

**THE REINFORCEMENT OF AFFIRMATIVE ACTION LEGAL POLITICS TO IMPROVE THE REPRESENTATIVENESS OF WOMEN IN INDONESIAN LEGISLATIVES**

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**ABSTRACT**

*This study investigated the reinforcement of affirmative action legal politics to improve the representativeness of women in legislatures. This research focused on the following backgrounds. Firstly, there is a serious problem of women representativeness in legislatures. The men are overrepresented, while the women are under-represented. Secondly, there is a problem in legal politics in governing affirmative action thereby incapable of improving the representativeness of women in legislative assembly. Thirdly, there is no study investigating the affirmative action oriented to the result of election. The studies conducted so far were nomination-oriented. This study aimed to find a model of affirmative action legal politic reinforcement that can ensure the improvement of women representativeness in legislatures. This study was a normative research emphasizing on dogmatic, theoretical and philosophical borders using statute approach, conceptual approach and comparative approach. The result of research revealed that legal politics governing affirmative action in election and political laws were very inadequate to ensure the improvement of women representativeness in legislatures as it is voluntary, without-sanction, and enacted for nomination process only. The solution offered was the reinforcement of affirmative action legal politics model with Reserved Seats system, that was, quota system by setting aside a certain number of seats for women among the representatives of legislative assembly, governed specifically in general election and political party laws, that is obligatory in nature and contains firm sanction to the political parties not complying with. Recommendations offered were as follows the reconstruction of general election and political party law responsive to the women’s interest and need, the optimization of political party’s role in cadre building and political education as well as firm sanction in the form of exclusion from general election participation for the political parties not meeting the targeted quota of 30% (thirty percents), the synergy of all parties in the implementation of affirmative action in media, civil society, and gender-responsive community participation.*

**Keywords:** legal politics reinforcement, affirmative action, women representativeness in legislatures.

**I. Introduction**

(Adequately)women representativeness in strategic decision maker institutions such as legislative one is believed as a decisive entrance gate to the women’s fate improvement. Through three functions the legislatures have, the women are enabled to struggle for many things both institutionally and politically for their better fate. In the position of legislator, women serve directly to determine not only some gender-sensitive legislation product (Law) but also the gender-friendly budget distribution, and the implementation of supervision ensuring gender equality.

Such ideal representation can be realized through an affirmative action reinforcement to represent the women adequately. Without affirmative action, it will be very difficult to expect the women’s adequate representativeness in legislatures. In the context of very strong patriarchic society such as Indonesian, free competition strip between men and women is unrealistic. Similarly, the half-hearted affirmative action taken by Indonesians so far will not have much to do with this problem. Evidently, the women’s political representativeness in legislative institution so far still faces relative exclusion. The number of women population is more than a half of total population. Similarly, the number of female electorates is higher than that of male ones. Nevertheless, their representativeness (in legislative institution) has not been comparable<sup>1</sup> (see Table 1).

**Table 1.**  
**The Ratio of Electorate to DPR RI (RI Legislative Assembly) Member Numbers<sup>2</sup>**

General Election	Electorate Number		DPR RI Member Number	
	Female	Male	Female	Male
1999	66,291,000 (57%)	50,009,000 (43%)	44 (8%)	455 (91.2%)
2004	65,957,990 (53%)	58,491,049 (47%)	65 (11%)	485 (89%)

<sup>1</sup>Joni Lovenduski, *Politik Berparas Perempuan*, Yogyakarta: Kanisius Publisher, 2005, p. 39. In this book, Lovenduski suggests that in democratic theory, there is descriptive representative constituting the foundation of the women’s demand for their representativeness in parliament. This theory assumes that although women should lies on decision making is comparable to their affiliation with population.

<sup>2</sup>Source: [www.kpu.go.id](http://www.kpu.go.id) , accessed on December 29, 2016

2009	87,854,388 (49.8%)	88,560,04 (50.2%)	103 (18 %)	456 (82%)
2014	92,767,493 (49.73 %)	93,060,494 (50.07%)	97 (17.3%)	463 (86.7%)

Data shown in table 1 clearly reveals the sufficiently striking discrepancy. The men are over-represented, while the women under-represented in political life in Indonesia.<sup>3</sup> This phenomenon is of course less healthy in democracy.

Departing from this reality, the author wants to discuss the idea “the reinforcement of affirmative action legal politics to improve the representativeness of women in legislatures”. The reinforcement of legal politics becomes important because legal medium is superior to other media. In the mission of improving such the condition and to achieve objective, law is equipped with compulsive power, supported with legitimate authority, and (ideally) formulated firmly so that its effectiveness is ensured.<sup>4</sup>

In addition, law in the context of legal politics is an instrument of organizing interest<sup>5</sup>. It organizes interest justly, determines what should and what should not be done, governs right and obligation of individual-group-institution, prepares sanction, and is equipped with its enforcing institution/apparatus.<sup>6</sup> In this position, law has a potential capability of bringing the mission of achieving the objective into reality. It is a public resource with any equipment necessary to achieve the objective. Law has legality basis, legitimacy basis (as it is developed by representative institution), has compulsive binding power, equipped with sanction, and enforced by legitimate institution.<sup>7</sup> It is the central position of law in the context of legal politics.

Regarding the importance of (adequate) women representativeness in politics, Anne Phillips<sup>8</sup> in her book entitled *Engendering Democracy* mentioned at least 4 main arguments.

*Firstly*, role model argument. This argument believes that the existence of women representative will encourage other representation. Their existence can aspirate their role. This argument believes that women and men have different life experience, so that women will bring politics into a set of values, experiences, and skills different from the men do. In more radical term, men and women are in the conflict of role and therefore it is unreasonable to see the women represented by the men.

*Secondly*, justice argument. This argument resists sexual segregation occurring anywhere, because segregation results in injustice by excluding women from political realism. This argument results in the elimination of constraints in women participation.

*Thirdly*, the argument stating that men’s interest is never equal to the women’s. Under-representation in each social category always results in problem. Sexual segregation by condition and experience generates women-specific point of view that can be complementary or antagonistic with the men’s point of view.

*Fourthly*, argument of democracy revitalization. This argument assumes that women should belong to power position. In this way, women will be bonded to politics thereby can improve the essence of public space. When there is a history of exclusion or marginalization against some groups in affecting politics, this group’s members are likely dissatisfied with political process so that they become apathetic and positively decline the attempt of binding themselves to other to solve the problem collectively. Such the condition encourages the specific representation of the disadvantaged group to be seen as democracy revitalization.

Considering this, the adequate and meaningful presence of women in politics can serve as, borrowing Hanna Pitkin<sup>9</sup>, “a way of standing for someone” and “a way of acting for someone” all at once. Either as a way of standing for someone or as a way of acting for someone, it will both ensure that the women’s need and interest will be represented more than when it is represented by the men. Such political representation will represent what occurring in the women and the women’s representativeness is considered as just (fair) in line with participatory democracy argument.

In such perception, political domain is considered as an entrance for the women into realizing the intended improvement. Politics is the most fundamental domain in fulfilling other rights. If even the women’s political right has not been met, their right in other sectors such as education, health and etc will have not been met as well.<sup>10</sup>

<sup>3</sup>Nuri Soeseno, et.al, *Data dan Fakta: Keterwakilan Perempuan Indonesia di Partai Politik dan Lembaga Legislatif, 1999-2001 (Executive Summary)*, [www.cetro.com](http://www.cetro.com), accessed on July, 2016.

<sup>4</sup>Bernard L. Tanya, *Politik Hukum, Agenda Kepentingan Bersama*, Yogyakarta: Genta Publishing, 2011, p.5.

<sup>5</sup>*Ibid.*

<sup>6</sup>*Ibid.*

<sup>7</sup>*Ibid.*

<sup>8</sup>Phillips, Anne, *Engendering Democracy*, Cambridge UK : Polity Press, 1991, pp. 10-13.

<sup>9</sup>Hanna Finichel Pitkin, *The Concept Of Representation*, Berkeley and Los Angeles : University of California Press, p. 373.

<sup>10</sup>Ufi Ulfiah, *Perempuan di Pangung Politik*, Jakarta: Rahima, 2007, p. 12.

*Affirmative action* is a series of program intended to certain groups to improve inequality they experience.<sup>11</sup>This policy is developed due to the wish to escape from discriminative environment. In practice, this policy is packaged in a policy, by some, categorized into indirect discrimination. Therefore, affirmative action is called as reserve discrimination<sup>12</sup>.

Indonesia uses affirmative action concept with 30%-quotasystem governed specifically in General Election and Political Party Laws (Acts). From substantive aspect, these two Acts change dynamically in each general election period but they are inadequate to ensure the improve women's representativeness in legislatives because it is voluntary in nature, without sanction and enacted to nomination process only thereby do not ensure the women's electability in legislatives. The enactment of affirmative action also finds constraint, namely, Republic of Indonesia Constitution Court's Verdict Number 22/PUU-VI/2008, having implication to the difficulty to implement the affirmative action in the attempt of improving women's representativeness in legislatives. This verdict represents clearly that there is an inconsistency in the regulation of affirmative action in Indonesia.

Regarding this condition, it is important to create the clear legal politics. As AdiSulistyono reminds<sup>13</sup>, legal politics vagueness in legislation will create a condition without law certainty and a state without law certainty will be difficult to image itself as the constitutional state. Until today, there has been no study studying legal politics of affirmative action by considering legal politic phenomena based on the women's need and interest oriented to the election result. The studies conducted so far are limited to legal politics of affirmative action with quota system emphasizing on nomination rather than on election result.

To mention some works in the form dissertation, they are: (1) Women Representativeness in Republic of Indonesia's Legislative Assembly (Viewed from Justice, Human Right and Democracy Principles)<sup>14</sup> written by R.R.Cahyowati, Post-graduate Program of Brawijaya University, (2) Women's Representation Politics: Women Protection Policy Advocacy<sup>15</sup> written by DwiWindyastuti Budi Hendarti (Postgraduate Program, Political Science Faculty of GadjahMada University of Yogyakarta), (3) Dilemma of Liberal Democracy: Normative, Institutional and Practical Constraints in Enacting Women Quota in Indonesia<sup>16</sup> written byNurAzizah, Postgraduate Program, Political Science Faculty of GadjahMada University of Yogyakarta).

All of those dissertations discuss affirmative action with quota system oriented to nomination process rather than to the result as governed in legislation governing affirmative action in Indonesia and not from legal politic perspective oriented to the result of election. This literature scarcity encourages the author to conduct this research and to write this dissertation.

## II. Problem Statement

There are 3 (three) relevant problems proposed related to the reinforcement of affirmative action legal politics for improving the women representativeness in legislatives:

1. What is the urgency of affirmative action to improve the women's representativeness in Legislatives?
2. Why is the legal politics of affirmative action so farincapable of improving the women's representativeness in Legislatives?
3. How can ideal model of affirmative action legal politics improve the women's representativeness in legislatives?

## III. Method

This study was a normative law research. Abdulkadir Muhammad stated that normative law research focuses on inventorying positive law, principles and legal doctrine, legal finding in case in concreto, law procedure, synchronization level, law comparison and legal history<sup>17</sup>.As a law research, this study involves three science layers: Dogmatic layer, Legal Theory and Philosophy of Law<sup>18</sup>.In legal dogmatic layer, the starting point of research is positive law provision, in this case, Election and Political Party Laws (Acts). In the term of legal theory, the starting point is concepts based on perspective and doctrine. In this research context, there are a number of theories and concepts relevant to be used to answer the research problem. Meanwhile in the term of philosophy, the starting points are principle and value. In this context, principle and value underlying the enactment of affirmative action to improve the women's representativeness in parliament is discussed.

In reviewing the reinforcement of affirmative action legal politics for the women's representativeness in Legislatives (particularlyin evaluating legal politics so far and proposition of legal politic reinforcement model in the future), the author used socio-legal design. The focus of design is to measure normality and abnormality of action affirmative legal politics for women

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<sup>11</sup>Carol Lee Bacchi, *The Politics of Affirmative Action: Women Equality and Category Politics*, London: Sage Publications, 1996, p. 15.

<sup>12</sup>*Ibid*, p. 17- 20.

<sup>13</sup>Adi Sulistyono, *Negara Hukum, Kekuasaan, Konsep dan Paradigma Moral*, Education Research Institution and SebelasMaret University Press, 2008, p.115.

<sup>14</sup>R.R.Cahyowati, *Keterwakilan Perempuan di Dewan Perwakilan Rakyat Republik Indonesia (Ditinjau dari prinsip Keadilan, Hak Asasi Manusia dan Demokrasi)*,Legal Science Postgraduate Program of Brawijaya University, 2011.

<sup>15</sup>Dwi Windyastuti Budi Hendarti, *Politik Representasi Perempuan : Advokasi Kebijakan Perlindungan Perempuan*, Postgraduate Program, Social and Political Sciences Faculty, Gadjah Mada University of Yogyakarta, 2009.

<sup>16</sup>Nur Azizah, *Dilema demokrasi liberal : hambatan normatif, institusional dan praktikal dalam pemberlakuan kuota perempuan di indonesia* , Postgraduate Program, Social and Political Sciences Faculty, Gadjah Mada University of Yogyakarta, 2012.

<sup>17</sup>Abdulkadir Muhammad. 2004. *HukumdanPenelitianHukum*. 1<sup>st</sup>ed. Bandung: PT. Citra AdityaBakti. p. 52

<sup>18</sup>Philipus M Hadjon, 1997, *PengkajianIlmuHukum*, A Paper in Upgrading and Workshop "Initiating Format, Proposal and Report of Normative Law Research", Faculty of Law of Brawijaya University, Malang.

representativeness in legislatures, viewed from the women experience and need perspective still handcuffed with cultural and structural restrictions in attempting to improve their fate.

Socio-legal study, according to SulistyowatiIrianto<sup>19</sup>, is an interdisciplinary study in studying law<sup>20</sup>. Using a variety of disciplines, the substance of law can be explained in-depth and satisfactorily<sup>21</sup>. The provisions of legislation existing, can be analyzed critically and explained for its meaning and implication to certain members of community, such as women, poor people, customary community, and etc. How the norms of law are disadvantageous or advantageous to certain community group can also be explained along with the reasons<sup>22</sup>.

Thus, discourse of the reinforcement of affirmative action legal politics for improving women representativeness in Indonesian legislative assembly will replete with women's experience nuance and need likely touched with value-free approaches.

#### IV. Discussion

##### A. The Urgency of Affirmative Action for Improving Women Representativeness in Legislatures

In the context of gender-equality women need in many sectors, the policy of affirmative action for improving women representativeness in legislative becomes very urgent. Affirmative action can be defined as provision or policy requiring the enactment of special treatment to certain less empowered (less disadvantaged) group in certain case in order to be equal to other more disadvantaged ones one day. Such the treatment is positive discrimination taken to accelerate the achievement of justice and equality. In other words, affirmative action refers to a series of program intended to certain groups to improve the inequality they encounter<sup>23</sup>. One most important means of applying it is law and its implementation guaranty should be contained in constitution and law.

Empirical data shows that along the history of General Election in Indonesia (1955-2014), women representativeness in legislatures encounter a serious gap. There is an obvious discrepancy. Men are over-represented, while women are under-represented in political life in Indonesia.

**Table 2**  
**Number of Women in Legislative Assembly during 1955-2014<sup>24</sup>**

Period	Number of Male Members (%)	Number of Female Members (%)
1955-1956	272 (93.7)	17 (6.3)
Constituent (1956-1959)	488 (94.9)	25 (5.1)
1971-1977	460 (92.2)	36 (7.8)
1977-1982	460 (93.7)	29 (6.3)
1982-1987	460 (91.5)	39 (8.5)
1987-1992	500 (87)	65 (13)
1997-1999	500 (89.2)	54 (10.8)
1997-1999	500 (89.2)	54 (10.8)
1999-2004	500 (91)	46 (9)
2004-2009	489 (88.9)	61 (11.09)
2009-2014	459 (81.97)	101 (18.03)
2014 – 2019	463 (82.68)	97 (17.32)

Table 2 indicates that women representativeness in legislatures is low consistently. The lowest number (5.1%) occurs in constituent period during 1956-1959. However, the highest number (18%) is up to now still far below the critical point (30%) from the result of general election in 2009-2014. The low representativeness of women in legislatures occurs not only at national (Republic of Indonesia's Legislative Assembly, thereafter called DPR-RI) but also at local level both in Provincial Legislative Assembly (DPRD Prop) and in Regency/Municipal (DPRD Kab/Kot). From the last 2009 Election, the mean representativeness of women is only 16% in DPRD Prop and 12.3% in DPRD Regency/Kot<sup>25</sup>.

<sup>19</sup>SulistyowatiIrianto, *AksesKeadilandanMigrasi Global: KisahPerempuan Indonesia PekerjaDomestik di UniEmirat Arab*, Jakarta: YayasanObor Indonesia, 2011, p. 36.

<sup>20</sup>SulistyowatiIrianto and Antonius Cahyadi, *RuntuhnyaSekatPerdatadanPidana: StudiPeradilanKasusKekerasandalamRumahTangga*, Jakarta: YayasanObor Indonesia, 2008, pp. 9-10. Zamroni explains that such approach model is known in varying terms according to its discipline. *Field research* for sociology, *naturalistic* for studies in education field, *ethnographic* for anthropology, and *socio legal research* for law discipline (*PengantarTeoriSosial*, 1992, pp. 80-81); See also F. von Benda-Beckmann, "Dari HukumManusiaPrimitifsampaikePenelaahanSosio-HukumMasyarakat-MasyarakatKompleks", in TO. Ihromi, *AntropologiHukum...op.cit.* p. 9-10.

<sup>21</sup>SulistyowatiIrianto and Antonius Cahyadi, *Ibid*, p. 10.

<sup>22</sup>*Ibid*.

<sup>23</sup>Carol Lee Bacchi, *Loc.cit*.

<sup>24</sup>[www.kpu.go.id](http://www.kpu.go.id)

<sup>25</sup>Sri Budi Eko Wardani, et al, *Analisis Kuantitatif Keterpilihan Perempuan di DPR dan DPRD Hasil Pemilu 2009; Executive Summary*, Unpublished Manuscript, 2010.

The women representativeness rate in legislatures is varying between one area and another, some areas have high rate and some others have low rate. It can be seen from the distribution of female members of legislatures in DPRRI sorted by their origin province. The worst situation occurs in 6 (six) provinces having no women representativeness in DPRRI: Sulawesi Barat, Bali, NTB, Bangka Belitung, Kalimantan Selatan and Nangroh Aceh Darussalam. There are 17 provinces with women representativeness below average in DPR-RI. It means that more than 50% of provinces in Indonesia do not meet the mean representativeness score of 18%; other 16 provinces have 20% women representativeness in legislature with 7 (seven) out of them having more than 30% women representativeness rate in legislatures<sup>26</sup>, while in other provinces, Maluku Utara shows highest representativeness rate in which 100% of its legislative members are women.

Such the condition suggests that Indonesian women have been too long left not to be present and involved in politics, so that the men's political experience is far ahead of the women's experience. The form of injustice and inequality in long term is the historical fact putting the women onto a position left behind the men because they are marginalized and have no political experience to follow contestation and to present discourse.

Political culture is created because the absence of women makes the political practice for women get difficultly the same space like the men do. In such condition, the solution considered as effective in dealing with the low representativeness of women in legislative assembly is to apply affirmative action as temporary strategic policy. Affirmative action is the form of positive discrimination generally applied to open opportunity and change. The very desirable form of affirmative action is quota policy. Quota is the minimum percentage intended to ensure the balance of number between men and women in political position and can significantly change a variety of political policies. International Parliamentary Union (IPU)'s study, as suggested by Ani Widyani Soetjipto<sup>27</sup>, found that significant (critical numbers) that can affect political policy is 30%. This rate is recommended by IPU and PBB as the minimum quota margin for the women in political institution including legislatures. The objective of affirmative in this quota form is to achieve the proportionality of women representativeness in strategic institutions, particularly legislative assembly and political party. Through larger number of women contributing to political institution, the women's voice and interest will be heard and accommodated more in many decision makings.

Many studies show that women's participation in political life will bring many advantages to the society. The adequate representativeness of women in policy maker institution will lead to the shift in the perspective on solving political problems by emphasizing on peaceful and anti-anarchic ways. In addition, the change of policy and legislation will result as well, that can include the women's specific need. For example, reproductive health, family wellbeing, children care, elder, sexual abuse, and women education issues. In addition, women's participation in decision making can prevent the discrimination from occurring against the women in society.

Dirga Ardiansa<sup>28</sup> states that the battle arena for women interest can be seen not only at national but also at local levels. Considering Indonesian Women Coalition (thereafter called KPI), rural women are still faced with many problems such as poverty, food vulnerability, gender-based violence, culture-based violence, and low access to public service (particularly healthcare, education, demographic administration and civil registration) until today. International Labor Organization (ILO) still finds a discrepancy of wage between genders in Indonesia with the difference up to 19% in 2014. The data shows that women get wage 81% of the men's, despite same education level and experience. National Women Commission reports that today there are about 342 discriminative policies, increasing from 282 policies in 2014, and 207 policies in 2013. Referring to those 324 discriminative policies, according to data of National Women Commission, 265 of them focus directly on the women based on religion and morality. The elaboration of 265 discriminative policies against the women substantively consists of 76 policies governing how to dress, 124 governing prostitution and pornography, and 27 governing the separation of public space between men and women based on morality, and 35 policies related to limitation of outing hour at night the regulation of which reduce the women's right to move, job option, and protection as well as law certainty. The National Women Commission also documents the data of areas releasing many discriminative policies: West Java, West Sumatera, South Sulawesi, Aceh, South Borneo, South Sumatera, and East Java<sup>29</sup>.

The data presented above will confirm that the problem of women representativeness in legislatures not only talks about the women's political right but also pertains to the struggle for women's life desire through some public policies developed by legislative assembly. This attempt clearly tries to eliminate discrimination against the women's right, and all at once to give the women the formal space to participate, thereby having formality access in contributing to struggling for women and nation wellbeing. Adequate representation will impact on the improvement of women wellbeing. In other words, the presence of women in adequate representation will serve as *a way of standing for someone* and as *a way of acting for someone* ensuring that the women's need and interest are more represented.

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<sup>26</sup>Op.Cit., [www.kpu.go.id](http://www.kpu.go.id)

<sup>27</sup>Ani Widyani Soetjipto, Politik Perempuan Bukan Gerhana, Jakarta, Kompas, 2005, hlm 40

<sup>28</sup>Dirga Ardiansa, *Menghadirkan Kepentingan Perempuan dalam Representasi Politik di Indonesia*, A Paper presented in Symposium of Representation Research Cluster of Political Study Center of DIP FISIP- University of Indonesia, October 2, 2015.

<sup>29</sup>*Ibid.*

**B. The Problem with Affirmative Action legal politics in Indonesia**

Indonesian constitution gives the affirmative action policy a space. Article 28 H clause (2) of second amendment to the 1945 Constitution clearly contains and governs the affirmative action principle. This article mentions: “everyone is entitled to get facilitation and special treatment to get equal opportunity and benefit to achieve equality and justice”. Thus, Indonesian’s constitution also adopts the difference principle. It, of course, becomes the basis of constitutionally affirmative action or positive discrimination application.

In line with its principle giving special treatment to the disadvantaged group, for Indonesian context, affirmative action can be intended to women, children, and minority group because factually those groups are so far less protected through the existing system. In addition to 1945 Constitution, Indonesian Government has ratified a variety of international conventions stating its commitment to supporting women participation in politics, among others, through the Law No.3 of 1984 about the Ratification of Convention on the Elimination of Any Discrimination Against Women, and Law No.68 of 1958 about the Ratification of Convention on Women’s Political Rights.

The legal politic development in Indonesia to protect women’s political interest has changed well, as indicated with the accommodation of minimum presence rate of 30% women in Political Party and General Election Laws. However, affirmative action governed in the two laws still have many limitation and it impacts on the less optimal attempt of improving women representativeness in legislatives.

The development of affirmative action in both laws is presented in table 3 below.

**Table 3**  
**The Development of Affirmative Action in Political Party and General Election Laws in Indonesia**

General Election Law		Political Party Law	
Laws	Affirmative Action Concept	Laws	Affirmative Action Concept
Law No.12/2003	There is affirmative action with 30% quota for women nomination without firm sanction thereby not binding the political party to comply with the provision compulsorily	Law No.31/2002	No affirmative action but there has been a consideration of the need for
Law No.10/2008	-There is affirmative action in the form of provision requiring the participant of general election to include 30% of women leadership at central level. -30% quota of women nomination in prospect legislative member list with administrative sanction not binding the political party. -Semi Zipper system, namely at least 1 (one) woman out of 3 (three) prospect legislatives members innominee list without sanction.	Law No.2/2008	-There is affirmative action in the provision of 30% quota for establishing new party and leadership at central, province, and regency/municipal level. -Administrative sanction applies to the party newly registering as a legal entity.
Law No.8 /2012	-There is affirmative action in at least 30% quota giving expectation that more than 30%, but it is not compulsory in nature and applies for nomination process only. In addition there is no sanction governed when the political party does not meet 30% quota. This regulation still applies zipper system.	Law No 2 / 2011	-Old concept is still used but there is an addition regarding political education and recruitment considering gender-equality aspect. This provision is voluntary in nature as well (using the word considering) and wit no compulsive sanction to political party.

Table 4 shows the progress of affirmative action accommodated by General Election and Political Party Laws along with their dynamics, but there are some problems resulting from the limitation of affirmative action specified in the material of respective laws, as explained below.

1. General Election Law plays an important part in improving the women’s representativeness in legislatives, but this law has not bond yet the political party to meet the targeted 30% quota with zipper system. The flexible formulation with no sanction provides different interpretation for political parties, and as a result: (a) politicalparty does not recruit women and build women cadre seriously and sustainably until the lowest level as the part of cadre education; (b) political party sees the affirmative policy only as administrative complement for verification purpose rather than as the absolute attempt needed to improve the discrepancy of political representation; (c) generally, female legislative member nominees are utilized to mobilize the electorates for political party.

2. Political Party Law has not bound political party strongly yet, particularly the long- and well-established political party, to include women into party leadership in all levels of party leadership. The absence of women in party leadership impacts on cadre building and recruitment problems to be present in political positions in legislatures.

The culmination of affirmative action legal politic problem in Indonesia is the release of Constitution Court's Verdict Number 20/PUU-XI/2013, dated on March 12 2014<sup>30</sup>, by some, considered as having attenuating the enactment of affirmative action with quota system in Indonesia. The opportunity of women representativeness designed in ordering number, *zipper system*, becomes useless with this Verdict. In relation to this Verdict, the author thinks that when connected to the application of affirmative action, affirmative action will be in conflict with legal positivism. The focus of positivism is that the law is always congruent with the article of law. Positivism cannot read the law from its sociological condition. Law cannot be conceived as the principle of determining and struggling for justice, but is merely implemented following the statement of law. Here, justice is treated without considering injustice condition becoming the basis of a group's social struggle. Women are a politically marginalized group; therefore inequality condition should be revealed completely with its sociological context and background. Positivism claim that will practice the law impartially even deepen the social injustice structure because the right is distributed unevenly in social groups. Positivistic view on law has closed the sociological property of law. It means that law is no longer considered as a part of society dynamics, but is accepted as merely definitive articles. Approaching the law in positivistic manner lead the state to loss knowledge on "substantive justice", the justice interpreted in socio-historical framework. Such justice is inculcated in social structure and needs extra-legal instrument to deconstruct it. In this context, it can be seen that Constitution Court's Verdict emphasizes only on formalistic view about law. Legal norm, in the logic of constitution court, is reduced completely into legal norm of positivism. Meanwhile, the law develops in a real socio-political condition within which there is power operation, interest hierarchy, and hegemonic political agenda. The legal norm failed reading this socio-political background will finally be discriminative against the society group with no access to majority politics.

The spirit of justice constitution is lost from the constitution judge's knowledge because the Court's point of view is dominated with ahistorical legalism. Constitution is merely read as "*Back Letter of law*", a set of dead letters, rather than a dynamic reference to promote justice based on "judicial activism" spirit. In such the condition, justice becomes merely legal confirmation over constitution rather than the constitution judge's active initiative to say "sociological historical interpretation" on real condition of "gender inequality". Historical justice needs approach beyond "legal constitutionalism" convention. In women's political case, injustice should be read with socio-historical background and in political and cultural construction. Even the concept of law itself should be reviewed in its socio-political historicity.

This constitution court's verdict, according to the author, implies the inconsistency in building an ideal legal politics to improve women representativeness in legislatures through affirmative action. In other words, the Constitution Court's Verdict Numbers 22 - 24/ PUU-VI/2008 determining the selected nominee to be based on the most votes successively makes the clause about women quota loss its "spirit/soul" because the women's struggle for "compelling" the political parties to put the women in the small order number loss its foothold. The accumulative consequence of half-hearted affirmative action application in legal politics so far can be seen in the map of women representativeness map in Legislatures during 2004-2014 not exerting significant effect on the improvement of women representativeness in Indonesian Legislatures.

### C. The Reinforcement of Affirmative Action Legal Politics Model to Improve the Representativeness Of Women in Indonesian Legislatures

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<sup>30</sup>See the Constitution Court's Verdict No. 20/PUU-XI/2013, dated on March 12, 2014. Against the application for judicial review by the Petitioner against the Law No. 8 of 2012 about General Election for the members of DPR, DPD, DPRD regarding the Explanation of Article 56 clause (2) and Article 215 letter b in contradiction with the 1945 Constitution. Therefore, in this case, the Constitution Court granted the application explained entirely as follows:

1. Phrase "or" in the explanation of Article 56 of clause (2) of Law No. 8 of 2012 about General Election for the members of DPR, DPD, DPRD is in contradiction with the 1945 Constitution as long as it is not interpreted as "and/or";
2. Phrase "or" in the explanation of Article 56 of clause (2) of Law No. 8 of 2012 about General Election for the members of DPR, DPD, DPRD has no binding legal power as long as it is not interpreted as "and/or";
3. Phase "not only in no. 3, 6 and so on" in explanation of Article 56 of clause (2) of Law No. 8 of 2012 about General Election for the members of DPR, DPD, DPRD in contradiction with the 1945 Constitution;
4. Phase "not only in no. 3, 6 and so on" in explanation of Article 56 of clause (2) of Law No. 8 of 2012 about General Election for the members of DPR, DPD, DPRD has no binding legal power;
5. The explanation of Article 56 of clause (2) of Law No. 8 of 2012 about General Election for the members of DPR, DPD, DPRD in complete form becomes "In every 3 (three) nominees, the female nominee can be put on 1 and/or, and/or 3 numbers, and so forth";
6. Phrase "considering" in Article 215 letter b of Law No.8 of 2012 about General Election for the members of DPR, DPD, DPRD in contradiction with the 1945 Constitution as long as it is not interpreted as "emphasizing on";

The reinforcement of affirmative action legal politics model proposed by the author to improve women representativeness in legislatives can be illustrated in Table 4 below:

**Table 4.**  
**Illustration of Affirmative Action Legal Politic Reinforcement Model to Improve the Representativeness of Women in Indonesian Legislatives**

No	Substance	Current Model	Ideal Model Expected	Note
1.	Affirmative action material	Affirmative action with quota seats system is voluntary in nature	Affirmative action with reserved seats system is compulsory	Reserved seats set aside a certain number of seats for the women among the representatives in legislative assembly, governed specifically in both constitution and law.
2	Affirmative action reinforcing method	Constitution and Law, but they are not compulsive, without sanction and inconsistent.	Constitution and law	Constitution, General Election Acts, Political Party Acts
3	Its law configuration	Positivistic Law	Progressive Law	The compatible legal system to realize affirmative action for women in parliament is progressive legal system. It is because progressive law has progressivism spirit, based on a number of pillars that can accommodate the affirmative action interest rationally for the women in legislatives.

Table 4 explains that the affirmative action legal politic reinforcement model to improve the women representativeness in legislatives includes three main points: (1) affirmative material needing to be reinforced, (2) affirmative reinforcement method used, and (3) effective legal configuration to realize the intended affirmative reinforcement.

### 1. Affirmative Material

Referring to a number of constraints in affirmative action material to improve the women representativeness in legislatives as aforementioned, the author proposes a reinforcement model with 30% quota system of women nomination based on *reserved seats*. Reserved seats set aside a certain number of seats (30%) for women among the representatives in legislative institution governed specifically. The application of affirmative action in reserved seat is considered as the most effective way of improving women representativeness, particularly in legislative institution and the effective institutional strategy to promote the genuine (substantial) gender quality and to empower the women status as citizen.

As we know, the quota system prevailing so far in General Election and Political Party Acts includes legislative quota and party quota prevailing in nomination process only and not ensuring the opportunity of being elected. The nomination of at least 30% women so far, for political party, is intended to meet the administrative requirement in order to participate in contestation so that there is no serious mechanism of political education, cadre building and recruitment from political party to encourage the quantity and quality of women representativeness, thereby having equal opportunity to the men's opportunity in politics. The history of women politics in Indonesia has conditioned the women so that its political experience is far left behind the men's.

To improve the women's opportunity of being elected, according to the author, they need an emancipatory (liberating) affirmative material. The emancipatory regulation is needed to deal with a crucial problem in social relations the women encounter in the form of bondage (the condition of being fettered) in domination structures such as political, economic, and social-cultural. In the context of bondage, the regulation of affirmative action should appear to be an emancipatory (liberating) institution. The emancipatory concept here refers to the one used in both modernism and postmodernism paradigm. As we know, in modern paradigm, the meaning of emancipation is projected to the attempt of escaping from myth, ideology, and irrational and replete-with taboo tradition, into the wandering of human rationality in arranging its life<sup>31</sup>.

Regarding an idea of liberation as the affirmative regulation, the author proposes to use a system that can liberate women from patriarchal legal culture fetter by means of developing a regulation enabling the women to be elected not only at nomination level but also to take their electability into account. It is this logic that, according to the author, should underlie affirmative action material regulation for women and the appropriate affirmative system is reserved seat, quota system setting aside a certain number of seats for women among the representatives in legislative assembly, governed specifically in General Election and Political Party constitution that is compulsory in nature and has sanction (being excluded from the participation in general election) for the political parties not following the system.

<sup>31</sup>See. F.B. Hardiman, "Mengatasi Paradoks Modernisasi", in *Diskursus Masyarakat dan Kemanusiaan*, Gramedia, Jakarta, p. 135.

## 2. Reinforcement Method

In supporting the affirmative material reinforcement above, a high-quality regulation model containing adequate certainty, justice and usefulness is required. Therefore, the author recommends a number of rules both theoretically and practically compatible to the affirmative legal politics reinforcement and dealing with the weakness of preexisting regulation. This strategy is very urgent to take, because the good or high-quality legal material is one key to the successful law enforcement. In modern legal system, in which convention and legality principle are inevitable requirements, the good/high-quality regulation factor plays an important part, due to some reasons:

*Firstly*, the clear/firm rule becomes important because it will be an effective guideline for all of those acting on, including law apparatus, in undertaking its law enforcement duty. Law is not often implementable and law enforcement process is inhibited only because the existing rule is very general and obscure thereby generating hesitancy among the apparatuses in applying the rule.

The very general regulation leads to pros and cons against affirmative action. There are many interpretations on affirmative action so that its formulation Indonesian legislation implies the half-hearted formulation by policy makers. The regulation governing affirmative action with 30% quota system as included in General Election Law so far is still voluntary in nature thereby making its effective application difficult.

This problem should get serious attention, because in civil law system in Indonesia, entire law organization should be based on the legislation or codification rule. In this system, all of those involved in affirmative action range are required to always refer to the legislation rather than to norms out of legislation like in common law system.

In dealing with legal event, the existing legislation is used to reconstruct the case dealt with, according to the "logic" of norms. As Erik Wolf suggests, for the law enforcers, convention (written law) is everything by which they work daily. As their work equipment, they are required to the regulation. Allegiance, of course, results from merely the uncertainty hazard, when they should care about other thing beyond the rule.

Therefore, it is difficult to expect the effective law enforcement when the legal material is low in quality, infirm and general. The low-quality rule even can get those involved into trouble. On the one hand, they should apply unclear/infirm rule in real cases. On the other hand, they are always haunted with potential oversight the regulation. In such dilemmatic psychological condition, it is difficult to expect the affirmative action with quota system to achieve the maximum objective.

*Secondly*, the understandable rule is beneficial for the society to adapt to the instruction contained in the rule of law. Generally, ordinary people understand very difficultly the juridical technical formulations contained in the preexisting rules. That is why the infringement often occurs due to poor understanding on a rule. The clearest example in applying affirmative action is Constitution Court's verdict having implication to affirmative action infertility in the attempt of improving the women representativeness in parliament. It can be imagined easily what happens to the ordinary people with low education level. Borrowing Santos' term, law "infertility" is related to "its nature" as the accumulation of unthinking law by people, because it is "strange" and out of their feeling's capture<sup>32</sup>.

*Thirdly*, a non-overlapping law material or rule, either vertically or horizontally, is very important to law supremacy. The overlapping rule not only results in the difficulty of enforcement, but will also be the niche from which law manipulation results. The infringement of one rule can be justified by other rule.

*Fourthly*, the aspiring law material will motivate the people to comply with the rule of law. The non-aspiring rule not only generates social resistance but will also harm justice. Without justice, a rule will manifest only as a formalized violence. The aspiring and just law is so important that since legal education appeared for the first time in Bologna Italia in the 12<sup>th</sup> century, there had been a distinction between *lege* and *ius*. *Lege* or *lex* refers to a rule as formal rule regardless the justice value of the rule. Meanwhile, *ius* refers to ideal law that should be reflected on the law as law, justice. *Ius* cannot always be found in all rules. Many rules serve as *lege* rather than *ius* in this country. Therefore, many practitioners mention Indonesia more as Law state, rather than as constitutional state<sup>33</sup>. The essence of law is justice. Law functions to cater to the society's need for justice. Law refers to a living rule corresponding to the ideal of living together, namely justice. Therefore, the content of legal norm should be just (fair). Without justice, law is only the formalized violence. The law is considered as important when we are faced with injustice<sup>34</sup>. People go to the court to ask for justice. The court considers justice as constitutive elements; unjust rule is not only a bad law, but also is not deserved to call law<sup>35</sup>.

*Fifthly*, a rule containing proportional sanction, meaning the sanction corresponding to the severity of infringement will have maximum preventive effect. Thus, the severity of sanction threat in a rule is a central issue in legal theory. The severe sanction, according to von Feurbach, has psychological effect making people breaking the law fearfully. Thus, sanction factor determines a rule's quality.

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<sup>32</sup>Boaventura de Sousa Santos, *Toward A New Common Sense: Law Science and Politics In The Paradigmatic Transition*, Routledge: New Fetter Lance, 1995

<sup>33</sup>See Bernard L. Tanya, *Hukum, Politik, dan KKN...*, Op. Cit, p. 176.

<sup>34</sup>*Ibid.*

<sup>35</sup>*Ibid.*

### 3. Law Configuration

As the *platform for action* to ensure the realization of gender equality, the affirmative action for women in legislatures has corrective and critical/political function against the existing biased-gender order and system. Thus, the attempt of realizing affirmative action to women in Legislative requires the change of value, norm, mindset and behavior, and thereby needs a legal system different from the one existing currently. In the author's opinion, the compatible legal system to realize affirmative action for the women in legislatures is the progressive one. It is because progressive law has progressivism spirit, based on a number of pillars that can accommodate the affirmative action interest rationally for the women in legislatures. The progressivism intended deserves to be considered when it is associated with affirmative action struggle for the women in legislatures using progressive law.

To improve the women representativeness in legislative, there should be a reform in mindset. In the context of seeking for more substantive justice through enacting women quota/affirmative action, an extraordinary ethical is required to get out of legality paradigm because the struggle for gender equality is not only the attempt of voicing the women's legal right, but also a systematic attempt of deconstructing conventional concepts that instead hide the injustice. The attempt of enforcing justice is not only to implement the clauses of law but also to interpret the law progressively in order that the law can be organized dynamically, considering the condition of discourse dominating the law reasoning tradition and sensitive to contemporization of justice concept.

Legalistic approach is oriented more to law certainty than to justice as political discourse. Justice is a historical right for the women because the state owes women for civilization. Social justice should be put onto the concept of equality in the struggle for right and the struggle needs affirmative justice line because for centuries, the start line of women politics has been put far behind that of men.

Putting the struggle for women politics under political constitutionalism paradigm enables us elaborates more injustice dimensions than all marginal social groups. It means the constitution we read politically results in other text, the text of substantive justice demand. It is such justice that can be realized in women quota/affirmative action enactment or in other words; norm contain historical text, namely, the emancipatory desire to get out of colonialism. It is the desire to realize independence, equality, and justice. It is this that actually supports the articles of constitution and it is this desire that is supported by women politics.

### V. Conclusion

From the discussion on the reinforcement of affirmative action legal politics as aforementioned, the following conclusions could be concluded.

1. *Affirmative action* is urgent to improve the women representativeness in Legislatures. The reality shows that there is a discrepancy of representativeness between women and men in legislative assembly. The number of female populations in Indonesia is more than a half of total population. Similarly, the number of female electorates is also higher than that of male ones. However, their representativeness (in parliament) has not been equal. The men are over-represented, while the women are under-represented in political life in Indonesia. Affirmative action is an emancipatory breakthrough assumed to be a fast track to improve the women representativeness in legislatures. Affirmative action policy is temporary, and time-bordered in nature, until the constraints to realize the women representativeness in legislatures achieve the specified limit. The adequate women representativeness in legislatures is the manifestation of their political right fulfillment as citizen to realize the justice democracy principle, the gender-responsive policy with gender-responsive budget support and to reduce structural and cultural discrimination the Indonesian women face today.
2. The regulation prevailed so far in Indonesia governing the affirmative action to improve the women representativeness in legislatures is low in quality because the norm governed is very general, voluntary or infirm, without sanction and inconsistent from one regulation to another. In addition, the release of Republic of Indonesia Constitution Court's Verdict 22-24/PUU-VI/2008 had changed the general election system in Indonesia and this verdict has indirectly broken the spirit of affirmative action specified in general election law. Through this verdict, only those with strong economic, social and political capitals can have high electability. Meanwhile, the women with slow access to political life, marginalized social values, and financial dependency will have low electability. In addition, the affirmative quota model used in General Election and Political Party Acts so far prevails only in nomination process regardless the opportunity of being elected (electability), so that the affirmative quota system cannot improve the women representativeness in legislative adequately.
3. Affirmative legal political model offered to improve the women representativeness in legislatures is Normative Legal Framework Reinforcement Model based on women's experience and need, presenting the 30% quota to the women using Reserved Seat system, by setting aside a certain number of seats for women among the representatives in legislative assembly, as governed specifically in General Election and Political Party constitution that is compulsory in nature and has sanction (being excluded from the participation in general election) for the political parties not following the system. In addition, a reinforcement of affirmative action legal politics is required in progressive perspective through reforming the mindset. In the context of seeking for more substantive justice through enacting women quota/affirmative action, an extraordinary ethical is required to get out of legality paradigm because the struggle for gender equality is not only the attempt of voicing the women's legal right, but also a systematic attempt of deconstructing conventional concepts that instead hide the injustice. The attempt of enforcing justice is not only to implement the clauses of law but also to interpret the law progressively in order that the law can be organized dynamically, considering the condition of discourse dominating the law reasoning tradition and sensitive to contemporization of justice concept.

## VI. Recommendation

From the conclusion elaborated above, the author recommends as follows:

1. Legislature should immediately reconstruct the reinforcement of normative legal framework regarding General Election and Political Party Acts (Laws). The reconstruction of normative legal framework reinforcement is used to reinforce the material and quality of rule based on women's experience and need.
  - A. The substance governed in General Election Law includes:
    - 1) There should be a reinforcement of affirmative action substance from the 30% quota system for legislative nomination (as governed in General Election Law currently) to the 30% quota with reserved seats, by setting aside a certain number of seats among the representativeness in legislative assembly governed specifically. The difference between old and new system lies on the old system prevailing for the 30% nomination only and reserved seats ensuring the nomination and electability for the women as whoever elected must be female. Technically, the ballot can be made separated for the general and the special one.
    - 2) Affirmative action with reserved seats system becomes a distinctive part in the body of General Election Acts.
    - 3) The reinforcement of norm governing the Affirmative Action using reserved seats system with 30% quota should include:
      - a) The word *compulsorily* considers the 30% quota for women. This word "compulsorily" is intended to confirm that the 30% quota is not voluntary in nature for political party.
      - b) Sanction for the political parties not fulfilling the 30% quota, by excluding them from General Election participation. This provision is intended to compel the political party to fulfill the 30% quota of women representativeness in legislatures.
      - c) The names of nominee in nominee list are organized separated and divided into two ballots: general and special. General ballot contains the names of legislative member nominees for the 30% quota of women at all levels of legislative assembly.
  - B. The substance governed in Political Party Law includes:
    - 1) Replacing the word "*considering*" with "compulsorily including" in Article 20 of Law No.2 of 2011.
    - 2) The reinforcement of norm governing the affirmative action with 30% quota-reserved seats system should include the firm sanction against the political parties not fulfilling the provision of 30% quota. And the sanction can be the exclusion from General Election. This sanction makes the provision compulsive.
2. In addition to the reinforcement of General Election and Political Party Acts substance, the role of General Election Commission should also be optimized as the institution organizing general election with an authority of developing a compulsory and compulsive technical regulation of General Election more responsive to the women.
3. Political party should have internal party system allowing the transparent cadre building system with party ideology and institutional framework as well as internal party regulation more responsive to women, indiscriminative and opened to the people out of the party structure. It is intended to create a women-friendly political climate.
4. All of those involved in the implementation of affirmative action policy ranging from political party leader group, women group, civil society, media to all of those committed to support the women participation in politics should play their part maximally in providing political education to practice the female nominee about how to campaign for effectively, to build self-esteem and self-confidence, and how to promote gender equality when they have been elected. In addition, a discourse to change the non gender-responsive mindset in to the gender-responsive one should be promoted continuously.

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