

Legislative Drafting in Genderless Language: Is Gender-neutral Drafting Relevant?

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Abstract: The technique of Gender-neutral drafting has been introduced in many jurisdictions that use English language to draft legislation aiming to alter the use of masculine pronouns. As commonly known, some languages are categorized as gendered language namely, French, Deutsche, Arabic and English often encounter challenges in formulating a non-sexist legislative sentences. This is not to say that the use of sexist language always results in discrimination on one gender. Thus, using of gender-neutral language is actually a tool to produce clarity which in turn should contribute to an effectiveness. For an inherently gender-neutral language such as Bahasa Indonesia, gender-neutral drafting is a new concept because technically a genderless language is unlikely to produce a sexist norm. In fact, there are cases where numbers of local legislations has resulted in discrimination against women. This article underline that gender-neutral drafting for a genderless language is relevant as concept that is applied in the research paper accompanying a draft bill to produce a more gender-responsive content and analysis. Gender-neutral drafting is a response to gender equality demands. Therefore, the drafter and policy maker should not entrapped in the use of terminology an-sich but taking into account the higher value to achieve by drafting legislation that is effectiveness. Furthermore, gender-neutral drafting approach is the earliest stage towards the concept of gender aware legislation that looking at equality as results or equality on the facts not merely a technique. In other words, gender equality is expected both formally in the text of legislation and substantially in the society.

1 INTRODUCTION

On 2010, Indonesian National Commission on Violence against Women reported there were at least 154 local regulations in Indonesia that was discriminative during 2002 to 2009 (Women, 2010). Years after that, problems related to the quality of local regulation has showed very little sign of improvement. On 2016, there were around 3000 local regulations invalidated by the central government based on two major considerations; *firstly*, it was in contrast to the government effort to draw investment for the purpose of national development. There were numbers of local government enacted regulations to impose permit in many areas which perpetuate long bureaucracy; and *secondly*, it did not accommodate diversity in a plural society which in turn affects minority groups including women (Ihsanudin, 2016).

‘Language does not merely reflect the way we think: it also shapes our thinking. If words and expressions that imply that women are inferior to men are constantly used, that assumption of inferiority

tends to become part of our mindset. Hence the need to adjust our language when our ideas evolve. Language is a powerful tool’ (UNESCO, 1999).The concept of gender and language are two interrelated things. The link between gender and language was conceived by Kleinman who argued that ‘when any group is made invisible by another, it becomes easier for the more powerful group to do what they want with the less powerful one’ (Kleinman, 2011).

Similarly, Ore argued ‘while language is certainly not the only social factor shaping reality – society’s social institutions such as the family, education, economy, media, etc. all play their part – it is an extremely important one’ (Ore, 2003). The use of a more gender-neutral form of language instead of male-generics is considered as worthwhile efforts to reduce gender inequality. In the context of legal drafting which has evolved at the same time with language, the debate on the use of language in the law making ranging from a trend of an archaic legalese to the plain one without exception to the pros and cons

about the concern to the techniques of gender-neutral language (Butt & Castle, 2006).

Gender neutral drafting has been a social response to the assertion that the enactment of legislation in a 'masculine' language contributes to the perpetuation of a male-oriented society. Xanthaki emphasized that legislation addressed to both men and women must be expressed in a gender neutral manner. This is to impress the readers accurately which legislation has gender as indeed an issue to be expressed in gender specific language and which legislation does not (Xanthaki, 2013).

Indonesian language is categorized as genderless language. However, the fact that there were numbers local regulation concerning prostitution which is bias and results in discrimination against women showed that even drafting in genderless language might produce a sexist norms. Departs from the above, this article intends to analyze whether gender neutral drafting technique is relevant to respond sexist norms in the legislative text in a genderless language.

Discussing the issue, this article will look at the two main element of the validity of regulation which are substantive aspect and procedural aspect. The analysis will first discuss the provision by asking the criteria or approach used in gender neutral drafting technique with the challenge of drafting in Indonesian language. Then the discussion continued with analysis regarding the dynamics of the process of regulatory making to look deeper on the procedural aspects.

2 DISCUSSION

Striving legislative quality is undeniably a challenge for every jurisdiction, because quality of legislation is a prelude to serve justice and legal certainty for the society. The law making process is a big thing because it involves many resources, the deliberation and thorough study of the theory and principles of law also a fundamental rights issue. Therefore, legislation should be the last resort because once it is enacted, the freedom of the people has been taken gradually. But in reality the enactment of new regulations is still believed to be an effective effort to solve problems in society which is then encourages the rise of various regulations.

Apparently, it is no longer considered as the last policy choice but the first and instant one. This is exacerbated by the hasty, formalistic and poor analytical on the root caused, so that regulations are often repressive rather than preventive assuming

many problems will be resolved with severe sanctions.

2.1 Sloppy Drafts That Is Results in Bias and Discrimination against Women

Indirect discrimination exists where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex, unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex (Hepple & Barnard, 2000).

As stated before, the promotion of gender neutral drafting departs from the idea to treat genders equally since it is written in the legislative text. Promoting the gender neutral drafting technique, Xanthaki introduces some approaches as follows: 1) repeat the noun in place of pronoun; 2) use 'his or her' instead of 'his'; 3) recast the sentence using the plural; 4) omit the pronoun; 5) replace the nominalisation with a verb form; 6) recast the sentence using a relative clause; 7) recast the sentence using a participle; 8) use 'they', 'them' and 'their' as singular unisex pronoun; also 9) avoid 'man' words for example: worker instead of manpower, firefighter instead of fireman, the average person instead of the average man (Xanthaki, 2013).

While in Indonesia, the above technique might be incompatible. Compare to English, Indonesian language is structurally simpler. To express something happened in the past or present it uses time signals without any changing to the verb or the structure. Furthermore, Indonesian language is categorized as genderless language. This language does not have any specific pronouns to indicate different gender which is in English for example (he or she). Therefore, challenge to drafting in Indonesian is basically not about how to bring up a neutral term but rather coming out from exhaustive words and redundancy.

Considering different challenge of the gender neutral drafting technique, the technique should be seen more than platform to reduce the use of masculine terms. While the drafter and policy maker should not entrapped in the choice of word, the spirit of the technique is actually prelude to achieve higher value of drafting legislation that is effectiveness. The gender-neutral drafting technique for a genderless language is relevant as concept that is applied in the research paper accompanying a draft bill to produce a more gender-responsive content and analysis. In other

words, gender equality is expected both formally in the text of legislation and substantially in the society.

Seeing the trend of the promulgation of regional regulations aimed at preventing prostitution, some regions show almost the same response with even the similar drafts. Firstly, it defined the word 'prostitution' is based on the gender assumption that prostitutes are female who have limited women from getting equal legal treatment. Local regulation of Indramayu Region Number 4 Year 2010, for example, define the term prostitution as an act in which a woman surrenders herself to have sex with the opposite sex and accept payments for the service.

Secondly, the formulation of multi-interpretation and prejudice-based does not address clearly what action is prohibited resulting in the condition where women being the target of bias accusation. Similar with Indramayu regulation, Local regulation of Tasikmalaya region Number 28 Year 2000, Tangerang region Number 8 Year 2000 provide provisions that forbid an attitude or behavior which may raise an assumption as prostitutes in the public area. Based on these rules, a number of women were victims of wrongful arrests by law enforcement officers.

Thirdly, the formulation of rules ignores the fact of vulnerability experienced by women in the long chain of prostitution including poverty and unequal gender relations that do not even touch users of the services. Repressive rules as such is more to make an impression of whatever to take as long as it does not happened in the region. The question then, how can regulations that was formulated in such condition could pass policy process?

2.2 Fabrication of Political Identity

Indonesia has ratified CEDAW in 1984 by enacting Law Number 7 of 1984 concerning the Ratification of the Convention on the Elimination of All Forms of Discrimination against Women. There are three principles towards gender equity namely substantive equality, non-discrimination, and state responsibility (UN Women, 2012). The CEDAW standard for equality is substantive equality. This is translated by the CEDAW Committee as de facto equality or equality in fact, or it can also be said as equality of results. However, there are challenges to the principle of substantive equality, namely the view from several parties to translate gender equality as formal equality and views that use protectionist approaches. Formal equality views are more often understood as similar treatment for people in similar circumstances. This formal equality sees men and women as parties who

are in similar circumstances so that both genders receive similar treatment in the regulations.

Another view considered as challenge to substantive equality is the protectionist approach. In contrast to the view of formal equality, this protectionist approach actually over-looks the different condition of women. This approach sees that women as vulnerable group must be protected. However, the protection efforts provided are often misguided. An example is the prohibition of women from working at night (article 130 of the Philippine labour law), and the prohibition of women from working in hazardous employment sectors (Article 113 of the Vietnamese labour law). If viewed carefully, the situation mentioned above is dangerous for women and men. However, instead of fixing an unsafe atmosphere to be safe, some argumentation prefer to provide "protection" to women by limiting their scope and access to work.

A number of regulations above use a similar rationale which states that the purpose of the issuance of policies is in order to promote religious teachings, to accommodate local religiosity and as the reflection of the strong Islamic character in the region. For instance, there are Local regulation in Enrekang region Number 6 Year 2005, Maros region Number 16 year Year 2005 and Agam region Number 6 Year 2005 concerning attire rules for muslims (men) and muslimahs (women) which results in stigmatization and social exclusion against women who unwillingly dressed as ruled (Komnas Perempuan, 2010).

This is in line with the tendency of using political image which is closely related to fabrication of political identity namely to gather votes by using symbols of ethnicity, religion, race and gender for a short-term political interests (Women, 2010). Due to the fact that it put more weighs on political imaging, the policy that was articulated through regulation was not supported by a strong, objective and thorough analysis to truly solve fundamental problems in society. Instead of unravelling the tangled threads of prostitution with multidisciplinary approach, this kind of regulation becomes a mere political tool for gaining voter turnout.

2.3 Gender Mainstreaming in Law Making Process

This section will discuss the legislative drafting mechanism which is concern to gender equality. In international law, legislative drafting must pay attention to the principles of gender equality as a value and standard set forth in the Convention on the Elimination of all forms of Discrimination against

Women (CEDAW). For Indonesia, CEDAW must be legally obeyed given that it has been ratified. CEDAW is also known as a substantive convention. This is due to CEDAW stipulates that States Parties must adopt the principle of equality between men and women in their national law, for 'the practical realization of this principle'.

Particularly regarding the formation of legislation, there are currently several scholars who formulate matters that need to be considered in legislative drafting that has the perspective of gender equality. For example is a guidebook which made by the UNDP Team on legislative drafting. It pays attention to aspects of gender equality by making the term Gender-Aware Legislation (GAL) (UNDP, 2003)

Similarly, the OSCE (Office for Democratic Institutions and Human Rights) has also made a practical guidebook. However, the term used is Gender-Sensitive Legislation (GSL) (OSCE, 2017). However, both GAL and GSL use the international framework and aim to achieve substantive equality in accordance with the principle in CEDAW.

In Indonesia, a guidebook has been created from the Ministry of Women's Empowerment and Child Protection regarding the parameters of gender equality in the formation of legislation. The term used in this document is Gender-Responsive Legislation. This gender equality parameter is important because it can be used as a reference and gender analysis tool in the formation of legislation and further on the technical formulation of operational policies. Thus it will prevent the emergence of discriminatory or gender-biased legislation. The targets to be achieved by publishing the Parameters of Gender Equality are how: (1) guaranteed gender justice in various policies both contained in the Laws of Regulations, development programs, and in other technical policies; (2) the reduced opportunity gap between women and men in achieving development; (3) decreased acts of violence against women and children. In addition, this document also has the aim of establishing Gender Responsive Laws, integrating gender equality perspectives in the process of establishing legislation, and guaranteeing gender equality recognition in the provisions of legislation and operational technical policies. Furthermore, this document also regulates a legislation monitoring mechanism through judicial review and executive review (Deputy for Gender Mainstreaming and Politics, Social Affairs and Law, 2012). With these parameters, it is expected to reduce the promulgation of gender-biased legislation as discussed in previous section.

3 CONCLUSIONS

The hard work of English speaking countries to apply equality since it is explicated in the text of legislation needs to inspire Indonesia even though the language technically does not encounter the same obstacles. Gender-neutral drafting is a response to gender equality demands. The cost of gender neutrality that is feared in gender neutral drafting may also not be experienced by Indonesia but the cost to society due to discrimination arising from norms that are not gender aware obviously must be paid more expensive. The formation of legislation in Indonesia is faced with non-technical factors that greatly affect the quality of design that is dominance of local majority expression and identity politics that delivered sloppy draftsmanship which, in turn, discredit women.

In the Indonesian context, the concept and techniques of gender neutral drafting should be seen as a spirit of pursuing equality and serving various segmentation. More importantly, it is an idea to raise an awareness to socially invisible group of people to get a recognition through text and not to be marginalized or sacrificed for a short-term political interest.

REFERENCES

- Butt, P. & Castle, R., 2006. *Modern Legal Drafting: A guide to using clearer language*. Cambridge: Cambridge University Press.
- Deputy for Gender Mainstreaming and Politics, Social Affairs and Law, 2012. *Ministry of Women's Empowerment and Child Protection*. [Online] Available at: <https://www.kemenpppa.go.id/lib/uploads/list/c3196-parameter-kesetaraan-gender-dalam-pembentukan-peraturan-perundang-undangan.pdf> [Accessed 8 July 2016].
- Greenberg, D., 2008. The Techniques of Gender-neutral Drafting. In: *Drafting Legislation: A Modern Approach*. Surrey: Ashgate, pp. 63-76.
- Hepple, B. & Barnard, C., 2000. Substantive Equality. *Cambridge Law Journal*, pp. 562-585.
- Ihsanudin, 2016. *kompas.com*. [Online] Available at: <https://nasional.kompas.com/read/2016/06/16/16372801/kemendagri.tegaskan.pembatalan.3.143.perda.sesuai.aturan>
- Kleinman, 2011. *Why Sexist Language Matters. Qualitative Sociology*. Pasadena, California: Salem Press.

- Komnas Perempuan, 2010. *Atas Nama Otonomi Daerah: Pelembagaan Diskriminasi dalam Tata Negara-Bangsa Indonesia*, Jakarta: Komnas Perempuan.
- Ore, T. E., 2003. *The social construction of difference and inequality: race, class, gender and sexuality*. Boston: Mc-Graw Hill.
- OSCE, 2017. *Making Laws for Work for Women and Men: A Practical Guide to Gender-Sensitive Legislation*, Warsaw: Centrum Poligrafii.
- UN Women, 2012. *Do our laws promote gender equality? Do our laws promote gender equality? A handbook for CEDAW-based legal reviews*. New York: United Nations.
- UNDP, 2003. *Drafting Gender-Aware Legislation: How to Promote and Protect Gender Equality in Central and Eastern Europe and In The Commonwealth of Independent States*, Slovakia: UNDP Regional Centre for Central and Eastern Europe and CIS Bratislava.
- UNESCO, 1999. *Guidelines on Gender-Neutral Language*, Paris, France: UNESCO.
- Women, I. N. C. o. V. a., 2010. *Institutionalization of Discrimination in the Indonesian State Order*, Jakarta: Indonesian National Commission on Violence against Women.
- Xanthaki, H., 2013. *Thorntons Legislative Drafting 5th edition*. London: Bloomsbury.

