



A Review of *Feminist Legal Theory* on Abortion Regulations for Rape Victims in Indonesia

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Abstract. The purpose of this study is to review and evaluate abortion regulations for rape victims, especially the requirements outlined in the Health Law and Government Regulation No. 61 of 2014 concerning Reproductive Health, using *feminist legal theory* as an analysis framework. This study uses an extra-doctrinal methodology outside the laws and regulations, emphasizing *feminist legal theory* as the basis of thought. The findings suggest that abortion regulations for rape victims still largely ignore women's life experiences and put them in difficult situations. The marginalization of women victims of rape in accessing safe abortion is a consequence of the gestational age limit for abortion, which fails to acknowledge the different experiences of women and treat them as a homogeneous group. To effectively address this issue, it is critical to involve the participation of women who have experienced rape, including victims of sexual violence, in the development of policies related to abortion for rape victims.

Keywords: *feminist legal theory*, Rape Victims, Abortion, Indonesian Law.

INTRODUCTION

Abortion is often a controversial topic, giving birth to several perspectives in the legal field, such as pro-life, pro-choice, and moderate. The *pro-life perspective* opposes abortion with a moral and theological framework as the basis for thinking that considers the fetus as a moral agent to have the right to live and be protected.¹ Protecting the mother's life is the only justification for allowing abortion in this perspective.² In contrast to *pro-life*, the *Pro-Choice* perspective supports abortion as enforcement of women's

¹ Andreea Mihaela Niță and Cristina Ilie Goga, "A Research on Abortion: Ethics, Legislation and Socio-Medical Outcomes. Case Study: Romania," *Romanian Journal of Morphology and Embryology* 61, no. 1 (2020): 283–294.

² *Ibid.*

reproductive autonomy in the face of unwanted pregnancies, allowing them to continue or abort a pregnancy according to a desire.³ This perspective focuses on the welfare of babies who are born but rejected, which often results in cases of child abuse. Other perspectives, such as moderate as an intermediary between the two perspectives above, state abortion is considered acceptable in certain circumstances, such as the result of rape or incest, when the mother's life is threatened, and when the pregnancy poses a serious threat to the mother's health or can cause severe illness.⁴

Indonesia adopts a moderate attitude towards abortion from a normative point of view.⁵ Although Article 463 of Law 1/2023 of the Criminal Code prohibits abortion, Article 60 Paragraph (2) of Law No. 17/2023 concerning Health allows abortion in certain situations. According to Muhammad Rofiq Adhitya (2023), abortion is only permitted in two circumstances, namely in cases of medical crises or pregnancies resulting from rape, which can cause psychological suffering for the victims.⁶ However, specific requirements for having an abortion may be complex or even unfulfilled by the victim because not all of them are aware of the pregnancy in the early stages of pregnancy or the victim's inability to act legally. In line with the research of Ibrahim and Andi Zilqarmain (2021), many factors contribute to the delay in reporting rape by victims, including fear of retaliation from the perpetrator, financial dependence on the perpetrator, lack of confidence to be trusted, feelings of shame and guilt, and skepticism about the effectiveness of the legal system.⁷ Therefore, the specified time limit is often exceeded.

The time limit will also limit the duration of the proof process. One of the requirements for rape victims to have an abortion is verification from the investigator that her gestational age is by the time specified by the law. If these requirements are not fulfilled, criminal penalties may be imposed. It can hold rape victims accountable for

³ R. Aj. Nindya Rizky Utamie, "A Comparative Study of Abortion in Indonesia and South Korea in the Perspective of Feminist Legal Theory," *Legal Window Journal* 10, no. 2 (2023): 217–229.

⁴ Diantika Rindam Floranti, "Legal Protection for Survivors of Forced Abortion in Indonesia," *Justitia Law Journal* 1, no. 6 (2021): 48–71, pp: <http://dx.doi.org/10.30651/justitia.v6i1.6059>.

⁵ Cindy Oeliga Yensi Afita, "Abortion Regulation in the Perspective of Indonesian Legislation," *Rio Law Journal* 1, no. 1 (2020): 1–15.

⁶ Muhammad Rofiq Adhitya, "The Impact of Psychological Rape The impact of physical rape such as chlamydia, herpes, HIV, and hepatitis can be experienced by rape victims. Therefore, it is important for rape victims to get help immediately," *Journal of the Faculty of LawSam Ratulangi Lex Administratum University XII*, no. 1 (2023): 1–6.

⁷ hurin Ibrahim and Andi Zilqarmain, "The Cause of the Victim's Reluctance to Report Sexual Harassment Cases in Indonesia and Its Relationship with the PKS Bill," *Researchgate*, no. March (2021), https://www.researchgate.net/publication/350449828_Penyebab_Enggannya_Korban_untuk_Melaporkan_Kasus_Pelecehan_Seksual_di_Indonesia_dan_Keterkaitannya_Dengan_RUU_PKS.

criminal charges. From the point of view of *Feminist Legal Theory*, women have autonomy over their bodies and resist outside control, especially in patriarchal societies dominated by men.⁸ *Feminist Legal Theory* challenges the idea that women are a monolithic group. This theory advocates an approach to studying law centered on women's experiences as the basis for analyzing various legal issues.⁹

The purpose of this study is to analyze the review of *feminist legal theory* on abortion regulations for rape victims in Indonesia and how to recommend abortion regulations for rape victims based on *feminist legal theory*. The study also seeks to analyze and evaluate the lack of impartiality and uniformity of women's representation in the legal system, especially about abortion regulations for rape victims.

METHOD

This research is included in the category of philosophical-doctrinal research with an approach outside the laws and regulations through an emphasis on *feminist legal theory* as a basis for thinking about the response to a problem related to abortion for rape victims. The author uses a philosophical approach to analyze *Feminist Legal Theory* about abortion policies for rape victims in Indonesia with deductive reasoning analysis.

DISCUSSION

Review of *Feminist Legal Theory* on Abortion Regulations for Rape Victims in Indonesia

Feminist Legal Theory emerged in the 1970s, along with the development of critical legal studies. According to Jazim Hamid et al. (2013), Critical Legal studies offer a platform for feminists to advocate for liberation and the establishment of justice and impartiality between men and women.¹⁰ Lucinda M. Finley argues that the tactics of 'equal treatment' and 'preferential treatment' for women, which should be applied in the law, are often insufficient to counter the ideology of neutrality or objectivity of the law.¹¹ Both ideas validate patriarchal thinking and categorize women as problematic and marginalized.

⁸ Berliantha Berliantha and Ilma Ainun Nabila Fasya, "Women in Criminal Law in Indonesia (A Study of Feminist Legal Theory)," *Iblam Law Review* 3, no. 2 (2023): 13–22.

⁹ Triantonio, "Feminist Legal Theory in the Indonesian Legal Framework," *Progressive Law and Society (PLS)* 1, no. 1 (2023): 14–26.

¹⁰ et al. Jazim Hamidi, Moch. Adi Sugiharto, Muhammad Ihsan, *Dissecting Contemporary Legal Theories* (Malang: Universitas Brawijaya Press, 2013), p. 358.

¹¹ Donny Danardono, "Feminist Legal Theory: Rejecting Legal Neutrality, Celebrating Difference, and Anti-Essentialism," in *Women and the Law: Perspectives on Equality and Justice* (Jakarta: Yayasan Obor Indonesia, 2006), p. 11.

Feminist Legal Theory examines the lack of resources in law school curricula that address the inequalities faced by women, especially about topics such as rape and abortion. *Feminist Legal Theory* uses deconstruction theory to analyze and interpret the meaning of law from a feminist point of view, as shown by the authors in this study.

Berliantha Berliantha and Ilma Ainun Nabila Fasya (2023) argue that in feminist jurisprudence, women have autonomy over their bodies and reject external control, especially from a patriarchal society dominated by men.¹² The *Pro-Choice* movement emerged in response to the issue of abortion, advocating for women's reproductive rights and recognizing abortion as a viable option for people facing unwanted pregnancies (KTD).¹³ This perspective assumes that women have rights to their bodies so that they can decide to continue or terminate the pregnancy. This perspective focuses primarily on the possible outcomes for unwanted children born in situations where they are often subjected to domestic violence.

The feminist perspective in Indonesia itself uses a moderate perspective on abortion to try to find a middle ground between *the Pro-Life attitude*, which opposes abortion as a whole, and *the Pro-Choice attitude*, which supports women's right to choose. According to this view, abortion is allowed under certain conditions, such as cases of rape or incest, when the pregnancy threatens the mother's life, or when the pregnancy can cause severe illness in the mother.¹⁴ Indonesia, along with 154 countries around the world, follows this principle, which is to allow abortion in cases of pregnancy due to rape and when there is a medical emergency that threatens the mother's life if the pregnancy is continued.

Indonesia normatively opposes abortion and imposes criminal sanctions as outlined in Articles 346-349 and 463-465 of Law 1/2023 of the Criminal Code. However, Law No. 17/2023 on Health includes exceptions to the abortion ban stated in Articles 60-62 of the Health Law.

Article 60

- (1) Every person is prohibited from having an abortion, except with the criteria that are allowed by the provisions of the criminal code.*
- (2) The implementation of abortion with the permissible criteria as intended in paragraph (1) can only be carried out:*

¹² Berliantha and Fasya, "Women in Criminal Law in Indonesia (A Study of Feminist Legal Theory)", *Op.Cit.*

¹³ Utamie, "A Comparative Study of Abortion in Indonesia and South Korea from the Perspective of Feminist Legal Theory". *Op.Cit.*

¹⁴ Floranti, "Legal Protection for Survivors of Forced Abortion in Indonesia". *Op.Cit.*

- a. *by Medical Personnel and assisted by Health Personnel who have competence and authority;*
- b. *to Health Service Facilities that meet the requirements set by the Minister; and*
- c. *with the consent of the pregnant woman concerned and with the consent of the husband, except for the rape victim.*

In line with article 463 of the new Criminal Code, which states that:

- (1) *Every woman who has an abortion is sentenced to a maximum of 4 years in prison.*
- (2) *The provisions as intended in paragraph (1) do not apply if the woman is a victim of rape or other sexual violence crimes that cause pregnancy whose gestational age does not exceed 14 weeks or has indications of a medical emergency.*

Indonesian law on abortion takes a moderate stance, banning all unsafe abortions but allowing them in cases where the pregnancy poses a threat to a woman's life or well-being, such as a pregnancy resulting from rape or a pregnancy that endangers the mother's life. The author argues that allowing abortion for rape victims is not solely rooted in moral considerations but also takes into account women's health and reproductive rights. The Health Law affirms that everyone has the right to a healthy, safe, and free reproductive and sexual life without coercion or violence about a legal partner. The recognition that reproduction is a woman's human right that must be protected from intimidation and violence is the basis for considering the acceptance of abortion for rape victims.

Abortion regulations for rape victims must be understood as an effort to maintain and improve the welfare and survival of women who are unable to prevent heinous acts of rape that result in unwanted pregnancies. Women have special human rights related to sexual reproduction that are recognized by law.¹⁵

The implementation of abortion for rape victims is regulated in Article 31, paragraph (2) of Government Regulation Number 61 of 2014. According to this regulation, abortion due to rape can only be carried out within 40 days from the first day of the last menstrual period and according to the new Criminal Code, abortion can be performed no more than 14 weeks. In addition, according to Article 34 paragraph (2) of the Reproductive Health PP, the occurrence of pregnancy due to rape, as referred to in paragraph (1) can be proven by: The gestational age is determined based on a doctor's certificate that ensures the occurrence of rape—expert testimony stating that rape has occurred from a doctor, psychologist, or other expert.

¹⁵ See Article 45 of Law Number 39 of 1999 concerning Human Rights.

Articles 427-428 of the Health Law impose criminal penalties on individuals who perform abortions that do not follow the provisions of the law. Specifically:

Article 427

"Every woman who performs an abortion that does not meet the excluded criteria as referred to in Article 60 shall be sentenced to a maximum of 4 (four) years in prison."

Article 428

(1) Any person who performs an abortion is not by the provisions as referred to in Article 60 against a woman:

- a. with the consent of the woman, she is sentenced to imprisonment for a maximum of 5 (five) years; or*
- b. Without the woman's consent, she was sentenced to a maximum of 12 (twelve) years in prison.*

(2) If the act as referred to in paragraph (1) letter results in the death of the woman, the woman shall be sentenced to imprisonment for a maximum of 8 (eight) years.

(3) If the act as referred to in paragraph (1) b results in the death of the woman, she shall be sentenced to imprisonment for a maximum of 15 (fifteen) years.

As mentioned earlier, abortion provisions for rape victims are only allowed if they meet the criteria specified in Article 31 and Article 34 of the Reproductive Health PP. Consequently, if these conditions are not met, women who are victims of rape can face criminal charges.

From the point of view of *Feminist Legal Theory*, it is argued that impartiality and objectivity of the law will inevitably result in laws that are biased towards certain genders. To understand and analyze the law thoroughly, it is essential to use a feminist approach. One such approach is to look at the law through the perspective of women's experience and combine it with forming regulations. This allows the development of new legal reasoning that considers women's experiences as a fundamental aspect of consideration.¹⁶ The question is, have the measures in the Health Law and Government Regulations on Reproductive Health been formulated taking into account the experiences of women, including those who are victims of rape?

The determination of the gestational age limit is the reason why rape victims cannot have an abortion. Every woman experiences a menstrual cycle that fluctuates based on age, health, hormones, and other variables. According to Auren J. Carlson and Natalie D. Shaw (2019), women with regular menstrual cycles usually have a menstrual period of about 25-35 days, while adolescent women may have a cycle length of 20-45 days.¹⁷ If the

¹⁶ Nickel Savitri, *Feminist Legal Theory in Practice* (Jakarta: Yayasan Obor Indonesia, 2006), p. 47.

¹⁷ Lauren J. Carlson and Natalie D. Shaw, "Development of Ovulatory Menstrual Cycles in Adolescent Girls," *Journal of Pediatric and Adolescent Gynecology* 32, no. 3 (2019): 249–253.

gestational age is determined by the HPHT method and the abortion window is limited to a maximum of 40 days, women who have experienced rape and have a regular menstrual cycle only have a narrow time, which is about 5-15 days, to provide evidence of the event. Then, if we follow the flow of the new Criminal Code with a span of no more than 14 weeks, the development of the fetus has begun to be active so that it is morally blameworthy because it concerns the life of a person, both mother and fetus.

Indeed, there are some cases where women do not consistently have a typical menstrual cycle, and the cycle duration can vary monthly. Psychological trauma, such as sexual violence, can cause irregularities in a woman's menstrual cycle.¹⁸ This has to do with the physical trauma that arises as a result of rape, which manifests as dysfunction in some organs of the body and mental illness that impacts the hormones of the individual who has experienced rape. Irregularities in the menstrual cycle, especially in cases of rape, can hinder pregnancy detection.

This implies that determining the maximum gestational age does not consider women's physiological state. The regulation broadly categorizes women who have various biological conditions related to menstrual periods and pregnancy. According to the author, when making laws from a feminist point of view, it is crucial to include studies of *anti-essentialism* identification. To create the law from a woman's point of view, it is crucial to recognize that each woman is unique and has a different experience and identity. The authors argue that when making laws, especially those related to abortion, that effectively regulate women's reproductive organs, policymakers should actively listen to the perspectives of women who have been marginalized.

Especially in rape cases, victims often suffer significant repercussions and losses. The author argues that the law cannot match the perspective and ordeal experienced by women who have abortions without first listening to and researching the experience of the rape victim herself. The author traces the requirements for abortion, which state that there must be a certificate from an investigator or other expert to prove the alleged crime of abortion.

If a regulation has formulated regulations focusing on women's perspectives, it should also consider the impact of rape on victims. Not all victims of sexual violence have the fortitude and courage to immediately report the violence they experienced in less than

¹⁸ Ilmy Nurul Amalia, Johan Budhiana, and Waqid Sanjaya, "The Relationship Between Stress and Menstrual Cycle Disorders in Adolescent Women," *Journal of Health Discourse* 8, no. 2 (2023): 75.

40 days. Rape victims tend to refrain from reporting the incident they experienced due to various factors. Such as concerns about potential retaliation from the perpetrator, the victim's inability to seek help due to financial dependence on the perpetrator, the victim resisting prosecution against their family members or friends, the victim harboring concerns about a lack of trust and confidence in their statements, inadequate resources to report, the victim having feelings of shame and remorse, the victim having feelings of shame and regret, victims perceive it as a secret disgrace, lack of trust in law enforcement and police authorities, skepticism towards law enforcement and the justice system.

Based on research data from J. Mulder et al. (2021) stated that victims of juvenile rape or minors will tend to quickly report rape cases involving their parents, while rape victims around the age of 25 are mainly reluctant to report the incident experienced because of poor psychological intensity after rape, so they refrain from giving birth to the child as a result of the rape.¹⁹

The absence of regulations that consider women's experiences as the primary consideration, as mandated by feminist legal thinkers, can be seen from the requirements for fetal age limits for rape victims who want to have an abortion and the need for a certificate from the investigator to verify the occurrence of rape. Rape victims are also vulnerable to the criminalization of abortion.²⁰ The Health Act stipulates that people who perform abortions without meeting the required standards can be threatened with imprisonment and fines. When discussing measures to combat sexism in the legal field, women, who are a marginalized minority.

A pregnant rape victim will be faced with a decision that makes her depressed. If she wants to have an abortion, she must notify law enforcement immediately. Unfortunately, it may show her incompetence and expose the victim to further abuse in rape cases. In addition, he also had to bear the burden of bearing the pain and psychological pressure of telling his case to law enforcement. However, suppose she is in a very urgent situation to have an abortion that exceeds the time in the regulations. In that case, she may be denied access to a safe abortion procedure that could potentially endanger her life. In addition, he or she may be subject to legal consequences such as imprisonment and fines.

¹⁹ J. Mulder et al., "Reporting after Sexual Violence: The Influence of Victim, Assault and Perpetrator Characteristics," *Journal of Forensic and Legal Medicine* 79, no. 1 (2021): 1–13, <https://doi.org/10.1016/j.jflm.2020.102076>.

²⁰ BBC, "Rape Victim Convicted of Abortion, Human Rights Activist Protests" *Www.Bbc.Com*, last modified 2018, accessed April 5, 2024, <https://www.bbc.com/indonesia/indonesia-45058277>.

The authors suggest that when making policies that effectively regulate women's bodies, it is essential to use the ideas of *Feminist Legal Theory* that prioritize women's experiences, rights, and choices. It is crucial for women, especially those who have experienced rape, to be given a platform to voice their opinions and actively participate in the law-making process. The law can only fully uphold women's human rights, as Article 45 of the Human Rights Law affirms that women's rights are human rights.

Recommendations for Abortion Regulation on Rape Victims Based on *Feminist Legal Theory*

Feminist Legal Theory, which criticizes regulations that allow abortion for rape victims, does not imply a lack of respect for fetal life or the supremacy of morality. However, the crux of the issue lies in determining whether regulations relating to abortion for rape victims have indeed provided women with a wide range of choices, especially those that are not constrained by burdensome restrictions that specifically impact rape victims. Are the regulations on abortion based on the experiences of women, including those who are victims of rape?

The moderate Feminist Legal Theory asserts that the focus on women's experiences aims to highlight the lack of recognition or downplay of women's suffering and the right to life of the fetus by the law, thereby revealing the exclusivity of the legal system. To develop abortion policies for rape victims from a feminist perspective, it is essential to prioritize women's experiences and ensure that they have the freedom to make choices without facing conflicting expectations.

One way to achieve this is to modify the abortion policy, which is to adjust the gestational age limit instead of 40 days or 14 weeks. Because 40 days is not enough time for rape victims to complete the post-incident psychological turmoil to report themselves. Then, the reason for not choosing a 14-week gestation age is because the fetus has begun to carry out movement activities, so in this case, an abortion will eliminate the life of the mother or fetus, which is morally contrary to societal values. Therefore, some of the author's recommendations through *feminist legal theory* are moderate to the regulation of abortion with a gestational age not exceeding 12 weeks because this time is medically safe for the mother's life, and 10-15% of countries in the world choose this time.²¹ In addition, involving women who are affected and represented by organizations such as the National

²¹ Figo, "Improving Access to Abortion Beyond 12 Weeks of Pregnancy," *Www.Figo.Org*, last modified 2024, accessed May 5, 2024, <https://www.figo.org/resources/figo-statements/improving-access-abortion-beyond-12-weeks-pregnancy>.

Commission on Anti-Violence against Women (Komnas Perempuan) can also determine good regulations. Policy formulation should be based on social research on the impact experienced by rape victims, the means for women to obtain safe abortions without suffering, and relationships with law enforcement in terms of investigation and protection for women involved in legal conflicts, including police, prosecutors, and courts.

The author argues that the law relating to the criminalization of rape victims who have abortions must recognize that these women are victims of criminal acts. An evaluation of the provisions on abortion for rape victims in health legislation, as well as an examination of empirical evidence from women's personal experiences. Thus, the role of judges extends from just law enforcement to actively seeking and determining the law (*rechtvinding*).

This aligns with the premise of *Critical Legal Studies*, the precursor to feminist legal theory, which states that judges are responsible for forming laws. Individuals who discover the law apply it and devise tangible solutions that allow future events to be resolved according to established standards.²² Therefore, interpreting the law from a feminist perspective in the context of abortion for rape victims, the law will prioritize the protection of women who have been victims and consider women's specific experiences (such as the impact of rape) when making decisions.

By following these standards, there will be no more cases where rape victims who have abortions are punished with imprisonment and fines, as stated in the Health Law. Therefore, it can be said that the law has protected women who are victims of rape.

CONCLUSION

From the findings of the above research, it can be concluded as follows:

1. Review *Feminist Legal Theory* exceptionally moderate to the regulation of abortion for rape victims in Indonesia has been considered by allowing abortion for rape victims, but there are still shortcomings involving women, namely eliminating women's experience in the formulation of legal policies which is one of the basics of *Feminist Legal Theory*. One of the additional evaluations submitted is regarding the gestational age limit of rape victims to be able to have an abortion, which must be proven by a certificate of examination results and provisions that criminalize rape victims in the Health Law. The analysis shows that the abortion policy for rape victims in Indonesia still considers

²² Jazim Hamidi, Moch. Adi Sugiharto, Muhammad Ihsan, *Dissecting Contemporary Legal Theories*, *Op.Cit.* p. 357.

women as something homogeneous and still perpetuates the marginalization of women and keeps women in double bondage.

2. To create abortion policies for rape victims with a feminist perspective, an emphasis on women's experiences is needed to identify legal exceptions (especially women's suffering) that are not recognized by the courts or legislation or at least minimized. In addition, women, significantly affected women, must be involved in the formulation of policies that regulate the 'female body' in this case, abortion, in order to create a law with a feminist perspective in adjudicating abortion cases of rape victims.

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