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Feminism Criticism of Abortion Provisions of Rape Victims According to Law Number 36 the Year 2009 on Health

Hotmaria Hertawaty Sijabat

Fakultas Hukum Universitas 17 Agustus 1945 Jakarta, Indonesia

Kunthi Tridewiyanti

Fakultas Hukum Universitas 17 Agustus 1945 Jakarta, Indonesia

Abstract--Abortion is a controversial term that has attracted attention from various points of view, although it has never reached common ground. One perspective of the discussion about abortion is juridical. The research method used is a normative juridical and normative-philosophical research method using the doctrine of feminism as an analytical tool. Research shows the following results. Law Number 36 of 2009 concerning Health, which regulates abortion, cannot provide legal protection to women who experience unwanted pregnancies due to rape victims. Following up on the study results, the authors propose the following suggestions. Articles regarding abortion in Law Number 36 the Year 2009 concerning Health need to be amended immediately to provide legal protection to women who experience unwanted pregnancies due to rape victims. Thus, the results of this work become an essential input for the development of similar studies in the future.

Keywords---abortion, criticism, health, law, rape victims.

Introduction

Abortion is one of the topics of conversation that is still a matter of debate now. The discussion about abortion is a controversial topic that never ends because it relates to human life, namely women who experience unwanted pregnancies and babies in the womb. Discourse on abortion can be discussed from philosophy, religion, culture, law, ideology, and others (Fuad, 2014). Various views or opinions about abortion reflect the diversity of viewpoints. One of the perspectives of the discussion on abortion is the juridical point of view in the discussion of Philosophy of Law and Legal Studies. Within the discussion framework, the doctrine of liberal feminism, which starts from the principle of equality or equal

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Corresponding author: Sijabat, H.H.; Email: sijabathotmaria@gmail.com

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rights and positions of men and women, is one theory that can be used as an analytical tool.

In positive law, abortion is regulated in Law Number 36 the Year 2009 concerning Health and the Criminal Code. In principle, abortion is an act that is forbidden to do. The prohibition aims to provide legal protection for pregnant women (Soekidjo, 2003). However, under certain conditions, the abortion ban can be ignored for specific reasons and conditions, such as an unwanted pregnancy by a woman who is a rape victim (Wouda et al., 1998; Norris et al., 2011). A rape victim who experiences an unwanted pregnancy can have an abortion with specific reasons, requirements, and procedures as an "emergency" measure. Of course, this provision aims to prevent women who experience unwanted pregnancies because rape victims have illegal abortions, which are categorized as criminal acts so that they are punished. If such an illegal abortion occurs, the abortion can be categorized as a crime that makes the victim suffer double suffering (Sedgh et al., 2012).

In particular, this paper discusses the regulation of women's abortion, which results in unwanted pregnancies as victims of rape. In particular, it can be seen that the reasons, requirements, and procedures for having an abortion regulated in Law Number 36 the Year 2009 aim to provide legal protection for women, especially women who experience unwanted pregnancies as rape victims (Savira & Novianto, 2020). The purpose of providing legal protection to women who experience unwanted pregnancies due to rape can be realized by referring to the reasons, requirements, and procedures for carrying out abortions regulated by law (Asyhadie, 2019). However, in reality, the reasons, requirements, and procedures for carrying out abortions for women who experience unwanted pregnancies because victims of rape place the women who are rape victims experience double suffering if they have abortions that are not following the law. Folky Fuad commented as follows:

" . . . the existence of a law that criminalizes all forms of abortion plus the fear of social sanctions if it is known to the public, makes women who experience unwanted pregnancies (for example, rape victims) perform abortions secretly to untrained people" (Fuad, 2014).

In reality, the case of abortion of a woman who experienced an unwanted pregnancy due to a rape victim that ended in punishing a woman who was a rape victim occurred precisely because of the provisions of Law Number 36 of 2009. This case occurred due to various factors that made the abortion act not fulfill the requirements—the provisions of Article 75 and Article 76 of Law Number 36 of 2009. Instead of providing legal protection for women who experience unwanted pregnancies because of rape victims, the provisions of Law Number 36 of 2009 become the legal basis for punishing these women as perpetrators of illegal abortions. Women who experience unwanted pregnancies due to rape victims carrying out illegal abortions are punished for violating Law Number 36 of 2009. The evidence that can be presented is the case presented as follows. Vivi Savira and Widodo Tresno Novianto commented as follows ". . . from the health aspect, the regulation regarding the legalization of abortion in the Health Act is due to the prevalence of unsafe abortion (*unsaved abortion*)" (Savira & Novianto, 2020).

However, legalizing abortion for various reasons, requirements, and procedures contributes to the Maternal Mortality Rate (MMR) in Indonesia (Savira & Novianto, 2020). Wiki Adisasmita stated that unsafe abortion is responsible for 11% of maternal deaths in Indonesia (Savira & Novianto, 2020). The evidence presented above reflects the gap between expectations and reality. The abortion regulation in Law Number 36 of 2009 is expected to protect women who experience unwanted pregnancies due to rape victims by opening up opportunities for abortion. However, reality proves another condition with these expectations. Provisions regarding the reasons, requirements, and procedures for legal abortion can cause double suffering to women who experience unwanted pregnancies because of rape victims. As stated above, the picture of the gap between *das sollen* (expected) and *das Sein* (reality) gives birth to interesting legal issues to be investigated.

Thus, this study aims to examine further the abortion provisions in Law No. 36 of 2009, which can provide legal protection to women who experience unwanted pregnancies due to rape victims.

Method

The research method used is normative and normative-philosophical juridical research methods. The primary research materials are secondary data in primary, secondary, and tertiary legal materials. The doctrine (teachings) of liberal feminism is used as an analytical tool.

Discussion

Liberalism doctrine

The doctrine taught by the liberal feminist movement is a doctrine that requires equality or equality of rights and positions for men and women in all fields, both social, economic, cultural, legal, political, and others. The doctrine of equality or equality of rights and positions, which is the foundation of the philosophy of the liberal feminist movement, can be considered as another form of interpretation or a particular form of interpretation of the principle of equality or equality of rights and positions of human beings taught by liberalism. Liberalism is an understanding that views human nature as merely individual beings. As individual beings, humans are free and independent beings, both male and female. Apart from being individual beings who are free and independent, human beings are also creatures who have the same or equal rights and position (Schmandt, 1960), the essence of being accessible and independent and beings who have the same or equal rights and status is innate. The state does not give the same or equal rights and positions but is human nature inherent in humans from birth. Liberalism views the rights and positions of men and women as equal or equal. The most despised English thinker, John Locke, taught such a doctrine.

John Locke was born in the Somerset region of England in 1632 and died in Masham in the Essex region in around October 1704 (Dunn, 1994). John Locke is seen as a pioneer in and a spokesman for liberalism and a pioneer for human rights (Hardiman, 2004). One of John Locke's famous ideas relates to organizing

state power, which is famous for separating legislative, executive, and federative powers. This idea inspired Montesquieu to give birth to a famous classical doctrine, namely the Trias Politica. However, in addition to the ideas stated above, John Locke's other idea is the idea of natural human rights. According to John Locke, human life is divided into 2 (two) phases, namely (1) the natural state and (2) the state (Sibuea, 2014). John Locke describes the ideal form of human life in a natural state. They lived in peace, kindness, benevolence, mutual protection, peace, fearlessness. In a state of nature, everyone has an equal position, both men and women (Suhelmi, 2007). John Locke described the position of every person in a state of equality of nature as follows: "Also their condition is equal, in that state all power and jurisdiction are reciprocal, no one is more powerful than the other, nothing is more clear than that they are beings of the same species and rank born of interbreeding with anyone to enjoy the same benefits of nature, and the use of the same faculties" (Locke, 2002).

Liberal feminism doctrine

The basic idea of liberal feminism comes from equality or equality of rights and positions of men and women, as stated above. However, the birth mother of liberal feminism teachings is Critical Legal Studies, with the famous foremost exponent Roberto Mangabeira (Unger, 1983). The Critical Legal Studies movement criticized objectivism and legal formalism within the framework of liberal thought. The critical ideas and methods used by Critical Legal Studies then produce a perspective that immediately attracts the attention of wise scientists in various legal fields of the same line. The method used by Critical Legal Studies offers a new perspective that can show the weakness of liberal legal doctrine, which departs from the assumptions (views) of formalism and objectivism. The critical method of Critical Legal Studies is widely used in various laws and others (Kasim, 1999). The critical method introduced by Critical Legal Studies immediately attracted the attention of the feminist movement. The liberal feminist movement uses the critical method taught by Critical Legal Studies to struggle. The construction of a neutral and formal legal doctrine that dominates the realm of liberal legal thought by liberal feminists is considered the cause of discrimination in the rights and positions of men and women.

John Locke's teaching on equality which has an equal understanding with the equal position of men and women is then interpreted by every person, class, a nation in the context of philosophical values, cultural values, local values, including supporters of the school of thought. Liberal feminism. The flow of liberal feminism following later interpreted the principle of equality or equality taught by John Locke and in the context of the values understood and believed by the school. The flow of liberal feminism then used the principles of equality and equality as the basic foundation of its struggle with interpreting the version of this school of thought. The flow of liberal feminism interprets the principle of equality or equality taught by John Locke. It seeks to realize it in reality in all fields and aspects of human life regardless of the context of philosophical values, cultural values, and local values of each group, ethnicity, and nation if possible. In this context, the belief and the flow of liberal feminism, which requires equal rights and position of men again if possible in all things, whether in the social, economic, legal, political, and other fields, can be seen as mere delusions. Linna

Astriyanti and Sri Rahayu Nur Jayanti commented on the philosophical roots of liberal feminism as follows:

Liberal feminism is a feminist movement based on a liberal concept, where men and women have the same rights and opportunities, both beings have rationality. Liberal feminism focuses on the struggle for equal rights between women and men as demonstrated by the existing law (Astrianti & Jayanti, 2018)

The liberal feminist movement assumes that women have been systematically disadvantaged in modern society (Mishra & Bohra, 2019). Based on this assumption, they advocate and encourage equal opportunities and opportunities for women. The same opportunities and opportunities must be open to women the same as men in broad scope, namely position, status, welfare, power, and others. The liberal feminist movement uses a critical method for the struggle for equal rights and positions for women and men. Sujet Kumar Mishra and Amrita Bohra commented as follows " The governing principles of feminism are that women should enjoy the same right in society as men, and they should share equally in societies opportunities and scarce resources " (Mishra & Bohra, 2019). The liberal feminism thought (idea) stated above can be used to criticize (critical method) of legal principles in all fields of law. One area of law that has specifically become a focal point of discussion is criminal law. More specifically, the rules of criminal law relating to the regulation of abortion about abortion of women who experience unwanted pregnancies due to rape victims.

Liberal feminism criticism about abortion of woman who experienced unwanted pregnancy due to rape victim

The idea of equal rights and positions of men and women in all fields, such as the principles championed by the liberal feminist group, is also embedded as a principle in the life of the Indonesian nation. Supporters of liberal feminism accept the view of equal rights and the position of women and men in all aspects and fields of life as one of the principles in everyday life of humanity, just like the Indonesian nation. However, the basic assumptions as the starting point for realizing the equal rights and positions of women and men are contradictory. Linna Astriyanti and Sri Rahu Nur Jayanti commented as follows: "So far, society has assumed that women have lower degrees than men, they also consider women to be weak, so they have a perception or assumption that men can act arbitrarily. against women (Astrianti & Jayanti, 2018). The liberal feminist movement believes that social, legal, and other systems create conditions for unequal treatment of women and men. This assumption implies that liberal feminists do not believe in the constitution and the legal system to realize women and men's equal rights and positions (Sachs-Ericsson et al., 2006; Luoma & Platt, 2015). This assumption colors the thinking of jurisprudence minimalism. More specifically, in the context of feminist jurisprudence understanding, Fokky Fuad commented as follows: "The feminist jurisprudence view sees that the world is created in the concept of male power (Fuad, 2014). With a similar view, Habib Shulton Asnami makes comments regarding the beliefs of supporters of feminist legal theory as follows "When viewed from the perspective of feminist legal theory,

basically this theory believes that the law that legal thinkers have presented has concentrated too much on patriarchal jurisprudence" (Asnawi, 2011).

The Indonesian people take constitutional and juridical-formal paths to realize the ideal of equal rights and positions of men and women in various law and other fields. The Indonesian people believe in the constitutional and juridical path to realize the ideals of equal rights and positions for women and men in all areas of life, especially in law. The constitutional basis that includes the principle of equal rights and women is stated in Article 27 paragraph (1) of the 1945 Constitution, which stipulates as follows "All citizens are equal before the law and government and are obliged to uphold the law and government without exception." The rule in Article 27 paragraph (1) of the 1945 Constitution referred to above is one of the pillars of the nation's life and the organizer of a way that reflects an ideal such as the ideals of the struggle for supporters of liberal feminism. Equal status in law and government is a constitutional guarantee given to women as citizens to receive equal treatment with men in all areas of life, whether political, legal, social, cultural, and others. Although the ideals of the Indonesian nation contain similarities to the ideals of the liberal feminist group, as stated above, the Indonesian people take a different way in realizing the ideals of equal rights and positions between men and women.

In the legal context, the principle of equal rights and position is further regulated in Article 28 H paragraph (1) of the 1945 Constitution, which states as follows "Everyone has the right to live in physical and spiritual prosperity, to have a place to live, and to have a good and healthy living environment and entitled to health services." The norms in Article 28 H paragraph (1) of the 1945 Constitution are further elaborated in Law Number 36 of 2009 concerning Health. One of the articles of Law Number 36 the Year 2009 that received attention and focus of discussion was related to the provisions regarding abortion. From the point of view of administrative law, the regulation of abortion in the Health Law implies that the rule of law regarding abortion is part of a regulatory law subject to criminal penalties if violated (Haines et al., 2006). This means that abortion can be carried out as long as the provisions regarding abortion can be fulfilled to avoid illegal abortion, categorized as a crime.

Article 75 paragraph (1) of Law Number 36 the Year 2009 expressly stipulates as follows "Everyone is prohibited from having an abortion." The norm that prohibits abortion is intended to protect women. However, the provisions regarding the prohibition on abortion are not absolute because abortion can still be carried out for specific reasons and under certain conditions. According to the provisions of Law No. 36 of 2009, abortion can be carried out for specific reasons, requirements, and procedures. Article 75 paragraph (2) of Law Number 36 the Year 2009 regulates the reasons for having an abortion in 2 (two) categories, namely as follows (a) indications of a medical emergency detected at an early age that threatens the life of the mother or baby who suffers from a severe genetic disease or congenital disabilities and others and (b) pregnancy due to rape which can cause psychological trauma to the rape victim. The procedure for having an abortion is regulated in Article 75 paragraph (3) of Law Number 36 of 2009. The requirements for having an abortion are regulated in Article 76 of Law Number 36 of 2009. Some of the requirements to have an abortion which is regulated in Law

Number 36 of 2009, are as follows (a) before 6 (six) weeks of pregnancy is calculated from the first day of the last menstrual period, except in a medical emergency, (b) abortion can be carried out by health workers who have the skills and authority who have certificates determined by the Minister, (c) with the approval of pregnant women who concerned, (d) with the husband's permission, except for rape victims and (e) health service providers who meet the requirements stipulated by the Minister (Austin et al., 2002).

In reality, the provisions of Articles 75 and 76 of Law Number 6 the Year 2009 regarding the reasons, requirements, and procedures regarding abortion are not easily implemented or fulfilled due to various reasons and factors. As a result, women who experience unwanted pregnancies due to rape victims are forced to have illegal abortions, categorized as criminal acts (Nishith et al., 2005; Choquet et al., 1997). Consequently, the woman has to experience double suffering, first, as a rape victim. Second, as perpetrators of illegal abortion crimes. In such conditions, women are considered victims of a legal system that leans towards the interests of men, which is considered a form of inequality or inequality in the rights and position of women with men.

There are 3 (three) views on abortion, namely (1) views known as pro-life, (2) pro-choice views, and (3) moderate views (Savira & Novianto, 2020). Each of these views has a different opinion regarding abortion. First, the pro-life view assumes that abortion cannot be carried out under any circumstances. The pro-life proponents start from a moral perspective as the basis of their argument. From a pro-life perspective, babies in the womb are legal subjects who have the same right to live as their biological mother's right to live (Nyandra & Suryasa, 2018). The only reason to allow abortion is abortion for medical reasons or indications (abortus provocateurs medical), namely for the safety of the mother's life. Second, pro-choice groups think abortion can be done. The basis of the argument put forward by the pro-choice group to allow abortion is the reproduction of women who experience unwanted pregnancies (Fatubun, 2021). This means that pro-choice assumes that every woman has autonomous rights over her own body. No one else has power over him other than the unwanted pregnant woman. Every woman has complete autonomy to determine "to continue" or stop" the woman's pregnancy (Mahabbati & Sari, 2019). The pro-choice ideology focuses on paying attention to the child's interests in the future because if the unwanted child is stillborn, it often leads to violence. Children become objects of violence by mothers who give birth to them who do not want them to be born. This view was born in the second wave of the growth of the feminist movement and belonged to the group of radical feminism views. Third, moderate groups have views that offer a "third way" as an alternative solution. The issue of pros and cons debates the issue of abortion. According to a moderate view, abortion can be carried out, but with rigorous and limited reasons that it can only be done in conditions (a) the pregnancy is life-threatening to the mother and (b) if the doctor concludes that pregnancy n can threaten the health of the mother or cause severe illness in the mother (Imyaminova & Yakubov, 2021).

The views contained in Indonesia's Law No. 36 of 2009 fall into moderate views. Article 75 paragraph (1) of Law Number 36 the Year 2009 expressly prohibits abortion. However, as an "emergency brake," Article 75 paragraph (2) of Law

Number 36 the Year 2009 provides concessions for having an abortion with rigorous reasons, namely 2 (two) kinds of reasons only. However, problems arise precisely because of the reasons and requirements that must be met to have an abortion legally (Setiawan & Efendi, 2021). The potential to be subject to criminal penalties arises from the reasons and conditions for abortion that are not met (Amstadter et al., 2010). The regulation of abortion for rape victims is regulated in Government Regulation Number 61 of 2014 concerning Reproductive Health. Article 31 paragraph (2) of Government Regulation Number 61 of 2014 concerning Reproductive Health stipulates as follows "Abortion as a result of rape as regulated in paragraph (1) letter b can only be carried out if the gestational age is 40 (forty) days at the latest calculated from the first day of the last menstruation." In feminism, the beginning of the problem arises from Articles 75 and 76 of Law No. 36 of 2009 concerning Health. The beginning of the problem is continued in Article 31 paragraph (2) of PP Number 61 of 2014 concerning Reproductive Health which regulates as follows "Pregnancy due to rape as regulated in paragraph (1) is evidenced by (a) gestational age following the incidence of rape stated by a letter a doctor's statement and (b) a statement from investigators, psychologists, and/other experts regarding the alleged rape." The determination of the age limit for pregnancy that victims of rape cannot have an abortion. Consequently, if these requirements are not met, and the abortion is still carried out, Article 194 of Law Number 36 of 2009 concerning Health is subject to criminal penalties.

The reasons and requirements, namely the gestational age limit for having an abortion, are considered convoluted because they do not reflect the biological conditions of women who are different from men (Baranov et al., 2021). Vivi Savira and Widodo Tresno Novianto commented as follows, "This means that the formulation of the gestational age limit (meaning the gestational age limit regulated in-laws and regulations . . . pen.) does not take into account the biological conditions in a woman's body. The law (meaning Law Number 36 of 2009 and PP Number 61 of 2014 ... pen.) has leveled women with multiple biological conditions related to the menstrual cycle and pregnancy (Savira and Novianto, 2020). Scientifically, every woman has a menstrual cycle/menstruation that varies depending on various factors. Vivi Savira and Widodo Tresno Novianto commented on the differences in the women's menstrual cycles as follows:

Research shows that every woman has a varied menstrual cycle/menstruation depending on factors such as age, health, hormones, and others. Women who have regular cycles have a menstrual cycle of about 26-35 days and adolescent girls around 20-45 days. If the gestational age is calculated from HPHT and abortion is limited to a maximum of 40 (forty) days, then for women who are rape victims with a regular cycle, they only have about 5-15 days to prove the rape incident they experienced (Savira & Novianto, 2020).

From the point of view of the biological condition of women, especially women who experience pregnancy due to rape victims, the requirements as stated above actually put the woman in a difficult position. In the view of feminists, the policies and rules contained in Law No. 36 of 2009 and Government Regulation No. 61 of 2014 are very impartial to women who experience pregnancy as victims of rape. Vivi Vivi Savira and Widodo Tresno commented regarding the regulation of the gestational age requirement as follows "In fact, if the law considers that it has made a policy taking into account women's experiences, the policy regarding

abortion for rape victims should also consider the impact of rape itself (Savira & Novianto, 2020)." In closing the discussion in this paper, Vivi Savira and Widodo Tresno make comments that reflect the stance and criticism of feminist supporters on the provisions regarding abortion in Law Number 36 the Year 2009 and Government Regulation Number 61 the Year 2014 as follows:

With the stipulation of a fetal age limit for rape victims to be able to have abortions and the need for investigators' statements to prove the rapes experienced, it shows that the abortion policy for rape victims in the Health Law and Government Regulation on Reproductive Health does not consider women's experiences as the main basis in their studies as stated hinted at by feminist legal thinkers (Savira & Novianto, 2020).

The comments of the supporters of the feminist movement stated above are more than sufficient to illustrate how clumsy the legislators are in regulating the issue of abortion. The moderate attitude adopted by the legislators in managing and regulating the issue of abortion does not protect women who experience unwanted pregnancies as victims of rape. Whether we realize it or not, instead of providing legal protection for women who experience unwanted pregnancies due to rape victims, the regulation of reasons, requirements, and abortion procedures regulated in Law Number 36 the Year 2009 and Government Regulation Number 61 the Year 2014 can actually "fall" women who experience unwanted pregnancies due to rape victims into the "double suffering abyss."

Conclusion

The descriptions of the arguments and explanations presented above lead to the following conclusions, Abortion arrangements in Law No. 36 of 2009 and Government Regulation No. 61 of 2014, which take a moderate attitude, cannot protect women who experience unwanted pregnancies due to rape victims. The regulation of the abortion issue has the opportunity to open up the possibility of "double suffering" for women who experience unwanted pregnancies due to rape victims.

Suggestions from this study about the conclusions stated above, and the authors can propose the following suggestions. According to the author, the provisions of Article 75 paragraph (2) and Article 76 of Law No. 36 of 2009 and Article 31 paragraph (2) of Government Regulation No. 61 of 2014 need to be changed to pay more attention to the biological conditions of women who experience unwanted pregnancies due to rape victims. Changes to the abovementioned provisions need to be made to prevent "double suffering" that may arise due to the laws and regulations described above.

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