



# Journal of Arts & Humanities

Volume 10, Issue 06, 2021: 31-43

Article Received: 21-06-2021

Accepted: 05-07-2021

Available Online: 10-07-2021

ISSN: 2167-9045 (Print), 2167-9053 (Online)

DOI: <https://doi.org/10.18533/jah.v10i6.2130>

## Legal Protection of Political Rights of Persons with Disabilities to Be Elected As Candidates for Members of the House of Representatives in General Elections: A Comparative Study between Kenya and Indonesia

Ferdinandus Ngau Lobo<sup>1</sup>, Istislam<sup>2</sup>, Aan Eko Widiarto<sup>2</sup>, Setyo Widagdo<sup>2</sup>

### ABSTRACT

In this article, the researchers examine the legal protection of the political rights of persons with disabilities to become members of the House of Representatives in Kenya and Indonesia using a statute approach and a comparative law approach. This study aims to find a good and responsive form of legal protection to fulfil and enforce the political rights of persons with disabilities to be elected as candidates for members of the House of Representatives by comparing the Constitution and the General Election Law in force in Kenya and Indonesia. The statutory regulations as the objects of this study are the Constitution of Kenya of 2010, the Election Act of Kenya No. 24 of 2011, the 1945 Constitution of the Republic of Indonesia, and the Law of Republic of Indonesia No. 7 of 2017 about the General Election. This comparison allows the researchers to implement a legal construction of the Law of the Republic of Indonesia No. 7 of 2017 on the General Election. This can provide legal certainty and justice for the fulfilment and enforcement of political rights for persons with disabilities to be elected as candidates for members of the Indonesian Parliament or the House of Representatives (Provincial or Regional/City) in a democratic and just General Election.

**Keywords:** Legal protection, Political rights, Persons with disabilities, General election.

This is an open access article under Creative Commons Attribution 4.0 License.

### 1. Introduction

Humans are God's creatures whose dignity should be upheld, and their rights and freedoms are respected and protected. However, not everyone can access or exercise their rights and freedoms, especially those who fall into the category of vulnerable groups (Coid et al., 2006). Those included in this category are women, persons with disabilities, minority groups, and others (Morrow, 1999).

<sup>1</sup> Student of the Law Doctoral Program-Faculty of Law of Brawijaya University, Malang, Indonesia, Lecturer of Law Faculty of Catholic University of Widya Mandira, Kupang. Email: [ferdinandlobo21@gmail.com](mailto:ferdinandlobo21@gmail.com)

<sup>2</sup> Associate Professor, Faculty of Law of Universitas Brawijaya, Malang, Indonesia.

Vulnerable groups experience vulnerability (Calva & Juarez, 2014) due to several factors, such as gender, old age, minorities, poverty, and disabilities (Browne & Misra, 2003).

The term vulnerability was originally a commonly used term in research related to geographical and natural hazards (Füssel, 2007). As illustrated by Morrow, vulnerability is how certain categories of people, such as the poor, the elderly, women-headed households, and recent residents, are at greater risk throughout the disaster response process. This concept is then used in research in ecology, public health, poverty and development, secure livelihoods and hunger, sustainability science, land change, and climate impacts and adaptation (Füssel, 2007). The term vulnerability is also used in research on social science and law.

Among vulnerable groups previously mentioned, the group of persons with disabilities is the most vulnerable to access their rights and freedoms (Russell, 2002). They are included in the category of vulnerable or marginalized groups whose rights and freedoms are ignored or excluded from the rest of the community (Smith, 2013). They endure discrimination in various aspects of life, especially in realizing their political right to become members of the House of Representatives elected through a general election, which according to Marshall et al. (Prince, 2001), is one of the important elements of citizenship.

In the embodiment of political rights, they have not received the same rights and opportunities as other people (Shapiro et al., 2000) and assessed not to be an integral part their fellow citizens. They experience significant negative stigmatization. This is particularly degrading and even triggers the loss of dignity of persons with disabilities as they interact with society in general. In fact, in a broader context, the State, through the government, also pays less significant attention to the fulfilment and protection of their rights.

The efforts to protect vulnerable groups have become the agenda of the world nations ever since the Universal Declaration of Human Rights (UDHR) (United Nations, 1948) was proclaimed. The UDHR has functioned over the past seven decades as a basic human rights instrument that exerts moral and political influence on the States, even though it is not a legally binding document. Even today, many understand the instrument as the constitution of the entire human rights movement and, more specifically, the number of its provisions that have earned the status of customary international law (Heyns & Killander, 2009). Thus, UDHR becomes an antecedent to existing international, regional, or national human rights.

UDHR and its substantive norms are fundamentally crucial for raising various issues concerning persons with disabilities where the issue of inclusion and equal participation in the State's political environment is at the core of the agenda. The UDHR contains a formulation of the commitment of participating countries to actualize respect for human dignity, independence, and the principle of equal rights and against discrimination among individuals in realizing their rights and freedoms. Compliance with the principles reflected in the UDHR is a key criterion for recognizing a country or regime in establishing relations between countries (international) (Smith et al., 2008).

Specifically concerning civil and political rights, the United Nations General Assembly, through Resolution No. 2200 A (XXI), ratified the International Covenant on Civil and Political Rights and the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). The covenant and optional protocol began entry into force on 23 March 1976. The covenant contains an affirmation of fundamental democratic rights that govern the relationship between the State and each individual, which regulates, among others, political participation and freedom of expression, the right to be involved in government, and the right to vote and be elected in general elections (United Nations, 1948).

The existence of the Convention on Civil and Political Rights affirms the State's obligation to ensure that every person whose rights and freedoms are regulated in the Convention that are violated to get an effective recovery, as stated in Article 3 of the covenant on Civil and Political Rights. Effective recovery means the State is obligated to guarantee and promote the fulfilment of the rights of persons with disabilities through legislative (making regulations) and administrative (supporting procedures) actions and harmonizing regulations, including eliminating unresponsive rules and policies that violate the rights of persons with disabilities. The recovery provided by each country is in accordance with the type and level of violations of civil and political rights experienced by persons with disabilities.

Both the UDHR, particularly Article 2, and the ICCPR prohibit discrimination based on various differentiating categories such as race, colour, gender, language, religion, politics, or views of nationality or social origin (United Nations, 1948). This should be perceived as open norms. Thus, in the current context, the discrimination referred to by the UDHR can also be interpreted as discrimination experienced by other vulnerable groups, including persons with disabilities.

Even though both the UDHR and the ICPPR have been enacted and enforced, persons with disabilities continue to experience discrimination concerning access and actualization of their rights and freedoms. Responding to the phenomenon of discrimination that groups of people with disabilities still encounter, the international community is raising collective awareness to recognize, respect, promote and fulfil the rights of persons with disabilities in a better and fairer way. This outstanding effort was realized through the Convention on the Rights of Persons with Disabilities (CRPD). This Convention was drafted and adopted by the United Nations General Assembly with Resolution No. A/61/106, dated 13 December 2006, and was later ratified on 30 March 2007.

Each participating country signed and ratified this Convention, then established laws and regulations in their home country. The formation of laws and regulations regarding the ratification of the International Covenant is closely related to the legal system adopted by each country. The majority of participating countries have ratified it or released a consent to be bound and issued the implementing legislation on the CRPD.

Indonesia and Kenya were two of the participating countries in the CRPD. The two countries have ratified and subsequently established laws and regulations as a form of the State's responsibility in respecting, fulfilling, protecting, upholding, and promoting the rights and freedoms of persons with disabilities in the two countries. Therefore, in this article, the researchers intend to examine the legal protection of the political rights of persons with disabilities to become members of the House of Representatives (parliament) in Indonesia and Kenya (a comparative of law).

## **2. Research methods**

This type of research is normative legal research, according to Peter Mahmud Marzuki said that legal research is a process to find the rule of law, legal principles and legal doctrines in order to answer the legal issues faced (Marzuki, 2005). The approach method used in this research is adapted to the type of research conducted where this research is a normative legal research (Marzuki, 2005). Based on the legal issues contained in this research, this study uses 5 (five) approaches (1) a statutory approach, which is used to examine all laws and regulations and (2) a conceptual approach.) is used to study developing concepts or doctrines related to the rights of persons with disabilities and democratic elections. (3) A comparative of law approach is used to compare the laws and regulations in force in Indonesia with the laws and regulations in force in Kenya regarding the political rights of persons with disabilities (Marzuki, 2005).

## **3. Result and discussion**

### **3.1. The dynamics of legal protection of persons with disabilities in Kenya**

In 2007, African countries entered into a joint agreement to promote and realize democracy and human rights in Africa through the African Charter on Democracy, Elections, and Governance held in Addis Ababa on 30 January 2007. This African regional agreement gave birth to a charter, a joint agreement and commitment to realizing democracy and human rights in African countries. The Joint commitment can be interpreted through the provisions of Article 6 of the African Charter, "State Parties shall ensure that citizens enjoy fundamental freedoms and human rights taking into account their universality, interdependence and indivisibility."

Through the African Charter, the participating countries agreed to:

- 1) State Parties shall eliminate all forms of discrimination, especially those based on political opinion, gender, ethnic, religious, and racial grounds as well as any other form of intolerance.
- 2) State Parties shall adopt legislative and administrative measures to guarantee the rights of women, ethnic minorities, migrants, people with disabilities, refugees and displaced persons and other marginalized and vulnerable social groups.

- 3) State Parties shall respect ethnic, cultural and religious diversity, which
- 4) Contributes to strengthening democracy.

The charter also regulates the joint commitment to protect the rights of persons with disabilities as stipulated in Article 31, paragraph 1, which emphasizes that "State Parties shall promote participation of social groups with special needs, including the Youth and people with disabilities, in the governance process."

This is a commitment of the African nations to eliminate various forms of discrimination experienced by vulnerable groups (e.g., women, minority groups, including persons with disabilities) to be involved in government.

Particularly in the protection and fulfilment of political rights, this is reflected in the provisions of Article 13, paragraph 1, which emphasize that "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."

This provision shows a common awareness to realize equal political rights for everyone in their country to participate in government in a broad sense without discrimination (including the political right to be elected as a member of the House of Representatives). This principle of equal rights also applies to vulnerable groups such as persons with disabilities.

Countries in Africa subsequently became involved and subsequently ratified the United Nations CRPD. The latest data shows that 182 countries have ratified the CRPD and 92 ratifications to its Optional Protocol, including Kenya. The agenda to ratify the United Nations CRPD in Kenya began a few years ago when the disabled people's organizations (DPO) came together through the United Disabled People's of Kenya (UDPK) to convey their aspirations to the Government of Kenya to ratify the CRPD. The aim was to provide expanded rights and increase opportunities for persons with disabilities and begin benchmarking the disability rights attainment (Musakhi, 2017).

Before ratifying the CRPD, Kenya already has a law on this particular issue, the Persons with Disability Act. No. 14 of 2003. This Act emphasizes its regulation on protecting the rights of persons with disabilities regarding physical accessibility and access to education, health services, and employment. The law does not yet regulate the political rights of persons with disabilities. Hence, the Kenya Disability Act of 2003 has prompted the agenda in the country to formulate disability rights that are more significant after the long process experienced by persons with disabilities in the country.

On 30 March 2007, Kenya signed the CRPD, and on 19 May 2008, the country ratified it. As a form of commitment to following up the spirit expressed in the CRPD, in 2011, their government assembled a team of officials from state and non-state actors to prepare a preliminary report to the UN Committee on the Rights of Persons with Disabilities. Disabled people's organizations in Kenya also submitted shadow reports to the committee. Kenya established a close partnership between the State and the Disabled People's Organizations (DPO), instituting a working committee appointed by the State's main secretary responsible for disability issues in the country to consider the committee's recommendations and develop a national action plan to implement these recommendations. This plan was completed and launched in November 2016, providing direction and ensuring the institutions and organizations or people responsible for implementing the CRPD in the country in a structured manner.

Kenya is also a country that declares itself as a state of law. This can be understood as equal rights before the law, which can be proven through the provisions of the 2010 Kenyan Constitution. The articles which are related to the characteristics of the state of law are, among others:

Article 27: Every person to equality before the law and prohibits direct or indirect discrimination on any ground, including disability.

Article 28: Guarantees the right to human dignity and the right to have that dignity respected and protected.

Article 54, paragraph 2 : The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.

According to researchers, the provisions of the 2010 Constitution of Kenya, especially the provisions of Article 54, paragraph 2, are truly receptive to the protection of the political rights of persons with disabilities, including the right to sit in public office on the occasion that they are elected through mechanisms of appointment or general elections. Thus, it can also be interpreted that what is

meant by the political rights of persons with disabilities in the 2010 Kenyan Constitution is the political right of persons with disabilities to participate in voting and being elected to parliament using affirmative action instruments. A significant and courageous step has been taken by Kenya in the form of affirmative action as stipulated in the Constitution of Kenya of 2010, Article 54, paragraph 2, in the form of the allocation of special seats for a minimum quota of 15% for vulnerable groups, including persons with disabilities to sit in public office either appointed or elected.

The basis for considering using the division of appointed and elected positions is that the recruitment of public positions in both the national and the local government can be executed by being appointed or elected through the general election. First, public offices recruited through the appointment mechanism (appointed officials) are governed by laws and regulations as is usually practiced in government where the president can appoint his assistants such as ministers and other positions. This also applies to regional/local government. The Governor and other local officials can appoint officials who will participate in the government. Second, it is apparent that public offices recruited through the election mechanism are members of the senate and local representative assembly recruited by political parties to be involved in the general election in the country, either the national or local parliament.

In Kenya, a public office that is appointed is a government position such as the executive. The Kenyan government is particularly focused on regulating affirmative provisions for persons with disabilities. This shows that the state not only recognizes the existence of political rights for persons with disabilities, but more than that, the state concretely makes efforts to ensure that the political rights of persons with disabilities are guaranteed to be manifested in both the Kenyan Constitution and Election Law.

In addition to what is stated in Article 54, paragraph 2, of the 2010 Constitution of Kenya also contains a phrase that regulates affirmative action with regard to the protection and fulfilment of the political rights of vulnerable groups, including persons with disabilities, to be elected as members of the House of Representatives. This is stated in Articles 97, 98, and 177 of the Constitution, among others:

Article 97, Membership of the National Assembly:

(1) The National Assembly consists of-

(c) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with article 90, to represent special interests including the youth, persons with disabilities and workers Article 98, Membership of the Senate

(1) The Senate consists of-

(d) two members, being one man and one woman, representing persons with disabilities.

Article 177, Membership of County Assembly

(1) A County of Assembly consists of-

(c) the number of members of marginalized groups, including persons with disabilities and youth, prescribed by an Act of Parliament.

Legal certainty protecting the political rights of persons with disabilities is further stipulated in the Election Act No. 24 of 2011 (revised of 2015). The provisions governing affirmative action in the law are contained in the provisions of Article 36, paragraph 1, about Allocation of Special seats:

(1) A party list submitted by a political party under

(a) Article 97, paragraph 1, of the Constitution shall include twelve candidates.

(c) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and

(d) Article 98, paragraph 1 d, of the Constitution shall include two candidates.

Furthermore, the provisions of Article 98, paragraph d, of the Kenyan Constitution emphasizes that two members being one man and one woman, representing persons with disabilities;

(f) Article 177, paragraph 1 c, of the Constitution shall include eight candidates, at least two whom shall be persons with disability, two of whom shall be the youth and two whom shall be persons representing a marginalized group. This provision is an interpretation of the

affirmation of Article 177 c, of the Kenyan Constitution, which regulates "the number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament."

The Kenyan Law about Elections also contains a problem-solving approach to the formulation of legislation. According to this Law, persons with disabilities are construed as a vulnerable group with equal rights to non-disabled people to be elected as candidate members. This legal construction requires a progressive step in the form of an affirmative action instrument to realize equal rights, which have been neglected thus far. The affirmative action in the Kenyan Law about General Elections is formulated in the form of a phrase regulating the allocation of special seats. The Kenyan Election Law results from a political agreement between the government and the Kenyan parliament to provide equal opportunities for marginalized groups, including persons with disabilities, to obtain legal protection to fulfil and enforce their political rights to participate freely in government (in a broad sense). This is an answer to the spirit of the CRPD that has been ratified and the aspirations of marginalized groups as voiced by the disabled people's organizations (DPO), whose political rights have been neglected, and in line with the Constitution of Kenya of 2010.

The moral basis for regulating affirmative action provisions for vulnerable groups, especially for people with disabilities (PwD), is in the form of allocation of special seats in each level of the Kenyan general election in the Election Act of Kenya No. 24 of 2011 are:

1) Persons with disabilities (PwD) have been excluded and neglected from their role in political and social leadership in their own country (Kenya). Beckwith et al. (2016, as cited in Price, 2018) observed the severe gaps concerning the efforts to enhance and promote the leadership role of persons with disabilities in developing countries. There are information gaps on how best to provide support to promote inclusive leadership for persons with disabilities, and there is a need for additional research to understand how far persons with disabilities have moved "beyond tokenism" and into authentic leadership roles (Price, 2018).

2) Article 5, paragraph 1, UN CRPD 2011 confirms: "States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law." The provisions in the CRPD constitute the spiritual stance of each participating country, recognizing that all people are equal before the law and are guaranteed without any discrimination for the sake of equal protection and equality of benefits.

3) The Kenyan Constitution, article 54, paragraph 2, has ordered facilities and exceptional treatment/affirmative action in the form of a 5% quota for vulnerable groups (including persons with disabilities) to sit in public office either elected through general election or appointment. It can be interpreted that in the recruitment of candidates for representatives of political parties, the quota of candidates for representatives of persons with disabilities at all levels of representation must be fulfilled to respect, protect, and fulfil the political rights of persons with disabilities.

Thus far, the rights of vulnerable groups such as youth and minority groups, women, and persons with disabilities to participate actively in politics, especially the right to be elected in an election, have been neglected and marginalized (Price, 2018). The regulation of the political rights of persons with disabilities is very much in accordance with the principles of the state of law or the rule of law (Asshiddiqie, 2005). Dicey presents a distinct feature of the state of law concerning the following:

(1) There is no arbitrary power. Everything and everyone is subject to the law (supremacy of law). Prohibiting punishment which is not based on law and sentenced by common court.

(2) Equality before the law, both for the citizens and government officials, regardless of their circumstances, are subject to the law (equality before the law). The same law applies to everyone in the same way.

(3) Human rights are guaranteed by law and court decisions (human rights). Protecting civil rights by common law. Thus, it seems that the human rights are the third cornerstone of the rule of law, but only at the first sight, since in Dicey's understanding of the rule of law, the courts are concerned with remedies rather than with abstract rights.

Through the affirmative action arrangement, candidates for the House of Representatives, including candidates with disabilities, have been provided legal protection for their political rights to be appointed as candidates in elections in Kenya based on their 2010 Constitution and the Election Act No.

24 of 2011. Therefore, persons with disabilities have been granted a special place to compete fairly in the elections in Kenya.

The affirmative action formulation for vulnerable groups such as PwD in the Kenyan Constitution and the Kenyan Law about Elections is very much in line with the principle of justice intended by Rawls. Rawls introduces two principles of justice as the solutions to the main problem of justice. First, the principle of greatest equal liberty. This includes, among others, freedom to play a role in political life (i.e., the right to vote, the right to run in elections), freedom of speech, freedom of belief (religion), freedom to be oneself (person), and the right to defend personal property. The participation of persons with disabilities in general elections is a manifestation of the principle of maximum freedom.

Meanwhile, the special treatment for persons with disabilities in the form of a 5% quota is in line with Rawls. Second principle of justice, the difference principle and the principle of fair equality of opportunity. Rawls teachings of justice are closely related to affirmative action or special treatment for marginalized groups to realize equal rights and equal benefits. Thus, setting quotas has provided a sense of justice for persons with disabilities in Kenya. In other words, the Government of Kenya has provided legal protection for the political rights of persons with disabilities in the country.

### **3.2. The political rights regulation for persons with disabilities in Indonesia**

Comparing the legal protection of the political rights of persons with disabilities in Kenya and Indonesia, the researchers used the existing constitutions in both countries and the Law about General Elections. By referring to both the Constitution and the Law about General Elections, the researchers can determine whether each government has regulated the protection of the political rights of persons with disabilities to become members of parliament.

In the 1945 Constitution of the Republic of Indonesia, the political rights of persons with disabilities are generally regulated in several provisions, such as Article 27, paragraph 1: "All citizens have the same position before the law and government and are obliged to uphold the law and government without exception."

Furthermore, Article 28 D, paragraph 3, regulates: "every citizen has the right to get equal opportunities in government." The provision of "getting equal opportunities" in government means equal opportunities for all people without discrimination to be involved in government in general. The government, in a broad sense, is the executive, legislative and judicial powers. Equal opportunity to be involved in executive power means that every citizen has the same rights to become President/Vice President, Governor, Regent/Mayor, or public positions within the scope of executive power.

Meanwhile, based on the 1945 Constitution of the Republic of Indonesia, it can be understood that legislative power means that all citizens have the same opportunity to become members of the legislature, including members of the People's Consultative Assembly, the People's Representative Council (or the House of Representatives), Regional Representative Council, and Regional People's Representative Assembly.

The provisions of Article 27, paragraph 1, and Article 28 D, paragraph 3, of the 1945 Constitution of the Republic of Indonesia have not specifically regulated the political rights of persons with disabilities. The two provisions only manage the equality of political rights in general (common similarity). In this regard, in electing public positions, including becoming candidates for members of the People's Representative Council (or the House of Representatives) or the Regional People's Representative Council (or the Regional House of Representatives), they must go through fair competition (all are treated equally).

Meanwhile, the regulation regarding special treatment/affirmative action is included in Article 28 H, paragraph 2, of the 1945 Constitution of the Republic of Indonesia, which regulates the following: "Every person has the right to get proper facilities and treatment to get the same opportunities and benefits in order to achieve equality and justice."

Theoretically, affirmative action is "the set of public policies and initiatives designed to help eliminate past and present discrimination based on race, religion, gender, or national origin, is under attack" (Sayuti, 2013). From a historical context, the term affirmative action is applied to the public sector where the state and public institutions issue policies that provide opportunities or special treatment to particular groups, including the quotas in state and public institutions such as parliament,

government, educational institutions, and offices (Gomes, 2003). Affirmative action is a result-oriented plan and program to tackle injustice at work, politics, education, and others.

To understand the meaning of affirmative action referred by Article 28 H, paragraph 2, of the 1945 Constitution of the Republic of Indonesia, the researchers use the interpretation of non-original intent to allow some flexibility to meet the current needs. The advantage of non-original intent interpretation is that it can fill the vacuum of the norm. This interpretation prevents crises due to narrow definitions and allows the constitution to develop under more enlightening meanings (Palguna, 2013).

Article 28 H, paragraph 2, of the 1945 Constitution of the Republic of Indonesia can be interpreted according to the current needs to protect and realize passive political rights (the right to be elected) for vulnerable groups, including persons with disabilities. Thus, provisions containing affirmative action can also be used to remove barriers for persons with disabilities to access and realize their political rights. Therefore, according to the researchers, the provisions of Article 28 H of the 1945 Constitution of the Republic of Indonesia can become a 'synthesis norm' for the long-neglected protection and fulfilment of the political rights of persons with disabilities.

The protection of persons with disabilities' rights is a specific concern of the government with the ratification of the CRPD by Indonesia with Law No. 19 about the Ratification of the Convention on the Rights of Persons with Disabilities. Subsequently, the government drafted a regulation implementation, namely Law No. 8 about Persons with Disabilities.

The political rights of persons with disabilities (PwD) are regulated by the Indonesian Law about Persons with Disabilities and Law No. 7 of 2017 about General Elections. Even though the 1945 Constitution of the Republic of Indonesia already regulates affirmative action, the formulation of the law on Persons with Disabilities is Law No. 8 of 2016 and Law No. 7 of 2017 about General Elections do not regulate specific treatment for persons with disabilities to realize their political rights.

This is apparent in the formulation of the provisions, among others, Article 75, paragraphs 1 and 2, and the Indonesian Law No. 8 of 2016 about Persons with Disabilities that regulates:

Article 75, paragraph 1:

"The Government and Local Governments are obliged to ensure that persons with disabilities can participate effectively and fully in political and public life directly and through representative institutions." This refers to the right to participate in government in a broad sense (executive, legislative, judicial, election administrators, and others).

Article 75, paragraph 2:

"The Government and Local Governments are obliged to guarantee the rights and opportunities for persons with disabilities to vote and be elected."

Article 76: "Persons with disabilities have the right to hold public office." Here, the term 'public office' is a position at a state public office that includes the executive, legislative, and other bodies, which main functions and tasks are related to state administration. The funds of which are partly or entirely sourced from the State and/or the Regional Budget".

The provisions of the Indonesian Law Article 75, paragraphs 1 and 2, and Article 76 about Persons with Disabilities have formulated regulations for the central and local governments to fulfil political rights and public office in government. This was formed because persons with disabilities have been treated with an exclusion, or their rights were neglected thus far.

Elaborating the provisions of the Indonesian Law Article 75 about Persons with Disabilities, the Indonesian Law No. 7 of 2017 about General Elections further regulates the right to vote and be elected as a member of the legislature for persons with disabilities. The regulation of political rights is explained in Article 5 of the Indonesian Law No.7 of 2017 about General Elections, which emphasizes that "persons with disabilities who meet the requirements have the same opportunity as voters and to be elected as candidates for members of the House of Representatives and the Regional Representative Council, as candidates for President/Vice President, as candidates for members of the Regional House of Representatives, and as Election Administrators."

As referred to by the Indonesian Law No. 7 of 2017 above, the term 'equal opportunity' is interpreted as a situation that provides opportunities and/or access for persons with disabilities to channel their potential in all aspects of the administration of the state and community. One aspect of



channelling the potential in the state administration includes the right to be elected as a legislative candidate.

Even though the existence of the political rights of persons with disabilities is stipulated in the Indonesian Law no. 7 of 2017 about General Elections, the provisions of its norm only regulates the existence of the political rights of persons with disabilities to vote and be elected as legislative members. It can be said that the 2017 Indonesian Election Law does not stipulate explicitly and in detail how to fulfil the political rights of persons with disabilities to be elected as legislative candidates, which are coercive and binding. As a comparison, as one of the marginalized groups with long-neglected political rights, women have been granted legal protection by the Indonesian Law No. 7 of 2017, Article 245 and Article 246, paragraph 2, to realize women's political rights. The legal protection for women is affirmative action (positive discrimination) in the form of a quota of at least 30% of the total candidates for the House of Representatives and Regional House of Representatives members. Meanwhile, by the electoral law, persons with disabilities are only recognized as having equal political rights without any affirmative action.

In policy-making, citizens are always considered to have a common similarity where democracy is interpreted and has a spiritual meaning that all must be treated equally (Valentina & Rusta, 2010). However, the facts and history show that not every citizen and identity, especially vulnerable groups such as persons with disabilities, have the same experience in democracy (Valentina & Rusta, 2010). Persons with disabilities are included in vulnerable groups who experience exclusion or marginalization when exercising their political rights, both active (the right to vote in elections) and passive (the right to be elected in elections) political rights.

### 3.3. The comparison of law on protection of political rights of persons with disabilities in Kenya and Indonesia

The Articles related to the characteristics of the state of law in the Indonesian and Kenyan constitutions include:

a. The 1945 Constitution of the Republic of Indonesia

Article 27: "every person to equality before the law and prohibits direct or indirect discrimination on any ground, including disability."

Article 28: "guarantees the right to human dignity and the right to have that dignity respected and protected."

b. Constitution of Kenya of 2010

Article 54, paragraph 2: "The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities (PwD)."

Burkens (Remaja, 2016) defines the state of law (*rechtsstaat*) as "a state that places the law as the basis of its power and the exercise of this power in all its forms is carried out under the rule of law."

Both Kenya and Indonesia have embodied the state of law principles in their respective Constitutions. The comparison between the two countries' Constitutions and Laws can be summarized as presented in Table 1.

Table 1.

*The Comparison of Legal Protection for the Political Rights of Persons with Disabilities to Be Members of the House of Representatives in Kenya and Indonesia.*

No	Criterion	Kenya	Indonesia
1	Legal framework	Constitution of Kenya of 2010, the Election Act, No. 24 of 2011	The 1945 Constitution of the Republic of Indonesia, Law Number 8 of 2016 about Persons with Disabilities, and Law No. 7 of 2017 about General Elections
2	The availability of an affirmative	Available	Available

	action mechanism in the Constitution		
3	The nature of affirmative action in the Constitution	<p>Concrete and particularized: Article 54, paragraph 2: “The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.”</p> <p>Article 97, paragraph 1 c: “Twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers.”</p> <p>Article 98, paragraph 1 d: “Two members, being one man and one woman, representing persons with disabilities.</p> <p>Article 177, paragraph 1 c: “The number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament.”</p>	<p>General and abstract, distributed in several articles including Article 27, paragraph 1; Article 28, paragraph D 3; Article 28 E, paragraph 3; and Article 28 H, paragraph 2. Specifically for Article 28 H, paragraph 2: “Everyone has the right to get appropriate facilities and treatment to get the same opportunities and benefits in order to achieve equality and justice.”</p> <p>Article 28 I, paragraph 4: “Protecting, promoting, enforcing, and achieving the fulfilment of human rights are the responsibility of the state, especially the government.”</p>
4	Forms of affirmative action for persons with disabilities (political rights) Affirmative action description in law	<p>The allocation of special seats for PwD in the form of a certain minimum quota to be elected as members of the senate, the National Assembly, and the Count Assembly.</p> <p>Concrete and particularized: The Election Act, No. 24, of 2011 (revised 2016) Section 36, allocation of special seats (1) A party list submitted by a political party under— (a) Article 97, paragraph 1 c, of the Constitution shall include twelve candidates; (d) Article 98, paragraph 1 d, of the Constitution shall include two candidates; (f) Article (f) 177, paragraph 1 c, of the Constitution shall include eight candidates, at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be person representing a marginalized group.</p>	<p>No quota is allocated</p> <p>General and abstract</p>

Availability of an affirmative action mechanism	Available (a 5% quota for marginalized groups including persons with disabilities)	Not available
Involvement of Disability Organizations in Drafting Law on Political Rights of Persons with Disabilities	Participation by Disabled People's Organization (DPO)	Did not participate in the formation of Law No. 7 of 2017 about General Elections

Table 1 compares laws regarding the legal protection of the political rights of persons with disabilities to be elected as candidates for members of the House of Representatives in Kenya and Indonesia. It is apparent that there are differences in legal instruments as the effort to fulfil and advance the political rights of persons with disabilities. The government of Kenya has provided law and regulations that are responsive to protecting the political rights of persons with disabilities to reduce or eliminate obstacles for them in fulfilling their political rights to be elected as candidates for members of the House of Representatives. It can be said that the formulation of the Kenyan Constitution and the Election Act, No. 24 of 2011 (revised in 2016), ensures that law stands as a response to social provisions and public aspirations.

Nonet and Selznick's responsive law theory suggests that good law should provide more than just legal procedures. The law must be competent and fair in that it should recognize the public's wishes and have a commitment to achieving substantive justice (Nonet & Selznick, 2003). Responsive law makes law a means of responding to social provisions and public aspirations. This legal system puts forward accommodation to accept social changes to bring about justice and public participation. In other words, responsive law presumes that goals are set objectively and are powerful enough to manage adaptive rule-making (Nonet & Selznick, 2003).

Affirmative action in the form of allocation of special seats (a minimum quota of 5% for marginalized groups, including persons with disabilities) is a response to social, political, and legal provisions that hinder the political participation of persons with disabilities from being elected as candidates for members of the House of Representatives.

Meanwhile, the regulation of protecting the political rights of persons with disabilities to be elected as candidates for members of the House of Representatives, the Indonesian Law No. 7 of 2017 about General Elections, is not responsive to the fulfilment and advancement of the political rights of persons with disabilities. This particular law only provides regulation to honour human rights (of persons with disabilities). Whereas, according to Nowak, the state's obligation is not only honouring but also fulfilling human rights.

Honour is closely related to society's ethical behaviour. It is a manifestation of moral value because people believe that this behaviour is according to God's rules, according to their religion and beliefs (e.g., Islam, Catholicism, Christianity, Hinduism, Buddhism, and other religions) (Miharso, 2009). In relation to the political rights of persons with disabilities to be elected as candidates for legislative members, the Indonesian Law merely recognizes the equal political rights of persons with disabilities in general. The Indonesian Law on General Elections has not formulated how to protect and fulfil the political rights of persons with disabilities so that they are not neglected nor received discriminatory treatment.

The existence of the Indonesian Law No. 7 of 2017 about General Elections can be linked to the theory of legal objectives, according to Radbruch (Mertokusumo, 1996), who emphasizes three legal objectives:

- 1) Justice (*gerechtigheit*);
- 2) Expediency (*zweckmassigkeit*);
- 3) Legal certainty (*rechtssicherheit*).

Justice (*gerechtigheit*) refers to the existence of equal rights before the law. Expediency (*zweckmassigkeit*) points to the good in human life, and this determines the content of the law where it aims to achieve order and peace in social life (Tanya et al., 2010). Meanwhile, legal certainty (*rechtsicherheit*) refers to a guarantee that laws containing justice and norms that promote goodness are indeed functioning as rules that are obeyed. Legal certainty contains two definitions: 1) the existence of general rules which regulate "allowed and prohibited actions"; 2) legal security for individuals from government arbitrariness. Meanwhile, the expediency of law (*zweckmassigkeit*) is the achievement of order and peace in the community because of orderly law (Rahardjo, 1991). Thus, the formation of laws and regulations must accommodate the three objectives of law.

In realizing the three legal objectives discussed above, Radbruch emphasizes the importance of using the principle of priority (Pungus, 2010). According to the principle of priority scale, what must be realized first is justice, then followed by expediency, and finally the legal certainty. The law has an objective to be achieved: to distribute rights and obligations among the individuals in society. In the embodiment of rights, the measure that should be used is justice which can sacrifice both expediency and legal certainty.

The three legal objectives and priority principles, as emphasized by Radbruch (Mertokusumo, 1996), are not fulfilled in the formulation of the Indonesian Law No. 7 of 2017 about General Elections in Indonesia. This is because the law has not fulfilled and protected the political rights of persons with disabilities to be elected as candidates for members of the House of Representatives, in particular, affirmative action in the form of the allocation of special seats as already implemented in the Kenyan Constitution and Law about General Elections.

#### 4. Conclusion

Based on the comparisons of laws presented in this article concerning the legal protection of the political rights of persons with disabilities in the Constitutions and Laws about General Elections implemented in Kenya and Indonesia, it can be concluded that the Constitution of Kenya of 2010 and the Election Act, No. 24 of 2011 are more responsive to legal protection of the political rights of persons with disabilities to be members of the House of Representatives (e.g., becoming a candidate for members of the Senate, the National Assembly, and the County Assembly). Persons with disabilities are constructed as a vulnerable group. This is explained in the Kenyan Constitution and Law about General Elections, containing a number of affirmative action for vulnerable groups (including persons with disabilities) to realize their political rights. Through these affirmative actions, the political rights of persons with disabilities not only can be realized but also fulfil the legal objectives to uphold justice, also legal certainty and benefits.

In contrast, regulating the political rights of persons with disabilities in Indonesia as stipulated in the 1945 Constitution of the Republic of Indonesia has not been further implemented in the Indonesian Law No. 7 of 2017 concerning General Elections. The 2017 Indonesian General Election Law only recognizes the equal political rights of persons with disabilities in a general sense. Hence, according to this law, persons with disabilities are deemed to have an in-common similarity with other citizens who receive equal treatment in participating in democracy (political rights). Therefore, the Indonesian Law No. 7 of 2017 about General Election has not provided a solution to the problem of discriminatory treatment experienced by persons with disabilities to realize their political rights to be elected as candidates for members in the House of Representatives and the Regional House of Representatives in Indonesia.

#### 5. Recommendation

Based on the conclusions outlined previously, it is suggested that:

a. The Government (the President and the House of Representatives of the Republic of Indonesia) should form an assessment team to implement legal comparisons, particularly based on the comparisons with Kenya, and accommodate best legal norming practices that are responsive to legal protection for the fulfilment and enforcement of political rights of persons with disabilities.

b. Amend the Law of the Republic of Indonesia No. 7 of 2017 about General Elections and formulating provisions that construct persons with disabilities as a vulnerable group in the embodiment

of their political rights to be elected as candidates for the House of Representatives or Regional House of Representatives.

c. Formulate an affirmative action in the form of a minimum quota of 5% (allocation of special seats) for persons with disabilities that must be fulfilled by political parties when submitting a list of candidates for members of the House of Representatives and the Regional House of Representatives of the Republic of Indonesia (Province or Regency/City).

## References

- Asshiddiqie, J. (2005). *Hukum Tata Negara dan Pilar-Pilar Demokrasi: Serpihan Pemikiran Hukum, Media, dan HAM*. Jakarta: Konstitusi Press.
- Browne, I., & Misra, J. (2003). The intersection of gender and race in the labor market. *Annual Review of Sociology*, 29(1), 487–513.
- Coid, J. et al. (2006). Prevalence and Correlates of Personality Disorder in Great Britain. *British Journal of Psychiatry*, 188(5), 423–431.
- Füssel, H.M. (2007). Vulnerability: A Generally Applicable Conceptual Framework for Climate Change Research. *Global Environmental Change*, 17(2), 155–167.
- Gomes, F. C. (2003). *Manajemen Sumber Daya Manusia*. Yogyakarta: Penerbit Andi.
- Heyns, C., & Killander, M. (2009). The African Regional Human Rights System. *International Human Rights Law In A Global Context*, 55 (1), 855–898.
- Mahfud, M. (1999). *Hukum dan Pilar-Pilar Demokrasi di Indonesia*. Yogyakarta: Gama Media.
- Marzuki, P. (2005). *Penelitian Hukum*. Jakarta: Prenada Media.
- Mertokusumo, S. (1996). *Mengenal Hukum: Suatu Pengantar*. Yogyakarta: Penerbit Liberty.
- Miharso, V. (2009). *Perjuangan Hak-Hak Sipil di Amerika dan Implikasinya Bagi Indonesia: Membongkar Pemikiran Marthin Luther King Jr. dan Malcolm X*. Yogyakarta: Sekolah Pasca Sarjana UGM.
- Morrow, B. H. (1999). Identifying and Mapping Community Vulnerability. *Disasters*, 23(1), 1–18.
- Nonet, P. & Selznick, P. (2003). *Hukum Responsif: Pilihan di Masa Transisi*. Jakarta: Ford Foundation-HuMa.
- Nowak, M. (2003). *Pengantar Rezim Hak Asasi Manusia Internasional*. Jakarta: Kementerian Hukum dan HAM Indonesia.
- Palguna, I. D. G. (2013). *Pengaduan Konstitusional (Constitutional Complaint): Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*. Jakarta: Sinar Grafika.
- Pérez, D. J. et. al. (2008). Prevalence and Correlates of Everyday Discrimination Among U.S. Latinos. *Journal of Community Psychology*, 36(4), 421–433.
- Prince, M. J. (2001). Canadian Federalism and Disability Policy Making. *Canadian Journal of Political Science*, 34(4), 791–817.
- Rahardjo, S. (1991). *Ilmu Hukum*. Bandung: Citra Aditya Bakti.
- Rawls, J. (1971). *A Theory of Justice*. Cambridge: Harvard University Press.
- Remaja, I. N. G. (2016). *Pengaturan Perlindungan Hukum Pegawai Pemerintah Dengan Perjanjian Kerja Dalam Penyelenggaraan Pemerintahan Daerah*. Malang: Disertasi Fakultas Hukum Universitas Brawijaya.
- Russell, M. (2002). What Disability Civil Rights Cannot Do: Employment And Political Economy. *Disability & Society*, 17(2), 117–135.
- Sayuti, H. (2013). Hakikat Affirmative Action Dalam Hukum Indonesia (Ikhtiar Pemberdayaan yang Terpinggirkan). *Jurnal Ilmu Pengetahuan Dan Pengembangan Masyarakat Islam*, 12(1), 41–47.
- Shapiro, A. et al. (2000). *Everybody Belongs: Changing Negative Attitudes Toward Classmates With Disabilities*. London: Routledge.
- Smith, R. K. M. et al. (2008). *Hukum Hak Asasi Manusia*. Yogyakarta: Pusat Studi Hak Asasi Manusia Universitas Islam Indonesia.
- Smith, S. R. (2013). Citizenship and Disability: Incommensurable Lives and Well-being. *Critical Review of International Social and Political Philosophy*, 16(3), 403–420.
- Tanya, B. et al. (2010). *Teori Hukum: Strategi Tertib Manusia Lintas Ruang dan Generasi*. Yogyakarta: Genta Publishing.
- Valentina, T. R., & Rusta, A. (2010). Affirmative Action Untuk Demokrasi yang Berkeadilan Gender Pada Pemilu Tahun 2009. *Jurnal Demokrasi*, 9(1), 93–110.