminal Code, which explains violence that results in loss of life or crimes against life. This means that the Criminal Code does not recognize the concept of violence that results in or is related to things other than the body and life, for example verbal violence that results in women's mental health. (Savitri, 2008). In addition, the weak position for women in the Criminal Code can also be found in the term of Rape, which regulates the act of rape only includes male acts against women who are not bound in marriage. In fact, the act of rape against women within the bonds of marriage may also be committed by the husband himself. However, in this case, it is not considered a crime by society, due to the role and position of the wife who has an absolute obligation to always be ready to serve her husband in marriage.

Even the new Criminal Code agreed upon by the government and the House of Representatives has been criticized by many, including Komnas Perempuan. The Chairperson of Komnas Perempuan, Andy Yentriyani, said that although the new Criminal Code contains several provisions that bring progress, there are still problematic articles related to efforts to handle sexual violence, eliminate gender-based discrimination, and fulfill basic rights. This condition puts the Criminal Code at risk of overcriminalization, violating women's rights and other civil liberties.

As for America, the country has actually made great progress in recent years in terms of gender equality, but with discriminatory laws still in place and high rates of sexual and gender-based violence in the world, there is still much to be done. *Quoting Equality Now: A Just Word for Women and Girls*, explained that the Americas, which includes North America, Central America, South America, and the Caribbean, in this region many women and girls are

not fully protected by national or international law. It is common in the region that many women and girls are not fully protected by national or international law. Not all countries have ratified international human rights standards and treaties, there are no explicit protections for women in the US Constitution, and women and girls in the region continue to experience very high rates of sexual violence, coupled with a lack of effective access to justice, particularly for adolescent girls. (<https://equalitynow-org.translate.goog/americas/>)

This article complements the results of previous studies. Previous research was written by (Soediro, 2019) This research analyzes the comparison of criminal law between Indonesia and America in the context of the criminal law system, the focus of this article is on the enforcement system and the criminal process and institutions related to the criminal law system in both Indonesia and America. Other research by (E. Susanto et al., 2023) This research is a comparison of laws in three countries. There are similarities and differences in the regulation of the crime of rape in Indonesia, South Korea and the United States. The similarities lie in: First, the regulation of rape with violence or threat of violence; Second, rape of a minor. While the differences that can be compared are: 1) Rape of disability; 2) the element of consent; 3) Length of sentence; 4) Object of Rape; 5) Inbreeding Rape; and 6) Marital Rape.

The research *gap* is different from the study of this article, the novelty of this article study emphasizes the analysis of the status of legal equality rights for women in criminal law. This analysis focuses on the provisions in criminal law relating to the protection of women's rights. This analysis aims to see the extent to which criminal law regulations provide equal relations between women and men in the context of the rule of law. This comparative legal study is to see how Indonesia and the United States in placing the status of women in law, this study is to see between Indonesia and America more *equality* in efforts to protect women.

Methods

The article uses a qualitative method, with in-depth analysis related to the phenomenon of women's conditions in legal regulations, this analysis emphasizes the position of women seen from the perspective of justice, women's rights and often neglected. The law in this article focuses on the regulation of criminal law in Indonesia and America. Two countries are studied to see how far these two countries provide legal constructions with a women's human rights perspective.

Qualitative research that focuses on legislation, the type of approach used is a normative approach. Legal norms become a reference to the extent to which they provide equal position of women in regulations, especially criminal law. This article is a literature study or commonly referred to as *library research*, which explores data sources from literature related to women's justice in criminal law. This is a secondary data source taken from several research results and international scientific journals related to the study of this article. The data analysis technique uses a deductive framework, which is based on general to specific facts. General facts in the sense of criminal law regulations as norms that regulate the rights of citizens are then drawn in empirical cases related to the conditions of women's justice. Deductive data analysis is analyzed qualitatively using the theory of justice.

Results

The Ratification of the Indonesian Criminal Code Leaves a Problem

Quoting the National Commission on Violence against Women (Komnas Perempuan), that the ratification of the Criminal Code (KUHP) contains a number of advances, but on the other hand Komanas Perempuan also regrets that the ratification of the Criminal Code leaves

various problems in terms of upholding women's human rights, including to be free from discrimination on any basis, including on the basis of gender, and also the protection of basic rights that affect women's lives.

The Criminal Code approved by the House of Representatives (DPR) together with the Government has the potential for *overcriminalization*, which can disproportionately harm women and legitimize criminalization practices against women. This result is suspected to be caused by the lack of full participation from the public in the form of constructive dialogue in understanding and compiling the RKUHP as a codification of national criminal law that is in line with other international and national human rights instruments.

Komnas Perempuan has been monitoring and providing advice and recommendations to the government for the Criminal Code on an ongoing basis since the 2014-2019 period of the Indonesian Parliament and the 2020-2024 period. This is a realization of Komnas Perempuan's mandate as a national human rights institution focused on eliminating all forms of violence against women and promoting women's rights. Komnas Perempuan's duties and authorities include providing advice and considerations to the government and legislative institutions to encourage the preparation and amendment and/or renewal of laws and policies that support efforts to prevent and overcome all forms of violence against women.

Listening to the results of the joint agreement of the House of Representatives and the Government regarding the revision of the Criminal Code, Komnas Perempuan appreciates a number of advances that can strengthen the fulfillment of rights that will contribute greatly to the fulfillment of women's rights to guarantee security and freedom from violence, including:

1. Adopt a definition of rape in line with international law that covers a wide range of acts of forced sexual intercourse and takes into account the particular vulnerabilities of women victims, including helplessness, disability and in marital relationships;
2. Expand the guarantee to terminate unwanted pregnancies from only for medical reasons and for victims of rape to also for all victims of sexual violence and up to the gestational age from 6 weeks to 14 weeks;
3. Lighten the punishment for women who abandon their children shortly after birth for fear of the birth of the child being discovered by others with the intention that the child will be found by others or with the intention of relinquishing their responsibility for the child born (Article 430) or who take the life of their child at the time or shortly after birth for fear that the birth of the child will be discovered by others (Article 460). This is considering that such conditions are usually found in relation to sexual violence, especially victims of rape and exploitation.
4. Has a linking article with the Sexual Violence Crime Law so that victims in a number of Criminal Code articles related to sexual violence can also enjoy their rights as stipulated in the TPKS Law.

However, despite some progress in the formulation of articles related to violence against women, Komnas Perempuan still notes a number of problematic provisions related to efforts to deal with sexual violence, eliminate gender-based discrimination and fulfill basic rights. This condition puts the Criminal Code at risk of *overcriminalization*, violating women's rights and other civil rights freedoms.

Gender-Based Violence in America

Gender-based violence (GBV) is a complex social and public health issue, which is a violation of human rights. Globally, GBV tends to occur in intimate partner relationships. Latin American countries report high rates of this violence. Despite social and historical

differences, Ecuador and Argentina are among the Latin countries aiming to abolish patriarchy.

Gender-based violence in Ecuador and Argentina takes many forms (physical, psychological, verbal and sexual), and can occur in public spaces (*work, streets, schools*) or private spaces (*family and intimate partner relationships*). (Joselyn Pispira, Jazmín Cevalco, 2021).. However, the World Health Organization (Organization, 2021) highlights, GBV is highly prevalent in intimate partner relationships: 27% of women aged 15-49 years have experienced physical and/or sexual violence perpetrated by their intimate partner. Although these countries do not share the same borders, and have social and historical differences, they both exhibit similar patriarchal cultural beliefs (*men represent power and strength in the public and private spheres*', *women should focus on nurturing and motherhood*', and *women should focus on mothering*'). (Bucheli & Rossi, 2019).

In Ecuador, the National Survey on Family Relations and Gender-Based Violence Against Women conducted by the National Institute of Statistics and Censuses showed that:(Censuses, n.d.)

Table 1: Statistics of Violence Against Women

| | |
|------------------|---|
| Ecuador | |
| 56,9% | Ecuadorian women have experienced psychological suffering |
| 5,4%, | Physical |
| 32,7% | Sexual violence |
| 42,8% | Women have experienced violence perpetrated by their intimate partners. |
| 32,7% | Related to domestic violence, |
| Argentina | |
| 86% | The most common form of violence is psychological violence |
| 56.3% | Physical abuse |
| 16.8% | Patrimonial |
| 20,1% | Symbolic |
| 7,5% | Sexual |

These data suggest that intimate relationships with partners can pose vulnerabilities and risks for women, and even end in homicide (Garcia-vergara et al., 2022). (Garcia-vergara et al., 2022).. Globally, a woman or girl is killed by a family member every 11 minutes. Fifty-eight percent of these crimes are committed by their intimate partners. These crimes are legally considered *murder of women*, as they demonstrate a sense of ownership over *women's* bodies and lives. In short, the high rates of GBV show that it is part of a cultural system that reproduces gender stereotypes and prejudices. Although Ecuador and Argentina have recently implemented laws to penalize GBV, they still need to develop public policies to prevent it. Therefore, it is important for the scientific community to engage in research that contributes to the prevention of this social problem.

Discussion

Protection of Women in Indonesian Criminal Law

Indonesian criminal law regulations explain most of the acts related to violence contained in Article 89 of the Criminal Code which is included in Chapter XIX, namely violence that results in loss of life or crimes against life, Chapter XX violence against the body or maltreatment and Chapter XXI on negligence that causes death. The violence regulated in the aforementioned chapters and articles only relates to the concept of violence against the body or life.

This means that the articles in the Criminal Code do not recognize the concept of violence that results in or is related to something other than the body and life, for example violence that results in a person's spikis, violence over a person's economic authority and violence related to reproductive organs or sexual violence for women. (Savitri, 2008).

The violence outlined in these chapters is not specifically targeted at victims of a particular gender or age. Thus, violence directed specifically at female victims is not included in the formulation of crimes of violence as set out in the three chapters. (A. F. Susanto, 2005).

Based on this idea, law formulators or law enforcers will apply it to concrete cases based on the meaning that has been standardized in the formulation and in the text. Thus, the violence contained in the formulation of the Criminal Code is narrowed through the meaning given through the text in Article 89 of the Criminal Code, and is interpreted as if there is no other meaning of violence other than that formulated in Article 89 of the Criminal Code.

For example, Article 285 of the Criminal Code on Rape, which regulates the act of rape to only include male acts against women who are not bound by marriage. This is largely accepted based on the view that rape against women within the bonds of marriage is not possible. This is due to the role and position of the wife who has an absolute obligation to always be ready to serve her husband in marriage.

The Criminal Code only regulates criminal acts of violence that result in physical injury, either resulting in death or injury. Thus, no special arrangements are given in the form of aggravated sanctions, for example, if the victims are women who are sociologically subordinated marginalized by the perpetrators, nor are arrangements given for criminal acts of violence that do not result in victims being physically injured, such as sexual harassment, reproaches or verbal violence which results in more psychological harm. The 1995 UN International Declaration on the Elimination of Violence has expanded the definition of violence to include not only physical violence, but also psychological and sexual violence.

In addition to the above, the new Indonesian Criminal Code also leaves many dynamics against women's rights. This has the potential to lead to excessive criminalization. There are at least four gender-vulnerable notes for women in the Indonesian Criminal Code passed by the DPR, which can be formulated in the table below:

Table 2: Deficiencies of the Indonesian Criminal Code

First, the crime of sexual abuse is still placed as a crime of decency. The crime of sexual abuse is more appropriately placed as a crime against the body because it is full of sexual violence. Moreover, there is a special article that states that all acts of sexual abuse and acts of facilitating sexual abuse are criminal acts of sexual violence.

Secondly, there is no connecting article between the running away of children and women for the purpose of marital control and Law No.12 of 2022 on the Crime of Sexual Violence. Article 454 of the Criminal Code only prohibits taking a woman away by deception, force or threat of force, with the intention of ensuring control over the woman, either inside or outside marriage. This action is included in the act of coercion of marriage regulated in the TPKS Law.

*Third, the new Criminal Code ignores the rights of victims of sexual violence because there is no formulation of criminal acts of forced prostitution and forced abortion. The act of forced prostitution is mentioned in Article 4 paragraph (2) letter f of the TPKS Law as an act of sexual violence regulated in other laws, but it is necessary to refer to the TPKS Law as a *lex specialis* in handling it. Given that the Criminal Code does not formulate it, the act of forcing prostitution cannot be punished. Among others, the crime of sexual abuse as a crime of decency, neglect of the rights of victims of sexual violence due to the absence of the formulation of the crime of forced prostitution and forced abortion.*

Fourth, the reduction of privacy rights in marriage and over-criminalization of adultery. The criminal offense of adultery in Articles 411-413 contains three prohibitions, namely cohabitation with a person who is not her husband or wife; cohabitation as husband and wife outside of marriage; and cohabitation with a member of her biological family. Despite being a complaint offense, where only the husband or wife in the event that the perpetrator is bound by marriage or parents or children in the event that the perpetrator is not bound by marriage, the criminalization of sexual relations outside of marriage and cohabitation violates a person's right to privacy. The crime of cohabitation, or living in a household without marital ties, has the potential to criminalize women disproportionately. The application of the cohabitation article can target women who choose not to be bound by the institution of marriage for various reasons and unregistered marriages such as religious marriages (siri) and traditional marriages.

Women, as a group in society within a country, are a group that must also be guaranteed their human rights. In Indonesia, the guarantee of human rights in general can be found in the 1945 Constitution of the Second Amendment to Article 28-A-J, and Law No. 39 of 1999 concerning Human Rights, more specifically the guarantee of women's rights can be found in Law No.7 of 1984 concerning the Ratification of the *Convention on the Elimination of all Forms of Discrimination Against Women*, commonly referred to as the Women's Convention or the Women's Convention or the CEDAW Convention. (Habib Shulton Asnawi and M. Anwar Nawawi, 2022).

Protection of Women in American Criminal Law

The US government takes a strong and vocal position on international human rights violations in other countries. But when it comes to upholding the legal rights of women and girls in their own country, there is a stark contrast. The absence of clear constitutional protections for women in America leaves them vulnerable to abuses.

It also makes their hard-won legal rights easier to revoke, as demonstrated by the rollback of women's human rights in recent years. This adverse setback and the increased risk of enacting more discriminatory laws is because the American Constitution does not sufficiently uphold equality based on sex.

Quoting (<https://equalitynow-org/>), most Americans do not realize that the human rights of women and girls are not guaranteed in the US Constitution. This is despite their profound and life-changing impact. Girls are most affected by the absence of a strong legal foundation to oppose and combat harmful cultural practices such as child marriage, which is still legal in 37 states. More than 300,000 minors some as young as ten were married in the US between 2010 and 2018. 86% of these minors were girls, and most were married to adult men.

The condition of women in the criminal justice system is very vulnerable. This can be seen in the data on women in American prisons. The data shows that the number of women and men in the criminal justice system is much different.

Citing Farney's research, more than 1,000,000 women in the United States have experienced legal problems, and are currently under the supervision of the criminal legal system (CLS), with the majority on probation or parole. (Aday & Farney, 2014).. Since 1980, the number of women in prison has increased by more than 800%, twice the rate at which the number of men has decreased (Carson, 2020). (Carson, 2020). Similarly, the male prison population decreased by 9% from 2008 to 2018, while the female prison population increased by 15%. (Zeng Z, 2021).

In addition, according to Mayer, women involved in CLS (WICLS) have high levels of mental and physical health conditions, socioeconomic challenges, and a history of trauma and

violence. (Meyer JP, Zelenev A, Wickersham JA, Williams CT, 2014).. These high rates are a consequence of pre-incarceration factors, including poverty, structural racism, and inadequate access to healthcare; limited prison and jail health services; and the health impacts of the carceral system itself (Binswanger I, Now, 2014). (Binswanger I, Nowels C, Corsi K, Long J, Booth R, Kutner J, 2011).. Broader efforts to address women's health equity should include WICLS, who are often excluded from public health programs, policies and initiatives.

Girls and young women of color are particularly vulnerable to legal problems. Legal problems that are often faced, especially by girls, are cases of sexual harassment committed in prison (Marquardt, 2020). Girls make up only 20% to 25% of the juvenile CLS population, yet 50% to 66% of those involved in the juvenile criminal justice and child welfare systems are girls (Saar MS, Epstein R, Rosemary R, Rosemary R). (Saar MS, Epstein R, Rosenthal L, 2015).. WICLS face a 95% history of violence and trauma, including sexual assault and intimate partner violence. Nearly 40% of WICLS meet criteria for post-traumatic stress disorder, and research suggests that untreated post-traumatic stress contributes to women's differential pathways to incarceration and recidivism (Baranyi et al., 2018). (Baranyi et al., 2018).

These data show that women in America are vulnerable to legal treatment in America. Yet America has formulated bipartisan criminal justice reform legislation, which includes WICLS health improvements, gaining support. *The Second Chance Act, Fair Sentencing Act, and First Step Act of 2018* have been passed. The Dignity for Incarcerated Women Act, which focuses on wellness, visitation, programming, supervision, and telecommunications, was reintroduced by Senators Elizabeth Warren and Cory Booker in April 2019.

Today, 85% of UN member states have provisions in their constitutions that specifically address gender equality. In 2023, leading women's rights organizations Alliance for Universal Digital Rights (AUDRI), Equality Now, ERA Coalition, Unchained At Last, and the US End FGM/C Network made a joint submission to the UN Human Rights Committee raising concerns about various issues in the US, including child marriage, FGM, and the lack of constitutional equality in the country.

It was encouraging to see that the Committee's review of the United States included many of the points outlined in the submission. Their statement included calling on the US to "guarantee protection against sex and gender-based discrimination in its Constitution," with the inclusion of the ERA. The recommendations also include encouraging countries to "pass laws prohibiting and criminalizing all forms of FGM," and "prohibiting marriage under the age of 18."

In addition, the Committee recommended that the US ratify the Convention on the Elimination of Discrimination Against Women (CEDAW), an important international legal treaty that strengthens countries' commitment to upholding the rights of women and girls. The US remains one of the few countries that has not ratified CEDAW. The ERA is a means to ensure the human rights of everyone in the US are protected at the national and state levels and safeguarded in the future.

Conclusion

The Indonesian Criminal Code only regulates criminal acts of violence that result in physical injury, either resulting in death or injury, thus no special arrangements are given in the form of aggravating sanctions, for example, if the victims are women who are sociologically subordinated marginalized by the perpetrators, nor are arrangements given to criminal acts of violence that do not result in victims who are physically injured, such as sexual harassment, reproaches or verbal violence that results in more psychological harm. The Criminal Code approved by the House of Representatives (DPR) together with the

Government has the potential for *overcriminalization*, which can harm women disproportionately and legitimize the practices of criminalization against women.

The condition of women in the material and formal criminal law system in the United States is also still very vulnerable, this can be seen in the data on women in prison institutions in America. The data shows that the number of women and men in the criminal justice system is much different. More than 1,000,000 women in the United States experience legal problems, and are currently under the supervision of the criminal legal system (CLS), with the majority on probation or parole. These high rates are a consequence of pre-incarceration factors, including poverty, structural racism. Girls and young women of color are particularly vulnerable to legal problems. A common legal problem faced by girls in particular is sexual abuse committed in prison. Yet America has formulated bipartisan criminal justice reform legislation, which includes improving the health of WICLS, gaining support. *The Second Chance Act, Fair Sentencing Act, and First Step Act of 2018* have been passed. The Dignity for Incarcerated Women Act, which focuses on wellness, visitation, programming, supervision, and telecommunications, was reintroduced by Senators Elizabeth Warren and Cory Booker in April 2019. In 2023, leading women's rights organizations Alliance for Universal Digital Rights (AUDRI), Equality Now, ERA Coalition, Unchained At Last, and US End FGM/C Network made a joint submission to the UN Human Rights Committee raising concerns about a range of issues in the US, including child marriage, FGM, and the lack of constitutional equality in the country.

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