

Constitutional Court Decision to Protect the Rights of Women and Children in Improving Justice and Legal Certainty

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Abstract

This paper aims to analyze how the Constitutional Court protects human rights, especially the rights of women and children. Through one of the powers of the Constitutional Court is to conduct a judicial review of the Constitution. The authority of the Constitutional Court is a push for the realization of the constitutionality of the law in order to protect human rights for everyone, including women and child right. The purpose is to analyze the extent to which the Constitutional Court performs its function as the guardian of the Constitution. The research uses statute approach, the comparative approach, the conceptual approach, and the historical approach, based on four judicial review cases: Constitutional Court Decision No.20/PUU-XI/2013 concerning Judicial Review No. 10 of 2008 of General Elections, Constitutional Court Decision No.46/PUU-VIII/2010 concerning Judicial Review Number 1 of 1974 on Marriage, Constitutional Court Decision No.22/PUU-XV/2017 concerning Judicial Review Number 1 of 1974 on Marriage, and Constitutional Court Decision No.24/PUU-XX/2022 concerning Judicial Review Number 1 of 1974 on Marriage. The results of the review demonstrate that: (1) there is an imbalance in legal products that harm women and children; and (2) the Constitutional Court has a mechanism to correct inequality in legal products through a judicial review mechanism. This paper finds that the Constitutional Court plays a significant role in safeguarding women's rights in law through judicial mechanisms. Moreover, this article provides an academic-based assessment of the Constitutional Court's decisions to provide optimal protection for the fulfilment of the rights of women and children.

1. Introduction

The Constitution is the highest basic law that binds all citizens. Therefore, all legal products must refer to and must not contradict the Constitution, for this reason, Indonesia's national legal politics must also be based on the Constitution. The presence of the Constitution in a country is a necessity because in the Constitution there are also restrictions on the power of government on the one hand and guarantees of the rights of citizens and residents on the other. These rights include basic rights, such as the right to life, property, welfare (health) and freedom. This shows that the constitutional nature is the limitation of governmental power and guarantee of protection of human rights. Limitation of power from the government aims to prevent centralization as well as abuse of power that adversely affect the government and society. While guaranteeing the protection of human rights is a characteristic of the problem that cannot be ignored in the administration of government, because it is a mandate of the Constitution, even this guarantee is practised by most of the countries in the world. According to Jimly Asshiddiqie the Indonesian Constitution does not only contain legal principles but also contains statements about beliefs, principles and ideals which were previously debated by the founding fathers when forming the 1945 Constitution.¹

The Constitutional Court in Indonesia set the goal of guarding the supremacy of the 1945 Constitution as a legal basis (*rechtstidee*) and the highest law (*de hoogste wet*) in Indonesia. One of the powers of the Constitutional Court is to conduct a judicial review of the Constitution. The authority of the Constitutional Court is a push for the realization of the constitutionality of the law. Through these regulations, the relevant parties are disadvantaged by the provisions of the laws and regulations which receive their violated constitutional rights. Despite of the existence of the Constitutional Court's authority, the laws made by the Parliament and the Government that oppose the rules of the Constitution and discuss the constitutional rights of the people will continue to emerge. Thus, legal products will only be a showcase of invitations that will not be able to achieve the legal goals themselves.

The number of laws requested by the Constitutional Court to show first, awareness of the public in the Constitution is increasing; second, overly dominant political interests in the formulation and formation of laws; third, the inability of the DPR and the Government to translate the mandate of the Constitution. Trust enhances compliance with the law, including the decisions and others of the court.² Trust is efficient, promoting self-regulation, whereby people comply with the law voluntarily, rather than through coercion, surveillance and intervention.³ One of the contents of the Constitution is the guarantee and protection of human rights. Regulated in a

¹ Jimly Asshiddiqie, *Gagasan Kedaulatan Rakyat Dalam Konstitusi Dan Pelaksanaannya Di Indonesia*, Cetakan 1 (Jakarta: Ihtiar Baru Van Hoeve, 1994), p. 60.

² Katie Miller, "Intellectual Humility: A Necessary Precondition to Building Trust in Courts," *International Journal for Court Administration*, 12.3 (2021), 1–14 (p. 2) <<https://doi.org/10.36745/ijca.419>>.

³ Miller, p. 3.

separate chapter in the constitution, namely chapter XA on human rights. for example in Article 28I paragraph (4) of the 1945 Constitution which reads, "the protection, promotion, enforcement, and fulfillment of human rights are the responsibility of the state, especially the government." Based on Article 1 point 1 of Law Number 39 of 1999 concerning Human Rights, human rights are a set of rights inherent in the nature and existence of every human being as a creature of God Almighty and is a gift that must be respected upheld and protected by the State Law Government and everyone, for the sake of honour and protection of human dignity.

Based on this understanding shows that human rights must be protected by anyone. Human rights are also owned by women and children. The relationship between the constitution and human rights can also be seen from historical developments. The struggle for the protection of

Human rights is always associated with the development of efforts to limit and regulate power which constitutes the teachings of constitutionalism. For this reason, this paper aims to analyze how the Constitutional Court protects human rights, especially the rights of women and children through one of the powers of the Constitutional Court in reviewing laws. Based on this background, the objectives of this paper are to examine the following questions: (1) What is the protection of the rights of women and children through the Constitutional Court's decision? (2) What are the implications of the Constitutional Court's decision on the protection of the rights of women and children?

2. Methodology

The research uses statute approach, the comparative approach, the conceptual approach, and the historical approach. Therefore, the analytical technique used in this research is qualitative analysis with descriptive analysis.⁴ The descriptive qualitative analysis used in this paper provides the consideration that not only is intended to reveal or describe the data collected as it is, but the primary legal material, secondary legal material, and study material documents or literature that will be checked and checked again by using triangulation techniques to find the midpoint and accuracy of opinions from various views to produce a conclusion.⁵ The method of presenting legal material in this study will be presented in the form of narrative texts that are arranged systematically, logically, and rationally. All existing data will be linked to one another in accordance with the subject matter studied. The analysis method used in processing the collected data using deductive logic through qualitative normative analysis methods. This normative analysis method is a way of interpreting and discussing research materials based on legal understanding, legal norms, legal theories, and doctrines that have a relationship with the subject matter.

⁴ Okky Cahyo Nugroho, 'Peran Balai Pemasarakatan Pada Sistem Peradilan Pidana Anak Ditinjau Dalam Perspektif Hak Asasi Manusia', *Jurnal HAM*, 8.2 (2017), 161–74 <<https://doi.org/10.30641/ham.2017.8.161-174>>.

⁵ Aidul Fitriciada Azhari, "Negara Hukum Indonesia: Dekolonisasi Dan Rekonstruksi Tradisi," *Ius Quia Iustum*, 19.4 (2012), 489–505 <<https://doi.org/10.20885/iustum.vol19.iss4.art1>>.

3. Results and Discussion

3.1 Protection of The Rights of Women and Children Through The Decision of The Constitutional Court

One of the changes in the 1945 Constitution which has the most provisions is related to human rights which are therefore constitutional rights. These rights include groups of rights commonly referred to as civil rights, political rights, economic rights, social rights, cultural rights, and even individual rights and collective rights of the community. The existence of guarantees of human rights in the Constitution makes the state constitutionally obligated to protect, respect and advance these rights. The authority of the Constitutional Court examines the law can be seen as an effort to protect the human rights and constitutional rights of citizens guaranteed by the 1945 Constitution so as not to be violated by the provisions of the law. If the provisions of the law violate the constitutional rights of citizens, then it can be ensured that the actions of state or government administrators carried out under these provisions will also violate the constitutional rights of citizens. Therefore, the authority of the test at the same time prevents that there are no acts of state and government administrators who violate the constitutional rights of citizens. The Constitutional Court also has the authority to decide upon the dissolution of political parties which is intended so that the government cannot arbitrarily dissolve political parties that violate the right to associate which is closely related to the right to freedom of conscience and freedom of expression guaranteed in the 1945 Constitution.

The Constitutional Court as an institution that has the authority to pass judicial review is an entry point to protect human rights, especially the rights of women and children. There are several decisions of the Constitutional Court relating to the rights of women and children, namely: (1) Decision of the Constitutional Court No.20 / PUU-XI / 2013 concerning Judicial Review No. 10 of 2008 concerning General Elections; (2) Constitutional Court Decision No. 46 / PUU-VIII / 2010 concerning Judicial Review No. 1 of 1974 concerning Marriage; (3) Constitutional Court Decision No. 22 / PUU-XV / 2017 concerning Judicial Review Number 1 of 1974 concerning Marriage; (4) Constitutional Court Decision No. 24 / PUU-XX / 2017 concerning Judicial Review Number 1 of 1974 concerning Marriage

3.1.1 Decision of The Constitutional Court No.20 / PUU-XI / 2013 Concerning Judicial Review No. 10 of 2008 Concerning General Elections

The decision of the Constitutional Court Number 20 / PUU-XI / 2013 is a constitutional review of Article 215 letter (b) and Elucidation of Article 56 paragraph (2) of Law Number 8 of 2012 concerning Elections. This decision began with a request from a non-governmental organization engaged in women's political empowerment. The basis of this petition is Law Number 8 of 2012 which is considered still discriminatory against women who are running for office. The Constitutional Court later in its decision granted the petitioners' petition in full because the articles being petitioned were considered unconstitutional and contradictory to Article 28H paragraph (2) of the 1945 Constitution states that everyone has the right to facilities

and special treatment to obtain equal opportunities and benefits in order to achieve equality and justice. The impact of Constitutional Court Decision Number 20/PUU-XI/2013 is a guarantee of legal certainty for special actions to increase the number of women's representation in parliament.

According to Ani Purwanti, there are a number of recommendations related to the implementation of the Constitutional Court Decision Number 20 / PUU-XI / 2013, namely: first, a General Election system model needs to be applied that is more able to accommodate the electability of women in parliament, especially in the Central Java Provincial House of Representative; Second, provide opportunities for Candidates for Members of the Central Java Province House of Representative who are women to be placed in the serial number of the potential elected; and third, the need for commitment to political parties as a main pillar in democracy to provide adequate political education to women cadres. Thus, the cadres of political parties who come from women are not only fulfilling the quota of women nominations determined by legislation.⁶

The existence of the Constitutional Court's decision is certainly related to political rights for women, even though there are no issues relating to women's political rights in Indonesia. The Constitutional Court's decision is related to affirmative action which gives opportunities to women for the realization of gender equality in the same role between men and women. The Constitutional Court's decision indirectly strengthens women's rights, especially related to political rights, although, at the level of implementation, there are still many obstacles related to the implementation of political rights for these women. The Constitutional Court's decision is also not a gift but must continue to be fought for because of the results of the 2019 Election alone political representation reached 20.52% for The House of Representative Republic Indonesia. Throughout history, the representation of women is the most compared to the election results that have ever existed in Indonesia.

According to Nur Asikin Thalib based on several existing legal instruments Indonesian women have a strong legal foundation for their rights involved in politics and formal political institutions similar to men. Unfortunately at the implementation level, there are still many limitations and constraints due to cultural values that live in the community, as well as technical obstacles in the field, the low level of education, and women's empowerment in political education are also not optimal. Besides that women who will enter politics must prepare themselves to be able to compete with men, for women must be active in the management of political parties, and equip themselves by fulfilling their capacities, competencies and as political citizens while remaining in the corridors of teak perfection female self. Besides that, political will from various related parties is needed, including binding legal rules including the General Election Commission (KPU) which is expected to issue regulations to accommodate the spirit of affirmative action. The Constitutional Court's decision to determine the vote acquisition of legislative candidates according to the principle of

⁶ Ani Purwanti, "Implementasi Putusan Mahkamah Konstitusi Nomor 20/PUU-XI/2013 Pada Penetapan Calon Legislatif Perempuan Di Provinsi Jawa Tengah," *Jurnal Konstitusi*, 14.4 (2017), 859–79 <<https://doi.org/10.31078/jk1448>>.

"most votes" has disrupted all women's political efforts in fighting for women's political rights of 30% quota (affirmative action). It is expected that with the decision will be "Whip" for women activists to continue to fight for the political rights of women who have been experiencing discrimination.⁷

3.1.2 Constitutional Court Decision No. 46 / PUU-VIII / 2010 Concerning Judicial Review No. 1 of 1974 Concerning Marriage

The Court ruled that Article 43 paragraph (1) of Law no. 1 of 1974 concerning Marriage contrary to the 1945 Constitution: Children born outside of marriage only have a civil relationship with their mother and mother's family and with men as fathers who can be proven based on science and technology and/or other evidence according to the law has blood relations, including civil relations with his father's family. Constitutional Court Decision No. 46 / PUU-VIII / 2010 does not mention the birth certificate of out-of-marriage children or the legal consequences of the ruling on birth certificates of out-of-marriage children. The implication of this Constitutional Court ruling is related to the legal status and proof of the origin of children outside marriage. The relationship with the birth certificate is because proof of the origin of the child can only be done with an authentic birth certificate issued by an authorized official by what is stipulated in Article 55 paragraph (1) of the Marriage Law. Regarding the legal consequences of the issuance of a birth certificate to a child out of wedlock in the child's birth certificate the mother's name is only listed. Because at the time of making a birth certificate, the status of the child is still an out-of-wedlock who is only recognized as having blood relations and civil relations with his mother and his mother's family.

The purpose of the Constitutional Court is to emphasize that even children outside of marriage are entitled to legal protection. According to the Constitutional Court's consideration, the law must provide fair legal protection and certainty for the status of a child born and the rights that it has, including for children born even though the validity of the marriage is still disputed. It should be noted that the Constitutional Court's consideration changed in contrast to the previous decision. Some of the most prominent opinions include the age limit of 16 years is a discriminatory legal policy on the pretext of gender. Besides that, it is seen as not in line with Law No. 23 of 2002 concerning Child Protection (Child Protection Act) because it is lower than the age limit for children which is 18 years. The peak, age limit is considered not by Law No.7 of 1984 concerning Ratification of the Convention Regarding All Forms of Discrimination Against Women (CEDAW Ratification Law) which has recommended every country raise and equalize the minimum age of marriage between men and women. This certainly raises questions about the implications that emerge as a result of the ruling.

In this Constitutional Court ruling, there is a concurring opinion of constitutional judge Maria Farida, including the following: Marriage that is not based

⁷ Nur Asikin Thalib, "Hak Politik Perempuan Pasca Putusan Mahkamah Konstitusi (Uji Materiil Pasal 214 Undang-Undang Nomor 10 Tahun 2008)," *Jurnal Cita Hukum*, 2.2 (2014), 233–48 <<https://doi.org/10.15408/jch.v1i2.1466>>.

on Law 1/1974 also has the potential to harm children born from such marriage. Potential losses for children who are primarily not recognizing the child's relationship with his biological father (biological father), which of course resulted in the imposition of his biological father's obligations to finance the needs of children's lives and other civil rights. In addition, in a society that is still trying to maintain the wisdom of traditional values, the understanding of family always refers to the understanding of the *batih* family or elementary family, which is a family consisting of fathers, mothers, and children (children). The presence of children in families who do not have complete elements of the *batih* family or do not have recognition from their biological father will give a negative stigma, for example, as illegitimate children. This stigma is a potential loss for children, especially social-psychological losses, which can be prevented by continuing to recognize the child's relationship with his biological father.

From the perspective of the legislation, the differentiation of the treatment of children due to certain causes which are not caused by the child's actions concerned can be categorized as discriminatory actions. The potential loss is confirmed by the provisions of Article 43 paragraph (1) of Law 1/1974 which states, "Children born outside of marriage only have a civil relationship with their mother and mother's family". The existence of Article a quo closes the possibility for children to have a civil relationship with their biological father. This is a risk of unregistered marriages or marriages that are not carried out according to Law 1/1974, but it is not appropriate if the child has to share in the losses incurred by the actions (marriages) of both parents.

If it is considered as a sanction, the state law and religious law (in this case Islam) do not recognize the concept of the child must bear the sanctions resulting from the actions committed by both parents or what is known as "hereditary sin". In other words, the potential losses due to marriages that are carried out not by Law 1/1974 constitute a risk for men and women who carry out marriages, but not risks that must be borne by children born in such marriages. Thus, in my opinion, the fulfilment of the rights of children born from a marriage, regardless of whether the marriage is valid or not according to state law, remains an obligation of both biological parents or biological parent.⁸

3.1.3 Constitutional Court Decision No. 22 / PUU-XV / 2017 Concerning Judicial Review Number 1 of 1974 Concerning Marriage

In this decision, the Constitutional Court stated Article 7 paragraph (1) along the phrase "age 16 (sixteen) years" Law Number 1 of 1974 concerning Marriage (State Gazette of the Republic of Indonesia of 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) contradicts with the 1945 Constitution of the Republic of Indonesia and does not have binding legal force. The provisions of Article 7 paragraph (1) along the phrase "age 16 (sixteen) years" of Law

⁸ Mahkamah Konstitusi Republik Indonesia, *Constitutional Court Decision No. 46/PUU-VIII/2010 Concerning Review of Law Number 1 of 1974 Concerning Marriage*, 2012, pp. 1–45 (pp. 43–44) <https://www.mkri.id/public/content/persidangan/putusan/putusan_sidang_46_PUU_2010-TELAH_BACA.pdf>.

Number 1 of 1974 concerning Marriage (State Gazette of the Republic of Indonesia of 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) still applies until Amendments are made according to the grace period as determined in this decision. The Court granted the legislators a maximum period of 3 (three) years to amend Law Number 1 of 1974 concerning Marriage (State Gazette of the Republic of Indonesia of 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019), specifically about the minimum age of marriage for women.

According to the Constitutional Court that differences in the age limit of marriage between men and women lead to discrimination based on sex or gender which results in not fulfilling the rights of girls as part of the human rights guaranteed by the Constitution. Therefore, the argument of the petition is legal according to some. Even though the petition argued that it was based on law, the Court could not necessarily (automatically) declare (decide) Article 7 paragraph (1) of the Marriage Law along the conditional unconstitutional "age 16" phrase as long as it is not read "age 19 years" as the petition. It means the Court cannot grant the wishes of the Petitioners who ask for a minimum age limit for marriages of men and women to be equal to 19 years because this is the authority of the legislators (positive legislator).

3.1.4 Constitutional Court Decision No. 24 / PUU-XX / 2022 Concerning Judicial Review Number 1 of 1974 Concerning Marriage

The decision of the Constitutional Court No. 24/PUU-XX/2022 examines the provisions of Article 2 paragraphs (1) and (2) and Article 8 letter f of the Marriage Law. Article 2 paragraph (1) of the Marriage Law (Statute Book of the Republic of Indonesia of 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) states that marriage is valid if it is carried out according to the laws of each religion and belief. In paragraph (2) it is stated that each marriage is recorded according to the applicable regulations. Article 8 (f) of the Marriage Law states that marriage is prohibited between two people who have a relationship that by their religion or other applicable regulations, marriage is prohibited. In this case, the applicant named E. Ramos Petege is an Indonesian citizen who converts to Catholicism and wants to enter into a marriage with a woman who converts to Islam. However, due to the prevailing laws and regulations, especially in the Marriage Law, it is impossible for both of them to have an interfaith marriage so in the end the marriage must be annulled. The petitioner considers that article a quo has reduced and mixed up the meaning of marriage and freedom of religion and the arbitrariness of the state interfering with the forum of citizen internum through the authority to determine the validity of marriage administratively only from the religious commonality of married couples. Thus, the petitioner considers that the validity of marriage stipulated in the provisions of Article 2 paragraphs (1) and (2) and Article 8 letter f of the Marriage Law is contrary to the principle of freedom and freedom of religion guaranteed in the provisions of Article 29 paragraphs (1) and (2) of the 1945 Constitution, and is unable to provide legal certainty to the public so that it is contrary to Article 28D paragraph (1) of the 1945 Constitution.

The Panel of Judges in its consideration explained that regarding the existence of the state in regulating marriage, the Constitutional Court in Constitutional Court Decision No. 56/PUU-XV/2017 pronounced in a plenary session open to the public on July 23, 2018, explained that about religion is divided into two. First, religion in the sense of believing in a particular religion which is the realm of the *internum forum* that cannot be limited by coercion cannot even be tried. Second, religion in the sense of religious expression through statements and attitudes according to conscience in public which is the realm of *forum externum*.⁹ Marriage is part of a form of worship as a religious expression so marriage is categorized as an *externum forum* where the state can intervene as well in managing zakat and managing hajj. The role of the state is not intended to limit one's beliefs but rather intended so that religious expression does not deviate from the points of religious teachings professed.¹⁰

According to the panel of judges, the provisions of Article 2 paragraph (1) of the Marriage Law provide a corridor for the implementation of marriage that for the marriage to be valid, the marriage is carried out according to the laws of each religion and belief so that the enactment of Article 2 paragraph (1) of the Marriage Law does not mean that it hinders or hinders everyone's freedom to choose their religion and beliefs. The choice to embrace their religion and beliefs remains the right of each person to choose, adhere to, and believe in them as guaranteed by Article 29 paragraph (2) of the 1945 Constitution.

Additionally, the panel of judges considered that with the provisions of Article 2 paragraph (2) of the Marriage Law which regulates the registration of marriage, it shows that the state has played a role and functions to provide guarantees for the protection, promotion, enforcement, and fulfilment of human rights which are the responsibility of the state and must be carried out by the principles of the state of law regulated and stated in the laws and regulations guaranteed in Article 28I paragraph (4) and paragraph (5) of the 1945 Constitution.¹¹ Thus, the panel of judges rejected the petitioner's application in its entirety because Article 2 paragraphs (1) and (2) and Article 8 of the Marriage Law did not conflict with the principle of guaranteeing the right to embrace religion and worship according to his religion and beliefs, equal standing in law and government, the right to live and be free from discriminatory treatment, the right to form a family and continue offspring, the right to fair recognition, guarantees, protection, and legal certainty and equal treatment before the law as guaranteed in the 1945 Constitution.

⁹ Mahkamah Konstitusi Republik Indonesia, *Constitutional Court Decision No. 56/PUU-XV/2017 Concerning Review of Law Number 1/PNPS/1965 Concerning Prevention of Misuse and/or Blasphemy of Religion in Conjunction with Law Number 5 of 1969 Concerning Statements of Various Presidential Decrees and Pr*, 2018, pp. 1–542 (p. 532) <https://www.mkri.id/public/content/persidangan/putusan/56_PUU-XV_2017.pdf>.

¹⁰ Mahkamah Konstitusi Republik Indonesia, *Constitutional Court Decision No. 24/PUU-XX/2022 Concerning Interfaith Marriage*, 2023, pp. 1–644 (p. 627) <https://www.mkri.id/public/content/persidangan/putusan/putusan_mkri_8844_1675141891.pdf>.

¹¹ Mahkamah Konstitusi Republik Indonesia, *Constitutional Court Decision No. 46/PUU-VIII/2010 Concerning Review of Law Number 1 of 1974 Concerning Marriage*, n. Legal considerations in paragraph [3.12] of Constitutional Court Decision Number 46/PUU-VIII/2010.

3.2 Implications of The Constitutional Court's Ruling on The Protection of The Rights of Women and Children

The decision of the Constitutional Court Number 20 / PUU-XI / 2013 is a constitutional review of Article 215 letter (b) and Elucidation of Article 56 paragraph (2) of Law Number 8 of 2012 concerning Elections has implications on political rights of women, even though there is no problem relating to women's political rights in Indonesia. Women's right are part of fundamental humans right that are recognized in international human rights treaties. The Constitutional Court's decision is related to affirmative action which gives opportunities to women for the realization of gender equality in the same role between men and women. The Constitutional Court's decision indirectly strengthens women's rights, especially related to political rights, although, at the level of implementation, there are still many other obstacles related to the implementation of political rights for these women.

In contrast to Nigeria, although women represent about half of Nigeria's population, they occupy less than 10 percent of seats in politics.¹² This affects their capacity to influence domestication instruments that protect their rights. The main reason is the patriarchy that prevails in most Nigerian communities even though the country has acceded to international human rights treaties that promote gender equality. Gender inequality permeates every level of Nigerian society, including political sphere.¹³ Despite the fact that Nigeria's constitution guarantees every citizen the right to participate in politics. Similarly, Nigeria's constitution recognizes the right of women to vote and be elected as members of parliament as enshrined in Article 77 and Article 106 of the 1999 Constitution.¹⁴ In addition to these constitutional provisions, Nigeria's National Gender Policy aims to increase the number of women in political office, party organs, and public life by setting a goal of 35 percent affirmative action in favor of women in all elected and appointed positions by 2015. However, it is clear that women in Nigeria have not benefited from this provision as few hold political office. Such male domination significantly hinders the protection and promotion of women's rights.¹⁵

According to decision of the Constitutional Court No. 46 / PUU-VIII / 2010, the relationship between an out-of-wedlock child and his father is a blood relationship in the biological sense that is confirmed based on a legal process. The uncertainty of children's constitutional rights and the ambiguous definition of a child outside

¹² Godiya Allanana Makama, "Patriarchy and Gender Inequality in Nigeria: The Way Forward," *European Scientific Journal, ESJ*, 9.17 (2013), 115–44 (p. 116) <<https://doi.org/10.19044/esj.2013.v9n17p%p>>.

¹³ Bolanle Oluwakemi Eniola, "Gender Parity in Parliament: A Panacea for the Promotion and Protection of Women's Rights in Nigeria," *Frontiers in Sociology*, 3.December (2018), 1–7 (p. 1) <<https://doi.org/10.3389/fsoc.2018.00034>>.

¹⁴ Eniola, p. 6.

¹⁵ Eniola, p. 6.

marriage has decreased legal protection and assurance for biological children.¹⁶ The Constitutional Court's ruling opens the possibility of law for the discovery of legal subjects who must be responsible for extramarital children to act as their fathers through legal mechanisms using evidence based on the latest science and technology and/or law. This shows that there are two ways in which an extramarital child may have blood relations and also a civil relationship with his biological father and his father's family, namely: (a) recognition by the biological father; or (b) endorsement by the biological father of the extramarital child.

The Constitutional Court's verdict only reinforces the position of the mother of the child outside marriage in requesting recognition of the biological father of the child outside marriage, if the father does not want to voluntarily acknowledge the child outside marriage. With the recognition of a child outside of marriage by his biological father, then that's when civil relations arise with the biological father and his father's family. Thus, after the process of recognition of the child outside of marriage, the child outside of marriage is born with a civil relationship between the child and his father as stipulated in Article 280 of the Civil Code ("KUHPer") which reads: With the recognition of children outside marriage, civil relations are born between the child and the father or mother. In this case, it is important to note that children born due to adultery or blood staining (incest, incest) should not be recognized. This is regulated in Article 283 of the Indonesian Criminal Code.

The Constitutional Court Decision Number 46 / PUU-VIII / 2010 states that Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage which reads "Children born out of wedlock only have a civil relationship with their mother and mother's family" contrary to the 1945 Constitution and does not have binding legal force as long as it means to eliminate civil relations with men which can be proven based on science and technology and/or other evidence according to the law turns out to have blood relations as their father. The verse must be read, "Children born outside marriage has a civil relationship with his mother and his mother's family and with a man as his father which can be proven based on science and technology and/or other evidence according to the law have blood relations, including civil relations with his father's family ". When analyzed, the legal logic of this ruling has the consequence of a relationship between a married child and his biological father; there are rights and obligations between out-of-wedlock children and biological fathers, both in the form of living, inheritance, and so forth. This certainly applies if first proofs are made through science and technology such as DNA testing and others which state that it is true that the child out of wedlock has a blood relationship with a man as his biological father.

For example, inheritance rights for children outside of marriage after the Constitutional Court Decision Number 46/PUU-VIII/2010: in the case of inheritance after the court ruling, the position of a child outside of marriage as intended by the Constitutional Court decision outside the married is not the same child with the

¹⁶ Rohmawati Rohmawati and Ahmad Rofiq, "Legal Reasonings of Religious Court Judges in Deciding the Origin of Children: A Study on the Protection of Biological Children's Civil Rights," *Ijtihad : Jurnal Wacana Hukum Islam Dan Kemanusiaan*, 21.1 (2021), 1–20 (pp. 4–5) <<https://doi.org/10.18326/ijtihad.v21i1.1-20>>.

bastard, has been gaining street or space to get recognition for the sake of protection of the rights of the child outside the marriage.¹⁷ Then the equation outside child married mate and children through legitimate rights and equal protection, the only difference being how they have the same rights and protection.¹⁸ ¹⁹In the case of the Constitutional Court Decision Number 46/PUU-VIII/2010 children outside marriage, deserved to be recognized by the biological father and are also entitled to inheritance equal to the other children. In the latest developments with changes to the Marriage Law, namely with the promulgation of Law No. 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage but does not accommodate the decision of the Constitutional Court Decision Number 46 / PUU-VIII / 2010. This is certainly unfortunate why lawmakers ignore the Constitutional Court's ruling.

The decision of the Constitutional Court No. 22/PUU-XV/2017 concerning the Testing of Law No. 1 of 1974 concerning Marriage has implications for the establishment of a minimum age limit for carrying out marriage. The establishment of this minimum age limit related to health problems is also an effort to provide legal protection related to the right to education. Everyone has the right to receive education, according to Article 31 paragraph (1) of the 1945 Constitution. The implementation of the right to receive education for this child is then stated in the compulsory education program regulated in Article 7 of Law 20/2003. The compulsory education program is currently 12 (twelve) years old and is now implemented by the government based on Article 2 letter of the Regulation of the Minister of Education and Culture No. 19 of 2016 concerning the Smart Indonesia Program. This means that there are several important things related to the rights of the child, in this case, related to the minimum age that a person is allowed to marry.

Additionally, there are concerns by the fact that this Constitutional Court ruling is an open legal policy for lawmakers. Thus in Indonesia, the right of children have been legally protected by official law and regulation, but facts show that some peoples or groups of people raise issues that these laws could not be properly implemented due to the current development.²⁰ This Constitutional Court decision has been followed up with the passage of Law No. 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage. But the change in the law, there has been an increase in the number of applications for dispensation of marital age in religious courts. The reason is, the age of marriage for women who were previously 16 years old became 19 years.²¹

¹⁷ Sulaiman Sulaiman, "Status Effect on Children Outside Married Status after Constitutional Religious Court Decision," *Jurnal Akta*, 8.2 (2021), 93--99 (p. 96) <<https://doi.org/10.30659/akta.v8i2.7924>>.

¹⁸ Sulaiman, p. 96.

¹⁹ Bagus Hermanto and I Gede Yusa, "The Ruling of the Constitutional Court of the Republic of Indonesia concerning Children Age Limit and Its Rights," *Kertha Patrika*, 40.2 (2018), 61--70 (p. 63) <<https://doi.org/10.24843/KP.2018.v40.i02.p01>>.

²⁰ Hermanto and Yusa, p. 63.

²¹ Hidayatun Ulfa and others, "The Enforcement of Marriage Law (No 16 of 2019) Through The Ambassadors of Child Marriage Prevention in Tembarak District, Temanggung Regency," *Pena Justisia*, 22.1 (2023), 309--25 (p. 317) <<https://doi.org/http://dx.doi.org/10.31941/pj.v22i1.2972>>.

Similarly, India has a law that expressly prohibits child marriage, where women are under 18 and men are under 21.²² Then there is the Prohibition of Child Marriage (Amendment) Bill, 2021, which was submitted to the legislature on December 20, 2021 which proposes to amend the Prohibition of Child Marriage Act, 2006, increasing the marriage age for women from 18 to 21 years old which applies to all individuals, regardless of religion. This is motivated by several things, such as medical reasons, employment, the right to equality, higher education, and so on.²³

Constitutional Court Decision No. 24/PUU-XX/2022 rejected the application for a material test of Article 2 paragraphs (1) and (2) and Article 8 letter f of the Marriage Law. The application for the material test conducted by E. Ramos Petege is the second time, because previously Damian Agata Yuvens, Rangga Sujud Widigda, Anbar Jayadi, and Luthfi Sahputra had applied for a material test against the provisions of the same article and decided in Constitutional Court Decision No. 68/PUU-XII/2014 so that the issue of interfaith marriage remains a complex social and legal issue.

The National Commission on Violence Against Women (Komnas Perempuan) considers that the judge's decision in Constitutional Court Decision No. 24/PUU-XX/2022 ignores the reality of interfaith marriage in Indonesia and the legal smuggling carried out so that marriages can be registered. The assumption that interfaith marriage does not give birth to the purpose of marriage and to cite the statements of one group by ignoring the views of other groups is an unconscionable attitude.²⁴ Women experience greater stigma than men when performing interfaith marriages. They will be considered adulterous, women as children will be evicted from their homes, and vulnerable to family violence such as forcibly separating women from their spouses/husbands and children, as psychic, and economic violence. Thus, unregistered marriages will have implications for various social problems for the children born too.

Violence against women is a sociocultural event that effect public health.²⁵ Women are in a subordinate position both socially and religiously, giving rise to discriminatory interpretations and becoming the cause of the birth of the problem of

²² Priyanka Ghai, "The Prohibition of Child Marriage (Amendment) Bill, 2021: An Analytical Perspective," *Russian Law Journal*, 11.2 (2023), 176–86 (p. 177) <<https://www.russianlawjournal.org/index.php/journal/article/view/573>>.

²³ Ghai, pp. 179–81.

²⁴ "Siaran Pers Komnas Perempuan Terkait Putusan MK Nomor 24/PUU-XX/2022: Pertimbangan Mahkamah Konstitusi Potensial Memperkuat Diskriminasi Dan Kekerasan Terhadap Perempuan Yang Menikah Beda Agama," *Komisi Nasional Anti Kekerasan Terhadap Perempuan*, 2023 <<https://komnasperempuan.go.id/siaran-pers-detail/siaran-pers-komnas-perempuan-terkait-putusan-mk-nomor-24-puu-xx-2022-pertimbangan-mahkamah-konstitusi-potensial-memperkuat-diskriminasi-dan-kekerasan-terhadap-perempuan-yang-menikah-beda-agama>> [accessed 7 March 2023].

²⁵ Dinair Ferreira Machado and others, "Violência Contra a Mulher: O Que Acontece Quando a Delegacia de Defesa Da Mulher Está Fechada?," *Ciência & Saúde Coletiva*, 25.2 (2020), 483–94 (p. 484) <<https://doi.org/10.1590/1413-81232020252.14092018>>.

violence against women.²⁶ Inequality and discrimination remain two major impediments to the enjoyment of the human rights of women.²⁷ Especially when there is institutional racism that upholds the dominant paradigm and can reinforce other factors including race, ethnicity, social class, patriarchy, religion, immigration status, and linguistic diversity that all intersect leading to increased vulnerability and oppression.²⁸

If doing a comparison with other countries, in recent years, the Colombian Constitutional Court, which has created under the Colombian Constitution of 1991 to mark a period of transition to a democratic under in which fundamental rights are protected, has been demonstrating increasing receptiveness to vindicating women's rights.²⁹ Indeed, it has been consolidating its position as a leading domestic court in the development of constitutional jurisprudence that promotes gender equality in ways that align with modern conceptions of women's international human rights, including conceptions inspired by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).³⁰ In Bangladesh committed to realizing human rights instruments guaranteeing women's access to justice and to further this obligation, the Constitution of Bangladesh guarantees equality before the law and entrenches affirmative provisions recognizing the right to remedy any violation of fundamental rights.³¹

However, the underprivileged women of the country are subjected to systematic as well as systemic denials of the right to access justice due to numerous legal, institutional, social, and economic challenges, such as inadequate legal protection, lack of legal literacy and awareness, societal shaming, costly litigation processes and so on.³² The Supreme Court of Bangladesh has taken a step to facilitate women's rights to access justice through gender-based public interest litigation and seeks to identify the factors driving this judicial approach and the challenges it faces.³³

Conclusions

²⁶ "Siaran Pers Komnas Perempuan Terkait Putusan MK Nomor 24/PUU-XX/2022: Pertimbangan Mahkamah Konstitusi Potensial Memperkuat Diskriminasi Dan Kekerasan Terhadap Perempuan Yang Menikah Beda Agama."

²⁷ M. Ssenyonjo, "Women's Rights to Equality and Non-Discrimination: Discriminatory Family Legislation in Uganda and the Role of Uganda's Constitutional Court," *International Journal of Law, Policy and the Family*, 21.3 (2007), 341–72 (p. 341) <<https://doi.org/10.1093/lawfam/ebm010>>.

²⁸ Jatinder Kaur and Nina Atkin, "Nexus between Domestic Violence and Child Protection: Multidimensional Forms of Oppression Impacting on Migrant and Refugee Women in Australia," *Australian Social Work*, 71.2 (2018), 238–48 (p. 6) <<https://doi.org/10.1080/0312407X.2017.1423092>>.

²⁹ Charles G Ngweni, "Conscientious Objection to Abortion and Accommodating Women's Reproductive Health Rights: Reflections on a Decision of the Constitutional Court of Colombia from an African Regional Human Rights Perspective," *Journal of African Law*, 58.2 (2014), 183–209 (p. 184) <<https://doi.org/10.1017/S0021855314000114>>.

³⁰ Ngweni, p. 185.

³¹ S M Atia Naznin, "Women's Right to Access to Justice: The Role of Public Interest Litigation in Bangladesh," *Australian Journal of Asian Law*, 21.2 (2021), 99–117 (p. 99) <<https://ssrn.com/abstract=3875277>>.

³² Naznin, p. 100.

³³ Naznin, p. 100.

Based on the research and discussion presented earlier, the author draws the following conclusions. The Indonesian Constitution guarantees and protects the rights of women and children, as stated in Article 28I of the 1945 Constitution of the Republic of Indonesia. This highlights the need to protect women and children. One of the efforts to protect human rights, including the rights of women and children, is through the judicial review conducted by the Constitutional Court. The Constitutional Court serves as a constitutional body that directly protects the rights of women and children in Indonesia.

Several Constitutional Court decisions have had significant implications for women's rights. For instance, Judicial Review No.20/PUU-XI/2013 on General Elections had implications for women's representation in representative institutions. Constitutional Court Decision No. 46/PUU-VIII/2010, dated 17 February 2012, made a legal breakthrough by ruling that Article 43 paragraph (1) of Law no. 1 of 1974 concerning Marriage was contrary to the 1945 Constitution, as it did not recognize the relationship between a child out of wedlock and their father. In addition, Constitutional Court Decision No. 22/PUU-XV/2017 on the judicial review of the Marriage Law found that Article 7 paragraph (1) of Law No. 1 of 1974 on Marriage, which stipulated a minimum marriage age of 16 years, was contrary to the 1945 Constitution, but the Court did not have the legal power to order the legislature to make changes to the Marriage Law. Finally, Constitutional Court Decision No. 24/PUU-XX/2022 had implications for interfaith marriage in Indonesia and the legal procedures surrounding such marriages.

Recommendation

Based on these conclusions and several aspects of this study, the author proposes the following suggestions: The Constitutional Court should promote and ensure that the constitution is consistently and responsibly respected and implemented by all components of the country. This article provides an academic-based assessment of the Constitutional Court's decisions to provide optimal protection for the fulfilment of the rights of women and children. This article also suggests that as an institution with significant authority to conduct a judicial review, the Constitutional Court must maintain consistency in overseeing the process. Furthermore, the Constitutional Court must prioritize ensuring the implementation of fair and equal human rights.

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