ANALYTICAL APPROACH ON THE LAW REGARDING SEXUAL VIOLENCE BETWEEN INDONESIA AND THE UNITED KINGDOM

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Abstrak
Criminal deeds bring disaster to the life of the people in general, and rights of many are to be stripped of from them without their consent which is then becomes the urgency on why criminal law needs to be enacted and applied. In its provisions, criminal law regulates about sexual violences. It has a potential to caused harm both physically and mentally towards its victim. However, the problem with the system is that at some point, the ideal justice is not met in its enforcement. Indonesian constitution is yet to enact a regulation to restrain or to impose more assertive measures on sexual violences. One of the examples is how rape is recognized only if the victim is a woman who is not the wife of the perpetrator. This idea does not fully protect the right of others who becomes a victim of sexual assault which doesn’t fulfil the ideal justice within the constitution. Comparing to how the United Kingdom sentenced Reinhard Sinaga to prison for life as the consequences of his deed, the authors want to create a comparison on the criminal law in both countries based on Rome Statute of ICC and to discover in what way can Indonesia’s criminal law improve.

Keywords: Criminal Law; Rome Statute; ICC; Sexual Violence.

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I. INTRODUCTION

Status Quo shows that Criminal deeds are seen in the society as the root of problems in many sectors. It brings disaster to the life of the people in general, and rights of many are to be stripped of from them without their consent. Assuming that this goes on without being handled, the society is going to be built under a general norm where it is okay to oppress the right of others. These are the basic urgencies on why criminal law is needed in the society, which is to serve its function to protect the people from oppression. Criminal Law is recognized by the government as a codified law. The regulation is applied in the state’s territorial scope unless it is otherwise specified. There is no exact definition on what is criminal law. Pompe’s opinion describes criminal law as regulation that determines the deeds that are considered as a criminal and describes what are the varieties are there within Criminal Law. Simons opine criminal law as orders and prohibition by the states that is threatens with punishments. (Bakhtiar et al., 2014) In general, criminal law is a regulation that binds and forces the people to obey by the existence of its consequences and punishments. The law then
would be passed on and progressively develops by time in order to adjust with their new emphasis on human rights and its treatment to uphold justice and protect the society.

Every state possesses its own independence to regulate their governments and people. This means in its application of criminal law also varies one country to another. United States regulates their criminal law under their Penal Code. Germany has their code enacted in 1975 and is known as Strafgesetzbuch. The consequences of adopting their own codification, this implies that every state diverse in their definitions in criminal code and have their own definitions of offences in example, on the idea of what is self-defense, necessity, negligence, insanity, and more.(Fletcher, 1998) The writer assumes that the diversity of its contents and provisions are based upon the idea of how society in every state was build upon different norms and general principles.

In its provisions, criminal law regulates about sexual violences. The mentioned criminal deed arises as we are facing the crisis of humanity. Survey conducted by the United Nations women shows that at least 35% of women had experienced physical and sexual violence at some point of their live.(Shabrina, 2018) Another research conducted on rural area entitled “Silence for the Sake of Harmony” Reveals that the lifetime and current prevalence of sexual violence were 22% and 12%. (Hayati et al., 2011) Aside to that, children and minors are also vulnerable to sexual harms. One of the living case is Saipul Jamil’s male minor victim. This shows that sexual violence can be committed anywhere. Be it at home, school, even in public places to anyone without exception, everyone is at harm. It is yet common to find that the perpetrators were people who are close to the victim. Despite the situation being, Indonesian constitution is yet to enact a regulation to restrain or to impose more assertive measures on sexual violences.

Sexual violence has a potential to caused harm both physically and mentally towards its victim.(Hilmi, 2019) It is not a rare case when one becomes a victim of sexual misconduct, it then becomes a traumatic memory that will reappear and haunts them.(Soponyono, 2019) In other perspective, sexual violence also violates an individual’s human right. (Purwanti & Zalianti, 2018) Despite the existence of the law, the problem with the system is that at some point, the ideal justice is not met in its enforcement. In other words, the deeds and the punishment that were given aren’t equitable in its comparison. Root of the problem arises either from the formal law, which tell about how the trial was held and also on how several deeds and action weren’t covered thoroughly within its codification. For example, in comparison of sexual assault cases that was conducted by Reinhard Sinaga.

Indonesian Criminal Law only recognizes rape The Criminal code article 285 which reads as follows:

“Barangsiapa dengan kekerasan atau ancaman kekerasan memaksakan perempuan yang bukan isterinya bersetubuh dengan dia, dihukum, karena memperkosa, dengan hukuman penjara selama-lamanya dua belas tahun”
The article implies that rape cases that are recognized in Indonesian Criminal Law are only if
the victim is a woman who is not the wife of the perpetrator. The problem with this the article is on
how it doesn’t provide the protection towards the rights that is needed in the status quo as a victim of
a sexual violence, especially in rape cases where the victims are not exclusive to women who is not
the wife of a perpetrator. In example, when cases such as homosexual assault occur, it is seen not as a
rape cases, but as fornication. Fornication on Homosexual assault is regulated on Article 292 of
KUHP which reads as follows:

“Orang dewasa yang melakukan perbuatan cabul dengan orang lain sesama kelamin, yang
diketahuinya atau sepatutnya harus diduganya belum dewasa, diancam dengan pidana
penjara paling lama lima tahun.”

The article refers that when a homosexual assault occurs, the perpetrator can only be convicted
maximum of 5 year of prison. The authors believe that despite the types of sexual violences that
happen, the victim will suffer physical and psychological consequences that are the same as when it
happens to women who are not married to the perpetrator as how it was regulated in Article 285 of
KUHP. Ironically, the perpetrator of each kind of sexual assault faces different kinds of consequences
for their action. The authors believe that this does not fulfill the idea of justice in the Indonesian
Criminal Law enforcement.

Reflecting from the case of Reinhard Sinaga, who is a serial rapist in Manchester, United
Kingdom that was convicted for 136 rape cases on 48 men, 44 of them repeatedly between 2015 and
2017, he was sentenced prison for life as the consequences of his deed. Assuming that the sexual
assault happens in Indonesia, the maximum conviction that the law could pass on towards Reinhard is
5 years of prisontime. The authors believe that how the United Kingdom prosecuted the criminal law
could be a reference for Indonesian criminal law to improve as an embodiment of the States
commitment to protect the rights of its people. Thus, the authors are inspired to conduct a research
that is titled “Analytical Approach on the Law Regarding Sexual Violence between Indonesia and the
United Kingdom”

In accordance to the background of the study, the authors intended to reach the following goals
as the output of the research:

1. To discover how sexual violence is regulated in Indonesia
2. To discover how sexual violence is regulated in the United Kingdom
3. To explore in what way sexual violence regulation can be improved in Indonesia

II. RESEARCH METHOD

The paper applies normative legal research design. Normative legal research is a research
design in which the process of the research has the goal to discover a certain rule of law, principles, or
doctrine to solve a current legal issue. (Mahmund Marzuki dan Peter Mahmud, 2011) Normative legal
research is also known as the literature study or doctrinal research due to its connection to literature and secondary data which consist of published paper, related journal and also statutes. Thus, the approach that is conducted within this design is a statute approach. The processing of the information will be from the legal material obtained from literature review to be analyzed. The legal material obtained that was achieved later would be classified and grouped in order to form a systematic drafting. This will then accumulate to create a Descriptive analysis. The descriptive analysis will be presenting the research result in a systematic overview towards the given case from the factual reports and issues.

As the research will be conducted with the research design of Normative Legal Research, the research object of the paper will consist of secondary data. (Sonata, 2015) The mentioned secondary data comes in form of legal material such as Statutes, Legal Studies, Previous Researches, and many more literature references. In this case, the research will be conducted on the legal instruments between Indonesia and the United Kingdom in terms of the respective state’s criminal code.

The data collection technique that will be conducted will be through literature review. The literature will be obtained from related legal studies and research, which is in this case, criminal codes that binds and regulate about sexual violences in the two states and also from previous researches in regards of sexual violences in both Indonesia and the United Kingdom specifically that discuss and represents rape cases.

The conducted research will apply the qualitative data analysis method. The authors will collect necessary information involved with the research and will analyse the problem within the existing system and codification. The research is intended to gather important information that could illuminate the inner workings of a foreign legal system. In this case, the object of research will be the Penal code in Indonesia and the United Kingdom.

III. RESULTS AND DISCUSSION

3.1. Sexual Violence Protection in Rome Statute of International Court of justice

Rome Statute is a treaty that established International Criminal Court. The establishment was adopted from a conference that was held in Rome, Italy back in 1998 and has come to force in 2002. The statute is a product of a five-week diplomatic conference in Rome. The Parties in its statutes has comes upon a conscious that humans are united in common bonds and had culture pieced together in a shared heritage that could be harmed by any time. The statute was made in a awareness of how men, women, and children has become a victim of unimaginable tragedies that is done and isn’t in line with how humanity should live by. (Schabas, 2010) It is believed that the heavy crime that was committed shall not be let unpunished and their prosecution must be done effectively by every state as they must end such impunity and prevent such crime from arising. This was done in the consideration of how it is the moral obligation and a responsibility of a state to excersise their criminal jurisdiction.
Within the jurisdiction of the court, there are several accordances within the statute. Meaning, there is a limitation on what can be brought in to court. According to article 5 of the statute, the limitation of the court’s jurisdiction is to only the most serious crimes that are concerned by international community as a whole. The mentioned “most serious crime” in this article is grouped in to 4 parts, and they are: The crime of genocide; Crime against Humanity; War Crimes; Crimes of Agression.(Cryer, 2000)

Within article 7 of the statute, Crime against Humanity is then grouped into several provisions. What is then becomes the specific interest within this paper is in regards of sexual violence, which is mentioned in Article 7.1. (g). Which means all deeds that are considered as “Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;” is recognized as a Crime against Humanity. The humanitarian Norm that regulates basically implies the prohibition of crime towards the pride and honor of womans and not only limited to torture.(Rehatta, 2014) This implies that sexual violence and deeds correlates to sexual misbehavior are classified in the statute as a Crime against Humanity. In line with the aspiration and concern on the statute’s urgency, thus a national jurisdiction must have an effective prosecution within the criminal court.

Rome Statute also regulates on penalties on article 77. The applicable penalties that could be imposed for crimes mentioned in article 5, the convictee will be eligible to be punished in several ways, which are:

1. Imprisonment up to 30 years,
2. Lifetime imprisonment when it is justified by the extreme weight of the crime
3. A fine which fulfils the criteria under the Rules and Procedure of Evidence
4. A forfeiture of proceeds, assets and property

In line of to determine the sentence mentioned in article 77, the court shall take into account the weight of the crime, individual factors of the convictee and other terms that is regulated in Rules and Procedure of Evidence. Thus, in order for a court to determine a sentence, a thorough investigation must be made.

The Rome Statute of International Criminal Court is a treaty. It means that it acts as a soft law. Its role is to become the guidance towards the national court and jurisdiction to enforce crimes, especially most serious crimes as regulated in Article 5. It is then found that the general ideas of Most Serious Crimes that is regulated in the statute Is adopted in many countries, even ones that doesn’t signed the statute including Indonesia.

3.2. Sexual Violence Protection in Indonesia

Indonesia is a state with Civil Law System. This means that the state recognizes written regulation as the primary source of law and codified statutes predominate. It is easily distinguishable
between Civil Law System and Common Law System, whereas the primary source of law is made by
the judge’s findings. In Common Law System, the court’s decision and findings will have
significance and impact into other cases that were similar with the condition of the cases is within
the same jurisdiction. In common Law System, judges hold an important role in creating new
law. (Octora, 2016) The Civil Law system is also known as the codified law. It means that the law
enforced is strictly based on what is written within the positive law. This means, the only way a court
can conduct a law finding, is when a certain case isn’t exclusively being regulated within the positive
law.

Indonesian constitution recognizes the enforcement of Human Rights. The enforcement of
human rights in Indonesia is regulated under the article 28 of the constitution. However, there were no
thorough explanations there. (Haryanto et al., 2013) This is what then regulated in Undang-Undang
No.39 Tahun 1999 tentang Hak Asasi Manusia which regulates about the human right which includes
rights to feel safe. Article 4 of the regulation describes as follows:

“Hak untuk hidup, hak untuk tidak disiksa, hak kebebasan pribadi, pikiran dan hati nurani,
hak beragama, hak untuk tidak diperbudak, hak untuk diakui sebagai pribadi dan persamaan
di hadapan hukum, dan hak untuk tidak dituntut atas dasar hukum yang berlaku surut adalah
hak asasi manusia yang tidak dapat dikurangi dalam keadaan apapun dan oleh siapapun. “

Within the explanatory of the article, it is mentioned that the right not to be sued based on
retroactive law can be excluded in the case of most serious crime of human right classified under
crimes against humanity. This means that in general, the regulation also recognizes the same idea in
the context of Crime against humanity. Thus, the term of sexual violence and its similar deeds are also
recognized as crime against humanity in Indonesian Criminal Law.

Indonesia recognizes sexual violence within its criminal code. Indonesia criminal code (known
as Kitab Undang-undang Hukum Pidana / KUHP) is the primary legal source for criminal law in
Indonesia. It regulates what are the elements of crimes, sentences, penalties for the convictee. The
criminal code is divided into 3 parts. The first part concerns General Provisions; the second part
describes Crimes; and the third part which regulates about Misdemeanors. The current existing
criminal code that is applied to this day is a heritage from the colonialism era. The criminal code itself
is a product of Dutch Government that is enacted in Indonesia. In Netherlands, the Code itself is
known as Wetboek van Strafrecht (WvS). One of the purposes of the law is to create a possibility for
the release of emotions that are arroused by the crime. (Toelle, 2014)

Criminal law has to be applied and enforced based on legality principles. The principle of
Nullum delictum noella poena sine praevia lege poenali, has been listed in Article 1 paragraph (1) of
the Criminal Code, “No act shall be punished unless by virtue of a prior statutory penal provision”.
That means, no act prohibited and punishable by advance if it is not stated in the rules of law,
furthermore also contain no analogies principle in determine the existence of a criminal act, and principle of no retroactive. (Haryanto et al., 2013)

Sexual violence is regulated in the second part of the Criminal Code, which regulates about crimes. The code regarding sexual violence is regulated in the chapter of Crime against morality. Specifically, sexual violence is regulated on article 285-297. The articles describe the classification of sexual violences, the elements and the eligible penalties.

What is then found within the provisions of the articles are that there are some elements within the criminal code that doesn’t exclusively include every aspect of sexual violences. Article 285 of Indonesian Criminal Code, it is regulated that one is convicted of rape if the deed is conducted violently by a married man on a woman who is not his wife and is threatened with 12 years of imprisonment. The non-exclusivity is as follows:

1. The perpetrator can only be married man, this has excluded the fact that rape can also be done by either woman or even an unmarried man. This generalizes that rape is only conducted by a man which is factually incorrect.
2. The victim of a rape is limited to only woman who is not the wife of the perpetrator. This neglected the protection from rape towards many actors, especially those who are a victim of homosexual rapes that where the perpetrator cannot fully be punished as it is not regulated.

The non-exclusivity then becomes restraints for certain victims of sexual violence from getting the protection they need and the eligible punishment for the perpetrator. In terms of when a homosexual rape occurs, the only article that regulates and binds homosexual violence is only article 292, where the perpetrator is only threatened with 5 years of imprisonment. This reflected that there is an imbalance in enforcement of justice within the criminal code, specifically in regards of sexual violences as the codified law has a stiff perspective on how it must be upheld despite the imbalance of punishment weighting and distribution. Due to this, it is very common to find that when a victim of homosexual assault speaks up and reports to the authority, it could not be processed due to the absence of the regulation. This also happens because of the stigma that homosexual doesn’t recognize rape (Aulia & Afifah, 2019) This results in the small number of reports of sexual assault. It is found that only 30% of women and 15% of men who were a victim of sexual violence speaks up about the deeds. (Weiss, 2010)

3.3. Sexual Violence Protection in the United Kingdom

The United Kingdom has a legal system of common law. It means that the source of law is sourced from body of law created by judges and similar quasi-judicial tribunals by virtue of being stated in written opinions. A common law court looks to past precedential decisions of relevant courts, and synthesizes the principles of those past cases as applicable to the current facts. If a similar dispute has been resolved in the past, the court is usually bound to follow the reasoning used in the prior
decision. The United Kingdom does not have a Criminal Code. However, there were proposals that were recommended. Many criminal offences that were conducted in Common law countries are being sourced from the jurisdiction by previous courts rather being specified in legislation. These legislations are what then concern offences, their prevention and the consequences. In comparison to courts in Civil Law System, the judges in Common Law Countries possess more independence in passing down the judgement as there is no written criminal code to refer to.

Sexual violence can also be found occurring in the United Kingdom. One of the most horrifying cases of assault is the one conducted by an Indonesian named Reynhard Sinaga. Sinaga is convicted for 136 homosexual offenses, in related to 44 victims. The conducted offense was done in the timespan of two and half year.

The 37 years old man lives in a flat in Manchester, England near a nightclub where he found most of his victims. He would target males in the late teens and early 20s. He convinced his victims to attend his flat using number of methods; Most of the sexual misconduct was done by drugging. The drug was later found by the judges to be a date rape drugs. The drug was addressed to make the victim unconscious, and by then, Sinaga conducted the homosexual violence by anal penetration on his victims. In most occasions, Sinaga doesn’t wear condoms and ejaculated in the anus of his victims. The conducted raped were also found to be filmed a photographed by Sinaga which shows that the victims were unconscious. Sinaga is also found to have taken the belongings of his victims such as items of personal properties. Most victims suffer loss of memories, which then becomes the reason why there were no reports on his misconduct. The case came to light in June 2017 when one of the victims was awake while Sinaga was positioned naked behind his back. The matter was then reported to the police. When interviewed by police, Sinaga denies that there is an attempt to assault and that the victim has consented. The police then discovered other victim’s identity from the gathered evidence, such as from pictures, films and from he objects that was taken by Sinaga. Some of the victim only realized that they were assaulted when they were contacted by the police. The assault has result in a significant psychological harm towards the victim. Some were reported to have seriously contemplated on suicide as the result of the assault.(Newton, 2015)

In the first conviction, it is stated that Sinaga presents a high risk of harm and is labelled as very dangerous. His denial and other trials that are pending make it not likely for him to make any progress in probation and prison services. Due to such conclusions, it is later found that Sinaga is sentenced to lifetime prison. Based on the case of Reynhard Sinaga, it is found that there are measures that were taken within the findings in the trials that Sinaga is a dangerous sexual predator that is too dangerous to be released.
3.4. Improving Sexual Violence Regulations in Indonesia

Within the result of the research, it is then found that the problem within the Indonesian Sexual Violence lies within how it was regulated within the current criminal code. It restraints for certain victims of sexual violence from getting the protection they need and the eligible punishment for the perpetrator.

In Rome Statute of International Criminal Court, Sexual violence and its similar deeds are categorized as Crime against Humanity. The measure and regulation did not specifically limit the definition of who are the victims of sexual violences. Thus, the statute doesn’t have any restrain as how Indonesian Criminal Code has on certain victims. It is highly suggested to review the Indonesian Criminal Code specifically in regards of sexual violences to provide better protection and exclusivity towardsthe victim.

Regarding penalties, Indonesian Criminal code also regulates different level and measure of punishment towards sexual violences throughout article 285-297. However, it is found that there is an imbalance in weighting the crimes and the measures of the punishment. This has cause a worry that the perpetrator of a sexual violence would potentially be punished for less number of years than what is deserved. On the other side, The Rome Statute of International Criminal Code regulations on the penalties did not specifically categorize sexual violence. This gives the court more independence in deciding the sentences as the statute regulates that most serious crimes are threatened by maximum of 30 years imprisonment and lifetime imprisonment if it is found that the decision is justified. It is highly suggested that Indonesian Criminal Code also provides the same independence and flexibility of the judge to decide the sentences on a sexual violence perpetrator.

IV. CONCLUSION

Criminal deeds bring disaster to the life of the people in general, and rights of many are to be stripped of from them without their consent which is then becomes the urgency on why criminal law needs to be enacted and applied. In its provisions, criminal law regulates about sexual violences. It has a potential to caused harm both physically and mentally towards its victim. However, the problem with the system is that at some point, the ideal justice is not met in its enforcement. Indonesian constitution is yet to enact a regulation to restrain or to impose more assertive measures on sexual violences. Assuming that this goes on without being handled, the society is going to be built under a general norm where it is okay to oppress the right of others. This then becomes the reasons why a criminal law is necessary in the society.

In its provisions, criminal law regulates about sexual violences and has a potential to create harms both physically and psychologically. The problem with its judicial exercise is that the ideal justice is not met in its enforcement. The deeds and the punishment are seemed to be equitable in its comparison.
In Rome Statute of the International Criminal Court, it is believed that the heavy crime that was committed shall not be let unpunished and their prosecution must be done effectively by every state as they must end such impunity and prevent such crime from arising. The statute recognizes 4 categories of most serious crime, which are: The crime of genocide; Crime against Humanity; War Crimes; Crimes of Agression. Sexual violations and similar deeds are grouped as Crime against humanity. It means that within the ideals of the statute, a national jurisdiction must have an effective prosecution within the criminal court.

Rome Statute of the international Criminal Court has the authority to penalize convictee of the 4 most serious crimes. According to Article 77 of the statute, there are 4 imposeable penalties towards the convictee, which are imprisonment up to 30 years, lifetime prison if justified by the weight of the crime, fine which fulfills the criteria under the Rules and Procedure of Evidence and a forfeiture of proceeds, assets and property.

The problem within the Indonesian Sexual Violence lies within how it was regulated within the current criminal code. Its restraints for certain victims of sexual violence from getting the protection they need and the eligible punishment for the perpetrator. Indonesian Criminal code also regulates different level and measure of punishment towards sexual violations throughout article 285-297. However, it is found that there is an imbalance in weighting the crimes and the measures of the punishment. This has caused a worry that the perpetrator of a sexual violence would potentially be punished for a smaller number of years than what is deserved. These are what then found to be the cause of how sexual violence victim struggles to seek for justice. This is proven by how only 30% of women and 15% of men reported sexual offences that occur. Despite so, the impact of the assault is proven to be significant, as how it impacts the victim Physically and Psychologically and the perpetrator is benefitted by how there are potentials on being sentenced for punishment less than they should have in accordance to the criminal code.

Upon the end of the research, it is highly suggested that a review and a revision on Indonesian Criminal Code is necessary, especially in the sector of sexual violence. The authors would suggest that the criminal code should not specifically limit the definition of who are the victims of sexual violences. Therefore, there is more exclusivity in the protection towards the sexual violence victims. The authors would also suggest that The Criminal Code must not specifically categorize sexual violence. This gives the court more independence in deciding the sentences. It is optional for the court to review whether the sentence should be lifted to 30 years (similar to the Rome Statute of International Criminal Court) or to maintain the number of maximum years by 15.
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