

Questioning the Formation and Enforcement of Law in Indonesia to Create Gender-Based Justice

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ABSTRACT

The formation and enforcement of law in Indonesia is currently considered just and established by the Indonesian people. However, the formation and enforcement of the law has created various injustices, especially for women. This paper has a rationale that departs from the concept of feminism. Furthermore, this paper also criticizes the formation of the rule of law in Indonesia, which seems to have equalized the needs of men and women alike, as well as the law enforcement that tend to be positivistic, especially for women with legal problems. The focus of this paper is to find the exact formulation of how to create public policies which build upon the value of gender-based justice and find an approach in law enforcement for women with legal problems. This paper concluded that law enforcement for men and women cannot be equalized. There is a need for a rationale in the formation and enforcement of the law for women with gender-based justice.

Keywords: Gender; Justice; Law Enforcement; Law Formation

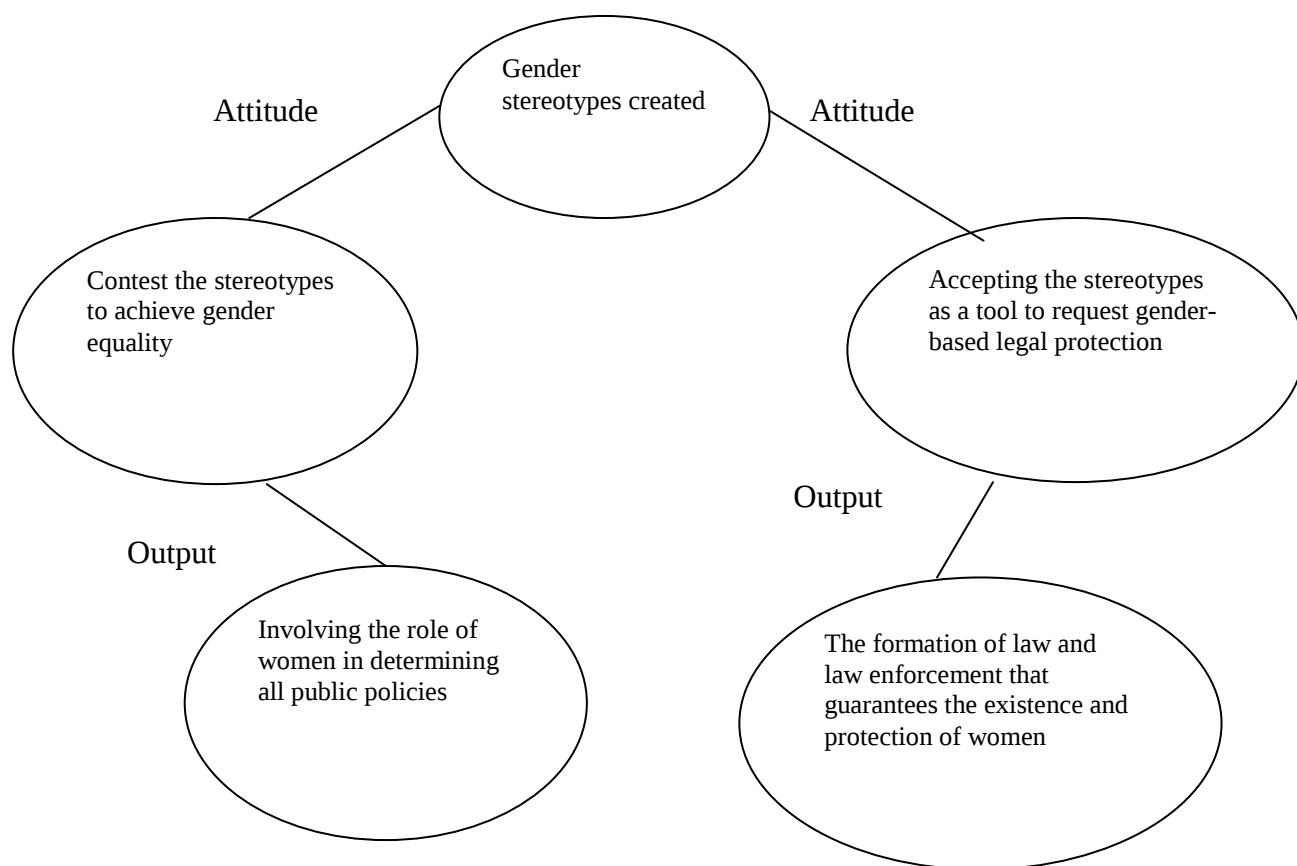
Introduction

This paper will explain the importance of an understanding of studying law and its enforcement build upon the value of gender-based justice. Since gender issue has always been a social life problem, (Rahminawati, 2001) it is always questioned by feminists, where, through their movements, continue to fight for gender equality. (Andika, 2019) For example, Zoe Marks in his journal article raises issues and ideas about women's participation in the war. She argues that the role of women in war is very important given this as a means of increasing gender equality. ("Gender, Social Networks and Conflict Processes," 2019)

In principle, the feminist perspective on an issue is strongly influenced by the situation and conditions of the era that it faces. In this case, the feminist movement is not only focused on the issue of gender equality but also other problems in accordance with the situations and conditions encountered. (Karim, 2014) For example, the views and struggles of feminists in Indonesia in the pre-independence era and the reform era were significantly different. In the pre-independence era, the feminists focused more on the issue of position between men and women in gaining access to proper education. In this era, the feminist figures such as RA Kartini, Dewi Sartika, and others emerged. During the reform era, on the other hand, the feminist view shifted to the issue of the economic crisis that threatens the welfare of women workers. (Djoeffan, 2001)

When talking about feminism, we should not limit our minds by assuming that feminism is a movement that continues to fight for gender equality between men and women. This is because feminism is significantly influenced by conditions and situations in a particular country. Gender segregation formed by the existence of stereotypes and discourse of fundamental differences between men and women can be the basis of the feminist movement to ask for special forms of protection to the state. Thus, the struggle faced by feminists is no longer revolve about the issue of gender equality, but more focused on the issue of asking for guarantees to the state to get access to legal protection for the existence of gender stereotypes that are more in favour of men. (Krisnalita, 2018) In the following explanation below, the author will be described the

establishment of feminist movements who contest the existence of gender equality, as well as the feminist movement that calls for a guarantee of legal protection based on gender stereotypes which occupy the role of men who are more dominant and superior than women. In this way, the readers are expected to be able to easily capture the essence that the author wants to convey. (Satjipto Rahardjo, 2009)



The issue faced by the feminists today is revolving around the guarantees of legal protection. Such legal protection is intended so that men and women don't get the same treatment before the law. (Kania, 2016) Protection of women needs to be prioritized and regulated more specifically by law, considering the gender differences created by the culture which further strengthens the position of men domination over women.

Nowadays, issues concerning women fill many discourses in Indonesian society, in addition to political and economic discourses. The issue of women becomes even more interesting when the awareness of injustice between men and women - often called gender inequality - is increasingly high in our society. (Marzuki, 2008) The issue that has attracted much public attention lately is the feminist issue in the field of law enforcement. Law enforcement in Indonesia has recently drawn attention and has generated various reactions towards gender issues. For example, law enforcement against the defendant Baiq Nuril who was sentenced to prison. She is alleged to have carried out the distribution of recorded pornographic conversations performed by his superiors as the Principal at SMA 1 Mataram. (Sari, 2019) After the appeal in the Supreme Court,

Baiq Nuril's case arose since she admitted that she did the recording because she was a victim of sexual harassment. She often gets unpleasant treatment from his superiors by continuing to talk about the forbidden relationship between his superiors and his affair. Therefore, Baiq Nuril recorded the conversation as a precaution.(Persada, 2019)

Based on the case above, it is necessary to conduct research that discusses the issue of law formation and its enforcement build upon the value of gender-based justice. In this paper, the author will describe how gender issues need to be accommodated and addressed in the formation of law and its enforcement in Indonesia to create justice that can be felt directly by the people of Indonesia.

Discussions

a. Creating public policies with gender-based justice

Public policies with gender-based justice cannot be separated from Aristotle's theory of justice. Aristotle emphasized his theory of justice to balance/proportionality.(McKerlie, 2001) According to him, justice is the equality of rights in one hand, but can also be said as the inequality of rights in the other. Aristotle divides justice into two types, namely distributive justice and cumulative justice.(Knoll, 2016) Distributive justice is justice which emphasizes that everyone can get something that is within their rights. Therefore, distributive justice according to Aristotle is very proportional.(Johan Nasution, 2014)

In writing this article, gender-based justice is intended so that citizens can get proportional access to justice. In this case, justice is determined proportionally based on gender. The realization of gender-based justice can be implemented when the state knows the needs of society by distinguishing men and women, without trying to equalize the needs of both sexes.

The idea of gender-based justice is a breakthrough in assessing and guaranteeing the happiness of the people based on gender studies. Differences in sex and gender between men and women lead to the consequence of different needs in society, i.e. the needs of men and the needs of women. Public policies build upon the value of gender-based justice do not only look at the level where good policy is the one that can provide happiness for the majority of people and is determined through certain indicators. The idea of gender-based justice, in this case, is more inclined to the issue of how the policy can guarantee the happiness of many people by focusing on aspects of meeting the needs that are divided by gender.

Public policy is very closely related to the formation of the rule of law. The formation of good law is the one that meets the philosophical values, juridical values, and sociological values. The regulation on the establishment of the rule of law has been stipulated in the Constitution of the Republic of Indonesia No. 12 of 2011 concerning the Legislation. In the Constitution, it has been explained that the formation of the rule of law needs to be accommodated in a National Legislation Program as the law & political direction of Indonesia. Therefore, it is clear that law & politics is the most fundamental aspects in determining the direction of Indonesian policy because, through the national legislation program, a national legal system can be created.

Considering the importance of law & politics in determining the direction of Indonesia's policy, and to create public policies with gender-based justice, it needs to be a discourse in formulating national law & politics in Indonesia. This is intended so that a legal product that can truly guarantee the creation of happiness, justice and welfare based on gender in Indonesian society can be formed. But until now, the concept of gender-based justice has never been a discourse in

the formulation of national law & politics. According to Mahfud MD, the formation of law & politics needs to be based on:(Moh. Mahfud MD, 2012)

- the creation of integration or national integrity both ideologically and in territory;
- the efforts to build democracy (popular sovereignty) and nomocracy (rule of law) at the same time;
- the efforts to build social justice for all Indonesian people;
- the principle of religious tolerance that is civilized.

In the concept of gender-based justice, the legislation in Indonesia is not only limited to the four basic political laws as referred above. It is also necessary to promote the welfare of Indonesian society based on gender value, so that a law that truly guarantees proportional welfare based on gender and the existence of women can be created.

One example of public policy that can provide gender-based justice is when natural disasters occur. When the community is evacuated to a specified refuge, then the state based on the mandate of the Constitution issued a policy of assistance for victims of natural disasters. What kind of assistance is appropriate for victims of natural disasters needs to be regulated in the Constitution. Providing such assistance needs to be formulated by basing itself on gender justice. In this case, the law has set various policies for providing needs which have been separated based on sexes, i.e. the needs of men and the needs of women. The policy of providing assistance is not generalized based on certain indicators but needs to be proportional to determine needs based on sex.

To this end, it is clear that gender justice is not only limited to involving the role of women in making public policy, but this article also tries to provide a breakthrough, where gender-based justice needs to be formulated in the form of public policy.

b. Apply a gender approach to women who have problems with the law

This research will analyze a gender approach to create a just law enforcement. The main concept of thought in analyzing this problem is feminism. Thus, readers need to understand that every exposure to the discussion presented in this section always sees a reality based on the perspective of feminism. Feminism is a school of thought that opposes and contest sexism in various ways and efforts. This is because feminists face various exploitations, harassment, and objectification in every aspect of their lives. Feminists believe that every woman has a bond with each other. As one fate and one idea, what happens to women is universal and has relevance to every women's life where they lack influence and position in our society.(Swank & Fahs, 2017)

Feminism tries to dismantle existing habits and norms. It always wants a new history written by women, not written by male domination.(Sunahrowi, 2018) The feminism school of thought has given birth to a feminist movement in the field of law, namely the concept of thought about Feminist Legal Theory (FLT). Feminist Legal Theory is a theory that tries to dismantle the establishment of the law which previously considered fair but still discriminate women and inflict harm towards them. Feminist Legal Theory states that the current law is never objective, not neutral, and cannot provide justice for women. The current law is only symbolized as a reflection of the dominant political philosophy in which the law made is patriarchal because it was written and made by men. Therefore, feminist schools assume that the law is made based on the perspective and interests of men.(Sulistiyawan, 2018)

Departing from the understanding of feminism as explained above, this paper conveys that law, and its enforcement, are said to have a value of justice if the formation and enforcement of the law are not objective and not apply to all without looking at the perspective of sex and gender. Good law and its enforcement need to distinguish between sexes and genders of men and women. This is not apart from the fact that men and women have a variety of differences. Not only differences in gender, but also differences in gender stereotypes created by society.

Gender stereotyping in most societies is in the form of the selection and determination of differences between men and women based on their physical conditions, traits, and thoughts. Women in society are always identified as having beautiful, sexy, charming, sweet, soft-spoken and petite physical conditions. In contrast to men who have the stereotype of having athletic, large, muscular, high-pitched, and strong physical conditions. Aside from physical conditions, men and women are also distinguished based on their nature. Women are identified as having compassion, high sympathy, sensitivity and sentimentality. Whereas men are considered to have insensitive, domineering, aggressive, brave, and adventurous nature. In terms of way of thinking, women are considered to have imaginative, artistic, intuitive, creative, and full of love. While men are considered to have analytical, logical, and not intuitive. Giving such stereotypes gives a significant effect especially if there are men who have female characteristics and vice versa. This will eliminate their social status and acceptance in society.(Alfian Rokhmansyah, 2016)

If we look at gender stereotypes in society as mentioned above, women have imaginative and intuitive thinking power, while men have analytical and logical thinking. As a consequence, women in their social activities act by using imagination and intuition, which means the main source of action is life experience (empiricism). Whereas men who have analytical and logical thinking in every action taken in society tend to rely on their rationality abilities.

In gender-based law enforcement, every legal problem that makes women a suspect should deeply be analyzed. Whether the deed is purely due to their desires or if other factors that cause women to take actions that result in them becoming a suspect. If we reflect on the thoughts of women who act based on experience, the consequence is that if there is an unlawful act by women, it will open to various possibilities. One of them is that it turns out that the woman is the real victim. As in the case of Baiq Nuril, an honorary teacher at SMA 7 Mataram who was convicted of her acts of recording and distributing immoral conversations with his school principal, Muslim. Baiq Nuril was sentenced to 6 months in prison and a fine of 500 million Rupiah through an appeal decision.(Siagian & Ishak, 2019)

If analyzed with the perspective of gender-based justice, the law enforcer should look at the case of Baiq Nuril based on her sex as women, i.e. someone who acts based on intuition with the main rationale in the form of experience. There is a reason for women in taking actions that are prohibited by law. These acts are the experiences of women, both good and bad, which ultimately affect the way they think and act. Baiq Nuril recorded immoral conversations based on her experience which is always told pornographic things by Muslims. Thus, to protect herself from being blamed, she recorded the conversation without permission. If law enforcers promote gender-based justice, they will be able to detect and conclude that behind the criminal offences committed by Baiq Nuril, she is the true victim of sexual harassment committed by Muslims.

Actions made by Baiq Nuril are natural. She did the act of recording because of her experience as a victim of sexual harassment where she was always told pornographic things by the principal. This paper provides an understanding that conditions can require a woman to act against the law

because there is pressure from her experience as a victim. For this reason, normative approaches need to be set aside and shifted to using a gender approach.

Besides the case of Baiq Nuril, another case that caught the public's attention was the case of the 3 girls who were prosecuted by prosecutors in Russia for allegedly killing their father. The issue of gender arises when the murder committed is a response to the torture of their fathers. So from this case, we can conclude that women who commit violations of the law are indeed caused by the basis of their experience. Law enforcement authorities need to understand and be careful in dealing with the issue of women with legal problems because they could be the true victim.

Conclusion

The law and its enforcement need to base themselves to the fact that gender stereotyping is still used and is believed as truth in today's modern society. Therefore, every policy in formulating rule of law needs to be selective. This is intended so that the policies issued can provide benefits, both for the needs of men and women. In addition, gender issues involving women with legal problems need serious attention. This is inseparable from the fact that women based their actions on empirical/experience factors. Therefore, all actions taken by women must have a reason. Law enforcers in dealing with women with legal problems need to treat women suspected of committing criminal acts like a victim. This is so that in the context of proof, she can be treated in ways that truly provide the value gender-based justice.

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