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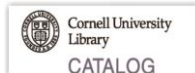
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**JURNAL DINAMIKA HUKUM** Indexed by :



## Implications of Victim Precipitation on Imposing Criminal Sanctions for Perpetrator (Study in the City of Purwokerto)<sup>1</sup>

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### Abstract

The study of victim precipitation in Purwokerto is still lacking. Consequently, it is nearly impossible to get clear correlation between victim precipitation and the imposition of criminal sanctions for perpetrators. The problems studied in this research are the implications of victim precipitation towards the imposition of criminal penalties for the perpetrators and factors that tend to impede the repercussions. This research used a qualitative research method, with juridical approach related to the imposition of a sentence for the perpetrator that is in the form of criminal punishment, which is lighter than prosecutor's demand. However, not all judgment of the judge include the victim precipitation aspect explicitly in considering the imposition of criminal sanctions. The legal substance aspect is the intervening factor, which is the specific minimum criminal threat that can override victim precipitation. Other contributing factors are the legal structure and the legal culture of the community.

**Keywords:** perpetrators; implications; criminal sanctions; victim precipitation.

### Abstrak

Minimnya pengkajian mengenai victim precipitation di Purwokerto, mengakibatkan belum dapat diketahui secara jelas ada tidaknya korelasi antara victim precipitation dengan penjatuhan sanksi pidana bagi pelaku. Permasalahan dikaji mengenai implikasi victim precipitation terhadap penjatuhan sanksi pidana bagi pelaku dan faktor yang cenderung menghambat implikasi tersebut. Penelitian ini menggunakan metode penelitian kualitatif, dengan pendekatan yuridis sosiologis. Hasil penelitian menunjukkan bahwa terdapat Implikasi victim precipitation terhadap penjatuhan sanksi pidana bagi pelaku berupa sanksi pidana yang lebih ringan dari tuntutan Jaksa, namun demikian tidak semua putusan hakim mencantumkan aspek victim precipitation secara eksplisit dalam pertimbangan penjatuhan sanksi pidana. Aspek substansi hukum menjadi faktor utama yang cenderung menghambat yakni ancaman pidana minimum khusus dapat mengesampingkan victim precipitation, sedangkan faktor lainnya yang turut menghambat adalah faktor struktur hukum dan budaya hukum masyarakat.

**Kata kunci:** pelaku; implikasi; sanksi pidana; victim precipitation.

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## Introduction

One form of legal protection given to society as basic rights that is protected by 1945 Constitution is the enactments of various regulations and policies that are in accordance with the needs of the community (Hartini, Sudrajat dan Bintoro, 2012). According to

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Article 28 D paragraph (1) of the 1945 Constitution, "Everyone has the right of recognition, security, protection and a just legal certainty and equal treatment before the law". This become the very foundation of legal protection for crime victims. Here, we can infer that the formation of regulations is one of a form of legal protection given to protect the society, which functions to prevent people from becoming victims of crime and to provide the rights to someone who has been a victim of crime that best suit their needs. However, the criminal law in Indonesia shows the opposite where its substance is more oriented towards the aspects of crime and the perpetrators of crime, while the regulation regarding the rights of crime victims is still lacking in comparison.

So far, the characteristics of law enforcement are still offender oriented, so this means that the fulfillment of the interests of victim's losses and suffering due to criminal acts is still unprotected. This is inseparable from the problem with the rights of victims and the representation of victims' interests that is yet to be a concern in the criminal justice system. Therefore, the position of the victim in the criminal justice system needs more attention (Yulia, 2016). In this regard, after several decades of development of theories in criminology studies, criminal procedural law, criminal law and practice in the criminal justice system has undergone major changes. This change lies in the growing attention of academics, practitioners and experts on victim's position in criminal justice, which in turn has led to the passing of various regulations, both national and international levels regulating the protection and fulfillment of the rights of victims (Samendawai, 2009).

This spark formation of various regulations on the rights of victims for various kinds of criminal acts, including Law no. 39 of 1999 concerning Human Rights, Law no. 26 of 2000 concerning Human Rights Courts, Law no. 23 of 2004 concerning the Elimination of Domestic Violence, Law no. 21 of 2007 concerning the Eradication of the Crime of Trafficking in Persons, Law no. 35 of 2014 which is an amendment from the previous law regarding child protection, Law no. 5 of 2018 which is an amendment from the previous law regarding the eradication of criminal acts of terrorism, to Law No. 31 of 2014 which is also an amendment from the previous law regarding the protection of witnesses and victims. These changes in various regulations signify the results of monitoring and evaluation efforts. Even though in its implementation has yet to fulfill the rights of victims optimally, various institutions or agencies that have the capacity to help fulfill the rights of victims, such as the Witness and Victim Protection Agency, the Counter-Terrorism Agency, The National Human Rights Commission, National Commission for Child Protection, etc., still continue to optimize the fulfillment of victims' rights.

However, if we take a closer look at the substantial attention towards victim of crimes, it seems one-sided. Proven by the lack of assessment regarding Victim Precipitation in the occurrence of crimes. Naturally, we delve into Victimology as a study of victims, including but not limited to the causes of becoming a victim. Victimology in this case examines the role of the victim and the relationship between the perpetrator and the victim (Wiguno, 2013). Victim precipitation in victimology is the participation from victims or victims' contribution to the crime being committed (Angkasa, 2017; Hendriana,

2018). According to Marvin Wolfgang (1957), "in many crimes, especially in criminal homicide, the victim is often a major contributor to the criminal act. Except in cases in which the victim is an innocent bystander and is killed in lieu of an intended victim, or in cases in which a pure accident is involved, the victim may be one of the major precipitating causes of his own demise." He then adds, "The term victim-precipitated is applied to those criminal homicides in which the victim is a direct, positive precipitator in the crime. The role of the victim is characterized by his having been the first in the homicide drama to use physical force directed against his subsequent slayer. The victim-precipitated cases are those in which the victim was the first to show and use deadly weapon to strike a blow in altercation – in short, the first to commence the interplay or resort to physical violence".

Victim precipitation exist not only in cases of murder or violence, but also sexually motivated crimes, *"Theoretically, victim precipitation of forcible rape means that in a particular situation the behavior of the victim is interpreted by the offender either as a direct invitation for sexual relations or as a sign that she will be available for sexual contact if he will persist in demanding it. Excluded are the situations where no interaction was established between the offender and the victim and when the offense was a sudden event which befell the victim"* (Amir, 1968). Victim precipitation is one of the theories in criminology that analyze how the interaction between victim and offender may contributes to the occurrence of a crime. However, there is a fundamental difference where Victim precipitation is more focused on understanding the interaction between victim and offender in the occurrence of a crime instead of the motive of the offender in committing a crime (Angkasa, 2017; Hendriana, 2018). Victim precipitation is a controversial theory asserting that victims sometimes initiate the actions, which lead to their harm or loss. It is important to study because research shows that it happens with some frequency, and therefore cannot be ignored simply because it is distasteful (Petherick, 2017).

Virtually, the existence of Victim precipitation is also observable in Purwokerto City, Banyumas Regency. Here, one of the factors that influence the occurrence of robbery is the behavior of the victims themselves (Hendriana, Sari and Utami, 2016). In fact, in human trafficking, it shows the the existence of victims' role, including the correlation between the role of the victim and the implementation of legal protection given for them.

There are at least four types of victims in human trafficking crimes, which indicate a correlation between victim precipitation and legal protection for victims, as follows. *Firstly*, "the innocent victims", in this case the victim has no role in human trafficking. This type of victim is usually children so it makes them easy to be deceived, trapped or forced. *Secondly*, "The victim because of their ignorance, negligence, or victim with minor guilt". There are fault from the victim, they are easily trust people, ignorance, and a behavior that indicated openness. Based on types of the first and second victim, there is a correlation between victim's guilt and the legal protection implementation toward them. The victim does not want to be a victim, so there is tendencies in wanting law security. *Thirdly*, it is "voluntary victim". They are agree to be in human trafficking cycle consciously. *Fourth*, "victim who completely innocent and victims of negligence or

victim with minor guilt, but finally they become voluntary victim". That at first the victim is classified as first and second type but as time goes by the victim accept the reality and they start to take the benefit; thus, they don't feel suffer or harm. Referring to type 3 and type 4, the victim does not feel harmed so it is hardly possible if the victim would reveal the case or fight for the right to get the legal protection. The victim uncooperative and potential to be permanent victim, which means that he/she, will be the victim of human trafficking, so it can be concluded that the behavior of victims in responding to legal protection toward them becomes the main factor that obstructs the success of legal protection implementation (Hendriana, Widyaningsih dan Sari, 2017).

However, the assessment of victim precipitation above is still limited to victims of human trafficking crimes. This means that general identification for other type of crime that potentially happened due to victim precipitation has yet to exist. On the other hand, the scope of the study above has not shown whether victim precipitation can be a factor for imposing criminal sanctions for the perpetrator. Unfortunately, lack of data and other research regarding victim precipitation is not helping either. Consequently, it affect the inability to monitor and clearly determine the mindset and concrete attitude of law enforcement officials in responding to the Victim Precipitation which is manifested through the stage of determining the suspect, the severity of prosecutors' charges and judgement. Sidelining the victim precipitation to the criminal justice system, surely, not only violating the presumption of innocence, but also the failure to achieve justice for the perpetrators.

According to Zvonimir Separovic, findings and various empirical evidence regarding the role of the victim will give better understanding toward the nature of criminal case, where law enforcement and the court must thoroughly investigate the role of the victim. For example, determining whether the provocation carried out by the victim is sufficient to reduce or eliminate the wrongdoing of the perpetrator (Efendi, 2001). Based on a theoretical level, ideally there should be a correlation between imposing criminal sanctions and Victim Precipitation. However, various factors that exist can influence or even hinder these implications

## Research Problems

Based on the explanation above, there are two issues that would be discusses in this article. *First*, how is the implication of victim precipitation for imposing criminal sanctions for perpetrators in Purwokerto. *Second*, what factors that tend to hinder the implications of victim precipitation on the law enforcement process for prepetator in Purwokerto.

## Research Methods

This article use use qualitative research method, with a juridical sociology or social legal research as a lecturer. This approach is a study that emphasizes the search for empirical coherence, because it constructs law as a reflection of social life itself in practice.



(Bintoro, 2014). Law is assumed as something that is not autonomous so that its enforcement is determined by non-juridical factors. Therefore, sociological legal research is built on an empirical, objective, constructive conceptual map (Zulfadli, 2013). Primary data collection in the field was carried out using the interview method and non-participant observation or non-role observation carried out on the research informants. Thus, the researcher did not fully involve himself in the observed social situation, but still carried out the observation function. The informants in this study consisted of two Purwokerto District Court judges, three Purwokerto Public Prosecutors and three Advocates in the Purwokerto area. Interviews were conducted at the Purwokerto District Court on 14 and 15 March, 6 April 2018, the Purwokerto District Attorney's Office on 20 and 21 March 2018, and the Advocate Office on 24 and 26 April 2018.

## Discussion

### **Implications of Victim Precipitation on Imposing of Criminal Sanctions for Perpetrators in Purwokerto**

Historically and theoretically, the analysis of victim precipitation is inseparable from Wolfgang's research, including the typology of victims from Mandelsohn, Hans von Hentig, and Stephen Schafer to Siegel's views. This is as explained by Petherick (2017), that:

“Victim precipitation was a term first used by Wolfgang to describe situations in which the victim was the initial aggressor in the action that led to their harm or loss. Victim precipitation existed in not only the research of Wolfgang but also in spirit in the early typologies of Mendelsohn such as the completely innocent victim (no precipitation) and the victim more guilty than the offender where one provokes another to commit a crime. Precipitation can also be seen in the typology of von Hentig, in the tormentor who precipitates his victimisation by torturing his family, and in Schafer's, typology with provocative victims and explicitly with precipitative victims. The latter type is a direct acknowledgement that some victims have characteristics or do something that entices an offender to commit crimes against them and is more akin to what Siegel calls passive precipitation.”

However, it is unwise that in every crime, victim becomes the object of blame. Blaming victims often occur; especially in events related to sexually motivated crimes, where people tend to blame the victim based on assumption that the victim have bad character. Naturally, correlation does not imply causation. In this case, the negative labeling toward the victim will further harm the victim. On the other hand, an assessment of Victim precipitation is still necessary. Not only aims to reveal the nature of criminal act, but also to ensure equal treatment before the law, in order to uphold basic rights in Article 28 D paragraph (1) of the 1945 Constitution that "everyone has the right to recognition, security, protection and just legal certainty and equal treatment before the law". Therefore, investigation of victim precipitation in the occurrence of crimes is obligatory in order to uncover the true nature of the crimes in order to bring about a fair law enforcement process, so it is unfitting to generalize victim precipitation with victims blaming.



As in one of a study, it is described that, “when the precipitating victims have the same characteristics as their non-VP sisters, they appear in those cases which do not seem to involve vulnerable situations, and thus lend support to our previous assumption that it is not solely the vulnerable situations but also some characteristics of victim behavior which are important in precipitating the offense. Further, the notion of negligent and reckless behavior on the part of the victim is as important to understanding the offense as is the appearance of these types of behavior in the offender. It does not make any offender innocent but allows us to consider some of these men, at least, less guilty and leads us to consider that the victim is perhaps also responsible for what happened to her” (Amir, 1968). Therefore, studying the behavior of the victim is as important as studying the behavior of the perpetrator themselves, so that it is possible to determine both the level of guilt from perpetrator of the crime and the possibility of the victim's responsibility. Some even believe that, “a better understanding of the role victims play in crime could help better tailor services for them in order to reduce victimisation or re-victimisation” (Petherick, 2017). Building upon these ideas, by studying victim precipitation, one can better understand the reasons why person become a victim of crime, and eventually help preventing someone to be a victims of crime and repetition of victims of crime.

Victim precipitation can occur in all kind of crimes, for example, in one of a study shows women can actually influence numbers of factors for rape to be happening and ultimately making her a victim of crime. These influences can be close relationship between men and women, men's grudges against women, cultural factors that are increasingly open-minded, risque fashion sense, travelling alone; finally yet importantly victim being in a close proximity of situation or condition that enable rape to be committed. These factors are the actions of women who lose control or supervisory power to fortify herself making it easy for men as perpetrators of rape to commit crimes to satisfy their sexual desires (Legesan, 2012). Another study also shows that, some of victim's demenaor like provoking or initiating attack can escalate into murder, persecution, and so forth.

In connection with this research, the results of interviews with research informants from judges, prosecutors and advocates in the Purwokerto jurisdiction, show that the types of crimes potentially occurring due to victim precipitation, inter alia, sexually motivated crimes against minors (sexual intercourse, molestation), human trafficking, persecution, and murder. In case of human trafficking, one of the prosecutors stated that in certain cases victim might contribute in human trafficking to occur. One of them is the intimacy between the perpetrator and the victim, in which the victim appear to be permissive in perpetrator's eyes thus opportunity arise. For example, the perpetrator and the victim have intercourse, and then the perpetrator offers the victim to another person. In this case, the victim did not volunteer because the perpetrator's actions were without victim's consent, but the perpetrator believed that the victim was willing to be an object because he believed the victim was permissive. In case of persecution, one of the judges at the Purwokerto District Court stated that the abuse could potentially occur because of the victim

precipitation, considering that the abuse itself occurs due to lack emotional control and sufficient self-awareness of a person, including the victim. For example, persecution that begins with victim provoking or initiating attack.

As for sexually motivated crimes has its own complexity. Purwokerto District Court judge stated in sexual intercourse and molestation against minors there are several forms of victim fallaciousness, ranging from victims who are negligent due to negative peer pressuare making them exploitable into having intercourse, to case where forcing victim to drink alcohol, which lead to sexual intercourse or molestation. There is also victim who voluntarily agrees to have intercourse. Finally yet importantly, most notable cupabilty is victim who actively role seducing and triggering the intercourse, but then claiming to be a victim and request for compensation. In fact, after interviewing judges, prosecutors and advocates, it turns out similar cases had happened in other jurisdictions. In response to this latter type of victim, it appears that the analysis of Victim Precipitation to uncover the true nature of crimes is neccesary especailly to determine the degree of guilt of the perpetrator, so that the prosecutor's charge and the judgement can be fair.

Another thing that is quite concerning is that among the four types of crimes mentioned above, according to prosecutors and lawyers, the most dominant victim precipitation actually occurs in sexually motivated crime or sexual intercourse against children. This fact is also unique, because in general, Victim Precipitation tends to occur in crime such as of murder and persecution, usually because it us he victim who provokes and even initiate the attack. This is possible because in Indonesia, intercourse and molestation against a child even though it is consensual (from both the victim and perpetrator) is still a crime; especially because religious values and customs also prohibit sexual intercourse and molestation outside of marriage. Meanwhile, a child still does not have mental maturity and logical reasoning, making potentially more inclined to commit various violations of the rules, including sexual intercourse outside of marriage. Naturally, this complexity should be taken into account in the efforts to combat crime, both preventively and proportionally. This means that in preventing crime and handling it in a comprehensive manner, the potential for victim precipitation needs to be minimized, so that crime prevention should not only focus on the perpetrator, but also on the community who has the potential to become victims of crime.

Policies on imposing criminal sanctions are part countermeasure to combat crimes that are inseparable from the state's goal of protecting the entire Indonesian nation and achiveving general welfare as a mandate from Pancasila and the 1945 Constitution. Consequently, the state's obligation is not only giving protection and prosperity for the people, but also giving protection and prosperity to perpetrator (Leasa, 2010). However, most legal practitioners still bealieve that imprisonment is the single most appropriate reaction in dealing with anti-social behavior. Therefore, a person whose act is unlawfull have to be sanctioned. As a result, even though imprisonment still has its benefits, in certain cases the benefits are minimal (Gunarto, 2009). Especially if a crime occurs due to victim precipitation, of course, severe sentences will not bring benefit and justice to the

perpetrator. Therefore, based on a theoretical level, ideally there should be a correlation between imposing criminal sanctions and the victim precipitation.

As a logical consequence with the existence of victim precipitation, the results of the analysis of 2 (two) judgements of the Purwokerto District Court show the implications of victim precipitation on imposing criminal sanctions for the perpetrator, as shown in the following table.

**Table 1.** Implications of Victim Precipitation on Imposing of Criminal Sanctions for Perpetrators in Purwokerto

Court Judgement Number	Charge	Judgement	Judge Consideration
No. 70/Pid.B/2016/PN Pwt (Persecution that led to death)	12 years  (Based on First Charge, Ar. 338 Criminal Code - The maximum sentence of imprisonment is 15 years)	2 years  (Based on the Second Primary Charge, A.351 par 3 Criminal Code- The maximum sentence of imprisonment is 7 years)	The defendant's actions were triggered by the victim's actions
No.193/Pid.Sus/2015/PN Pwt (extramarital intercourse with children)	7 years  (Based on Primary Charge, A 81 par 2 Law no. 35 years 2014 – The minimum sentence of imprisonment is 5 years and maximum sentence of imprisonment is 15 years)	1 year  (Based on the Secondary Charge, Ar. 287 par (1) Criminal Code- The maximum sentence of imprisonment is 9 years)	The defendant's actions occurred with victim's consent.

Table 1 shows that victim precipitation would lower sentences than that of prosecutor's charge. It should be noted that the judge did not deviate from the prosecutor's charge; it is just judge have different legal basis in making decisions, also judgement impose sanction below maximum penalty. Looking at the judgement of the Purwokerto District Court No. 70/Pid.B/2016/PN Pwt regarding the persecution that led to the death, the prosecutor in this case demanded the defendant 12 years in prison based on the first charge (Article 338 Criminal Code), while the judge base the decision based on the second charge (Article 351 paragraph (1) Criminal Code) with maximum sentence of imprisonment is 7, although in the end the judge sentenced him to only 2 years in prison.

Similarly in the Purwokerto District Court Judgement No. 193/Pid.Sus/2015/PN Pwt related to extramarital sex against a child, the prosecutor in this case demanded the defendant 7 years in prison based on primary charge (Article 81 paragraph 2 of Law No. 35 2014, with minimum imprisonment of 5 years and a maximum of 15 years in prison), while the judge decides based on secondary charge (Article 287 paragraph (1) of the Criminal Code) with maximum sentence of 9 years imprisonment, but the judge sentenced him to

only 1 year imprisonment . This shows that the judgement has use victim precipitation as consideration to unravel the true nature of a crime as a legal fact that was revealed in court.

Based on the information from one of the prosecutors at the Purwokerto District Prosecutor's Office that in some cases Victim Precipitation in crime circumstance would have implication with imposing criminal sanctions for perpetrators who were decided by the judge, for example in the Purwokerto District Court Judgement No. 193/Pid.Sus/2015/PN Pwt. Lawyers explanation also reaffirm it, according to victim precipitation in crime circumstance would have implications with imposing criminal sanctions for the perpetrator by the judge, evidently sanction in judgement is lower than the prosecutor's charge, sanction in judgement is close to a special minimum sentence, some even way below special minimum sentence.

However, it should be noted that even though victim precipitation do exist, the judge should never give free judgement. Naturally, it is inseparable with criminal responsibility principle, to wit there is no crime without guilt or often referred to as "*Gen straf zonder schuld; Actus non facit reum nisi mens sir rea*" (Yustitianingtiyas, 2016). Consequently, it becomes normal for the judge only to lower punishment from sentences, because even though victim precipitation do exist, the perpetrator also has their culpability, thus perpetrator can still be convicted. Especially in the criminal act of intercourse against children, even though the victim here plays an active role in the inciting intercourse, the perpetrator as an adult should still be convicted, in the end victim precipitation is only a factor that mitigates charges or lower sentences on the perpetrator.

Building on the idea above, after interviewing the judge shows that the perpetrator can be given free judgement as long as there is no evidence that prove he is infact the perpetrator, but victim precipitation, has yet to result in such judgement. However, author believe that, this matter should be studied further since in sentences there are reasons that give justification or excuses which result in someone's unlawful actions to not be sentenced. Consequently, author bealive that that the existence of victim precipitation could potentially be a reason for free judgement. For example in cases where someone was the perpetrator of murder or persecution as self-defense agaisnt the victim's attack.

Ideally, victim precipitation should also influence prosecutors' charges. In response, several prosecutors stated that before carrying out their duty, the prosecutor always aim to look at the background of the crimes that would be tried in court thoroughly. Similarly, with lawyer's opinion, that prosecutor's charges can be lower than the special maximum sentence or that the prosecutor's charges are usually close with special minimum sentence. However, the results of the analysis from the two examples of judgements above show the opposite where the prosecutor has yet consider victim precipitation aspect, so that there is still a trend for the prosecutor's charges against the defendant to remain high. This includes the basis for the prosecutor's chargess which tend to be based on the first or / primary charge, means that they still ignore Victim Precipitation as a legal fact that has been revealed in court.

In connection with the inclusion of Victim Precipitation in the consideration of imposing criminal sanctions, one of the informants, a lawyer stated that usually judges would include victim precipitation explicitly in the consideration of imposing criminal sanctions under "Mitigating Factor in Sentencing" section. As an example we can see in Purwokerto District Court Judgement No. 70/Pid.B/2016/PN Pwt and Purwokerto District Court Judgement No.193/Pid.Sus/2015/PN Pwt (see table 1), explicitly and firmly the judge includes Victim Precipitation as consideration on imposing criminal sanctions, under "Mitigating Factor in Sentencing" section. However, it should be noted that usually in judgement do not use the term victim precipitation, but rather use other sentences that are more general in nature. For example, in the two court decisions, the words "Mitigating Factor in Sentencing is that defendant's actions were triggered by the victim's actions" or "The defendant's actions occurred with victim's consent".

Therefore, even though the term victim precipitation is not used, the use of these more general sentences can still indicate an explicit inclusion of victim precipitation in a judgement. This is understandable because the term victim precipitation itself is an academic term used in Victimology, so not all fields of science use the same term and not everyone can understand the meaning of victim precipitation. Therefore, the use of other, more general sentences by judges is normal and can make it easier for the public to understand that victim precipitation exist in a case.

It is an interesting that in other judgement the victim precipitation is only implied in the elaboration of charges and is not explicitly stated in the consideration on imposing of sentences. It means that there is no uniformity for victim precipitation to be a part of consideration on imposing criminal sanctions. Based on the responses of several judges actually show that there are different perspectives. One of the Purwokerto District Court judges stated that during his experience as a judge, the victim precipitation aspect was explicitly included in the consideration on imposing criminal sanctions, under mitigating factor in sentencing section. Meanwhile, another judge stated otherwise that he preferred victim precipitation or that victim's error should not be explicitly stated in judgement. This is because Supreme Court has provide a template for imposing sanctions, even though, the judges themself already know and understand the existence of a Victim Precipitation. According to him, victim precipitation has also been described in the consideration of each elements in articles used as basis of charge by the public prosecutor, it means that it must have been implied in the judge's decision.

In response to these perspectives, it appears that each judge has their own art in drafting judgement. However, this inconsistency creates difficulties in quantitative data collection, which shows whether there victim precipitation exist in a judgement, as well as reviewing and monitoring the implications of imposing criminal sanctions on perpetrators. As an illustration, if each judge includes victim precipitation explicitly in the consideration under "mitigating factor in sentencing" section, it will facilitate the process of data collection, assessment and monitoring regarding whether or not victim precipitation exists and to what extent its implications in imposing criminal sanctions for

the perpetrator. Therefore, it is necessary to have a common perspective and uniformity of formulation to include the victim precipitation explicitly in the consideration on imposing criminal sanctions.

### **Factors Inhibiting Implications Victim Precipitation against the Process of Law Enforcement for Prepetator in Purwokerto.**

Based on interviews with one of the judges in the District Court of Purwokerto, there are several factors that affect the imposition of criminal sanctions for prepetator, among other legal facts revealed in court, the severity of the guilt of the accused, to what extent victim precipitation in the occurance of crimes, considerations of disparity, last but not least proportional justice for victims and perpetrators. In regards to the defendant's condition, another judge explained that the matters incriminating the defendant could include the extent of the victim's loss, to what extent defendant's actions disturbed the public, and whether the defendant had previously been convicted or not. Meanwhile, things that mitigate the defendant can include the defendant's confession of his actions and mistakes, the defendant regrets of his actions, the defendant promise to not repeating his actions again, the defendant is the backbone of the family, and the defendant has provided compensation to the victim. Naturally, it indicates that victim precipitation is one of the factors for judges' consideration in making decisions.

Ideally, victim precipitation should have more presence every chain of law enforcement process. This means that should not only has implications on the judgment, but also at the time of determining the suspect and the consideration of the prosecutors' charges. However, in fact there are factors that impede these implications. In order to analyze factors that impede the implications of victim precipitation the process of law enforcement for perpetrators of a crime, will be analyzed by three components that must be included in the system of law according to Lawrence Meir Friedman, to wit consist of components of structure, substantive and cultural (Hendriana, 2016).

Based on the results of interviews of some of the judges in the District Court of Purwokerto, there are obsatcle in terms of legal substance, is that on the one hand, there is Victim Precipitation in the occurance of crime; but on the other hand, the judge has to follow the special minimum sentence. For example, the Law 35 of 2014 on Amendments to Law no. 23 of 2002 on Child Protection regulates special minimum sentence. According to the judges, the implementation of this regulation (special minimum sentence) actually does not bring justice to the perpetrator.

Naturally, if a crime occurs due to victim precipitation, especially the victim that actively encourages the occurance of the crime, then the special minimum sentence is not proportional to the severity of guilt of the perpetrator. For example in a criminal act of intercourse based on consent, Regarless of what extent the victim precipitation has can not remove prepetator's guilt if it happened with minors, but special minimum sentence would be incriminatory for the prepetator.



In response, there is a belief that judges should not impose sentences below the minimum standard, because Indonesia adheres to the Continental System so that judges (in accord with guideline for imposing criminal sanctions) are bound by the law (conservative view). This is a form the embodiment of binding persuasive principle of precedent. On the other hand, in the context of the minimum sentences as contained in the formulation of special crimes regulation, it explicitly regulate maximum and minimum sentences, and therefore does not require more interpretation (not to be interpreted differently). Therefore, in the application of special criminal sanctions apart from being based on the provisions of Article 103 of the Criminal Code and 284 paragraphs (1) and (2) of the Criminal Procedure Code, it can use jurisprudence as a jurisprudence basis in imposing criminal sanctions, but it is noteworthy that it still have to be based on the minimum provisions, which is, at least equal to or above the minimum (K. Haris, 2017). In conclusion, the conditions that able to mitigate the defendant cannot be a reason for the judge to dismiss the special minimum sentence of imprisonment.

On the other hand, there is another view, that it is often possible some action is unregulated in the law or statutory regulation, or ambiguous law, or even the inability of regulation that exist to keep up with situations and social conditions that continue to develop dynamically. Judges facing such situation is not allowed to refuse to examine the case just because there is yet any legislation that regulate or ambiguous law. According to Article 10 paragraph (1) of Law Number 48 of 2009 on Judicial Powers states, "Courts are prohibited from refusing to examine, hear and decide a case filed on the pretext that the law does not exist or is unclear, therefore it is obligatory to examine and decide it". Rather, the judge here can make legal discoveries or even use unwritten legal principles in examining and deciding the case. Consequently, even though normatively legislation regulate special minimum sentence both for imprisonment and criminal fines, but in practice there are judge that decide to dismiss special minimum sentence that has been strictly regulated with reason or consideration of sense of social justice and moral justice (Rumadan, 2013). It appears that this concept is inseparable from the provisions of Article 5 Paragraph (1) of Law Number 48 of 2009 on Judicial Power that states, "Judges and judges of the constitution are obliged to explore, follow, and understand the legal values and the sense of justice that exist in Public."

Similarly, according to Mertokusomo and Pitlo, judges are no longer just a mouthpiece of laws, but a legal establishment that give shape to the body of law to be able to answer legal necessity. Therefore, there are more to it than just a philosophical reason the needs to break through the limits of special minimum sentences but also as an embodiment of free and independence judges in finding a legal norm. According to Mertokusomo and Pitlo, this is known as a teaching on judge freedom, in which judges are not merely mouthpieces for legislators, but able to autonomously, creating and exploring social processes (Rumadan, 2013).

Correspondingly, it appears that breaking through the limit of a special minimum criminal penalty is still a matter of debate among not only academics and criminal law

experts, but also legal practitioners. Consequently, whenever a judge try to dismiss or break through the limit of a special minimum sentence, it means that the judge gravitate to adopt values of philosophical and sociological juridical in order to achieve justice for the parties involved. The reason is that there is yet any legal basis specifically regulate the exclusion of special minimum sentences. Even if the provisions in Act No. 48 of 2009 on the Powers of Justice facilitate judges to be able to explore, and understanding the legal values and sense of justice that exist in society. However, this provision or any other reason has yet to provide common foundation for every judges dealing with special minimum sentences, because there is a bealive that by dismissing special minimum sentences would lead to legal uncertainty.

As a comparison in narcotics cases, currently there is Circular Letter of the Supreme Court (SEMA) No.3 of 2015 on Enforcement of the Formulation of the Results of the 2015 Supreme Court Chamber Plenary Meeting. In the formulation of criminal chamber law A.1, stipulates that:

Judges examining and judging cases must be based on the General Prosecutor's Charges (Article 182 paragraph 3 and paragraph 4 of the Criminal Procedure Code). Prosecutor charging with Article 111 or Article 112 of Law Number 35 Year 2009 on Narcotics, but later on legal facts revealed in court proved to be more in comply with Article 127 of Law No. 35 Year 2009 on Narcotics which is not charge with. The defendant was proven to be a user and the quantity was relatively small (SEMA No. 4/2010), so the judges have to judge in accordance with charges but is also allowed deviate from the special minimum sentences provisions by making sufficient considerations.

Examining SEMA No. 3 of 2015 above, the provisions in it seems artificial. As illustration, the Public Prosecutor in the case of narcotic abuse did not charge the defendant with Article 127 of Law Number 35 of 2009 on Narcotics, but instead charge with Article 111 and/or Article 112. This means that the charges are not in comply with the evidence revealed in court, or simply that the charge of the public prosecutor was wrong. In perspective, Article 111 paragraph (1) and Article 112 paragraph (1) do contains a special minimum sentences of imprisonment 4 years in prison, while the court the defendant in fact proved to be just Misusing drug of Narcotics Group I for personal use. It means that the defendant should have been charged with Article 127 paragraph (1) that regulate maximum imprisonment of 4 years (no specific minimum) in the first place. Based on this, the defendant should have been acquitted because the charges were not in comply with the facts revealed in court. However, according to SEMA, judge can give guilty verdict in accordance to charges. The assumption is that the defendant do possess Narcotics Group I, *mutatis mutandis*, the defendant do owns, keeps, or controls of said drugs. It means that the elemet of law "Everyone unlawfully owns, keeps, controls, or provides Narcotics Category I, not a plant" in charges (eg, charged with Article 112) have been met, but the judge can deviate from special minimum sentences of Article 112.

This shows that on one hand, it appears inconsistent and artificial, but on the other hand, SEMA No. 3 of 2015 accommodates aspects of justice for perpetrators. One instantecs

is Judgement Number 220/Pid.Sus/2017/PN.PWT, in which the panel of judges deviate from specific minimum sentences basing it on SEMA No. 3 Year 2015. Interestingly, one perspective is the nature of trafficking and abuse of narcotics itself is an offense that endanger many number of victim, especially in the children, adolescents, and young generations in general, hence becoming main concern of the government. Therefore, it would also be wrong if General Prosecutor's mistake in formulating charges would make the perpetrator of misuse of drugs free of criminal liability. However, if forced to comply with the special minimum sentences of Article 111 or 112 of Law Number 35 of 2009 on Narcotics, it would be unjust because the defendant was only an abuser of Narcotics Category I for personal use, hence judge's decision to deviates from special minimum sentences.

Consequently, SEMA No. 3 of 2015 allow judges to deviate or break through special minimum sentences in judging narcotics cases as explained. But keep in mind that the primary problem in dealing with Victim Precipitation in Psurwokerto is not the case of narcotics abuse rather sexually motivated crime against children, as Victim Precipitation predominantly occurs in the case of molestation or sexual intercourse against children. Therefore, if narcotics cases have exclusion clause to deviate from the special minimum sentences, naturally it does not preclude the possibility for other types of cases. However, it should be noted that SEMA is a recommendation so that it does not have binding legal force. Therefore, according to one of the informants (judge), "it is necessary to have a Supreme Court Regulation that regulate the exclusion of special minimum sentences". It means that it is possible for Victim Precipitation to only be revealed at the trial, in fact in certain cases this revelation happen during at pledoi or after prosecutor' demand, while prosecutor's charges is not in comply with legal facts revealed in court.

In connection with the flaw of legal structure, according to informants (judge) state that in Purwokerto District Court there are general prosecutor who is demanding high-sanctions for perpetrators regardless of the existance of Victim Precipitation in the commission crime. He also said that there are flaw in the stage of pre-adjudication, because of the success or failure of case handling at the Adjudication stage, surely also depends on police initial action in gathering evidence. The evidence naturally include finding and analyzing the presence or absence of victim precipitation and to what extent it influence the commission of crime, so that the victim precipitation is also a consideration for the Police in determining a person as a suspect.

Similarly, according to informants (prosecutor) to date the practice of the criminal justice system is yet to be a unified model, especially coordination between investigator and the prosecutor. Naturally, it will be problematic if the perpetrator is already detained and it turns out that victim precipitation is exist in the commission of crime, which was only revealed in court or even after the pledoi or prosecution.

In response, the author's analysis of court judgement shows that the law enforcement process still ignores victim precipitation aspect. For example in court judgement no. 193/Pid.Sus/2015/PN Purwokerto on extramarital sex with children (see

table 1). The occurrence of this case was inseparable from the existence of victim precipitation. It was revealed that on the previous day the victim also had intercourse with another person, in which this other person eventually became a suspect (in another criminal case). The next day the victim then had intercourse with the defendant (in this criminal case) whom she just knew and the money the defendant used to pay for the hotel was the victim's money. Interestingly, the other criminal case is only came into light during the defense or pleddoi (not at the time of trial), that previously victims had had a similar case in other jurisdictions (other District Court). This proved that this was not the first time the victim had intercourse with a man.

No wonder, then judge give low sentences, to wit imprisonment for a year. This prove that the judiciary here has considered the aspect of victim precipitation in imposing criminal sanctions for the perpetrator, which can also be found in the consideration of the imposition of criminal sanctions that one of the mititgates factor for the defendant sentence is "The act of the defendant occurred with victim's consent". Understandably, judge's judgement in this case is based on the secondary charges, viz., Article 287 paragraph (1) of the Criminal Code with the maximum sentence for imprisonment is 9 years subsequently the judge only sentence the defendant for a year in prison. Contrarily, Prosecutor's demands is based on the primary charges, viz., Article 81 paragraph 2 of Law No. 35 th 2014 with 5 years and 15 years; respectively those of minimum and maximum sentence for imprisonment, and eventually prosecutor demanded 7 years in prison.

Naturally, this raises some question as to why the judge's judgements rather use secondary charge than the primary charge. The reason being that the judges considered the element of "committing trickery, a series of lies or persuasion to a child to have intercourse with him or with other people." was not fulfilled. However, the element of "having intercourse with a woman outside of marriage, of which he knows or should reasonably be able to suspect, that the woman has not reached the age of fifteen, or if her age cannot be determined, the woman is not yet able to be married", had been fulfilled. On appeal, high court's judges also declare the defendant guilty by meeting the elements of paragraph 287 (1) Criminal Code, only criminal sanctions is raised to be 3 years and 6 months in imprisonment. In response to this, it appears that district court judges really do consider the aspect of victim precipitation in imposing criminal sanctions for perpetrators, thus making justice as a reflection of proven legal facts.

Contrarily, high court's judges focus more on the aspects of the interests of children who have become a victim of crime. Yet by imposing 3 years and 6 months sentences for imprisonment, half of the demands of the prosecutor (7 years), prove that high court judge has ruled out the aspects of victim precipitation entirely. Differently, another informant (lawyer) explain the possibility of a case with both victim and perpetrator are children, in addition the victim also plays an active role in the occurrence of molestation or sexual intercourse. It brings more complexity, since not only it is about victim precipitation, but also whose interest should come first and the issue of diversion.

Another main points that should be assessed in the case above, is the revelation during pledooi (not during trial) that the victim had previously had a similar case in another jurisdiction (another District Court). It shows that the police only focused on finding evidence to prove the perpatator's guilt rather than findin background and other aspects from victim's point of view, hence victim precipitation is undetectable since the beginning of law enforcement process. Although victim precipitation is unable to eliminate perpetrator's guilt, but it is still very important in order to bring justice for both parties.

Simimilarly, in case No. 70/Pid.B/2016/PN Purwokerto regarding persecution that led to the death, here the perpetrator was sentenced to 2 (two) years in prison (see table 1). Since this case started with the victim joking and taunting the perpetrator first, creating back and forth squabble, and eventually victim slapped the perpetrator. The perpetrator then confronted the victim at his home with the intent to put everything behind and apologize, but was attacked by the victim and his wife, resulting in fight. The results of *post mortem et repertum* actually show that the victim's death was due to a heart attack. In this case, it was clear that victim precipitation existed in which the victim provocked then attacked first. The existence of victim precipitation is increasingly visible in the consideration of the imposition of criminal sanctions that one of mitigating factor in sentences is " the defendant's actions were triggered by the victim's actions ".

Even one of the informants stated that the case should never been brought to court in the first place while the victim's wife who helped persecute the perpetrator should be the one processed by the police. Victim precipitation here stimulate the occurrence of these events, yet public prosecutor still prosecute the accused to 12 years imprisonment basing it on the primary charges, Article 338 of the Criminal Code on murder. Druing appeal, the high court's judge still found the defendant guilty of fulfilling the elements of Article 351 paragraph 3 of the Criminal Code, but the imprisonment was increased to 3 years imprisonment. Understandably, it appeared that the prosecutor still ignore Victim precipitation in determining the charges and demands, especially high court's judge who impose harsher sentences for the defendant.

As comparison in case of attempted robbery at Sumamarecon Bridge, Bekasi (May 23, 2018), in self-defense, victims killed one of the perpetrator, leading to victims as suspects. However, in its development, the status of the suspect was revoked and in fact was given an award from the police because of his courage to fight against these robbers. Naturally, it prove that during pre-judicial stage, the police have considered the aspects of victim precipitation and the reasons for eliminating sentence.

Still on the discussion of structural component, based on a lawyer's perspective, not all judges see victim precipitation as something that mitigate sentences for perpetrators. Another obstacle is that the budget to accomodate witnesses at prosecutor's office is still minimal, and may hinder the prosecutor in searching for substantive legal facts, including the existence of victim precipitation.

Besides these two components, there are also obstacle in legal culture aspect. Based on information from prosecutor in Purwokerto District Attorney that people tend to be apathetic in being witnesses, making it difficult to find substantive legal facts, especially victim precipitation. Even for victim's family, according to one advocate that there is a tendency for the victim's family to conceal the negative side of the victim, making it more difficult to unravel victim precipitation.

## Conclusion

Implication of victim precipitation on imposing criminal sanctions for perpetrators comes in lighter sentences in judgement than the demands of the Prosecutor. However, there has yet any uniformity of the judge's perspective and consistency of formulation regarding the inclusion of victim precipitation explicitly in the judge's judgement.

Meanwhile, obstacle factor is special minimum sentences can dismiss victim precipitation. Obstacle of legal structure aspects, including the exclusion of victim precipitation at the stage of pre-adjudication, lack of coordination between investigator with the prosecutor's office, some prosecutor tend to give higher demand and pragmatic point of view, not all judges regards the aspects of victim precipitation, as well as a lack of budget in prosecutor's office for witnesses accomodation. Obstacles from the aspect of legal culture, among others, people tend to be apathetic in becoming witnesses, and the tendency of the victim's family to conceal the negative side of the victim, making it difficult to unravel victim precipitation.

## Suggestion

*First*, the need for uniformity and consistency of perspective and formulations, respectively, regarding the inclusion of victim precipitation explicitly in the consideration of criminal sanctions. *Second*, there needs of special regulations that facilitate judge to be able to deviate or break through the provisions of special minimum sentence specifically in case of victim precipitation. *Third*, there is a need for a common perspective and synergistic efforts among law enforcers in regards to victim precipitation aspect as part of every process of the criminal justice system. *Fourth*, building public legal awareness to be cooperative in unraveling the existence of victim precipitation.

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