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Legal Politics of Gender Inequality in Determining Legal Capability in Indonesian Legislation

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ABSTRACT
The issue of gender equality in legislation has become a timeless theme that has emerged throughout history. Most of the statements related to this issue usually do not come from a strong theoretical basis because they do not analyze the political and legal aspects of this gender inequality. This issue can often be found in the formulation of regulations regarding legal capability. The legal politics of legislation varies greatly depending on the interests of the parties that intersect with the legislation. Thus, the critical question is: which the realms of law that legal politics of gender inequality related to legal capability are strengthened and weakened? The purpose of this research is to develop theses that will be very useful for those who are interested in studying gender issues. By using text analysis on some normative provisions in the legislation, the authors conclude that legal politics which includes the issue of gender inequality related to legal capability, will emerge in non-neutral areas of law. In the category of legal cybernetics theory, this area is included in the high information, but low energy fields. But, in high energy areas, such politics of law do not appear explicitly.

Keywords: *Legal Politics, Legal Capability, Gender Inequality, Indonesian Legislation, Legal Cybernetics*

1. INTRODUCTION

It is fascinating when some political observers consider that women who are head of government in some countries in the world are more successful in overcoming the effects of the Covid-19 pandemic than men who occupy the same position [1][2]. At first glance, such an assessment would like to emphasize that the issue of gender inequality is a myth [3], but on the other hand, this statement reveals that such an issue still exists today.

Issues about gender inequality in legislation usually do not appear explicitly. This issue is hidden behind the legislative texts regarding legal capability. These texts are not neutral sentences because their formulation must be motivated by particular legal politics [4]. Thus, research on gender inequality related to legal capability will inevitably intersect with research on legal politics from areas of law in the legislation.

Research on the politics of law behind legislation requires an appropriate tool of analysis, namely a theory that can dissect the variants of legal politics. A legal capability which is regulated in legislation sometimes refers to categories that are not based on gender, but quantitative criteria, namely, age. However, if the age for being declared legally capable is still differentiated between men and women, it means that the issue of gender inequality still applies.

Thus, the legal area of legislation is expected to significantly influence the politics of law regarding this legal capability, particularly the issue of gender inequality. Legal capability (in Dutch called r*echtsbekwaamheid*) is a legal institution that is very important in all fields of law because it determines when a person can act independently as a legal subject. Legal capability, thus, has the meaning assigned to maturity. The concept of maturity status is a concept that contradicts the concept of children. Legal capability is divided into two competencies, namely legal capability to perform all legal action (*handelingsbekwaamheid*) and legal capability to take only specific legal action (h*andelingsbevogheid*) [5].

This paper wants to question in what areas of law the politics of law regarding gender inequality related to legal capability appear to be strengthening or vice versa, appear to be weakening. This question requires a choice of theory, in which the authors choose a modification of the theory of legal cybernetics. It is desirable for this modification of the theory will help to provide an analytical blade to answer the above questions. The answer to that question will be in the form of several theses that are useful for future research on similar topics.

2. LITERATURE REVIEW

2.1. Theory of Legal Cybernetics

The cybernetics theory was popularized by Talcott Parsons, who stated that there are four interrelated systems, namely cultural, social, political, and economic systems [6]. This form of connection is shown through

two main streams. The cultural system will affect the social system through the flow of information or values, and so on. The influence continues to the economic system. The farther away from the cultural system, the strength of the flow of values will weaken. In the opposite direction there is an economic system that is very rich in energy. This current will drive the political system, and will continue into the cultural system. The further away from the economic system, the energy flow will weaken. Thus, the economic system is a system that is high energy, but low information. On the other hand, a cultural system is a highly informative system, but low energy.

The cultural system is a high information system because it contains values which are substantially very useful for providing input to the social system. Because it is very rich in information and values, this system also tends to be non-neutral. This is explained by the fact that the cultural system is very strongly associated with primordial aspects. This is distinct from an economic system which is very energized to be able to move the political system [7].

Parson's rationale has inspired many experts to elaborate on this cybernetic theory. Most legal experts still believe that law is an integrated system that is structurally binding. Shidarta is one of the scholars who has modified this theory by inserting two other systems, namely the legal system and the technological system. He developed a longer arrangement of these systems. If it is described, it will show the cybernetics relationship between social, cultural, legal, political, economic and technological systems [8] [9].

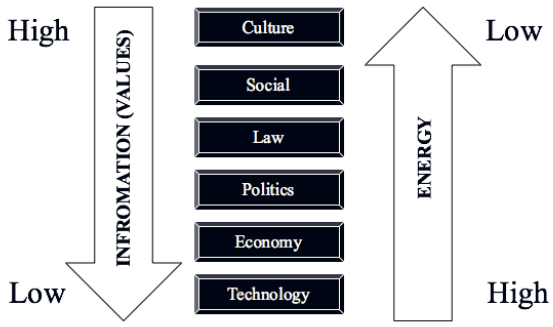

Figure 1 Shidarta's Modified Legal Cybernetics

2.2. Legal Values and Legal Energy

Legislation whose regulatory material is in the cultural area, thus, will be very rich with information (values). Legal politics in this area is also highly informative. This material content will be passed down to the social system, which means that the social system takes a reference to culture.

The legal system will then take its reference to the social system. In this context, the law here mainly refers to legal procedures containing the rules of the game in enforcing the law. The legal system is concerned that the rules it makes will have sociological validity by adopting as many behaviors as is already available in the social system.

Information from this law then flows into the political system with dwindling content. It means politicians, who are running a political system will see the law as the primary reference. Their behavior will be subject to restrictions provided by the legal system. The crucial point occurs at this momentum. Because the law is a product of the ruler, the legal politics contained in the legal system is full of the interests of the ruler. That is why, in many developing countries, the legal system often fails to become a reference for the behaviors of their politicians [10] [11].

With a diminishing supply of value flows, the economic system seeks its reference to the political system. Decisions and various activities in the economic sector refer to the political system. When the political system is in turmoil, it will have an impact very soon on economic stability.

The economic system then becomes a reference for the technological system. The economy of a strong country will have an impact on the availability and adequacy of technology for its people. In this technological system, values are already in the thinnest layer.

Such an explanation also applies to the reverse flow, that legislation in the field of technology will contain a strong flow of energy, with legal politics that do not have a great deal to do with information or value.

With the energy it has, the economic system will affect the political system. This economic energy has the possibility of changing the direction of legal politics in legislation. Karl Marx has long indicated the lobbies of capital owners in influencing political decisions [12]. Such decisions are then poured into legal products, in the form of legislation.

The legal system can change the social system. Roscoe Pound once said that law is a tool of social engineering [13][14]. It is noteworthy that this legal energy for changing social behavior is not entirely reliable. The phenomena may happen because legal energy is not necessarily effective enough in competing and dealing with other systems that have been working in society.

From this flow of energy, the law can be seen as a product of politics. The law has a special duty to ensure integration in the entire system, whether it is a system of a particular family, society or state. This specific task can only be performed if the political system has the energy to produce laws, especially in determining procedural rules. The relationship between politics and law underlines the legal politics of legislation.

Then, through a relatively long course of time, this social system can then change the culture. The proponents of the historical school of law thought

strongly support this view. Mueller describes this as a change from situation to orientation. The situation he means to be a social existence, while the orientation is social consciousness [15].

2.3. Neutral and Non-neutral Areas of Law

The above descriptions of information (values) and energy flows correlate with views of neutral and non-neutral areas of law. If the material regulated by the legislation relates to highly informative systems, such as culture and social, then the area of law is called non-neutral. Non-neutrality occurs because of the substantial interference of primordial aspects, such as religion and customs in these areas of law. Conversely, if the legislative material deals with high energy legal systems, such as technology and economy, then these areas tend to be called neutral.

Gender inequality issues related to legal capability are considered non-neutral topics in the areas of legislation that correspond to cultural and social systems. This non-neutral legal area is pluralistic in which various legal sub-systems outside the state law also compete to provide its validity to the public. The types of non-state laws include religious laws and customs. The existence of these non-state laws has been around for a long time, has been passed down from generation to generation and applies to large-scale groups of people [16]. These laws grew together with the development of that society. Their existence may end because of the abandonment of the supporting community, but they may also return to life if their new support bases grow back.

During the New Order government, legal development was deliberately directed to only focus on developing neutral legal areas. This design was confirmed by one of the legal technocrats at that time, namely Mochtar Kusumaatmadja. He reasoned that a lot of debate would arise if the legislation in these non-neutral areas of the law were undertaken. Even so, Law Number 1 of 1974 concerning Marriage was born when Mochtar Kusumaatmadja served as minister of justice. The law caused controversy, and then it was rejected by the Islamic party factions in the House of Representatives [17]. Finally, the formulation of articles on legal capability is highly compromising, by absorbing Islamic law on the one hand, but also western civil law on the other.

3. METHODOLOGY

The research conducted for the writing of this paper used text analysis on some legislation currently in force in Indonesia. This text analysis is included in the realm of normative legal research with a conceptual approach.

4. ANALYSIS

This study took as many samples as laws as the object of analysis. The six laws are as listed in figure 2 below. Each of these laws represents areas of law as shown in the order of the systems according to the legal cybernetics theory.

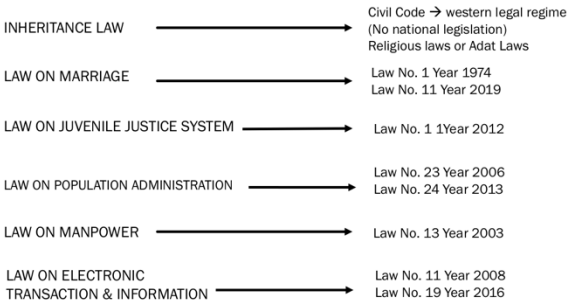

Figure 2 The Objects of Analysis

The first area of law to be studied is in the area of inheritance law. Indonesia has no state law regulating inheritance law, except for regulations that exist in the civil code. The provision in this codification does not apply to all groups of the population. However, members of the community may claim to be subject to the provision in this civil code.

Thus, Indonesia does not have clear legal politics at all to build state law in this inheritance law. How to interpret the definition of the legal capability in that provision is very much determined by the respective family law. Religious law and customary law (*adat* law) have heavily influenced the constellation of Indonesian family law [18].

In the field of inheritance law, gender inequality will continue to occur as long as religious law and customary law have not accepted the status of women equal to men. Court decisions that give female heirs the same amount of inheritance as male heirs do exist, but these decisions have not been able to change the mindset of society in distributing inheritance thoroughly. The law of inheritance does not regulate the status of maturity. Article 2 paragraph (1) of the civil code says that it is possible for a baby in the womb of a mother to be an heir if there is an interest in the baby to acquire an inheritance. The law also does not prescribe the gender of the baby. This provision applies only to citizens who comply with western inheritance law.

An interesting development took place in the law of marriage. Long before Indonesia's independence, the Dutch East Indies government was aware of this pluralism of the marriage law [19]. Even so, the government believes that it is in the interest of preventing early marriages to occur. For this reason, the minimum age of marriage is determined, as stated in Article 29 of the civil code. This minimum age can be a picture of the legal politics of the Dutch East Indies government in marriage law. The minimum age limit is 18 for men and 15 for women.

Article 330 of the civil code provides a rather odd form of provision, stating that a person who is not yet 21

years old is not yet an adult unless that person has already been married. Here gender is not the standard.

This requirement of having been married beforehand was not consistently used as an achievement of legal capability. Adult women who have the status of wives are declared incapable of committing certain lawful acts. This provision means that after being declared an adult, then it turns out to be legally incapable.

Legal politics after Indonesian independence rejected this view so that in 1963, the Supreme Court issued a circular to declare Article 1331 paragraph (2) of the civil code as no longer legally binding.

When law number 1 of 1974 came into effect, the minimum age for men was increased to 19 years, and women to 16 years. This age limit, through law number 16 of 2019, is changed to 19 years for men and women. This change in legal politics occurred due to strong pressure on policymakers to start accommodating gender equality issues. This urge did not come for the first time from the decision of the Constitutional Court Number 22 / PUU / XV / 2017 [21].

The politics of law on paper are not always in line with the practice in society. Early childhood marriages still occur and are almost certainly carried out without the supervision of the state. The reasons for the justification of this behavior are because the practice is possible according to religious law and customary law.

Even if a married woman is declared to have no legal capability for particular legal acts, this marriage must be a legal marriage from a state perspective. If the marriage is carried out illegally, and from that marriage, children are born, then the status of these children is out-of-wedlock. In cases like these, the children only have a legal relationship with the biological mother. This situation makes the mother is always the guardian of the out of wedlock children until they reach adulthood, which is 21 years.

An interesting development occurred in 2012 when the Constitutional Court conducted a judicial review of Article 43 paragraph (1) of the Marriage Law. Through its decision Number 46 / PUU-VIII / 2010, the Constitutional Court stated that a child could have a legal relationship with his biological father, even though the child has not received his/her father's recognition. The prerequisite for obtaining this relationship is scientific evidence, such as a DNA test.

This Constitutional Court decision provides fresh air for activists of women's rights in Indonesia, considering that such marriages often harm women's rights. Unfortunately, fresh air from the Constitutional Court was not welcomed by the Supreme Court. The applicant for the previous judicial review cannot enjoy the new interpretation of Article 43 paragraph (1) of the Marriage Law because the case of the applicant's marriage must be decided through a separate decision in the religious court. Through decision No. 329 K/Ag/2014, the Supreme Court refused to determine the legal relationship between the child born out of wedlock and his biological father. The court considered that the marriage was never registered, so the case was not under the jurisdiction of a religious court. It can be seen here that the politics of state law in Indonesian marriage law remains in an obscure realm.

The above case has a close relationship with the issue of legal capability because the children who were previously given legal competence to act in the area of family law, for example being the heir of their biological father, are now unable to obtain this right. In the end, such children still only have a legal relationship with their biological mother, even though in a formal juridical manner, article 43 paragraph (1) of the Marriage Law has been given a different meaning. The *ergo omnes* constitutional court decision has been defeated by an individual-in-concreto Supreme Court decision.

Legal politics in determining legal capability seems to be increasingly neutral in the juvenile justice system law. This law gives status for children who become criminals as "children in conflict with the law".

The term "Children in conflict with the law" is defined as a child who has attained the age of 12 (twelve) years but has not yet reached the age of 18 (eighteen). In this stipulation, the law does not address gender differences in the status of children in the context of the juvenile criminal justice system.

The population administrative law also uses a formulation that does not differentiate between gender aspects when determining when a person has the legal capability to be recorded in population administration. This law states that residents of Indonesian citizens and foreigners having a permanent residence permit, who have reached the age of 17 (seventeen) years of have or had been married, are mandatory to have an ID card.

The standard in the population administration law is different from those in the labor law. A person is considered an adult worker when he or she reaches the age of 18. The gender aspect is not mentioned in this age requirement. Other conditions besides age, namely having been married are not part of this formula.

The last object of analysis is the law on electronic transactions and information. This law is closely linked to technology, so anyone who can transact using digital technology does not need to be specifically regulated. In other words, political law in this area does not raise the issue of gender inequality. The legal capability of the contracting parties is fully subject to contract law which upholds the principle of freedom of contract.

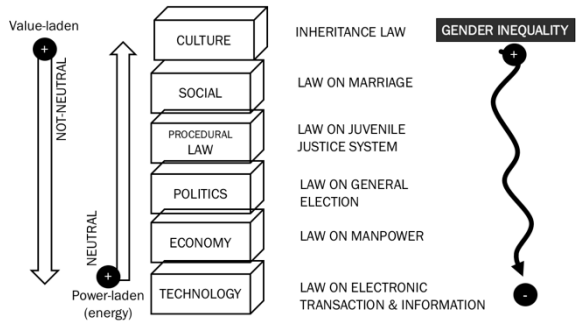

Figure 3 The Areas of Law and Gender Inequality Issues

Laws that are deeply in contact with cultures, such as marriage and inheritance laws are in the non-neutral domain of law. In this realm, legal politics regarding legal incapability does not show its assertiveness. The state even tends to allow various legal regimes to compete with one another. Religious law, customary law, and western law can insist on giving their respective meanings of legal [in]-capability as well as the interpretation of gender [in]-equality. Laws in this area of law often use quantitative standards, namely the minimum age as a requirement for legal capability, but this measure is also violated by giving dispensations in the name of religion and custom.

Legal politics with regard to determining legal capability will appear more objective because it uses quantitative standards in neutral legal areas. Issues of gender inequality do not even seem to arise in these neutral areas of law. This is clearly seen in the laws of the realm of law regulating technological and economic activities.

The thinking framework offered by the authors in this paper can, on the one hand, help legal researchers to determine whether a legal politics about gender equality in determining legal capability will become a crucial issue in legislation or not. For this reason, researchers need first to ascertain whether the legal area is in a neutral or non-neutral area. This neutrality variable sometimes becomes a challenge in itself because the material of a piece of legislation can have a broad spectrum. For example, agrarian law is a law that is heavily influenced by customary law, but from an economic perspective, agrarian law can be in a neutral domain.

5. CONCLUSIONS

In conclusion, the legal politics on legal capability in Indonesian legislation is very dependent on the field of law, whether it is in a neutral or non-neutral realm. The less neutral a legal field is, the less clear our legal politics will be. On the other hand, the non-neutrality of a legal field also raises issues related to gender inequality. The less neutral a legal field is, the more gender inequality will be in content.

AUTHORS' CONTRIBUTIONS

Shidarta: Conceptualization, Methodology, Formal analysis, Writing-Review-Editing, Supervision. **Imelda Martinelli**: Validation, Investigation, Writing-Original Draft preparation.

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