

Feminist Legal Theory as a Review of Legal Philosophy: Its Relation with Gender Equality in Indonesia

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ABSTRACT

The emergence of the Feminist Legal Theory is caused by an imbalance in the legal order which tends to be patriarchal, including in writing history the role of women should be balanced with that of men. In the perspective of legal philosophy, fulfilling women's right and gender equality is an effort to obtain justice as a legal goal to realize the principle of equality before the law. The research method is normative juridical research with a qualitative analysis approach using primary and secondary legal sources. As a conclusion that the need for equal participation for women and men to exercise their rights and obligations in every policy and program as well as legal norms in laws and regulations that can guarantee equality of policies and programs that provide benefits to men and women.

Keywords : feminist legal theory, legal philosophy.

INTRODUCTION

The principle of equality of men and women before the law has been stated in Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia that all people have equal status before the law.

Article 28 H paragraph (2) of the 1945 Indonesian Constitution states that everyone is entitled to facilities and special treatment to obtain equal opportunities and benefits in order to achieve equality and justice. In this article there is legal force for equality between women and men in equal rights as citizens, besides that there is equality in responsibility between men and women because in each article of the 1945 Constitution there is no special regulation for men or women but directly mentions as "citizens".

The inequality of the legal order that is too patriarchal has led to the existence of Feminist Legal Theory or feminist legal theory. According to feminists, the making and

compilation of history does not reflect the role of women, only from the perspective of men. Starting from this history, concepts about human existence, gender potential and social engineering are created, resulting in logic, language and legal structures that reflect the character and values of the male perspective (Aditya Yuli Sulistyawan, 2018).

Along with the development of the Critical Legal Studies movement in America, Feminist Legal Theory emerged in the 1970s where in the development of legal thought, feminism also influenced the emergence of new thoughts about the relationship between law and women's rights.

Feminist Legal Theory's view that the law plays a role in emphasizing the subordination of women and seeks to reform the legal position and approach to women and gender (Martha A. Fineman, 2015).

Feminist jurisprudence is a school of legal philosophy based on a belief in gender-based political, economic, and social equality (Neeuro Tandon, 2008).

Feminist Legal Theory, also called *Feminist Jurisprudence*, is the idea of the applicability of law to women and the discrimination that women get from the law.

Feminist Legal Theory aims to fight for justice for oppressed women, while the study of law not only applies the principle of certainty but also the principle of justice. (Setiawan, 2018).

Feminist Legal Theory is a legal philosophy based on gender equality in the political, economic and social spheres.

Feminist Legal Theory argues that as written in history, the legal sphere is an instrument to perpetuate the position of women under the subordination of men, where men create biases in the concept of human nature, gender potential and abilities, and patriarchal culture in regulating society.

Directly or indirectly, patriarchal culture has created gender discrimination that women's position in law and society is considered lower than that of men. Therefore, changes in the status of women are sought by Feminist Legal Theory through legal changes, approaches and views on gender cases to be fairer and more balanced.

Feminist legal theory has influenced legal thinking in various areas of law, including domestic relations such as marriage, divorce and family, domestic violence, employment, sexual harassment, civil rights, taxation, and reproductive rights. (Setiawan, 2018).

The regulation of women's rights in Indonesia is written in Articles 45 to 51 of Law No. 39/1999 on Human Rights and Law No. 23/2004 on the Elimination of Domestic Violence.

The Indonesian government has ratified several international treaties related to women's rights such as: Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) through Law No. 7 of 1984 (Law on the Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women) and Law No. 5 of 1998 on the Ratification of the Convention against Torture and Other Cruel or Inhumane Treatment or Punishment (CAT).

The Indonesian government has also established the National Commission on Violence Against Women (*Komnas Perempuan*) through Presidential Decree number 181 of 1998 dated October 9, 1998; which was later strengthened by Presidential Regulation number 65 of 2005.

Women are included in vulnerable groups together with other vulnerable groups such as children, minorities, refugees and others as written in various studies and arrangements of national legal instruments and international law seeing from various social, cultural, economic or physical conditions that cause women as a weak and unprotected group so that they are at risk and danger of experiencing violence or violations of rights by other groups (Krisnalita, 2018).

Women's rights include various types of rights such as (Krisnalita, 2018):

1. Political rights, as follows: The right to participate in government; The right to be elected and vote in elections to determine the people's representatives in government; and the right to take part in government and non-government organizations.
2. The right of citizenship.
3. The right to education and teaching.
4. The right to work.
5. The right to health.
6. The right to perform legal acts.

One of the principles introduced and developed in an effort to realize the fulfillment of women's rights is the principle of gender equality where the term gender was introduced by social scientists to explain the differences between women and men that are natural and culturally formed (Hasanah & Musyafak, 2017).

The term gender is always associated with culture, which refers to differences in the status and roles of men and women and is formed in a long social and cultural process

(Sinulingga, 2006).

The acquisition of opportunities and rights of men and women as human beings begins with the principle of gender equality to play a role and participate in political, legal, economic, socio-cultural, educational, defense, national security activities, equality in enjoying the results of development and the elimination of discrimination and structural injustice.

The principle of gender equality raises discourse in Indonesia because every concept, product of thought and scientific theory is the result of a worldview.

This paper is about women's rights and thoughts or principles of gender equality in the perspective of legal philosophy as well as issues regarding the concept of law that has justice for women and the feminist jurisprudence approach in an effort to realize legal reform, especially for women in Indonesia.

RESEARCH METHOD

Legal research is a scientific activity based on certain methods and thoughts that aim to study certain legal symptoms by analyzing them with a prescriptive doctrinal approach (Muhaimin, 2020).

In conducting legal research, a research method will be used to support the analysis of the research conducted. In this research, the method used is normative legal research method (normative juridical) using qualitative analysis method. Normative legal research is research by only processing and using secondary data related to the issues raised.

This type of research is a normative juridical research method through a qualitative approach. The normative juridical research method with a qualitative approach is research that includes activities to describe, interpret, systemize, inventory and evaluate the overall positive law that applies in a country.

This research will use a conceptual approach through literature study. The conceptual approach here means that the author will analyze every doctrine or perhaps expert opinion related to the object of this research.

RESULTS AND DISCUSSION

Philosophy of Law is a branch of philosophy that studies the nature of law (Prasetyo, T. ; Barkatullah, 2013). Paradigms are part of philosophy, because they are the main, parent, or 'umbrella' philosophy.

Feminist legal theory is a legal theory born from the thinking of feminists, which is a

women's movement, which has the belief and/or view that women experience injustice because of their gender and therefore seeks to eliminate it by increasing women's autonomy and advocating for women's rights (Savitri, N. , 2006).

The purpose of law is justice, which philosophically is the most important legal goal to realize order in society and legal certainty. In the term "justice" there is the term "fair" which is the basic word.

In the Big Indonesian Dictionary (KBBI), the term "fair" is defined as:

- (1). equal weight; not one-sided; impartial;
- (2). favoring the right; adhering to the truth;
- (3). appropriate; not arbitrary.

The definition of "fair" as mentioned in the KBBI above reflects that the law must fulfill these elements, namely: equal, impartial, adhering to the truth, and not arbitrary.

The first element is "equal" weight (not one-sided; impartial) tends to be said to be "balanced" rather than "equal" that justice is the nature, actions, and treatment that is fair, when connected with the definition of "fair", then justice is defined as the nature, actions, and treatment that is balanced / equal, impartial, adhering to the truth, and not arbitrary.

The issue of justice dates back to the Ancient Greeks and Romans. Justice as one of the cardinal virtues (cardinal virtue) (Marzuki, 2016).

Aristotle said that law has the sole purpose of realizing justice (Machmudin, 2003).

John Rawls explained that there is a connection between law and justice, namely the importance of law-based and administrative-formal justice which basically provides a minimum guarantee that everyone in the same case must be treated equally (Ujan, 2001).

The fulfillment and protection of women's rights arise because of demands based on the conditions of injustice experienced by women. Therefore, the gender equality movement and issues are intended as an effort to obtain the fulfillment and protection of women's rights which cannot be separated from thoughts about justice.

Feminism is one of the most influential thoughts on the birth and development of women's rights as well as an understanding, study and social movement that aims to change the subordinate status of women in a society that prioritizes the male perspective (Suwastini, 2013).

Women's rights originated from thoughts about the protection and fulfillment of rights for women, including groups vulnerable to human rights violations and gender equality, which have been accommodated in various national and international legal

instruments but guaranteed de facto fulfillment by each country.

From the point of view of legal philosophy, this is to provide certainty that women obtain justice as the purpose of law and the principle of equality before the law that applies gender discrimination.

Reforms to the legal system aimed at realizing justice for women include gaining equal access to resources for women and men in legislation, including access to health facilities, access to information, education, economic resources and others so as to provide substantive justice for women.

The source of Qur'an Law states that there is no difference between men and women because they get the same glory before the Creator (Dr. H. M. Dimiyati Huda, M.Ag, 2020), as Surah al-Isra' (17) verse 70 as follows:

وَلَقَدْ كَرَّمْنَا بَنِي آدَمَ وَحَمَلْنَاهُمْ فِي الْوَجْرِ وَالْبَحْرِ وَرَزَقْنَاهُمْ مِنَ الطَّيِّبَاتِ وَفَضَّلْنَاهُمْ عَلَى كَثِيرٍ مِمَّنْ خَلَقْنَا تَفْضِيلًا ۝٧٠

“And We certainly honored the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what We have created, with [definite] preference.”

Women who work and have careers in their work with the aim of developing and dedicating their potential and expertise, but they are burdened with the public opinion that women or mothers who work and have careers will not be able to carry out a good role as a wife and mother. In this case, Islam provides opportunities for women to take part outside the home if basically the community needs their expertise and efforts to realize *wajibah Ijtima'iyah* (Nafsiyatul Luthfiyah, 2015).

Ethical and religious education is needed in everyday life as a form of balance for science-oriented education (Nasrudin Umar, 2010). Education must first be obtained from the family.

The role and potential of women needs to be increased due to the demands faced, including through formal and non-formal education at home and abroad. The challenges faced by women in this modern era are (Nurul Hidayati, 2015):

- First : It comes from himself, especially his role and function in the family.
- Second : It comes from science and technology, especially for women with multiple roles.

Modern society no longer cares to answer metaphysical questions about human existence, the origin of life, the meaning and purpose of life in the universe. Modern man has lost the moral aspect as a control function of the tyranny of purely material science. Modernism has failed because it has ignored transcendental spiritual values as the potential of life (Haedar Nashir, 1999). For this reason, modern humans, including women, must

fortify themselves.

Women are expected to be able to develop their potential for the future of the family and the nation, namely the opportunity to have knowledge, nobility, wealth and also children; these four things are still given by society to women.

CONCLUSION

Thoughts related to feminism are efforts to realize gender equality and the principle of equality before the law, where everyone is equal before the law regardless of gender, race, or social status.

The need for equal participation for women and men to exercise rights and obligations in every development policy and program, the formulation of which legal norms are regulated in laws and regulations that contain provisions relating to the supervision of the implementation of equal rights and obligations between women and men as well as legal norms in laws and regulations that can guarantee equal policies and programs that provide benefits for men and women.

Women's issues are representative issues to be scheduled in the process of making legal instruments. Legislation is expected to identify women's issues, which is an obligation for legal drafters to realize substantive justice in lawmaking so that the laws formed have a goal for the benefit of women's lives.

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