

GENDER AND CONSTITUTIONAL LAW IN AUSTRALIA AS A CONSIDERATION FOR INDONESIA

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ABSTRACT

Women's inequality seems to be a product of political, legal, cultural and religious forces. Research has been conducted on the experience of gender equality of other countries, in this case, Australia. The promotion of gender equality through the politico-legal process, especially through its Constitution and legislation, has resulted in significant progress for women in Australia. This article uses gender analysis. The Australian constitution will be analyzed in a gendered way. It is expected that the findings may assist in improving the constitutional framework for the protection of women's rights in Indonesia. Thus, the aim of this paper is to question how Indonesia can learn from a liberal democratic state to empower women through constitutional amendments or other politico-legal processes.

Key words: gender equality – constitutional law – gender analysis

INTRODUCTION

Women's inequality seems to be a product of political, legal, cultural and religious forces. For such a long time, Indonesian scholars are interested in researching the causes and effects of women's inequality in terms of work, marriage and nationality. The majority of this research identifies the patriarchal culture of Indonesia as the main reason for women's continued limited participation in political life and decision making, as well as in public life and work. However, such research does not focus on this inequality from the perspective of constitutional law.

Research has been conducted on the experience of gender equality of other

countries, in this case, Australia. The promotion of gender equality through the politico-legal process, especially through its Constitution and legislation, has resulted in significant progress for women in Australia. The aim of this paper is to question how Indonesia can learn from a liberal democratic state to empower women through constitutional amendments or other politico-legal processes.

The constitution is important for every country and can be described as one of the requirements of a nation's existence as such. Karpin and O'Connell suggest, it defines the system of the federal and state government and acts as the basic framework of a representative democracy.

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In relation to the issue of women and the Constitution, they argue that it contains three structural frameworks, namely “Federalism; Separation of Powers; and Responsible and Representative Government”, rather than overtly articulating the protection of women’s rights.¹ Clearly, women’s rights are not a primary concern of the document. Rather, in legislating to protect and enshrine women’s rights, the Constitution offers mechanisms and structures through which laws can be enacted.

Research about women and the constitution is quite new, and there have not been many feminist writers concerned about this issue. Some contemporary feminist legal scholars have begun to focus on women and the constitution, even though their research is not always constitutionally oriented. There is a gender gap in comparative constitutional law discourse. Baines and Rubio-Marín argue that “comparative constitutional law covers a wide range of topics... but [not] gender”.² They edited a book called *The Gender of Constitutional Jurisprudence* in which analyses about women and the constitution based on twelve countries’ experiences are collected. Further, in this book they found several themes common to women and the constitution that can be used as an agenda to further gender equality. These are:

Women and constitutional agency; women and constitutional rights; women and constitutionally structured diversity; women and constitutional equality doctrine; constitutionalizing women’s reproductive

rights and sexual autonomy; women’s rights and the constitutional definition of the family; women’s socioeconomic development and democratic rights in the constitution; and constituting women: the gender of constitutional jurisprudence³

The second amendment of the UUD 1945 added a new chapter about human rights. However, under the title of human rights in chapter XA of the UUD 1945, there is no section regulating gender equality. Clearly, gender is not a focus in the UUD 1945 and its amendments. This makes the invitation from Baines and Rubio-Marín should be taken into account. They suggest feminists and other scholars to think about constitutions in a gendered way.

In considering theories of feminist jurisprudence, this paper attempts to begin to fill the gender gap in the constitutional law discourse in Indonesia. Equality may be enshrined in the UUD 1945, but this does not mean that it exists in practice. This suggests a conflict between law-in-the book and law-in-action.⁴ Thus, this research aims to intervene into the gap between politico-legal rhetoric and practice, as well as to make recommendations for Indonesia to promote gender equality.

Methodology

In intervening into this gap, this article uses gender analysis. The Australian constitution will be analyzed in a gendered way. It is expected that the findings may assist in improving the constitutional framework for the protection of women’s

¹ I. Karpin, and K. O’Connell, ‘Speaking into a silence: Embedded constitutionalism, the Australian Constitution, and the rights of women’ in B. Baines and R. Rubio-Marín (eds), *The Gender of Constitutional Jurisprudence*, Cambridge University Press, Cambridge, 2005, pp. 22-25.

² B. Baines and R. Rubio-Marín, ‘Introduction: Toward a feminist constitutional agenda’ in B. Baines and R. Rubio-Marín (eds), *The Gender of Constitutional Jurisprudence*, Cambridge University Press, Cambridge, 2005, p.2.

³ Ibid, pp. 7-21.

⁴ DR. Parsell, Indonesia: Working on the Front Lines, Ford Foundation Report.

rights in Indonesia. Thus, it is important to look at the rationale behind the decision to explore Australia's experience relative to Indonesia's.

Australia has been chosen for three reasons. Firstly, Australia has a different political situation to Indonesia. Australia has a well-defined democratic tradition and an extensive history as a democratic state. On the other hand, Indonesia is a newly democratising nation. Australia has experienced democracy since the birth of its federation in 1901. Meanwhile, Indonesia, which gained its independence in 1945, has only experienced western-style democracy since the fall of Suharto as second president in 1998.

Secondly, both countries have significant areas of difference related to their constitutions. The most obvious differences include:

- the legal system: Australia adopts common law and Indonesia adopts civil law
- the making of the constitutions: Australia by Constitutional Conventions and Indonesia by revolutionary war.
- the enactment of the Constitutions: Australia by referenda and in Indonesia through the People's Assembly.⁵
- the Bill of Rights: Australia does not have a Bill of Rights but Indonesia does.

The issue of the Bill of Rights is important because it is related to the notion of "embedded constitution" in the

Australian constitutional system. Third, the socio-cultural background is different in both countries. It is important to consider whether or not this different socio-cultural background has any impact on the protection of women's rights.

AUSTRALIAN WOMEN AND THE CONSTITUTION

The Australian Constitution began its long and complex history alongside the Federation movement in the 1890s. The Constitution making process was started by the Constitutional Conventions⁶ in 1891, 1897 and 1898.⁷ This was followed by referenda in each state. Prior to Federation, each state was an independent colony. The final year of the federation movement was marked by the endorsement of the Constitution and the inauguration of the Commonwealth on 1 January 1901.

Women are both un- and under-represented in the drafting process, in the Constitution, and in the Australian constitutional system. Women were not present in the Constitution making process.⁸ Also, the protection of women's rights is not articulated in the Constitution. However, the Constitution remains important as a framework for this protection. This can be understood by looking at the notion of an "embedded constitution"⁹ which is applied in Australia.

⁵ 'President Gus Dur's cabinet breaks much new ground', *Inside Indonesia*, no. 61, Jan-Mar 2000, available <<http://www.insideindonesia.org/edit61/surpr.htm>>. 1998.

⁶ However, there are questions about the formality of the UUD 1945. For further discussion see Yusuf and Basalim (2000); see also Suharizal (2002).

⁷ Constitutional Conventions here refer to the meetings held by some Federation leagues on the issue of the federation movement and the Constitution prior to the formation of the Commonwealth. This term will be used to distinguish between the term 'conventions' that will be used in the discussion on Australian women in the Constitution. Further discussion can be seen in Cass and Rubenstein (1996) and Lindsay (2003).

⁸ D. Cass, and K. Rubenstein, 'From Federation forward: The representation of women in the Australian Constitutional system', in H. Irving (ed), *A Woman's Constitution? Gender and History in the Australian Commonwealth*, Hale and Iremonger, Sydney, 1996, p. 117.

⁹ *Ibid.*, p. 118.

The Australian Constitution was made through complex process. According to Lindsay, this process started with the establishment of federation leagues, such as the Australasian Natives' Association to support the Federation movement. Officially, it held the first Constitutional Convention in 1891 and the second Constitutional Convention in 1897–1898. This was followed by the Premiers' Conference in 1899 to consider the Constitution Bill. Referenda on the federation issue were held during 1899-1900 in all colonies.¹⁰ On 9 July 1900, the *Constitution Act* was assented to Queen Victoria. Finally, on 1 January 1901, the Commonwealth of Australia came into existence by Royal Proclamation.¹¹

However, women were not present in the Constitution making process. The exclusion of women in this process began with the creation of the federation leagues. One of these leagues, the Australasian Natives' Association, opened the membership only to "Australian-born men of British origin".¹² The absence of women also extended to the Constitutional Conventions which aimed to draft the Constitution. Delegates were elected from all colonies to attend the Constitutional Conventions, but no women became delegates to these Conventions.¹³ New hope emerged in 1894 when the South Australian government enfranchised (white) women with the right to vote along with the right to stand for election.

This enfranchisement did not extend to indigenous Australians, whose political rights were established much later (DIMIA August 2002). Thus, South Australian (white) women contributed to the second Convention by electing their representatives. However, there were still no women delegates to this Convention. One South Australian woman, Catherine Helen Spence, sought to participate but failed to become a delegate, partly due to comments from the South Australian Premier, Charles Kingston, who doubted "her eligibility to stand as she was a woman".¹⁴ Clearly, women's political rights existed in theory and on paper. However, in practice, women's participation in the machinery of government was subject to a range of obstacles.

The exclusion of women continued in the next stage, the referenda in each of the colonies. The purpose of the referenda was to seek approval for the Constitution. Cass and Rubenstein assert that there was a problem of gender inequality in the process of seeking approval because half the population (women) could not vote in four of the six colonies.¹⁵ Only South Australia and Western Australia had granted women the vote. Cass and Rubenstein argue that "[n]ot only were women not represented in the Conventions which drafted the basic law, but they were virtually not represented in the electorate which endorsed it".¹⁶ These barriers to women's participation at the

¹⁰ For fuller discussion see I. Karpin and K. O'Connell (2005).

¹¹ In the 1890s, there were six colonies in Australia. They were: South Australia, Western Australia, New South Wales, Tasmania, Queensland and Victoria. They became states as a result of Federation. Since then, two territories (the Australian Capital Territory and Northern Territory) have been enacted.

¹² K. Lindsay, *Federal Constitutional Law*, Lawbook Co., Sydney, 2003, pp. 4-5.

¹³ *Ibid.*, p. 4

¹⁴ I. Karpin and K. O'Connell, *op cit.*, p. 26.

¹⁵ D. Cass and K. Rubenstein, *op cit.*, p. 117.

¹⁶ *At the time of referenda only South Australia (1894) and Western Australia (1899) had enfranchised their woman citizens. Other States enfranchised their woman citizens as follows: New South Wales (1902), Tasmania (1903), Queensland (1905) and Victoria (1908). At federal level, women had the right to vote in 1902.*

political level effectively produced gendered inequalities that affected Australian women for almost a century.

The absence of women in the Constitution making process opened a huge debate on representative democracy in Australia. It is noted that representative government is one of the principles of the Australian Constitution, besides the doctrines of Federalism and Separation of Powers. According to Cass and Rubenstein, representation is an important element in democratic theory with participation as a mechanism to establish it. Further, they argue that “the system is not representative without the presence of a broad range of people and groups from the electorate”.¹⁷ In conclusion, they quote Labor Prime Minister Paul Keating, who stated in 1993 that the “ruling body of the nation should be representative of the people it serves. At present it is not”.¹⁸ Keating was referring specifically to women’s representation in Parliament. By looking at the Constitutional making process and the present constitutional practices, Cass and Rubenstein argue that “[a]ny constitutional system which has failed in the past and continues to fail in the present to adequately present women cannot continue to be called ‘representative’”.¹⁹ Clearly the notion of representative democracy relies upon the population electing representatives for Parliament, but overwhelmingly, these representatives are men. There is no mechanism ensuring a gender balance of candidates for election.

When the Australian Constitution is considered, it is worth examining the article by Karpin and O’Connell entitled ‘Embedded Constitutionalism, the Australian Constitution, and the Rights of Women’ in *The Gender of Constitutional Jurisprudence*. The authors discuss the notion of the Australian Constitution which is embedded into the larger institution of government, and examine the Constitution as a framework for the articulation of the rights of women and other minority groups. The Australian Constitution is a multifaceted politico-legal document. Karpin and O’Connell argue that to get the full meaning of the Constitution, it is important to read it in the context of the conventions relating to the Constitution and the common law.²⁰ Further, they state that “the Constitution is both constitutive of and constituted by the legal, political, and cultural system in which it operates”.²¹ A similar argument is proposed by Tony Blackshield, who describes the Constitution as a skeleton whose social flesh is “filled out by practice, convention, habit and tradition”.²²

Karpin and O’Connell argue that “the Australian Constitution is a document that is mostly silent about rights”.²³ The protection of women’s rights is not articulated in the Constitution. Instead, this protection is regulated through Federal and State legislation. This legislation is enacted through the power of legislative bodies to make laws under the subject of external affairs in s. 51 (xxix) of the Constitution²⁴.

¹⁷ D. Cass and K. Rubenstein, *op cit*, p. 118.

¹⁸ *Ibid*, p. 116.

¹⁹ *Ibid*, p. 121; see also Ryan, M. (ed), *Advancing Australia: The Speeches of Paul Keating, Prime Minister*, Big Picture Publications, Sydney, 1995, p. 247.

²⁰ *Ibid*.

²¹ Conventions here refer to the unwritten set of rules governing the role of the Queen, through the Governor-General as her representative, the selection of Prime Minister, and the membership of the cabinet among other things. For further discussion see Hughes (1980).

²² I. Karpin and K. O’Connell, *op cit*, p. 23.

²³ *Ibid*.; see also J. Innes, *Millennium Dilemma*, 1998)

²⁴ *Ibid*. p. 22.

The principle of gender equality is translated from international conventions and treaties on women's rights into the national legislation. At the international level, the CEDAW was adopted by the United Nations General Assembly on 18 December 1979. It then came into force on 3 September 1981 (UN GA Res. 34/180, 1981). At the national level, Australia ratified the CEDAW on 27 August 1983.²⁵ The ratification does not mean that the international obligations/principles in the CEDAW can be implemented automatically at the national level. According to Keyzer, "a treaty will not form part of Australian domestic law until it has been implemented in a valid Federal law".²⁶ As a consequence, Australia passed the *Sex Discrimination Act* in 1984 which has the CEDAW as an appendix. This was followed by the enactment of the *Affirmative Action (Equal Opportunity Employment) Act* in 1986 which particularly regulates equal opportunity for women in the employment area. It is important to note that Australia also expressed "reservations" about women in combat-related fields and about paid maternity leave.²⁷

To sum up, the Australian Constitution articulates neither the protection of human rights in general nor women's rights in particular. However, s. 51(xxix) of the Constitution (external affairs) gives power to the legislative body at the federal level to make laws relating to the protection of women's rights as a consequence of the ratification of the CEDAW.

Sex discrimination legislation at the national level was instituted as an implication of the ratification of the CEDAW. There are two pieces of legislation on the issue of sex discrimination, namely the *Sex Discrimination Act 1984 (Cth)* (the SDA) and the *Affirmative Action (Equal Opportunity Employment) Act 1986 (Cth)* (the AAA). These pieces of legislation are applied at the federal level. States must act in accordance with the national legislation. The two Acts use different approaches to achieve gender equality, which will be discussed in more detail below.

Sex discrimination legislation at the national level in Australia

The SDA and AAA comprise the federal legislation on the issue of sex discrimination. Even though both have the same purpose, to wipe out gender discrimination, they use different approaches to achieve this purpose. The SDA regulates sex discrimination in general. It regulates the legal remedy for an individual woman who experiences discrimination. Meanwhile, the AAA aims to eradicate gender discrimination particularly in the employment area and the action of prevention is introduced in this act.

The SDA was the first piece of legislation on sex discrimination after the ratification of the CEDAW in 1983. It was enacted by the Commonwealth Parliament in March 1984 and came into force on 1 August 1984.²⁸ Prior to this, the Bill was proposed by Susan Ryan, a Labor Senator

²⁵ s. 51 of the Australian Constitution states that "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (xxix) External Affairs". For fuller discussion see Karpin and O'Connell (2005).

²⁶ E. Evatt, 'Eliminating discrimination against women: The impact of the UN Convention', *Melbourne University Law Review*, vol. 18, 1991, p. 435.

²⁷ P. Keyzer, *Constitutional Law*, 2nd ed, LexisNexis Butterworths, Chatswood, 2005, p. 170.

²⁸ G. Brooks, 'A Discussion of the Sex Discrimination Act and the Affirmative Action (Equal Employment Opportunity for Women) Act, which focuses on their scope of operation and their effectiveness', thesis, Flinders University of South Australia, Adelaide, Australia, 1996, p 6)

and Minister Assisting the Prime Minister on the Status of Women, on 2 June 1983.

The Act makes it unlawful to discriminate directly or indirectly on the grounds of sex, marital status, or pregnancy. The grounds defining these forms of discrimination are outlined in sections 5–7 of the SDA. The discrimination is considered unlawful if it occurs in certain areas, such as employment (s. 14); education (s. 21); goods, services and facilities (s. 22); accommodation (s. 23); land (s. 24); clubs (s. 25); and administration of Commonwealth laws and programs (s. 26). The SDA provides individual and group complainants with legal remedies when they suffer specific forms of discrimination.

Acts contain objectives which function as aims of the legislation. These aims are, however, open to interpretation and legal debate. The SDA's objectives are stated in s.3 (a) to (d). They are:

- a. to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women; and
- b. to eliminate discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, services and facilities, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs; and to eliminate discrimination involving dismissal of employees on the ground of family responsibilities; and

- c. to eliminate discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and
- d. to promote recognition and acceptance within the community of the principle of the equality of men and women (the *Sex Discrimination Act 1984 (Cth)* s. 3).

Clearly, these objectives set out the intentions of the legislation. However, the SDA also details a number of exemptions. Under Division 4 of Part II of the SDA, there are three classifications of exemptions: “permanent exemptions, exemptions for specified acts done under statutory authority and temporary exemptions on application to the HREOC”.²⁹ For instance, there are exemptions in the operation of religious bodies, voluntary bodies and certain industrial agreements. However, Brooks argues that no matter the type of exemptions, the existence of exemptions is “contrary to the aims of the legislation, let alone the convention upon which it is based”.³⁰

The *Affirmative Action (Equal Opportunity Employment) Act* was passed by the Commonwealth Parliament in August 1986. It became effective on 1 October 1986. The AAA aims to provide equal employment opportunities for women. It requires certain employers to develop and implement affirmative action programs for women. The words ‘certain employers’ is used here because not all employers have the same obligations under this Act. It covers all higher education institutions and all private sector employers with 100 or more employees.³¹ The AAA, however, has

²⁹ C. Ronalds, *Affirmative Action and Sex Discrimination*, Pluto Press Australia Ltd., Sydney, 1991, p. 13.

³⁰ Sex Discrimination Unit, Human Rights and Equal Opportunity Commission (HREOC), *1996 Guidelines for Special Measures under the Sex Discrimination Act 1984*, Sydney, 1996, p. 23.

³¹ G. Brooks, *op cit*, p. 8.

exemptions in which it does not cover federal government employers,³² state government employers³³ and voluntary bodies.³⁴ The operations of the Act were to be phased in over four years to develop and implement an affirmative action program for women. Once the affirmative action program was in place in the workplace, the employers had to submit two reports annually to the Director of Affirmative Action.

The AAA defines 'affirmative action' in s. 3(1) of the Act. It has two criteria, which are that:³⁵

- appropriate action is taken to eliminate discrimination ... against women, and
- measures are taken ... to promote equal opportunity for women.

The SDA and the AAA cover a related but separate issue of gender equality as a principle of eliminating sex discrimination. In contrast to the SDA, the AAA recognises women as a class rather than individuals. Under the SDA, women as individuals can bring complaints to the Court and ask for a legal remedy for the discrimination actions incurred against them.

However, under the AAA, *prevention* of sex discrimination is considered more important than the remedy. This is expressed in the requirements in the AAA to compel institutions to give a report to a government agency, in this case HREOC. In these reports, the employment policies and practices of the institution are reviewed and reassessed. "Accountability for the actions of employers, both in the private and the public sectors, is ensured through a system

of reporting to a government agency".³⁶ However, within the AAA, there is no mechanism to apply material or financial penalty where an employer fails to lodge the report (s. 19 of the AAA). Critics argued that the mechanism of public accountability alone is not adequate in promoting affirmative action. They asked for fines to sanction actions which breach the AAA. However, there is same doubt about the effectiveness of the fines mechanism. Although this mechanism has been implemented in both the SDA and the AAA, it is not clear that this sanction can effectively decrease the number of breaching actions.

Some problems have arisen as a result of the implementation of these two pieces of legislation, the SDA and the AAA. The next section explores these problems. Also, it examines whether the implementation of these two acts has resulted in gender equality.

The existence of gender equality in Australia

Despite the existence and application of the SDA and the AAA in Australia, problems to do with gender inequality are still apparent. Before discussing the problems of the SDA and the AAA, it is important to look at the problem of the authority of the HREOC as a body to administer the SDA. Initially, some constitutional law scholars raised concerns that the HREOC would breach the principle of Separation of Powers in the Constitution. The HREOC performs an administrative function and therefore

³² C. Ronalds, *op cit*, pp. 12-29.

³³ Federal Government departments are not covered by the AAA as they are covered by s. 22b of the Public Service Act.

³⁴ State Government employers are exempt from the AAA as they are a body established for a public purpose by or under a state or territory law. For fuller discussion see Ronalds (1991) Chapter 5.

³⁵ The exemption for voluntary bodies is a question of fact. They are exempted due to their non profit activities. However, there is no legal definition of the term 'profit'. Further discussion see Ronalds (1991).

³⁶ C. Ronalds, *op cit*, p. 29.

cannot have a judicial function, such as by giving binding legal decisions. However, s. 82 of the SDA states that the HREOC can pass non-binding decisions, which then must be taken to the Federal Court to be re-heard in order to make them enforceable.

Brooks identified several areas of contradiction in the SDA. Mainly, these occurred between some sections of the SDA and its objectives. Firstly, Brooks considers s. 43 of the SDA, which states that it is not unlawful to discriminate against a woman in relation to combat duties or combat related duties.³⁷ In s. 3(a) of the SDA, the words ‘certain provisions’ are used because of two reservations made by Australia about the CEDAW: these reservations relate to combat duties or combat related duties³⁸ and paid maternity leave.³⁹ The Lavarch Report recommended the alteration of this section.⁴⁰ However, the response from government has consisted only of reviews rather than statutory change. Further, paid maternity leave is left to be negotiated in workplace agreements between employers and the employees, an area of contention in Australia currently. Secondly, Brooks highlights the existence of exemptions in the SDA which are not in accordance with the purpose of the Act to eliminate discrimination against women. Lastly, she looks at the limitations in the area of sexual harassment action. Section 3(c) of the SDA recognises sexual harassment action only in the workplace and educational

institutions. Due to recommendations made in the Lavarch Report, the SDA has been amended⁴¹ by adding s. 28(b) to s. 28(l) which extended the scope of areas to provision of accommodation, land, clubs and Commonwealth laws and programs. Brooks also identifies problems in the SDA at the practical level. She states that to measure the effectiveness of the SDA is not an easy task. This does not mean that the SDA is not effective. However, the best measurement should be applied to determine the Act’s effectiveness.⁴²

Further, Chappell points out that there are four weaknesses of the SDA compared to broad protocols contained in the CEDAW which was the origin for the SDA. Firstly, the SDA did not fully translate the CEDAW. Secondly, it was more limited because it focused on formal and direct discrimination rather than the systemic and substantive approach. Thirdly, it was weak because it included an individual complaints-based mechanism for redress. Lastly, it was much less clear on challenging the public/private distinction by regulating exemptions.⁴³

In addition, Chappell points out that gender inequality continues to exist in Australia despite the implementation and application of legislative frameworks to protect women’s rights. She strongly argues that “[u]nder the Howard government, women’s rights have been diluted not strengthened”.⁴⁴ Her argument is mainly based on the Howard government’s political

³⁷ *Ibid*, p. 12.

³⁸ *Brooks*, *loc cit*.

³⁹ *This second reservation has since been removed, see Chappell (2002)*.

⁴⁰ *Brooks*, *loc cit*.

⁴¹ *House of Representatives Standing Committee on Legal and Constitutional Affairs 1992, Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia, Australian Government Publication Service, Canberra, 1992, p. 265.*

⁴² *The changes are through the Sex Discrimination and Other Legislation Amendment Act 1992.*

⁴³ *G. Brooks, op cit, pp. 8-19.*

⁴⁴ *L. Chappell, ‘Winding back Australian women’s rights: Conventions, contradictions and conflicts’, Australian Journal of Political Science, vol. 37, 2002, p. 478)*

actions including the refusal to sign the Optional Protocol of the CEDAW which she claims has threatened women's rights.

Sex discrimination legislation and mechanisms have been enacted by the government in order to eliminate discrimination against women. However, at the practical and operational level, this must be supported by other mechanisms such as an adequate measurement of the implementation of the SDA and the AAA. Importantly, goodwill from the government to eradicate gender discrimination is a must, even in a staunchly democratic nation like Australia. Clearly, legislative frameworks must translate into effective public policy, and gender must be the focal point.

Reconsidering the Australian experiences

Gender discourse in the Indonesian legal system, especially in the field of constitutional law, is quite new. There is a gap in feminist jurisprudence within the discourse of Indonesian constitutional law. Indonesia is the focus of this part because the overall aim of this paper is to survey possibilities for Indonesia to learn from its neighbour, Australia. Three aspects, namely feminist jurisprudence, theories of constitutional law and Islamic feminism, are considered important in my consideration of Australian ways of promoting gender equality.

Movements to improve gender equality in Australia have been promoted through the legislative framework. Within Australian constitutional law discourse, the protection of women's rights is considered one of the "external affairs" that is regulated under s. 51 (xxix) of the Australian Constitution. In

relation to Australia's efforts to eliminate discrimination against women, the government ratified the CEDAW in 1983. As a consequence of this ratification, the government passed the SDA and the AAA. These legislative achievements, however, have not resulted in gender equality in practice. As Brooks (1996) and Chappell (2002) argue, efforts to eradicate sex discrimination have not resulted in women experiencing substantive equality.

Australia's efforts such as passing the SDA and the AAA can be a good example for Indonesia. However, the Australian approach to diminishing sex discrimination cannot simply be transplanted to Indonesia, as there are still some questions on issues of legal, political and social consequences. Thus, to reconsider the Australian women's experiences, it is important to look at some possible objections from the perspectives of comparative constitutional law and fundamental Islamic scholars.

Gender of constitutional jurisprudence

As noted above, the relation between women and constitutional law is rarely discussed by feminist jurisprudence scholars due to the assumption of its weaker impact on women's lives.⁴⁵ However, the constitution remains as an important legal instrument to women as citizens. This can be seen by the emergence of feminist thought as a marginalised but persistent voice within constitutional law discourse.⁴⁶

Baines and Rubio-Marin identify a huge gap in analyses of constitutional law. They conclude that claims for gender equality premised on constitutional rights are increasing. Studies on constitutional law have examined gender issues doctrinally,

⁴⁵ *Ibid*, p. 486.

⁴⁶ M. Davies and K. Mack, 'Legal feminism – now and then', *The Australian Feminist Law Journal*, vol. 20, 2004, p. 2

such as political participation, freedom from discrimination and violence, and other economic and social rights. However, their analyses usually are limited at the national level. Comparing these national level analyses is considered difficult. This is because within the perspective of comparative constitutional law, the process of comparing can only be conducted among countries which have or share the same legal tradition.⁴⁷

Some comparative constitutional law scholars object to the very idea of adopting constitutional transnationally. Thusnet, for example, identifies scepticism regarding “any direct “borrowing” of solutions developed in one system to resolve problems in another”. However, Tushnet proposes the idea of “filtration”, by which means:⁴⁸

[W]e can learn from experience elsewhere only to the extent that we avoid too much detail about that experience. For example, if we identify a complex set of functions closely tied to particular institutions elsewhere, we will be unable to learn about how we might alter or understand our institutions as they perform their somewhat different set of functions, ... our constitutional arrangements similarly express our constitutional culture.

It can be seen that Tushnet carefully proposes the way to compare issues within the constitutional law discourse. He claims that the process of learning from other countries’ experiences can be conducted in rather general terms that will help to cope with the constitutional problems.

Tushnet’s analysis supports Baines and Rubio-Marin’s contention that in

contemporary legal discourses of gender, every kind of comparison can be conducted. They argue that in this case it is gender, not constitutional law, which is the focal point of research. They argue that there is a “need for a feminist analysis of constitutional jurisprudence in which gender becomes the focal point and for a broader comparative constitutional law approach that encompasses both of the world’s major legal traditions”.⁴⁹ According to this perspective, the difference in legal systems or traditions which applies in Australia and Indonesia need not be a barrier that prevents Indonesian women learning from Australia and vice versa.

Baines and Rubio-Marin foreground the question of how feminist work in the field comparative constitutional law can be promoted. There are no easy answers, but Baines and Rubio-Marin suggest focusing on constitution making processes as well as using existing constitutional judicial processes to promote gender equality. In proposing this focus, they maintain their awareness of different emphases, such as material facts, terminology and goals, from feminist and jurists in dealing with the issue of gender equality. For example, on one side, feminists claim that gender equality can be achieved only when women’s subordination is overcome. On the other side, many jurists refuse to acknowledge that this subordination is real.⁵⁰

Thus, Baines and Rubio-Marin propose a “middle course” between these perspectives by designing a feminist constitutional agenda and inviting other feminist constitutional scholars to continue their efforts to redress and eventually eradicate the subordination

⁴⁷ Baines and Rubio-Marin, op cit, p. 1.

⁴⁸ Ibid.

⁴⁸ M. Tushnet, ‘The possibilities of comparative constitutional law’, *The Yale Law Journal*, vol. 108, 1999, p. 1308.

⁴⁹ B. Baines and R. Rubio-Marin, loc cit.

⁵⁰ Ibid. p. 3.

of women. Their goal is “to identify, sustain and promote the constitutional norms and strategies that will achieve gender equality for women”.⁵¹

Attempts to eliminate sex discrimination within constitutional law discourse should not be limited by national boundaries. Despite objections from comparative constitutional law scholars, these efforts should be continued. The struggle to achieve gender equality by learning from other countries’ experiences is not only challenged by comparative constitutional law scholars but also by Islamic scholars. In the case of considering Australian experience in promoting gender equality, objections come from Islamic fundamentalists who argue that Western values should not distort the original intent of the UUD 1945,⁵² which is in dialogue with both the religious and the nationalist framework of Islam.

Islamic feminism

The potential union of Islam and feminism has been controversial since its conception. Some traditional and conservative Islamic scholars reject the idea of feminist movements in Islam. The anti-West and anti-imperialist movements in 1970s and 1980s strongly rejected the ideas and ideals of Western feminism. However, these discourses were regarded by others as an impetus for new feminist interpretations of gender rights in Islam.⁵³

The matter of feminism in Islam is significant in this paper because Indonesia is a large Muslim country. For the majority

of Indonesians Islam is not merely a personal faith, but also structures their way of life. Within almost all aspects of life, Indonesian Muslims incorporate Islamic values. This also holds true in Indonesian law - in the existence of a special religious court, for example.⁵⁴ This section discusses women’s equality in Islam by looking at the importance and crucial position of Islamic values in the Indonesian society.

Any suggestion that Indonesia should consider the Australian experience in promoting gender equality is bound to raise objections from some Islamic scholars. On one hand, Australia is a western secular country. On the other hand, while Indonesia cannot be said to be wholly religious, Islam plays an important role in Indonesian life. However, this opposition between Islam and the West is criticised by some as being naive and too general. Mirza argues that this kind of opposition fails to recognise the diversity and complexity in Islam and the West.⁵⁵

To counter possible objections from Muslim fundamentalists, it is important to examine women’s position in Islam. The most significant *surah* in the *Qur’an* referring to women’s role is *Surah An-Nissa*. Verse 34 of *Surah An-Nissa* states that “Men are custodians (qawwamun) of women, with what *Allah* has made some to excel over others and with what they spend out of their wealth”.⁵⁶ This verse has been used by Islamic fundamentalists to justify the higher position of men in Islamic society. However, this does not mean that Islam privileges men over women. Shokri and Labirz challenge

⁵¹ Ibid, p. 5.

⁵² DS. Lev, *The Transition to Guided Democracy: Indonesian Politics 1957-1959*, Ithaca, New York, 1966, p.48.

⁵³ Q. Mirza, ‘Islamic feminism, possibilities and limitations’, in H. Mogishsi (ed), *Women and Islam: Critical Concepts in Sociology*, Routledge, London, 2005, p. 304.

⁵⁴ R. Lukito, *Pergumulan Antara Hukum Islam dan Adat di Indonesia*, INIS, Jakarta, 1998, p. 73.

⁵⁵ Q. Mirza, op cit, p. 300.

⁵⁶ This translation is used by Afary based on *The Holy Qur’an*, Columbus 1991 (English translation).

the contention that Islam is necessarily sexist by citing *surah* 49 verse 13: “God privileges only the most pious and knowledgeable human beings”.⁵⁷ Riffat Hassan, a Pakistani Islamic feminist, also argues that the *Qur’an* does not discriminate between men and women. Sex discrimination in Islamic thought, she argues, is imported from other sources. Thus, Hassan proposes to use the *Qur’an* as a standalone source and to discard other religious commentaries and traditions such as *hadith*, *fiqh* and *syari’ah*.⁵⁸

Against this, interpretations from a majority of Islamic scholars continue to disadvantage and subordinate women, as we saw regarding the Indonesian experience on the issue of its female president. Recall, that the controversies surrounding the election of female president were mainly based on the verse 34 of *surah An-Nissa*. As a result of these inequalities, some Muslim women challenge gender inequality by proposing Islamic feminisms. Mainly, these types of feminisms emerge as a challenge to Western feminisms. They argue that Western feminists failed to acknowledge differences between women and has cast the experiences of a specific group of women to be emblematic of, or normative for, all women. Thus, the notion of equality contained in feminist discourse was predicated upon a denial of difference and the ethnocentric assumptions of white Western, heterosexual, middle class women.⁵⁹

Interestingly, Mirza notes that some Islamic feminists, especially in the period of Islamic feminisms’ formation, were influenced by Western feminisms.⁶⁰ Further, she claims that the choice to use an Islamic framework was due to two reasons: first, individual faith or personal belief and second, because of the need to have legitimation of their claims.

As mentioned above, Islamic feminism is not a singular term. Barbara Stowasser divides this feminism into three categories: ‘the modernist movement’; ‘mid-century modernism’; and ‘the new epistemology movement’. Her categorisation is based on the contemporary Qur’anic interpretations and their new gender paradigms.⁶¹ Yamani classifies Islamic feminisms into a broader typology. She divides them under the terms: ‘new feminist traditionalists’, ‘pragmatists’, ‘secular feminists’, and ‘neo-Islamists’.⁶² Across this diversity, Islamic feminisms share a characteristic desire to recreate and renew gender equality within an Islamic framework.⁶³ Borrowing words from Yamani, Islamic feminists have “a common concern with the empowerment of their gender within a rethought Islam”.⁶⁴

The process of reconsidering Australian experiences to inform Indonesian legal reform in order to achieve gender equality should not be hindered by the idea of the opposition between Islam and the West. As it has been analysed before that the critical dialogue between Western and Islamic feminists has set productive precedent

⁵⁷ J. Afary, ‘The war against feminism in the name of the Almighty: Making sense of gender and Muslim fundamentalism’ in H. Moghissi (ed), *Women and Islam: Critical Concepts in Sociology*, Routledge, London, 2005, p. 249.

⁵⁸ S. Mojab, ‘Islamic feminism: Alternative or contradiction?’, in H. Moghissi (ed), *Women and Islam: Critical Concepts in Sociology*, Routledge, London, 2005, p. 323.

⁵⁹ Q. Mirza, op cit, pp. 303-304.

⁶⁰ Ibid, p. 304.

⁶¹ Ibid, p. 306.

⁶² Ibid, p. 310.

⁶³ Ibid, p. 312.

⁶⁴ M. Yamani, ‘Introduction’ in M. Yamani (ed), *Feminism and Islam: Legal and Literally Perspectives*, New York University Press, New York, 1996. p. 2.

in the initial of the creation of Islamic feminism. Additionally, Najmabadi argues that “if *Islam, secularism, nationalism, and feminism* are historically defined and in changing relationship, there is no reason not to imagine reconfigurations of these terms”.⁶⁵

Clearly, Australian constitutional efforts to eliminate sex discrimination can inform Indonesian legal reform. It may be possible to achieve this through the adoption of Australian ways to promote gender equality. However, objections, raised by some scholars in comparative constitutional law and Islamic feminism, relating to the process of reconsidering the Australian experiences, should be taken into account.

It is also clear that the issue of women’s equality in Indonesia has politico-legal, religious and cultural aspects. Dialogue between these areas is important if gender is to be a focal point in constitutional law discourse. Feminist perspectives can illuminate the gaps in constitutional law to show that perspectives on human rights can be gendered, further entrenching gender inequality.

Conclusion

Gender inequality is apparent in public and private life in Indonesia. Sex discrimination continues to exist despite the fact that equality has been promoted in the Constitution. However, gender equality is not addressed specifically. This raises the question of the effectiveness of the constitutional framework in eliminating sex discrimination.

Gender equality has been promoted in the Australian legal framework. This began in 1983 when Australia ratified the

CEDAW. The protection of women’s rights is regarded as one of the “external affairs” governed by s. 51(xxix) of the Australian Constitution, so these are not articulated in the Constitution. The ratification of the CEDAW gave the legislative body power to pass legislation concerning women’s rights as described in the s. 51 (xxix) above. As a result, the SDA, which has the CEDAW as an appendix, and the AAA have been passed to further promote gender equality. However, critics argue that these two pieces of legislation are ineffective in guaranteeing women’s rights. Clearly, women’s rights in Australia are not completely guaranteed by either the Constitution or the legislative bodies. Because law is always in process, it is possible that new laws could overturn the SDA and the AAA at sometime in the future, as Chappell (2002) has warned.

Indonesia can redress sex discrimination by considering Australia’s experience in promoting gender equality. However, Australian ways of promoting gender equality cannot simply be adopted and applied in Indonesia. There are some differences between Indonesia and Australia, both constitutionally and culturally, that have been raised by Indonesian scholars. In spite of these objections, Australia’s efforts to promote gender equality should be taken into account to provide some direction for Indonesia.

A major objection comes from comparative constitutional law scholars. Australia and Indonesia have different legal traditions which mean it is debatable that legislative and constitutional approaches in Australia can be imported to Indonesia. However, the new approach proposed by Baines and Rubio-Marin offers hope for a

⁶⁵ A. Najmabadi, ‘(Un)veiling feminism’, in H. Mogishshi (ed), *Women and Islam: Critical Concepts in Sociology*, Routledge, London, 2005, p. 228.

reconsideration of Australian experiences as compared to Indonesia. They promote the use of gender as a focal point in the discourse of comparative constitutional law in order to achieve gender equality.

Secondly, objections come from the traditionalist Muslim scholars who ground their objections on differences in religion and culture. Even though Indonesia is not an Islamic country, Islamic values are strongly attached to Indonesian society. Indonesian experience suggests that women are experiencing oppression and discrimination sometimes in the name of religion. Some Indonesian Muslim scholars base their arguments on interpretation of the *Qur'an* and *hadith*. However, these interpretations are considered by a number of Islamic feminists to be misogynist misreading. Thus, Muslim feminists challenge this by recreating and renewing debates about gender equality within an Islamic framework.

The suggestion that Indonesia can learn from Australian experience is neither straightforward nor uncontested. Objections from various perspectives must be considered. However, this does not mean that efforts to eliminate sex discrimination in Indonesia should stop. The new approach to look at gender as a focal point of constitutional provisions can be adopted to achieve gender equality.

Finally, legislative measures proposed by Indonesia to protect women's rights should be closely monitored to ensure that principles of good governance extend to the area of gender equality.

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