

The Feminist Legal Theory Movement and its Implementation in the Indonesian Constitutional System



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ABSTRACT: The Feminist Legal Theory movement has had many impacts on the legal system in the world, especially in Indonesia. Feminist Legal Theory, which focuses on fighting for equality for women, has succeeded in removing women from discrimination. In Indonesia, the feminist movement has made a big difference to the development of the country's constitution. Women are no longer considered as marginalised people whose rights can be denied by men. Women are not the shadow of men, but more than that women are figures who stand alone to do something that is considered only men can do, while still not eliminating their nature as women.

KEYWORDS: Feminist Legal Theory, Constitutional, Equality

I. INTRODUCTION

Equality is something that continues to be fought for today. Equality is the goal in the struggle to eliminate discrimination in this world. One of the movements that persistently fights for equality is the feminism movement. Feminism itself is a movement that fights for equal rights for women and eliminates discrimination against men. Feminism was born from the assumption of a gap between women's rights and men's rights in the fields of law, politics, education, and other basic rights inherent in humans.

The feminist movement grew which later gave birth to the thought movement of the legal theory of feminism or so-called feminist legal theory (FLT) in the 1970s. Feminist legal theory (FLT) evolved along with the birth of critical legal studies (CLS) a movement that strongly criticized the law in force at the time. For feminist legal theory itself, the law is male-type, where the law is only the thoughts of men and does not accommodate the interests of women. The feminist movement is divided over several streams, three of which are major currents which is liberal feminism, Marxist feminism, and radical feminism.

Feminist Legal Theory cannot be separated from the three major schools of feminism. Feminist Legal Theory, which gave rise to a distinctive feminist method of analysis in law, is widely used to analyse a very wide range of issues in various fields of law. The study, among others, by criticising the law from a feminist angle as its main study (Sulistiyawan, 2018). Feminist Legal Theory seeks a change or reform to the order of the legal field which is expected to make the law responsive and contain women's perspectives.

The feminist movement has a long history in Indonesia. The patriarchal culture that is very strong in Indonesia is a challenge for the feminist movement in seeking equality for women. The patriarchal culture that considers the realm of women as limited to the bed, well and kitchen makes women not get their rights properly. Women are only considered as men's companions, not as a whole figure of their own. It is not uncommon for women to experience physical and even sexual violence.

This inequality in the fulfilment of rights between women and men is what made RA Kartini begin to spearhead the feminism movement in Indonesia. RA Kartini departed from her experience as a woman who was not respected for her rights, especially in terms of education. The struggle for women's emancipation by RA Kartini began with the opening of a school for women in Jepara. Kartini began to teach writing and reading to women, despite experiencing a lot of opposition from various parties. However, this did not dampen Kartini's intention to fight for emancipation for women. Kartini's struggle began to show results marked by the development of schools for women called 'Kartini School' in various regions. Until then, many female figures participated in the fight for women's emancipation in Indonesia.

The feminist movement in Indonesia is beginning to show results for the equality of women and men. Equality for women and men is affirmed by the Indonesian constitution, namely the Constitution of the Republic of Indonesia (UUD NRI 1945). Article 27 paragraph (1) of the 1945 Constitution states that 'all Indonesian citizens are equal before the law and government and shall uphold the law and government with no exception'. The article explains the recognition of equal rights for every citizen. According to Moempoeni Martojo, the term citizen certainly implies both women and men (Kania, 2015). This means that equal position is obtained by every citizen, whether female or male, regardless of race, ethnicity, class, religion and position.

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Recognition of women's rights has also begun to enter the constitutional system in Indonesia. This is marked by the ratification of CEDAW (Convention on the Elimination of All Forms of Discrimination against Women) with Law No. 7 of 1984 concerning the Ratification of the Convention on the Elimination of All Forms of Discrimination against Women. Ratifying the convention means that the Indonesian government must be optimal in implementing every rule in the convention (Natalis, 2020). Therefore, all forms of regulations in Indonesia must include gender justice in every legislation made. In this paper, the author will try to discuss the feminist legal theory movement and how it is implemented in the Indonesian constitutional system.

II. METHOD

This research is a normative legal research with library legal research. In this research, the author uses a qualitative analysis method. This research uses qualitative research. Qualitative research is research that collects data and then presents it in the form of words. Qualitative research is research that intends to understand the phenomenon of what is experienced by the subject.

III. DISCUSSION

A. THE DEVELOPMENT OF THE FEMINIST LEGAL THEORY MOVEMENT

Feminist Legal Theory (FLT) first emerged in the 1970s, along with the development of the Critical Legal Studies (CLS) movement in America. The current of thought that tends to strongly criticise the inequality and discrimination received by women in terms of the law makes feminist legal theory in some ways included in the Critical Legal Studies section. However, even so, FLT leaders consider that although CLS has provided thinking that critiques legal inequality, this is only in the context of men's thinking.

Feminist legal theory or feminist jurisprudence is a philosophy of law based on gender equality in the political, economic and social spheres. Feminist Legal Theory is based on the feminist movement's view that historically, law has been an instrument to perpetuate women's position under male subordination (Heri Setiawan., et al., 2018). Laws that are born only reflect the values brought by men so that the existing legal style is masculine and cannot accommodate women's rights.

Feminist legal theory was born out of the growing feminist movement that considered women to be alienated and marginalised from society. Feminism as a philosophy and movement is related to the Enlightenment Era in Europe, spearheaded by Lady Mary Wortley Montagu and the Marquis de Condorcet. After the American Revolution in 1776 and the French Revolution in 1792, the idea developed that women were less fortunate than men in their social reality. At that time, women, whether from the upper, middle or lower classes, did not have rights such as the right to education, politics, property rights, and employment (Retnani, 2017).

The word feminism was first coined by utopian socialist activist Charles Fourier in 1837. The European-centred movement migrated to America and flourished with the publication of John Stuart Mill's "The Subjection of Women" in 1869. Their struggle marked the birth of First Wave feminism. In the years 1830-1840, in line with the eradication of the practice of slavery, women's rights began to be considered with improvements in working hours and wages for women, given the opportunity to participate in education, and the right to vote (Retnani, 2017).

The early 19th century marked a new milestone for the feminist movement, where women were recognised in the political sphere. Women were given the right to vote and to join parliament. More resonance in the feminist movement came with the birth of the critical legal school. In the 19th century, Sigmund Freud came up with the idea that the original nature of men and women cannot be changed, but the most important thing is to give a crucial or important part to women in their social relationships. Similarly, Simone de Beauvoir urged women to step outside of socially defined boundaries and become "the other" (Hidayati, 2018).

The period 1960-1970 did not see a significant period of feminism, but its existence was gaining attention. Feminists made their mark in 1967 with the passing of a number of laws that reorganised sexuality and marriage. This inspired other countries to create similar movements. This also gave rise to the feminist legal theory movement.

The feminist movement began to make its presence felt in Indonesia during the colonial era. One of the pioneers of the feminist movement was RA Kartini who emerged in 1876-1904. Starting from the experience of RA Kartini who found it difficult to get an education equal to her male siblings. Kartini was only shackled by her parents, unlike her brothers who were educated at Leiden University in the Netherlands. She felt humiliated by the existence of polygamous marriages. She then pioneered the opening of schools to educate women. After that, a feminist figure was born in West Java, Dewi Sartika (Djoefan, 2001). After the presence of RA Kartini and Dewi Sartika, feminism began to show its existence in Indonesia. There were many women's organisations such as Gerwani, Perwari, Dharma Wanita and other organisations that aimed to empower women.

CEDAW calls on so-called 'signatory states' to embody the principles of gender justice in their respective constitutions. States must act to translate the principles of CEDAW into their legal systems, including by amending discriminatory laws to adopt laws that promote gender justice and women's empowerment and ensuring that the practice of law serves the purpose of upholding women's rights (Natalis, 2020).

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B. IMPLEMENTATION OF THE FEMINIST LEGAL THEORY THOUGHT MOVEMENT IN INDONESIAN CONSTITUTIONALISM

Juridically, women's rights in the economic, social, cultural, civil and political fields, which are the substance of the CEDAW Convention, have been recognised by the international community, including Indonesia, which ratified the Convention in 1984 and is also obliged to implement it (Giri, 2017).

Indonesia currently adheres to positivistic legal theory, where law is something that is written and made by the authorities, in this case the state. As a consequence of positivistic law, all citizens must comply with what is written by legislation. The applicable law is a law that is free from moral issues. The written rules (positive law) of this country may only act as a caste bastion in the social strata of life and almost deviate from the philosophical purpose of its formation (Erwin, 2012). Legal positivists consider the law as a portrait of social reality or even social reality itself. So that to find out the form of sexual division of labour (division of labour between women and men) that has been and is currently applicable in Indonesia, one is considered sufficient to read for example the Civil Code, Marriage Law number 1 of 1974, and the Criminal Code (Heri Setiawan., et al., 2018).

For the feminist legal theory movement, positivism in Indonesia will only lead to a return to discrimination against women because, judging from the applicable legal provisions, there are those that still marginalise women. For example, in the Civil Code there are rules regarding marriage agreements, namely agreements made for husband and wife to manage them individually. This agreement will make women have economic independence, but then another rule in the Civil Code explicitly denies this rule and states that the husband can be the captain of the wife's property, even the husband can transfer property obtained together during marriage, without the wife's consent.

However, there are also regulations that have prioritised the elimination of discrimination against women, even privileging women. Regulations that contain women's equality in the eyes of the law include the Law on Human Rights, the Law on the Elimination of Domestic Violence and the Law on Politics.

1. Law on Human Rights

Law No. 39/1999 on Human Rights brought fresh air to gender equality in Indonesia. The influence of the feminist legal theory movement characterises this law. With the Human Rights Law, all laws and regulations must be in line with the principles of human rights protection, namely the elimination of discrimination based on religion, ethnicity, race, ethnicity, group, class, social status, economic status, gender, language, and political beliefs. The prohibition of discrimination is regulated in Article 3 paragraph (3), which states "Everyone is entitled to the protection of human rights and basic human freedoms, without discrimination"

The prohibition of discrimination against certain groups in the Human Rights Law makes women no longer a marginalised figure who must be under the shadow of men. The rules regarding human rights apply to all groups, which also apply to all genders.

2. Law on the Elimination of Domestic Violence

Law No 23/2004 on the Elimination of Domestic Violence sees sexual violence as a violation of human rights. The previous Criminal Code saw sexual violence only as ordinary violence. Before the Law on the Elimination of Domestic Violence was passed, domestic violence was only considered a family disgrace which resulted in victims not receiving adequate legal protection. Most victims are women who seem helpless in a patriarchal culture.

Often women victims of violence are blamed (or partly blamed) for the violence perpetrated by the perpetrators (men). For example, wives who are victims of domestic violence by their husbands are blamed with the assumption that the domestic violence committed by the victim's husband is the result of her mistreatment of her husband. This stigmatisation of the victim in relation to her treatment (or service) to her husband has made the victim as bad as the perpetrator of the crime. Thus, adequate legal instruments are needed to eliminate domestic violence (Firdaus, 2008).

The lack of law enforcement against domestic violence cases is due to several things, including an understanding of the root causes of domestic violence itself from the perspective of law, religion and culture. For this reason, efforts to disseminate women's human rights must be carried out effectively to reduce the number of victims who fall victim to domestic violence (Kania, 2015).

The entry of the feminist legal theory movement brought domestic violence into the realm of law. The thinking of the feminist legal theory movement, which aims to protect women from acts of discrimination, is elaborated in regulations on the elimination of domestic violence. Domestic violence, especially that experienced by many women, is a violation of human rights and not just a shame. It is appropriate for the law to regulate this domestic violence and to bring it within the scope of the law, so that the victims receive legal protection. This can also prevent the occurrence of domestic violence in the future.

3. Political Law

The importance of women's participation in politics lies in the fact that it is women themselves who truly understand and appreciate women's problems and conditions. The inclusion of women in the political sphere is expected to have an impact on the policy products produced, especially those that are directly related to women's lives. In addition, the Indonesian government has ratified the convention on women's political participation, the Convention on the Political Rights of Women. This means that the Indonesian government is obliged to fully implement every part and article of the convention. In fact, women's political rights in a broad sense are an integral and inseparable part of human rights, and vice versa, human rights are a fundamental aspect of various democratic frameworks (Thalib, 2015).

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The feminist legal theory movement has been fairly well implemented in political laws in Indonesia. There are at least two pieces of legislation that were born to attract the participation of Indonesian women in politics, namely Law No. 2 of 2008 on Political Parties, last amended by Law No. 2 of 2011 on Political Parties, and Law No. 10 of 2008 on General Elections for Members of the House of Representatives, Regional Representatives Council, and Regional Representatives Council, last replaced by Law No. 8 of 2012 on General Elections for Members of the House of Representatives, Regional Representatives Council, and Regional Representatives Council.

Indonesia's electoral system has been designed to increase women's representation in parliament. Starting with Law No. 12/2003 on Elections, Article 65 Paragraph 1, which states that political parties "may" nominate 30% of women as legislative candidates. However, the results obtained are not satisfactory, as only 11.27% of the initial expectations of 30% have been achieved (Thalib, 2014). This result was also achieved because the 2004 elections used a limited open proportional system in which candidates had to receive votes equal to or greater than a predetermined voter divisor number (BPP), and if this was not met, the first-past-the-post system was used. In the 2004 elections, many female candidates were placed at the bottom of the list, so that they could not be elected, even though many female candidates received more votes than male candidates at the top of the list and had to be willing to give up their votes so that the candidates above them could meet the voter divisor number.

The electoral system in Law 12/2003 was considered unfair and disadvantageous to women candidates, until it was changed with the birth of Law 10/2008 on the General Election of Members of the House of Representatives, the Regional Council of Representatives and the Regional Council of Representatives. Law 20/2008 gives more attention to women than Law 12/2003, where in Law 20/2008 there is a rule that each political party must include at least 30% (thirty percent) of women in the list of proposed candidates. This is a must for political parties to nominate candidates for the general elections. In addition, another mechanism adopted is the alternate system, where every 3 candidates must have at least 1 female candidate and are arranged based on serial numbers. Then, the electoral system in Law No. 10/2008 uses the determination of elected candidates with the lowest serial number system if it does not reach 30% of the BPP. This system is called affirmative action. In this way, the representation of women in parliament can reach 30% of the total number of members of parliament.

But then the rules regarding this serial number system were tested in the Constitutional Court, and the Constitutional Court's decision No. 22-24/PUU-VI/2008 declared that the determination of elected candidates for legislative members by serial number in Article 214 was unconstitutional. Based on the decision of the Constitutional Court, Law No. 8/2012 amending Law No. 10/2008 on the general election of members of the Chamber of Deputies, the Council of Regional Representatives and the Council of Regional Representatives was enacted. Law No. 8/2012 stipulates that the determination of the elected candidates shall be made by majority vote, as stated in Article 215 of the Law.

The change from a serial number system to a majority vote system has had many effects on the legislative election system, especially in terms of women's representation. Maria Farida Indriati said, Women's quota issues are things that need to be fought for as a constitutional right to achieve equality in the development of the Indonesian nation as a whole. Changing the system of determining elected candidates from serial numbers to majority vote will lead to inconsistencies in affirmative action, although majority vote is the most appropriate manifestation to fulfil the principles of democracy.

The determination of elected candidates with the most votes will have a major influence on women's representation in parliament. Unlike the system of determining serial numbers where political parties can arrange the placement of women candidates so that later they can be elected, but the determination with the most votes relies more on the existence of these candidates, especially women candidates.

The feminist legal theory movement has changed Indonesia's constitutional system, particularly the representation of women in government. This was marked by Indonesia's first female president, Megawati Soekarnoputri, who then attracted other women to participate in politics, which had previously been a male preserve. The arrival of the feminist movement in Indonesia also changed the stigma of society, which had only revolved around mattresses, wells and kitchens, to women who needed to be independent and empowered. However, this did not change their nature as women who were, after all, 'mothers' to their homes.

CONCLUSIONS

The feminist legal theory movement has been a breakthrough in eliminating discrimination against women in the legal system. The feminist movement has succeeded in transforming the law, which has been seen as masculine, into a law that is also friendly to women. Women are no longer seen as marginalised people whose rights can be denied by men. Women are not the shadows of men, but rather figures who stand alone to do something that only men are supposed to do, without losing their femininity.

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