

# THE CONSTITUTIONAL INTERPRETATION OF WOMEN'S POLITICAL RIGHTS

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## *Abstract*

*The research focuses on the gender equality and justice interpretation of women's political rights in the Constitutional Court decisions. The problem is how does the interpretation of the constitution protect and fulfill women's political rights?. The research method is legal doctrinal, focusing on constitutional interpretation with several approaches, including the statutory, analytical, and case approaches. The result of the research shows that the function of the Court as a protector of women's political rights is a consequence of the existence of human rights in the 1945 Constitution. Its guarantees the constitutional review authority to protect human rights. Based on several decisions of the Court: affirmative action case, leadership positions in the house of representatives case, the women position of governor and vice governor's appointment in a Special Region of Yogyakarta. These decisions, which are above cases, are a form of protection and fulfillment of women's political rights in realizing gender equality and justice. Of course, it is motivated by the fact that women's representation must be present in every political decision-making in the national and local governance.*

**Keywords:** *Constitutional Court; Women; Political Rights; Gender Equality; Justice*

## **1. Introduction**

The guarantee of human rights in the 1945 Constitution proves the foundation democratic state.<sup>1</sup> Based on Article 28I (4) of the 1945 Constitution, the Indonesian state is obliged to protect, promote, uphold and fulfill women's political rights. Women's political rights must be equal to men's. Therefore, it fits for women not to be easily tricked, and men are powerful, innovative, and tend to be arbitrary towards their power. It fits for women to open freedom of paradigm so that they will be able to encourage positive changes in action for women.

Women's political rights must be protected, promoted, upheld, and fulfilled by the government, and there cannot be one “article/ paragraph/ phrases” in regulations that do not favor women. Unfortunately, the fact is that the struggle of women in achieving equality and justice in the field of political leadership has not been able to lift the dignity of women to be equal to men. Gender inequality and injustice are discrimination between women and men in gaining access to politics/general elections, unfair participation, and unequal and unfair benefits from development.

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<sup>1</sup> Tanto Lailam, *Pertentangan Norma Hukum Dalam Teori Dan Praktik Pengujian Undang-Undang Di Indonesia* (Yogyakarta: LP3M UMY, 2015), 51.

The global challenges in the future are increasingly complex, and very dynamic and competitive for women, so it takes the role of women to face, solve global problems, become a formidable leader, and needs the role and support of the government in empowering women. Many women have participated in politics (for example, becoming legislative candidates, governor candidates, regent candidates). To realize these obstacles seemed unseen but impeded access to top leadership; for example, gender issues and injustice were inherent and social-cultural constructed. Moreover, women have a great responsibility in the household, namely educating children who are the next generation of the nation and state. Woman (mother) is the first primary school (*madrasah*) in human education. If she is wrong in educating and instilling morals in children, it will be the beginning of the destruction of the next generation. Nevertheless, without the father's presence in educating, primary school (*madrasah*) for children will never be perfect. Likewise, in politics, without the presence of women will experience stagnation and loss of direction, especially in terms of legislation-making that is friendly to women.

Many women in political life, but women's representation has not shown women's political identity to bring Indonesia's political change in a better direction. There are several reasons for the importance of women's political representation: justice and equality; women's interests; emancipation, and change in the political process. Representations of women politicians in legislative bodies are significant, namely: House of Representatives (Dewan Perwakilan Rakyat/ DPR), House of Regional Representatives (Dewan Perwakilan Daerah/ DPD), Regional People's Representative Council (Dewan Perwakilan Rakyat Daerah/ DPRD), also the women as a regional head (Governor, Regents, and Mayor). It is a representation that influences state and regional policies. However, the politician is a minimal quantity; it is disproportionate to their amount in Indonesian. These limitations affect women's participation, either directly or indirectly, in the empowerment of women. In addition, there are many laws or regional regulations that do not favor women, so there are quantity and quality of weak representation.

Women's political rights are a set of rights inherent in the nature and existence of every human being that must be respected, upheld, and protected by the state, law, government, and everyone for the honor and protection of human dignity. Constitutional rights are human rights and the rights of citizens guaranteed by the 1945 Constitution. These rights are recognized and guaranteed for every citizen, both men, and women. Women, in this case through empowerment and guarantees, should get the same opportunity to make choices by rejecting assumptions about women's priorities and erasing gender-based differences recognized in law. Women themselves

realize the importance of raising the issue of women's rights as a type of human rights that must be able to be recognized and guaranteed protection. Women must have protection and other rights in life. Specifically, regarding women's political rights contained in the legal system on human rights, women's rights in their aspirations in government, especially towards the recognition of women's rights regarding discrimination in various sectors.

Therefore, based on equality before the law and government principle, both men and women have equal rights or opportunities to participate in social and political aspects. So, if there is discrimination against women, it is a form of violation of women's human rights and violations of the constitution. Regulating women's political rights is not sufficient to ensure the development of women's constitutional rights under the 1945 Constitution. Considering the laws developed by a political system that is less in favor of women and women's representation is not more than 30%. It means that they protect, advance, uphold and fulfill the constitutional women's political rights regulated in the law. It requires wider community participation, not only in the legislation-making but also in the constitutional review if laws impair and are contrary to constitutional of women's political rights.

In the Indonesian judicial system, the institution that must review law (constitutional review) is Constitutional Court (hereinafter the Court). The court to protect human rights must be able to realize respect, fulfillment, and protection of human rights, primarily women's rights in the political system.<sup>2</sup> The Court was created to uphold constitutional values, strengthen checks and balances mechanism, create a clean and good government, and protect the human rights of citizens<sup>3</sup>, and one of the major functions of judicial review/ constitutional review is individual rights' protection.<sup>4</sup> In this context, the Court also interprets gender justice based on the constitution to resolve gender issues in the political system. Based on the explanation above, this research problem is the constitutional Court's role in interpreting women's political rights in realizing gender equality and gender justice?

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<sup>2</sup> Penny Naluria Utami, "Optimalisasi Pemenuhan Hak Korban Kekerasan Terhadap Perempuan Melalui Pusat Pelayanan Terpadu," *Jurnal HAM* 7, no. 1 (2016): 61, <https://ejournal.balitbangham.go.id/index.php/ham/article/view/71>.

<sup>3</sup> Pan Mohamad Faiz Kusuma, "The Role of the Constitutional Court in Securing Constitutional Government in Indonesia" (University of Queensland, 2016), 4.

<sup>4</sup> Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (London: Routledge, 2018).

## **2. Method**

The research is specific to constitutional law and gender issues, which develop legal and gender in revealing a legal truth and gender justice. The research is doctrinal research, focusing on the laws and regulations with several approaches, including: a) the statutory approach carried out by examining the laws and regulations relating to the legal issues be studied; b) analytical approach, aimed at reviewing the implementation of legal terms in various laws or court decisions; and, c) case approach, examines various women's political rights cases.

Data collection techniques are that library research aims to examine primary data (primary legal materials, secondary legal materials, and tertiary legal materials). Analysis of the data in this study used descriptive qualitative. This approach treats objects based on specific categories, selection, and classification judicially and systematically. Stages of data analysis, namely: a) data are systematized or arranged and adjusted to the object under study; b) data that has systematized then described and explained according to the object under investigation in theory; c) The data has been described, evaluated, analyzed using applicable legal measures. Several activities were carried out at this stage, such as gathering various decisions and other literature and mapping legal documents' results; and, d) The end steps to understand and formulate the research results.

## **3. Results and Discussion**

### **3.1. Gender Justice**

The Global fund for women defines gender justice as the systemic redistribution of power, opportunities, and access for people of all genders by dismantling harmful structures, including patriarchy, homophobia, and transphobia. Similar to terms like racial justice and climate justice, it signifies an intersectional approach that centers the needs, experiences, and leadership of people most impacted by discrimination and oppression.<sup>5</sup> Gender justice is a fair condition for women and men through cultural and policy processes that remove barriers to play for women and men. *Gender justice* is a condition that is fair for women and men through a cultural and structural process that stops the actualization barriers for those who, because of their gender, experience obstacles, both physically and mentally, culturally and structurally.

Gender equality and justice are conditions where women and men's portions and social cycle are equal, harmonious, balanced, and harmonious. The essence of respect and protection of human

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<sup>5</sup> "What Is Gender Justice," *Global Fund for Women*, accessed October 15, 2021, <https://www.globalfundforwomen.org/what-we-do/gender-justice>.

rights is to maintain the safety of human existence through the action of balance, i.e., the balance between rights and obligations, as well as the balance between the interests of individuals and common interests.<sup>6</sup> This condition can be realized if there is the fair treatment between women and men. The application of gender equality and justice must pay attention to contextual and situational issues, not based on mathematical calculations and not universal. So, the concept of equality is a qualitative philosophical concept, not always quantitative in nature.<sup>7</sup> Gender equality is a fundamental human rights principle enshrined in binding human rights treaties and a goal to which governments and international organizations have committed.<sup>8</sup> Specifically, the idea of gender justice does not include concern private-sphere caregiving alone, that it also requires robust gender-sensitive macro policies of job creation and public provision.<sup>9</sup>

Gender injustice occurs because of the beliefs and justifications that have been instilled throughout human civilization in various forms that afflict women and are also experienced by men. Although gender inequality in various lives is experienced by women more, gender inequality also affects men. Gender equality is a condition for men and women to obtain opportunities and their rights as human beings, to play a role and participate in political, economic, social, cultural, defense, and national security activities, and equality in enjoying the results of these developments. Injustice and inequality of women in politics and public life are caused by, among others: a) The view states that politics is the world of men, so women do not need to be involved in politics; b) The man is the head of the family, so the woman does not have to be involved in the decision-making process at various life levels; c) Women are only complementing in politics, so that often placed in positions that are not important; and, d) The legal system in the political field is still discriminatory for women.<sup>10</sup>

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<sup>6</sup> Joko Setiyono, "Human Rights Based Law Enforcement for the Violation of Local Regulation By Civil Service Police of Semarang Municipality," *Diponegoro Law Review* 1, no. 1 (2016): 61, <https://ejournal.undip.ac.id/index.php/dlr/article/view/12207>.

<sup>7</sup> Kementerian Pemberdayaan Perempuan dan Perlindungan Anak, *Pembangunan Manusia Berbasis Gender 2013* (Jakarta: Kementerian Pemberdayaan Perempuan dan Perlindungan Anak, 2013), 46.

<sup>8</sup> Eleanor Gordon, *Justice and Gender* (Genewa – Switzerland: DCAF, OSCE/ODIHR, UN Women, 2019), 5.

<sup>9</sup> Nancy Fraser and Kate Bedford, "Social Rights and Gender Justice in the Neoliberal Moment: A Conversation about Welfare and Transnational Politics," *Feminist Theory* 9, no. 2 (2008): 225–245.

<sup>10</sup> Kunthi Tridewiyanti, "Kesetaraan Dan Keadilan Gender Di Bidang Politik ‘ Pentingnya Partisipasi Dan Keterwakilan Perempuan Di Legislatif," *Jurnal Legislasi Indonesia* 9, no. 1 (2012): 73–90, <https://ejournal.peraturan.go.id/index.php/jli/article/view/377>.

### **3.2. Constitutional Interpretation of Gender Equality and Justice**

The Court was established in 2003 after Indonesia's transition to democracy<sup>11</sup>, the court represents one of the most successful products of the constitutional reformation that emerged in Indonesia when Soeharto fell in 1998 after 33 years in power. It is significant because, in the past, the former authoritarian president Suharto ensured that no courts had judicial review power.<sup>12</sup> Traditionally, the introduction of constitutional courts aims to protect human rights and democracy after the end of authoritarian regimes (the rights protection theory).<sup>13</sup> The court created during the democratic transition has emerged as real constraints on political authority.

The Court is a new state organ in the Indonesian constitutional system as a result of the amendment of the 1945 Constitution.<sup>14</sup> It is the first Indonesian judicial institution with the power to perform constitutional review.<sup>15</sup> The function of the Court to guard the constitution, interpreter of the 1945 Constitution, and the protector of human rights and democracy.<sup>16</sup> In the explanation of the Constitutional Court Law No.24 / 2003, it is regulated that: "...one important substance of the amendment to the Constitution is the existence of the Court as an institution that functions: (1) handling certain cases in the state institutions; (2) in the framework of maintaining the constitution, It carried out responsibly following the will of the people and the goals of democracy; (3) It is a correction to the political experience of the constitutional life in the past which results in a double interpretation of the constitution.

I Dewa Gede Palguna says that the authority in constitutional review, the Court has a title: a) The court as the guardian of the constitution; b) The court as the controller of decisions based on a democratic system (control of democracy); c) The court as an interpreter of the constitution (the sole or the highest interpreter the constitution). The authority to interpret of the 1945

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<sup>11</sup> Dominic J. Nardi, "Embedded Judicial Autonomy: How NGOs and Public Opinion Influence Indonesia's Constitutional Court" (The University of Michigan, 2018), <https://deepblue.lib.umich.edu/handle/2027.42/144040>.

<sup>12</sup> Melissa Crouch, "Judicial Review and Religious Freedom: The Case of Indonesian Ahmadis," *Sidney Law Review* 34 (2012): 545–572, <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/journals/SydLawRw/2012/25.html>.

<sup>13</sup> Andy Omara, "Protecting Economic and Social Rights in A Constitutionally Strong Form of Judicial Review: The Case of Constitutional Review by The Indonesian Constitutional Court" (University of Washington, 2017), <http://hdl.handle.net/1773/40921>.

<sup>14</sup> Iwan Satriawan and Khairil Azmin Mokhtar, "The Role of Indonesian Constitutional Court in Resolving Disputes among the State Organs," *Hasanuddin Law Review* 5, no. 2 (2019): 159, <http://pasca.unhas.ac.id/ojs/index.php/halrev/article/view/1669>.

<sup>15</sup> Simon Butt, "The Indonesian Constitutional Court: Reconfiguring Decentralization for Better or Worse?," *Asian Journal of Comparative Law* 14, no. 1 (2019): 147–174, <https://www.cambridge.org/core/journals/asian-journal-of-comparative-law/article/indonesian-constitutional-court-reconfiguring-decentralization-for-better-or-worse/00B5ECC01E8761330D87951CF74B8CB0>.

<sup>16</sup> Tanto Lailam, "Penataan Kelembagaan Pengujian Norma Hukum Di Indonesia," *Jurnal Konstitusi* 15, no. 1 (2018): 213, <https://jurnalkonstitusi.mkri.id/index.php/jk/article/view/1267>.

Constitution cannot be separated from the authority to constitutional review; d) The court as the protector of citizens 'constitutional rights; and, e) The court as the protector of human rights.<sup>17</sup>

The functions of the Court as a protector of women's political rights is a consequence of the existence of human rights as constitutional content. The existence of human rights guarantees in the constitution means that the state has constitutional legal obligations to protect, respect, and advance these rights. The court authority examines the law to protect human rights guaranteed by the 1945 Constitution so as not to be violated by the provisions of the law. If the provisions of the law violate the constitutional rights of citizens, then it can be ensured that the actions of the state or government institutions carried out under these provisions will also violate the constitutional rights of citizens. Therefore, the authority of the review at the same time prevents that there are no acts of state and government who violate human rights.<sup>18</sup>

The view above shows that the court also has a function as a protector of woman's political rights, in the sense that if there are laws that violate the constitutional rights of citizens, the Justice must be canceled the laws. Also, the constitutional review is a form of checks and balances system in the structuring of national legal system, which essentially provides oversight of legislation product (law) made by the House of Representatives and the President.<sup>19</sup> Article 24C of the 1945 Constitution states that "the Court examines the law against the Constitution" as a provision for granting constitutional review authority to the Court. This provision does not contain the Constitutional Court's authority to interpret the constitution. However, it is impossible to evaluate the conflicting norms of law if it is not using the interpretation of the constitution (the legitimate interpreter of the constitution).<sup>20</sup> Some cases of gender equality and justice interpretation in women's political rights cases include:

**a. Affirmative Action Case**

The issue of women's political rights in this decision number 22-24/PUU-VI/2008 related review of Article 214 letter a, letter b, letter c, letter d, and letter e of Law No.10/

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<sup>17</sup> I Dewa Gede Palguna, *Pengaduan Konstitusional (Constitutional Complaint): Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara* (Jakarta: Sinar Grafika, 2013), 313–314.

<sup>18</sup> Janedjri M. Gaffar, "Peran Putusan Mahkamah Konstitusi Dalam Perlindungan Hak Asasi Manusia Terkait Penyelenggaraan Pemilu," *Jurnal Konstitusi* 10, no. 1 (2013): 14, <https://jurnalkonstitusi.mkri.id/index.php/jk/article/view/93>.

<sup>19</sup> Iwan Satriawan and Tanto Lailam, *Open Legal Policy in the Constitutional Court Decisions and National Legislation Making* (Amsterdam: Atlantis Press, 2019), 405.

<sup>20</sup> Tanto Lailam, "Penafsiran Konstitusi Dalam Pengujian Konstitusionalitas Undang-Undang Terhadap Undang-undang Dasar 1945," *Jurnal Media Hukum* 21, no. 1 (2014): 88–106, <https://journal.umy.ac.id/index.php/jmh/article/view/1159>.

2008 on General Election,<sup>21</sup> which states that the determination of elected candidates for legislative members. These articles are contrary to the 1945 Constitution (Article 1 (2), Article 27 (1), Article 28D (1) and (3), and Article 28E (3)). The Petitioner's petition is grounded and must be granted, whereas with the recognition of equality of legal position and equal opportunity in government (equality and opportunity before the law) as adopted in Article 27 (1) and Article 28 D (3) of the 1945 Constitution. It means that each legislative candidate has the same position and opportunity before the law. Applying an unequal legal provision for the same two conditions is as unjust as applying a legal provision that is the same for two unequal conditions. According to the Court, the provisions of Article 214 of Law No 10/2008 contain a double standard so that it can be judged to apply different laws to the same situation so that it is considered unfair.

Considering that it is true, affirmative action is a policy that Indonesia has accepted originating from the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). It is regulated by Law Number 7/1984 on Ratification CEDAW. The petition is a choice between principles of the 1945 Constitution and demands for policies based on CEDAW; the priority should be on the 1945 Constitution. The provisions of Article 28H paragraph (2) of the 1945 Constitution that "everyone has the right to special treatment" then the determination of a quota of 30% (thirty percent) for female candidates and one female candidate from every three legislative candidates, according to the Court, has fulfilled the special treatment.

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<sup>21</sup> The determination of the elected candidates for national legislative members, provincial legislative members, and regency/municipal legislative members from the political party participating in the election is based on the seat acquisition of the political party participating in the election in an electoral district, with the following provisions:

- a. The members elected candidates of the DPR, the provincial DPRD, and the regency/city DPRD are determined based on candidates who get at least 30% (thirty percent) of votes from the selector divider of election voters
- b. In the case of candidates who meet the provisions of letter a, the number is more than the number of seats obtained by political parties participating in the election, then seats are given to candidates who have a smaller serial number among candidates who meet the provisions of at least 30% (thirty percent) of the selector divider of election voters;
- c. in the event that there are two or more candidates who meet the provisions of a letter a with the same vote acquisition, then the determination of elected candidates shall be given to candidates who have a smaller serial number among candidates who meet the provisions of at least 30% (thirty percent) of the selector divider of election voters, except for candidates who get 100% (one hundred percent) of the selector divider of election voters
- d. in the case of candidates who meet the provisions of a letter, the number is less than the number of seats obtained by political parties participating in the election, then seats that have not been divided are given to candidates based on the serial number
- e. If no candidate receives at least 30% (thirty percent) of votes from the selector divider of election voters, the selected candidate shall be determined based on the serial number.



Affirmative actions are termed as representatives of women. It has been defined as a proactive measure to eliminate discrimination against a backward social group. The Indonesian Women's Coalition said that affirmative action is a particular policy, regulation, or program that aims to accelerate equality of position and conditions that are just for marginalized and socially and politically weak groups, such as the poor, the disabled, laborers, farmers, fishers, and others, including women's groups. Shidarta argued that affirmative action was defined as an effort to increase the rights or opportunities for people who were initially not/disadvantaged to experience progress within a certain time.

Affirmative action can also compensate for discrimination, marginalization, and exploitation experienced by disadvantaged social groups. The correction was carried out in obtaining equal opportunities and benefits to achieve equality and value in all fields of life, social, economic, political, cultural, defense, and security, which most likely had not been enjoyed by the social groups left behind. If this is related to the backwardness of women, then pursuing the lag can be done with affirmative action. In fact, affirmative action provisions have no implications for political life in Indonesia. The Comparison of the number of Members of the House of Representatives from the 2009 -2019 Election Results<sup>22</sup> can be seen in table 1.

The table 1 shows that the affirmative action policy has not been in line with the increase in the amount of women's political representation in the House of Representatives. However, there is a significant increase in women politicians. Members of the House of Representatives in the 2019 elections, up to 3.1% from the previous election (2014), show that women and men have the same political rights and obligations. However, obstacles that arise due to cultural factors cause women's political representation in parliament to be very low. Women's representation is very lame.

**Table 1.**  
**The Comparison of the Number of Members of the House of Representatives from the 2009 -2019 Election Results**

Period	Women	Quantity %	Men	Quantity %
2009-2014	101	18,10%	459	82 %
2014-2019	97	17,32%	463	82,68%
2019-2024	117	20,33%	458	79,67%

Source: Juniar Laraswanda Umagapi, "Representasi Perempuan Di Parlemen Hasil Pemilu 2019: Tantangan Dan Peluang," *Kajian* 25, no. 1 (2020): 19–34

<sup>22</sup> Juniar Laraswanda Umagapi, "Representasi Perempuan Di Parlemen Hasil Pemilu 2019: Tantangan Dan Peluang," *Kajian* 25, no. 1 (2020): 19–34, <https://jurnal.dpr.go.id/index.php/kajian/article/view/1886>.

Indeed, this quantity is increasing, but it has not yet demonstrated women's political identity who can bring Indonesia's political change towards a better direction for women. There are several reasons for the importance of women's political representation: justice and equality; women's interests; emancipation, and change in the political process. Political participation for women and politics does not interlink with one another. It is evident by the representation of women on the political stage and formal political institutions whose amount is still significantly less (not fulfilling affirmative action). In legislative bodies, women's representation is a minimal quantity, unbalanced by their amount in Indonesia. Affirmative action as one form of "fast track policies" is an effort to guarantee that women are involved in the political process and making political decisions.

Adopted affirmative action policies do not necessarily have positive implications for strengthening participation and representation of women's politicians.<sup>23</sup> The realization of Gender Equality and Justice is marked by the absence of discrimination between women and men in gaining access, opportunities to participate, control over development, and obtaining equal and fair benefits from development. Having access and participation means having the opportunity to use resources and having the authority to make decisions on how to use and produce these resources. Whereas having control means having full authority to make decisions on the use and outcome of resources. Building gender equality and justice cannot be done in a relatively short time. Several obstacles stem from the legitimacy of cultural constructions that tend to be patriarchal, inaccurate interpretations of religious teachings, and political policies. The low rate of women's participation: structural barriers, political institutions, and political culture.<sup>24</sup> Gender Equality and Justice in practice refers to the absence of differences in rights and obligations between men and women guaranteed by legislation produced by the state and society.

Various problems that many women legislative candidates are only to fulfill the conditions of affirmative action. The candidate is not a cadre of political party; the problem of the most votes system in general elections, women must compete with men in political contestation. In addition, socio-cultural values prioritize men politicians, the image of women as a weak person who does not fit into politics, religious teachings in favor of men

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<sup>23</sup> Mudiwati Rahmatunnisa, "Affirmative Action Dan Penguatan Partisipasi Politik Kaum Perempuan," *Jurnal Wacana Politik* 1, no. 2 (2016): 90–95, <http://jurnal.unpad.ac.id/wacanapolitik/article/view/11049>.

<sup>24</sup> Ella Syafputri, "Keterwakilan Perempuan Di Parlemen: Komparasi Indonesia Dan Korea Selatan," *Global South Review* 1, no. 2 (2014): 165, <https://journal.ugm.ac.id/globalsouth/article/view/28839>.

politicians, lack political will of the government, and deficiencies in individual quality and a political cadre. It should also be considered to formulate a pattern/system of recruitment of women candidates by political parties. To increase political awareness and ability of women candidates so that the relevant candidates, when elected later, can contribute, and have a fundamental role in carrying out their duties and functions as representatives' people so that they can fight for the protection and fulfillment of women's political rights.

The above problems have a powerful influence on the role of women in national and regional leadership, including in the democratic system. Moreover, implementing a democratic system prioritizes individual competition, even though women have been positioned as weak/unequal in society. In addition, the electoral system uses the most votes to determine the legislature members. How is it possible that an unequal position in a society/democratic system must compete to become a member of the House of Representatives through general elections? Ideally, with the unequal conditions of women and men in society, affirmative 30 is also applied in determining the membership of the House of Representatives.

However, the Court interpretation that affirmative action cannot be the basis for "elected candidates" for female candidates determining House of Representatives members. However the affirmative action case not only impact on women's representation in parliament. It also has implications for other political representations in the local election arena. With the most votes and political competitiveness, political women must be present at regional and national leadership levels, such as regional heads (regents, mayors, or governors). Based on a survey of the [katadata.co.id](http://katadata.co.id), the number of women participating in the 2020 regional head elections, namely: governor and vice governor candidates (women: 5, and men: 45), mayor and vice mayor candidates (women: 26, and men: 126), regent and vice-regent candidates (woman: 128, and men: 1.102).<sup>25</sup>

#### **b. Leadership of House of Representatives Case**

This Court decision No.82/PUU-XII/2014 regarding review of Law No.17/2014 on the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*), House of Representatives (*Dewan Perwakilan Rakyat*), House of Regional Representatives (*Dewan*

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<sup>25</sup> Andrea Lidwina, "Calon Kepala Daerah Perempuan Lebih Sedikit Dari Laki-Laki Di Pilkada 2020," *Databoks*, last modified 2020, accessed October 15, 2021, <https://databoks.katadata.co.id/datapublish/2020/11/13/calon-kepala-daerah-perempuan-lebih-sedikit-dari-laki-laki-di-pilkada-2020>.

*Perwakilan Daerah*), Regional House of Representatives (*Dewan Perwakilan Rakyat Daerah*). The Court gave a gender justice interpretation that was filling in the leadership in the legislative body in Article 97 (2) “leadership of Commissions (*Pimpinan Komisi*)”, Article 104 (2) “leadership of Legislation Committee (*Pimpinan Badan Legislatif*)”, Article 109 (2) “leadership of Budget Committee (*Pimpinan Badan Anggaran*)”, Article 115 (2) “leadership of Committee for Inter-Parliamentary Cooperation (*Badan Kerjasama Antar Parlemen*)”, Article 121 (2) “leadership of Honorary Court of the Council/ Ethics Committee (*Majelis Kehormatan Dewan*)”, Article 152 (2) “leadership of Household Committee (*Badan Urusan Rumah Tangga*)”, and Article 158 (2) “leadership of Ad-Hoc Committee (*Pimpinan Panitia Khusus*)”. The article contradicts the 1945 Constitution and does not have binding legal force in the Constitutional Court's decision. The decision cancels these articles if not interpreted according to the Constitutional Court's decision: "determination of leadership that prioritizes women's representation according to the balance of the number of members in each faction".

Of course, the involvement of women in decision-making in the House of Representatives is very needed, so it is fundamental if women are given rights and obligations by prioritizing the representation of women according to the balance of the number of members of each faction in various House of Representatives instruments. Some exciting things to discuss related to the Court's decision, namely:

- 1) Policies that do not prioritize women's representation in the completeness of the House of Representatives and other state institutions are policies that are contrary to the spirit of women's human rights according to the 1945 Constitution. Affirmative action political policies towards women have become a state legal, political policy that provides equal opportunities to women to hold executive, legislative, judicial, and regional government positions. Affirmative action is not identified in gender equality. This policy can be applied to persons with disabilities, indigenous and other minority groups. Policy makers must issue rules that provide opportunities for socially marginalized groups to be at an equal level. This spirit reflects the provisions of Article 28H (2) of the 1945 Constitution, which stipulates that "every person has the right to get special facilities and treatment to obtain equal opportunities and benefits to achieve equality and justice".

- 2) Prioritizing the representation of women in the completeness of the House of Representatives and other state institutions is a form of respect for the equality of women and men in the field of government. The representation of women in occupying the leadership positions of the House of Representatives is a particular form of treatment for women guaranteed by the constitution, which must be realized concretely in the legal policies adopted by the legislators. The affirmation of this treatment cannot only be a legal idea. In the context of a democratic rule of law and a democratic state based on the law, this idea must become a legal policy contained in the legislation as a positive law to guarantee legal certainty as stipulated in the 1945 Constitution.
- 3) The abolition of the law of gender mainstreaming politics in Law No.17/2014 has created legal uncertainty that is fair for women because such provisions can disperse all affirmative policies carried out in other political institutions. Especially in Law No. 27/2009, women's affirmative politics have been accommodated as legal norms, whereas Law 17/2014 was removed. In the context of the struggle for women's political rights, according to the constitution continues to be carried out so that each law must guarantee equal rights and obligations in the field of government. Women must actively participate in every decision-making, especially in forming laws, ensuring that laws regulate equality and justice for women and men.

The Constitutional Court's decision, which determines the composition by taking into account women's role, is a form of protection and fulfillment of women's political rights in realizing gender equality and justice. Of course is motivated by the fact that women's representation must be present in every political decision-making in the House of Representatives, both in the form of laws and other decisions, which can guarantee fair legal certainty for women.

### **c. Woman Political Position in Special Province of Yogyakarta**

Special Region of Yogyakarta is an area that has privilege status as a top-up public government that is on the government province, which is in Law Number 13/2012.<sup>26</sup> It has special authorities, including the appointment procedures, positions, duties, and authority of

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<sup>26</sup> Dian Agung Wicaksono, Ananda Prima Yurista, and Almonika Cindy Fatika Sari, "Mendudukan Kasultanan Dan Kadipaten Sebagai Subyek Hak Milik Atas Tanah Kasultanan Dan Tanah Kadipaten Dalam Keistimewaan Yogyakarta," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 8, no. 3 (2019): 311, <https://rechtsvinding.bphn.go.id/ejournal/index.php/jrv/article/view/342>.

the Governor and Vice Governor, local government institutions, culture, land, and local spatial planning. Based on Law No.13/2012, the special authority of the province lies in the mechanism of appointing the positions of the Governor and Vice Governor, which is different from other regions. In other regions, they are elected by the people. Its privilege is "Sultan appointed as Governor and Adipati Paku Alam is determined as Vice Governor" by Regional People's Representative Council (Dewan Perwakilan Rakyat Daerah) with special conditions and mechanisms. Unique mechanisms must have a clear constitutional basis and not create discrimination based on sex (jenis kelamin).

Law Number 13/2012 has a problem related to the Governor and vice governor appointments. The problem in Article 18 (1) letter m, that is: "the candidates for Governor and Vice Governor are citizens of the Republic of Indonesia who must meet the following requirements: letter m. submit a curriculum vitae which includes, among others: a history of education, work, blood brother, wife, and children" (huruf m. menyerahkan daftar riwayat hidup yang memuat, antara lain riwayat pendidikan, pekerjaan, saudara kandung, istri, dan anak). It is a point related to letter c: the candidates must be enthroned as *Sultan Hamengku Buwono (King)* for the candidate for Governor and enthroned as *Adipati Paku Alam (Duke)* for candidates Vice Governor. The Article 18 (1) letter m considered contrary to the 1945 Constitution because it is discriminatory by not providing equal opportunities (equality before the law between men and women) based on the 1945 Constitution, not based on the regulations of *Kraton Yogyakarta regulations (Palace of Yogyakarta Hadiningrat)* and *Adipati Paku Alam*.

According to the applicant, the main problem is the requirement of the phrase "curriculum vitae for his wife," which is discriminatory, which shows the interpretation that the Article a quo determines that Candidates for Governor and Vice Governor must be male. Whereas the appointment of the Governor and Vice Governor is one of the special features, the Governor is automatically held by the Sultan, while the Adipati Paku Alam holds the Vice Governor. Meanwhile, who is enthroned as a Sultan is determined by the internal of the Palace of Yogyakarta Hadiningrat, and the Adipati Paku Alam determined by the Palace of Pakualaman based on paugeran (internal regulations). Article a quo is discriminatory because there is no constitutional basis in the 1945 Constitution.

The decision of Court Number 88/PUU-XVI/2016, which in essence states that the phrase which includes, among others, the history of education, work, siblings, wife, and

children in Article 18 (1) letter m is contrary to the 1945 Constitution and has no binding legal force. The arguments of the Constitutional Court are:

- 1) The Article is contrary to the principle of equality before the Law (Non-Discrimination principle) based on the 1945 Constitution.
- 2) Restrictions in Article 18 (1) letter m, including women as a candidate for Governor or Vice Governor of Special Region of Yogyakarta, have nothing to do with the intent and purpose of guaranteeing the rights and freedoms of others. On the other hand, no one whose rights and freedoms are disturbed or violated if the parties mentioned in Article a quo become Governor or Vice Governor.
- 3) Restrictions in Article a quo are not based on the intention to fulfill just demands based on moral considerations, religious values, security, and public order in a democratic society. On the contrary, to meet the just demands of the Indonesian democratic society. It means that in the Indonesian democratic society, no moral ideas, religious values, security, or public order are disturbed or violated if the parties mentioned in Article a quo, including women. In empirical also such restrictions are not found in appointment the position of the regional head in other regions, both the position of the regional head at the provincial and region/ city level, also for public positions in general.
- 4) Special Region of Yogyakarta is a unique province that appoints Governor and Vice Governor positions. It depends on the requirements of who is enthroned as a Sultan based on internal Law (paugeran) in the *Kasultanan Nyayogyakarta Hadiningrat*. Besides that, who is enthroned as Adipati Pakualaman based on the internal Law of the Kadipaten Pakualaman.

According to Court, Article 18 (1) letter m has prevented and restricted women from being Governor and Vice Governor of the Governor and limiting the role of the *Kasultanan* and the *Pakualaman* to give the throne following internal law (*paugeran*). In this case, Law No.13/2012 has intervened in the living law (a living constitution), which intervenes in the Kesultanan and the Pakualaman to determine who is enthroned by sex (*jenis kelamin*). This condition contradicts the constitutional guarantee of equality before the law and government in Article 27 (1) of the 1945 Constitution (1): "All citizens are at the same position in law and government and are obliged to uphold the law and government without exception. In addition, it contradicts Article 28I (2) that: "Everyone has the right to be free from discriminatory treatment on any basis and has the right to get protection against such

discriminatory treatment". An analysis in this context, there are needed two points to be emphasized that:

- 1) The Constitutional Court has the authority to review Laws against the 1945 Constitution. Based on the 1945 Constitution, there must be no discrimination and contain injustice to women or men. The 1945 Constitution contains the equal principle of rights and obligations between women and men. It is reasonable if the Court considers that Article 18 (1) letter m violates women's political rights in the constitution because this law has exceeded the legislation/interventions of authority (entered into the authority of the Kesultanan and Pakualaman). Article 18 (1) should only regulate the mechanism for electing a Governor and Vice Governor who is different from other regions (direct regional election).
- 2) The Court does not rule to provide opportunities for women to be candidates for Governor/ Vice Governor and does not have the opportunity to become Sultan and Adipati Paku Alam. The decision was only to neutralize the relevant article based on the 1945 Constitution (the supreme law of the land). The basic principle is that no laws contradict the constitution, including Law Number 13/2012. The Sultan automatically holds the governor's position, which means that the position depends on the Sultan who has enthroned it. At the same time, the affairs of the Sultan's throne are not the affairs of the state/ central government and society but the internal affairs of the Kasultanan Hadiningrat (special regulations). The same regulations for an appointment the position of Vice Governor held by the Adipati Paku Alam.

An essential thing in filling out the governor is the internal rules of the Kesultanan palace, and in filling the Vice Governor is the internal regulation of the Pakualaman. This internal regulation is the main basis in determining who becomes the Sultan/ Adipati Pakualaman. Law Number 13/2012 on Special Region of Yogyakarta only regulates the mechanism for determining the governor and vice governor candidates. It means that the Court's decision only impacts the administrative requirements for determining the Sultan as Governor and Adipati Pakualaman as Vice Governor, which is not discriminatory.

#### **4. Conclusion**

The research is the Constitutional Court's role in interpreting women's political rights in realizing gender equality and justice. Based on several decisions of the Court: affirmative action



case, women in leadership of the House of Representatives, and the women position of governor and vice governor's appointment in a Special Region of Yogyakarta. Based on these cases, it shows that the Court is a protector and provides the fulfillment of women's rights in politics in Indonesia, although the implications do not always prioritize the role of women in the political system, and women have to compete with men in elections. The Court's decision above cases protects and fulfills women's political rights in realizing gender equality and justice. Of course, it is motivated by the fact that women's representation must be present and contribute to every political decision-making in the national and local governance.

## References

- Butt, Simon. "The Indonesian Constitutional Court: Reconfiguring Decentralization for Better or Worse?" *Asian Journal of Comparative Law* 14, no. 1 (2019): 147–174. <https://www.cambridge.org/core/journals/asian-journal-of-comparative-law/article/indonesian-constitutional-court-reconfiguring-decentralization-for-better-or-worse/00B5ECC01E8761330D87951CF74B8CB0>.
- Crouch, Melissa. "Judicial Review and Religious Freedom: The Case of Indonesian Ahmadis." *Sidney Law Review* 34 (2012): 545–572. <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/journals/SydLawRw/2012/25.html>.
- Fraser, Nancy, and Kate Bedford. "Social Rights and Gender Justice in the Neoliberal Moment: A Conversation about Welfare and Transnational Politics." *Feminist Theory* 9, no. 2 (2008): 225–245.
- Gaffar, Janedjri M. "Peran Putusan Mahkamah Konstitusi Dalam Perlindungan Hak Asasi Manusia Terkait Penyelenggaraan Pemilu." *Jurnal Konstitusi* 10, no. 1 (2013): 1–31. <https://jurnalkonstitusi.mkri.id/index.php/jk/article/view/93>.
- Gordon, Eleanor. *Justice and Gender*. Geneva – Switzerland: DCAF, OSCE/ODIHR, UN Women, 2019.
- Hendrianto, Stefanus. *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes*. London: Routledge, 2018.
- Kementerian Pemberdayaan Perempuan dan Perlindungan Anak. *Pembangunan Manusia Berbasis Gender 2013*. Jakarta: Kementerian Pemberdayaan Perempuan dan Perlindungan Anak, 2013.
- Kusuma, Pan Mohamad Faiz. "The Role of the Constitutional Court in Securing Constitutional

- Government in Indonesia.” University of Queensland, 2016.
- Lailam, Tanto. “Penafsiran Konstitusi Dalam Pengujian Konstitusionalitas Undang-Undang Terhadap Undang-Undang Dasar 1945.” *Jurnal Media Hukum* 21, no. 1 (2014): 88–106. <https://journal.umy.ac.id/index.php/jmh/article/view/1159>.
- . “Penataan Kelembagaan Pengujian Norma Hukum Di Indonesia.” *Jurnal Konstitusi* 15, no. 1 (2018): 206–230. <https://jurnalkonstitusi.mkri.id/index.php/jk/article/view/1267>.
- . *Pertentangan Norma Hukum Dalam Teori Dan Praktik Pengujian Undang-Undang Di Indonesia*. Yogyakarta: LP3M UMY, 2015.
- Lidwina, Andrea. “Calon Kepala Daerah Perempuan Lebih Sedikit Dari Laki-Laki Di Pilkada 2020.” *Databoks*. Last modified 2020. Accessed October 15, 2021. <https://databoks.katadata.co.id/datapublish/2020/11/13/calon-kepala-daerah-perempuan-lebih-sedikit-dari-laki-laki-di-pilkada-2020>.
- Nardi, Dominic J. “Embedded Judicial Autonomy: How NGOs and Public Opinion Influence Indonesia’s Constitutional Court.” The University of Michigan, 2018. <https://deepblue.lib.umich.edu/handle/2027.42/144040>.
- Omara, Andy. “Protecting Economic and Social Rights in A Constitutionally Strong Form of Judicial Review: The Case of Constitutional Review by The Indonesian Constitutional Court.” University of Washington, 2017. <http://hdl.handle.net/1773/40921>.
- Palguna, I Dewa Gede. *Pengaduan Konstitusional (Constitutional Complaint): Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*. Jakarta: Sinar Grafika, 2013.
- Rahmatunnisa, Mudiwati. “Affirmative Action Dan Penguatan Partisipasi Politik Kaum Perempuan.” *Jurnal Wacana Politik* 1, no. 2 (2016): 90–95. <http://jurnal.unpad.ac.id/wacanapolitik/article/view/11049>.
- Satriawan, Iwan, and Tanto Lailam. *Open Legal Policy in the Constitutional Court Decisions and National Legislation Making*. Amsterdam: Atlantis Press, 2019.
- Satriawan, Iwan, and Khairil Azmin Mokhtar. “The Role of Indonesian Constitutional Court in Resolving Disputes among the State Organs.” *Hasanuddin Law Review* 5, no. 2 (2019): 159–179. <http://pasca.unhas.ac.id/ojs/index.php/halrev/article/view/1669>.
- Setiyono, Joko. “Human Rights Based Law Enforcement for the Violation of Local Regulation By Civil Service Police of Semarang Municipality.” *Diponegoro Law Review* 1, no. 1 (2016): 61–80. <https://ejournal.undip.ac.id/index.php/dlr/article/view/12207>.

- Syafputri, Ella. “Keterwakilan Perempuan Di Parlemen: Komparasi Indonesia Dan Korea Selatan.” *Global South Review* 1, no. 2 (2014): 165–175. <https://journal.ugm.ac.id/globalsouth/article/view/28839>.
- Tridewiyanti, Kunthi. “Kesetaraan Dan Keadilan Gender Di Bidang Politik ‘ Pentingnya Partisipasi Dan Keterwakilan Perempuan Di Legislatif.” *Jurnal Legislasi Indonesia* 9, no. 1 (2012): 73–90. <https://e-jurnal.peraturan.go.id/index.php/jli/article/view/377>.
- Umagapi, Juniar Laraswanda. “Representasi Perempuan Di Parlemen Hasil Pemilu 2019: Tantangan Dan Peluang.” *Kajian* 25, no. 1 (2020): 19–34. <https://jurnal.dpr.go.id/index.php/kajian/article/view/1886>.
- Utami, Penny Naluria. “Optimalisasi Pemenuhan Hak Korban Kekerasan Terhadap Perempuan Melalui Pusat Pelayanan Terpadu.” *Jurnal HAM* 7, no. 1 (2016): 55–67. <https://ejournal.balitbangham.go.id/index.php/ham/article/view/71>.
- Wicaksono, Dian Agung, Ananda Prima Yurista, and Almonika Cindy Fatika Sari. “Mendudukan Kasultanan Dan Kadipaten Sebagai Subyek Hak Milik Atas Tanah Kasultanan Dan Tanah Kadipaten Dalam Keistimewaan Yogyakarta.” *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 8, no. 3 (2019): 311–328. <https://rechtsvinding.bphn.go.id/ejournal/index.php/jrv/article/view/342>.
- “What Is Gender Justice.” *Global Fund for Women*. Accessed October 15, 2021. <https://www.globalfundforwomen.org/what-we-do/gender-justice>.