



Representation of women in the legislative institutions from the perspective of justice

Lucky Arie Syahrizal¹, Faisal², M Nur²

¹ Student, Faculty of Law, Universitas Syiah Kuala, Indonesia, Banda Aceh, Indonesia

² Lecturer, Faculty of Law, Universitas Syiah Kuala, Indonesia, Banda Aceh, Indonesia

Abstract

Discussion: The principle of equality before the law in the Indonesian legal system necessitates equal fulfillment of rights for both men and women, including the fulfillment of women's representation in legislative institutions. Currently, the fulfillment of women's representation as stipulated in Law Number 12 of 2003 is determined by considering the participation of women at a rate of 30%. However, this provision continues to present practical challenges. On one hand, the 30% quota has not been met as it consistently remains below 30%. On the other hand, the percentage of the 30% quota for women's representation established in the provision of Law Number 12 of 2003 has not been sufficient to realize gender equality in politics. Therefore, the purpose of this research is to assess the compatibility of the provision on women's representation in legislative institutions with the principle of the rule of law, and to analyze the legal protection relevance within the provision from the perspectives of legal justice and human rights.

Research Method: This research is of a juridical-normative nature, employing three approaches: the conceptual approach, the historical approach, and the statute approach. The analysis of this research is prescriptive in nature.

Conclusion: The research findings indicate that the provision regarding women's representation in legislative institutions in Indonesia is not in line with the concept of the rule of law. Various ideas about the concept of the rule of law, such as Islamic nomocracy, *rechtstaat*, and the Pancasila rule of law concept in Indonesia generally emphasize equality without differentiation under the law. The 30% quota for women's representation does not currently reflect the principle of equality as envisioned in the concept of the rule of law. From the perspective of legal justice, the 30% quota for women's representation is essentially a form of affirmative action aimed at providing equal opportunities in the political sphere. However, this quota does not fully embody the principle of representative participation of women and does not completely adhere to the principle of equality before the law. As a result, this provision falls short of meeting the principle of legal justice. The legal protection provision of the 30% quota, as regulated in Indonesian legislation, is also irrelevant and not in line with the concept of human rights. This quota provision actually differentiates between women and men, thereby constituting discrimination against equality and parity under the law.

Keywords: Women's Representation, Legislative Institutions, Justice

Introduction

The Indonesian Constitution provides opportunities for every individual to have equal chances of participation in the government, as clearly stipulated in Article 28D paragraph (3) of the 1945 Constitution. Such equal opportunities are provided without distinguishing between ethnic background, religion, race, or gender. This means that every citizen is granted equal chances, without any discrimination in its implementation. This embodies the implementation of equality in the realm of politics (political equality). One form of equality and equal rights in the realm of governance is the fulfillment of women's rights. Women's rights in governance and politics are among several constitutional rights, as the constitution explicitly states that every citizen, including women, has equal rights in governance, as articulated in Article 28D of the 1945 Constitution. This is in line with the principle of equality before the law, which signifies the equal standing of every individual in both the legal and governance contexts.

Affirmative action policies for women in the field of politics began after the amendment of the 1945 Constitution and were initiated with the enactment of Law Number 12 of 2003 concerning the Elections for the People's Consultative Assembly, Regional Representatives Council, and Regional People's Representative Council. Efforts to enhance

women's representation were undertaken through provisions that required participating political parties in the elections to consider women's representation, aiming for a minimum of 30% when nominating candidates for the People's Consultative Assembly, Regional Representatives Council, and Regional People's Representative Council.

Referring to those provisions, it can be understood that efforts to enhance women's representation in politics and their participation in legislative bodies are part of affirmative action policies. These affirmative action policies emerged because throughout Indonesia's political history, women often faced discriminatory treatment. Therefore, the lack of women's representation in politics has led to a growing demand for women's involvement in politics, as evidenced by the inclusion of a 30% representation quota for women in the Election Law and the Political Party Law. Efforts to address the aspirations and constitutional rights of women's representation are not unique to Indonesia. However, the percentage of women's representation quotas varies across different countries. For instance, in the United States, the figure is 16.8%, in Japan 11.3%, in South Korea 15.6%, in Malaysia 9.9%, and in Brazil 8.6%. These figures are actually lower compared to the provisions in Indonesian legislation, even though some of these countries (such as the United States, Brazil, and Japan) are considered more

developed than Indonesia. Meanwhile, the highest women's representation quota is found in the Rwandan parliament at 56.3%, followed by Tanzania at 36%, Uganda at 34%, and Nepal at 33.2%. These provisions aim to place women on an equal footing with men. However, scholarly discussions and expert opinions on women's constitutional representation rights are still seen to pose practical challenges, which can be identified in two aspects. Firstly, the 30% quota for women's representation has not yet been met. In other words, up to the time of this research, women's representation in parliament has consistently remained below 30%. The provisions of Law Number 12 of 2003 have been relatively ineffective in realizing women's constitutional rights. Secondly, the stipulated 30% quota for women's representation in Law Number 12 of 2003 is deemed insufficient to achieve women's political equality.

Another issue concerning the protection of the women's representation quota revolves around the principles of justice and gender equality. In this regard, the demand for women's emancipation in all fields is inherently incongruent with the limitations and protections placed on women's representation in the legislative arena. Additionally, the prevailing cultural norms in Indonesian society, where women are often positioned as homemakers responsible for household chores, contribute to these challenges. Cultural assimilation is also influenced by religious dogmas that perceive limitations on women's rights, including their involvement in politics. This certainly affects the realization of justice and equal rights under the law.

Regarding the two issues mentioned above, it can be argued that Law Number 12 of 2003 has not yet been effectively enforced and has practically failed to meet the concept of legal justice. In the study of legal application, the concept of legal effectiveness is recognized, which means that a law established through legislation should be capable of being applied and effectively enforced within society. A legal rule can be considered effective when the population of the society, who are the subjects of the law, are egalitarian, equal, or on an equal footing, with no party significantly more prominent than others. Furthermore, the law will also be effective when the legislators or enforcers of the law share a common understanding of the content of the enacted law with the society. The effectiveness of a law can be assessed through four indicators: the presence of well-crafted legal content, law enforcement authorities possessing legal authority, a society with legal awareness, and the availability of resources and infrastructure for legal implementation.

The 30% quota for women's representation in parliament (legislative institutions) has not yet demonstrated an egalitarian approach to fulfilling the rights of both women and men, even though this percentage has never been achieved in reality. The concept of justice dictates the absence of protection and numerical restrictions in efforts to fulfill individual rights. However, legal justice envisions that everyone has equal access and opportunities to participate in the election of legislative members.

Referring to the above description, it can be reiterated that affirmative action policies aimed at fulfilling women's constitutional rights to be involved in parliamentary membership still present challenges, both in practical terms and within the ideal legal context established in provisions governing women's representation in legislative elections. Based on the issues mentioned above, the author is

interested in further examining the regulation of women's representation in legislative institutions from a justice perspective.

Research Methodology

Legal research is divided into two types: normative legal research and sociological legal research. In this study, the type of research used is normative legal research, also known as doctrinal legal research. This involves examining literature materials, including legislation and court decisions, as well as legal experts' viewpoints, particularly concerning the provisions of women's representation in legislative institutions. As a normative legal research, the issue studied in this research is approached through three approaches. First is the conceptual approach, which involves examining the relevant legal concepts and doctrines pertaining to the researched legal issues. The second approach is the historical approach, which delves into the historical background and the evolution of regulations related to the legal issue under study. The third approach is the statute approach, which involves examining all laws and regulations relevant to the legal issue being addressed. These three approaches are directly related to the representation of women in legislative institutions.

In general, the data sources for a research study are categorized into two forms: primary data sources collected from the field, and secondary data sources gathered from literature materials. Given that the data for this research is entirely drawn from literary sources, the data sources used include legal documents such as the 1945 Constitution, Law Number 39 of 1999 on Human Rights, Law Number 12 of 2003 on Legislative Elections, Law Number 2 of 2008 on Political Parties, and Constitutional Court Decision Number 22-24/PUU-VI/2008. In this study, the data analysis is prescriptive in nature, involving the ideal concept of a law or something that should be, particularly concerning the legal issues of women's representation in legislative institutions from a legal justice perspective.

Research Findings and Discussion

A. Theory of the Rule of Law, Legal Justice, and Human Rights

1. Theory of the Rule of Law

The theory of the rule of law has given rise to various forms. In this point, we will focus on three specific forms: the Continental European theory known as *rechtsstaat*, the Islamic nomocracy theory, and the Indonesian state based on Pancasila. The concept of the rule of law is constructed by developing a functional and just legal system itself, along with efforts to structure the suprastructures and infrastructures of political, economic, and social institutions in an orderly manner. This concept is nurtured by fostering a culture of rational and impersonal legal awareness within the context of national and societal life.

There are several forms of the rule of law. In the Western context, the concept of the rule of law was developed by Immanuel Kant and Friedrich Julius Stahl. According to Kant, a rule of law or *rechtsstaat* is a state whose role is to ensure order and security within society. On the other hand, Stahl characterized the rule of law based on four aspects. Firstly, it involves the recognition and protection of human rights. Secondly, the state is founded on the principles of the *trias politica* theory. Thirdly, governance is conducted in accordance with legal provisions. Lastly, a specialized

administrative judiciary is established to address and resolve legal issues arising within society, aiming to seek legal justice.

In the context of Islam, a rule of law is based on Islamic nomocracy, which is a concept of a state characterized by general principles outlined in the Quran and Sunnah. These principles include consultation (*musyawarah*), equality and justice, governance as a trust (*amanah*), recognition and protection of human rights, independent judiciary, peace, welfare, and the obedience of the people. In the context of a rule of law based on Islamic nomocracy, power is derived from the law, and governance is conducted according to Islamic legal norms and principles. Its main form is that the provisions within Islamic legal teachings (including those concerning punishments for offenders and perpetrators of criminal acts) can be enforced effectively when supported by the authority of the government. A well-functioning authority can be enhanced through guidance from Islamic legal principles.

In the context of the Indonesian state based on Pancasila, it emphasizes the integration and accommodation of religious values and legal principles within the state's legal framework. This means that religion and the state are not separate but are interconnected. The state is organized based on the belief in the one and only God (*Ketuhanan Yang Maha Esa*) and positive freedom. The Pancasila-based state of law encompasses key elements such as the Pancasila principles, the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*), a constitutional system, equality, and an independent judiciary. Indeed, the Pancasila-based state of law is closely related to the implementation of governance based on religious principles.

2. Theory of Justice

Justice is a recurrent theme and issue frequently discussed in legal studies. The term "justice" is a derivative of the term "fair" and generally signifies correctness, impartiality, and neutrality. The term "*adil*" itself in Arabic is referred to as "*al-'adalah*," derived from the word "*a-da-la*," which signifies rectitude or justice. "*Adil*" also means being in the middle, similar to the role of a referee who acts as an intermediary. The discussion of the theory of justice has been extensively explored by classical and modern scholars and philosophers, including Aristotle (322 BC), Immanuel Kant (1804 AD), John Rawls (2002 AD), and others. Generally, justice in the broader context is understood through two main divisions:

Distributive Justice

Distributive justice is closely associated with justice based on proportionality. Fairness in the context of distribution implies providing proportional justice to the public within the realm of public law. It entails ensuring that resources, benefits, and opportunities are allocated in a manner that is proportionate and just, thereby striving to achieve a balanced and equitable societal arrangement. In the context of women's representation in legislative institutions, distributive justice would involve ensuring that women are proportionally represented and have access to the benefits and opportunities associated with political participation. Exactly, in this context, fairness is understood as establishing the rights and obligations of individuals according to their abilities and varying circumstances. For instance, granting rights to someone based on their capabilities, achievements, and other relevant factors.

Retributive justice is directly related to matters like positions, taxes, and other general aspects. It encompasses the equitable treatment of individuals based on factors that are applicable and relevant to their situations, ensuring a balanced distribution of privileges and responsibilities.

Corrective Justice

Corrective justice is justice that is concerned with rectifying something that is wrong and providing compensation to the aggrieved party or appropriate sanctions against the wrongdoer. Thus, reimbursing losses and imposing sanctions constitute the elements of corrective justice according to Aristotle's perspective. The position of corrective justice is focused on rectification, specifically rectifying what is wrong according to the applicable legal norms. For example, if one party commits an error (a crime, offense, or otherwise) or breaches a contract, then corrective justice in this context seeks to provide adequate compensation (penalty) to the aggrieved and proven party, commonly referred to as the victim in criminal cases.

In addition to the two forms of justice mentioned above, there is also what is referred to as normative justice or procedural justice. This means that the law is established in accordance with mechanisms, procedures, and existing legal norms. Its implementation is rigid and must precisely align with the rules of law as outlined. Normative justice tends to lean towards legal rationality.

3. Theory of Human Rights

Understanding the theory of Human Rights (HAM) should ideally begin with a conceptual grasp. Various terms are commonly used to signify the meaning of HAM, including human right, fundamental right, natural right, the right of man (in English), *mensenrechten*, *rechten van den mens*, *fundamentele rechten* (in Dutch), *droits de l'homme* (in French), *derechos humanos* (in Spanish), or *menschenrechte* (in German). In the context of Bahasa Indonesia, commonly used terms are *Hak Asasi Manusia* (HAM), *hak kodrati*, and *hak-hak dasar dari pada manusia*, all of which refer to the fundamental rights inherent to human beings. These terms encapsulate the core principles of human rights and underscore their significance in upholding equality, dignity, and justice for all individuals, including women, within legislative institutions. In essence, these terms convey the same underlying meaning, namely, that humans possess fundamental and inherent rights that must be protected by everyone, particularly by the state.

The theory of human rights (HAM) has been acknowledged at the legal value level by modern nations. In fact, many experts assert that a key characteristic of the modern concept of the rule of law is the assurance of human rights within its constitution. According to Friedrich Julius Stahl, the characteristics of a rule of law (*rechtsstaat*) must encompass four elements, one of which is the assurance of human rights. Jimly Asshiddiqie, a prominent expert in the field of constitutional law in Indonesia, asserts that the doctrine of Human Rights is now relatively universally accepted worldwide as a moral, political, and legal framework and as a guiding principle for building a more peaceful world. Jimly further emphasizes that the guarantee of Human Rights should be enshrined in the Constitution of a democratic and constitutional state, often referred to as a constitutional democracy.

The first universally recognized formulation that governs the fundamental and essential human rights which must be

protected and widely accepted worldwide is the Proclamation of the United Nations General Assembly on Human Rights dated December 10, 1948, commonly known as the Universal Declaration of Human Rights (UDHR). In its content, several issues are addressed, including the fulfillment of basic rights that are deemed inherent to every individual. Fajlurrahman Jurdi aptly describes the classification of human rights concepts outlined in the UDHR. There are at least 20 (twenty) principles of rights acknowledged in the UDHR, which are explicitly and clearly stated in Articles 3 through 21.

These provisions are fundamental human rights that must be recognized and are inherent. The regulation of human rights applies and is extended to every individual, including children, adults, and both men and women. Basic rights inherent in humans should align with the principle of recognition of freedom and liberty, including matters related to individuals involved in legal cases, such as criminal suspects, the rights of individuals as witnesses, examined persons, investigated or accused individuals, defendants, as well as convicts and those who have been rehabilitated. The intended rights include the right to be accompanied by legal counsel, not subject to arbitrary actions by law enforcement, the right to be presumed innocent, and the right to a fair trial, and there are many more provisions concerning rights that are fundamental for each individual. Based on the above discussion, it can be understood that the theory of Human Rights is universally recognized by societies worldwide. In the system and concept of modern rule of law, the protection of Human Rights ideally should be explicitly and prominently affirmed in the constitution. This is done as a statement to citizens that fundamental human rights are regulated, protected, and guaranteed to endure.

B. Analysis of Women's Representation Provisions in the Legislative Body from the Perspective of the Rule of Law Principle

The principle of the rule of law calls for equality among all citizens in the eyes of the law, ensuring that both men and women have the opportunity to participate in governance, stand for election, and become members of the legislative body. The regulations concerning women's representation in Indonesia are confirmed through the enactment of Law Number 12 of 2003 concerning the Election of the People's Consultative Assembly, Regional Representative Council, and Regional People's Representative Council. This law mandates that the quota for women's representation in the legislative body must comprise a minimum of 30% of the total quota for members of the People's Consultative Assembly and Regional People's Representative Council.

The provision of this quota is essentially part of affirmative action, which is an effort to fulfill the rights of women that were previously perceived and treated unequally. Article 65 paragraph (1) of Law Number 12 of 2003 states that every political party participating in elections may nominate legislative candidates at both the national and regional levels, and must ensure women's representation of at least 30%. This can be understood from the wording of the article as follows:

Every political party participating in the elections may nominate candidates for the People's Consultative Assembly (DPR), Provincial Regional Representative Council (DPRD Provinsi), and District/City Regional Representative

Council (DPRD kabupaten/kota) for each electoral district, ensuring women's representation of at least 30%.

The representation of women is not only in the implementation of legislative elections but also a requirement for every political party to include 30% women's representation in its membership. This is explicitly stated in Article 2 paragraph (1) and (2) of Law Number 2 of 2008 concerning Political Parties, which mandates that the establishment of a political party must include 30% representation of women.

1. Political parties are established and formed by at least 50 (fifty) Indonesian citizens who are aged 21 (twenty-one) years or older through a notarial deed.
2. The establishment and formation of Political Parties as referred to in paragraph (1) shall include 30% (thirty percent) representation of women.

These two provisions are part of efforts to accommodate and increase the number of women as legislative members. This is expected to ensure that women's interests are taken into account in every decision-making and law-making process within the legislative body.

However, the provision regarding women's representation does still pose some issues. Various experts have expressed both agreement and disagreement with these provisions, each presenting different arguments. For instance, the views of Prof. Yoce Aliah Darma are noteworthy in this context. That the provision for women's representation, clearly outlined in the law, signifies progress in Indonesia's democratic process. The 30% quota requirement enhances the likelihood of women becoming members of parliament, thereby enabling them to advocate for women's rights in policy-making and contributing to gender equality. A similar perspective is shared by Prof. Musdah Mulia, who views the quota as a policy that fosters opportunities and efforts to balance gender equality within the legislative body. Although the 30% quota is presented as a temporary measure, it aims to level the playing field and address the historical disparity between men and women's participation in parliament.

Meanwhile, there are also experts who still perceive that the quota does not fully reflect the principle of equality as envisioned in the rule of law. This viewpoint is articulated by Prof. Jimly Asshiddiqie. The ideal quota is a provision in which there is an equal representation between men and women, meaning they have an equal percentage. The discussion regarding these differing views indicates that the protection of women's representation quotas is still problematic. This is further compounded by the fact that these quota provisions have not yet been fully met in reality, especially if aiming for equal and parallel representation, such as setting a 50% women's representation. Such limitations would be more appropriate if seeking to accommodate the principles of a legal state that emphasize equality without discrimination.

Judging from the concept of a rule of law state, one of its basic principles is that all citizens, regardless of gender differences, are equal and must be placed as equal legal subjects. The ideas and concepts of a rule of law state that are developing in the world, both rule of law in the form of the rule of law (pioneered by A.V. Dicey), *rechtsstaat* (developed by Julius Stahl), Islamic nomocracy, and the state of Pancasila law that applies to the state of Indonesia are both requires equality in the eyes of the law without any

significant differences. In particular, the rule of law principle that applies in Indonesia requires equality for every citizen in the eyes of the law.

In the author's view, the application of the rule of law principle in the context of fulfilling women's representation before the law actually does not need quota restrictions. Because precisely with the 30% quota limitation, this shows that there is inequality between men and women as desired by the principle of equality and equality before the law in the principle of the rule of law itself. If quota restrictions are indeed set, then the quota should be increased to 50% for men and 50% for women. This of course will limit the representation of the two parties to be equal and even the opportunity will better fulfill the principle of equality desired in the rule of law principle. Therefore, the arrangements for women's representation in the legislature as applicable in Indonesia have not been able to fulfill the rule of law principle, namely the principle of equality before the law for all Indonesian citizens.

C. Relevance of Legal Protection in Women's Representation Provisions from the Perspectives of Legal Justice and Human Rights

The representation of women with a 30% quota proposed by each political party to become members of the legislative body is essentially still insufficient to achieve a balanced legislative membership at both the central and regional levels. The quota established in the legislative regulations should, in fact, be capable of ensuring a full level of women's representation in the legislative institution (parliament) and upholding the principle of equality under the law. From the perspective of the principle of legal justice, the ideal regulation of legislation should strive to uphold the principle of legal justice within society. The essence of the principle of justice is that every individual is entitled to access an equal position or have equal opportunities with regard to one another. In another sense, the principle of justice involves balance and proportionality. Treating the same cases equally and treating different cases differently. In the theory put forth by John Rawls, the fundamental principles of justice that he proposes are that every person must have equal rights and the principle of necessity to regulate social inequalities aimed at benefiting all individuals, positions, and roles that are open to everyone. He also explains that, for the sake of justice, there must be an effort to create space for political freedom, encompassing the freedom to exercise the right to vote and the right to hold public office.

The theory of legal justice advocates for the realization of equality within society, without the need to differentiate based on social structures or income levels, let alone to differ in terms of the opportunity and right to vote and be voted for between women and men. The concept of justice calls for equal rights without necessitating the legal protection process of a 30% representation quota for women in parliament.

The protection of such representation signifies that every citizen, regardless of gender, has equal access to participation and representation in the legislative field. This is especially relevant in legislative elections both at the central and regional levels, as well as in political parties. Ideally, the concept of legal justice does not necessitate a legal protection process because it speaks to equality in

various opportunities, providing equal access without differentiating based on representation quotas. In fact, the principle of proportional justice calls for a rule that women's representation should be equal to half of men's representation. Such protection is also not aligned with the theory of human rights, wherein every citizen is placed in an equal position regarding the fulfillment of the right to be elected and to vote to become a legislative member.

Based on the description above, it can be understood that the protection of women's representation quotas is somewhat at odds with the principles of legal justice and the fulfillment of human rights. Ideally, there are two conceptions that should be considered in this aspect:

1. **One Hand, No Need for Protection:** On one hand, there is no need for protection since the fulfillment of women's representation should be voluntary. Imposing quota limits could, in fact, introduce legal uncertainties regarding the mutual fulfillment of rights and the application of fair competition. Efforts should be directed towards enhancing the quality of women, providing them with a comprehensive understanding of political participation and leadership. This is essential to dispel any notion that women are incapable of competing in the political arena, such as becoming legislative members.
2. **On the Other Hand, If Protection is Needed:** On the other hand, if such protection is deemed necessary and the goal is to genuinely apply the principle of equal rights to both parties, then a proportional provision could be established. This provision would require setting a requirement that the male membership in parliament is restricted to half of the total male members. This measure would be independent of whether the quota can be feasibly met or not in practice.

Conclusion

The conclusions drawn from this discourse suggest that the current regulations regarding representation, which mandate a minimum of 30% women's membership in the legislative field in Indonesia, do not align with the concept of a legal state. Various ideas about the concept of a legal state, including the Islamic nomocracy, the *rechtstaat* form of legal state, and the Pancasila legal state concept in Indonesia, generally emphasize equality under the law without discrimination. The provision of a 30% women's representation quota has not yet fully embodied the principles of equality or egalitarianism and equality before the law, as desired within the framework of a legal state concept.

From the perspective of legal justice, the 30% women's representation quota essentially constitutes a form of affirmative action aimed at providing equal opportunities in the political arena, particularly within legislative bodies. However, this quota has not fully realized the representative principle of women and has not met the principles of legal justice. The legal protection provision of the 30% quota as stipulated in Indonesian legislation is also irrelevant and inconsistent with the conception of human rights. This quota provision actually differentiates between women and men, thus amounting to discrimination against equality and parity under the law.

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