

**FULFILLMENT OF THE RIGHT OF ACCESS TO JUSTICE
THROUGH THE APPLICATION OF RESTORATIVE JUSTICE
PRINCIPLES FOR WOMEN FACING THE LAW**

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Abstract

The right to obtain justice is a human right that must be respected, protected, and fulfilled by the state. "However, currently the fulfillment of the right to obtain justice is still far from expectations. The research method used is normative juridical or literature research related to normative legal substance, to find truth based on scientific logic viewed from the normative side by examining library materials or secondary data consisting of primary legal materials, secondary legal materials and tertiary legal materials. The results of this study show that in prosecuting women facing the law, judges have considerations based on the facts at trial, exploring the values that live in society, international conventions and agreements related to gender equality that have been ratified. The state makes regulations for judges as a guideline in prosecuting women against the law, to ensure gender equality, equal protection and non-discrimination.

Keywords: *law, fulfillment, right of access*

1. INTRODUCTION

In the history and practice of upholding human rights everywhere in the world, we talk a lot about access to justice, the right to justice and the guarantee of impartial legal processes and services from the justice system, which must always be guaranteed by the state. Not only is this an important issue within the legal jurisdiction of authoritarian regimes, underdeveloped countries or countries that are in the process of becoming more democratic, but it is also important and still visible in developed countries that have practiced democracy for hundreds of years. The Black Lives Matter movement, for example, in the United States, shows that there is still fair due process discrimination for citizens with certain backgrounds (Stubbs, 2010).

The main problems that often confront access to justice are generally Problems in the operational system of the justice system (lack of cooperation among law enforcement agencies, ineffective legal aid agencies for poor justice seekers, lack of counseling before a matter is brought to court, and high costs of litigation), tructural problems (elitism in the justice system, legal language that is too complex for ordinary people to understand, poverty problems that make everything difficult and fragile, and low legal awareness among the people themselves) that are certainly intertwined (Abregu, M., 2001 "Barricades or Obstacles: The Challenges of Access to Justice").

The issue of access to justice is one side that may seem "luxurious" to be a priority for many poor or developing countries. Before getting there, many rulers think that there is another long queue of priorities. Access to finance for industrial activities and micro-trade, access to education systems, access to health systems, access to infrastructure that better supports mobility and economic activity. Access to Justice may rank in the list. This way of thinking is of course incorrect, because access to all those considered priorities is part of access to justice in a broader sense. Without equal treatment before policy and due process, these priorities will also not be able to be built. We have learned enough from past regimes that physical and economic development alone only manages to form large, fragile, crumbling buildings. The author in this case does not want to convey thoughts about access to justice in the sense referred to above. This title only wants to bring it to the context of applying the Principle of Restorative Justice for Women Facing the Law.¹ (Fitzpatrick, 2006).

In the realm of criminal law, there is a solution that emphasizes restoring to its original state rather than adhering to punishment from the court, the principle of solving criminal cases is known as the principle of restorative justice. Currently, the practice of all law enforcement institutions in Indonesia, both the Supreme Court, the Attorney General's Office, the Indonesian Police and the Indonesian Ministry of Law and Human Rights has adopted the principle of restorative justice as a way to resolve criminal cases. In 2012 these 4 institutions made a joint agreement, namely a memorandum of understanding with the chairman of the Supreme Court of the Republic of Indonesia, the Minister of Law and Human Rights of the Republic of Indonesia, the Attorney General of the Republic of Indonesia and the Chief of Police of the Republic of Indonesia Number 131 / XMS / SKB / X / 2012, Number M-III-07. HM.03.02 Year 2012, Number KEP-06/E/EJP/10/2012, Number B/39/X/2012 dated October 17, 2012 concerning the Implementation of the Application of Adjustment of the limits of minor criminal acts and the amount of fines, quick examination events and the application of restorative justice ("Memorandum of Mutual Understanding"), which regulates the settlement of criminal cases through the principle of restorative justice. In this Memorandum of Mutual Understanding, the principle of restorative justice for the first time received a definition of Article 1 paragraph (2) (Sherman et al., 2007).

This memorandum of understanding does require the implementation of restorative justice, which is only for minor crimes. But in its development, not only minor crimes can be solved with the principle of restorative justice. The regulations made by each institution essentially regulate how the principle of restorative justice can be applied in solving criminal cases at every level of the criminal law enforcement process from the stage of investigation and investigation, holding prosecution and also the examination stage in court proceedings. The state is obliged to protect every citizen, as the purpose of the state in the Preamble to the 1945 Indonesian Constitution, namely protecting the entire Indonesian

nation and all Indonesian bloodshed, promoting general welfare, educating the nation's life and participating in implementing world order based on independence, lasting peace and social justice. The protection in question includes protection of women and women facing the law. As a country that has ratified the International Covenant on Civil and Political Rights with Law Number 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights (Meertens & Zambrano, 2010).

Indonesia is guided by the Convention in realizing equality of all people before laws and regulations, prohibiting discrimination and ensuring equal protection from discrimination including sex or gender. Indonesia as a party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) recognizes the state's obligation to ensure that women have access to justice and are free from discrimination in the justice system. Thus, it is the obligation of the state to accommodate and protect women's rights in the face of the law, by providing access to justice and avoiding discrimination in criminal justice proceedings. The problem focuses on how access to justice as legal protection for women vis-à-vis the law in the criminal justice system (Ginsburg, 2006).

2. IMPLEMENTATION METHOD

This includes normative legal research with a statutory approach (statue approach), conceptual approach (conceptual approach), analytical approach (analytical approach), and comparative approach (comparative approach). By starting to explain the background of the problem in the perspective of philosophical, sociological and juridical problems. By using a literature review that is relevant to the problems raised. Furthermore, using a literature review used legal principles, relevant legal theories that exist which are supported by technical analysis of legal material description, interpretation, and argumentation.

research is normative juridical, legal research in this case vague norms (vague van normen) related to the regulation of nationalization of foreign investment, in what case the government carries out nationalization actions, and legal protection of investors related to nationalization of foreign investment based on Law Number 25 of 2007 concerning Investment, by using secondary data consisting of primary legal material, secondary legal material and tertiary legal material. The relevant regulation to discuss and analyze the issues raised in this thesis is Law Number 25 of 2007 concerning Investment.

The technique of collecting legal materials in writing this journal uses card system techniques, namely reviewing relevant regulations, books or reading materials or, scholars' scientific papers and the results are recorded with a card system, this is done to make it easier to decipher, analyze, and make conclusions from existing concepts

3. RESULTS AND DISCUSSION

This The right to obtain justice is a human right that must be respected, protected, and fulfilled by the state. "However, currently the fulfillment of the right to obtain justice is still far from expectations. Respect, protection, fulfillment of the right to obtain justice is the key to realizing the second precept of Pancasila, namely Just and Civilized Humanity and the fifth precept, namely Social Justice for All Indonesian People. In its implementation, looking at Komnas HAM's complaint data that the right to obtain justice still has problems and is one of the rights that is often complained. Throughout 2020, there were 644 new cases. This is not much different from the conditions of the previous three years, namely in 2017 which reached 352 cases, in 2018 it reached 652 cases and in 2019 it reached 586 cases (Heywood, 2009).

Thus, we can say that there is a serious problem, although of course there is a verification process when handled by Komnas. However, at least this figure shows that indeed our right to legal justice in this country, there are still problems in its implementation. Then, in general, complaints received by Komnas HAM are closely related to the performance of law enforcement officials. Both the police, prosecutors, and judicial institutions, including how these law enforcement agencies exercise their authority that are not in accordance with procedures, abuse of authority, and / or excessive use of force / violence. In this regard, it is important to ensure that the right to justice can be exercised by all law enforcement officials. In addition, it is also important for the community to understand and know their rights to be able to ensure that their rights are violated or not. States have an obligation to provide recognition, guarantee, protection and fair legal certainty and equal treatment before the law to all persons. The state must also ensure that everyone can get facilities and special treatment to obtain equal benefits in order to achieve equality and justice (sahala, 2021).

The principle of Restorative Justice or Restorative Justice is currently being adopted and applied by law enforcement agencies in Indonesia. According to Kevin I. Minor and J.T. Morrison in the book "A Theoretical Study and Critique of Restorative Justice, in Burt Galaway and Joe Hudson, eds., Restorative Justice: International Perspectives" (1996), restorative justice is a response to perpetrators of crimes to recover losses and facilitate peace between parties. Restorative justice is a method that is philosophically designed to be a resolution of the resolution of the conflict that is happening by improving the situation or losses arising from the conflict. Meanwhile, according to the official website of the Supreme Court, the principle of restorative justice is one of the principles of law enforcement in solving cases that can be used as an instrument of recovery and has been implemented by the Supreme Court (MA). The principle of restorative justice or restorative justice is an alternative to solving criminal cases, which in the mechanism (criminal justice procedures) the criminal focus is changed to a process of dialogue and mediation. Dialogue and mediation in restorative justice involves several parties including the perpetrator, victim, family of the perpetrator or victim, and other related parties. In general, the purpose of the legal settlement is to create an agreement on the settlement of criminal cases. In addition, another goal of restorative justice is to obtain a fair and balanced legal verdict for both the victim and the perpetrator (Emerson, 1976).

The main principle in restorative justice is law enforcement that always prioritizes restoring back to its original state, and restoring the pattern of good relations in society. The

application of restorative justice began with the implementation of a community out-of-court settlement program, called victim offender mediation (VOM), in Canada in the 1970s. The program was initially implemented as an alternative measure in punishing child criminals, where before the punishment was carried out, the perpetrator and the victim were allowed to meet to draft a legal proposal which became one of the considerations of many judges. According to criminal law expert Mardjono Reksodiputro, written by Jurnal Perempuan (2019), restorative justice is an approach that aims to build a criminal justice system that is sensitive to victims' problems (Pranis, 2002).

One of the foundations for the application of restorative justice by the Supreme Court is evidenced by the implementation of policies through Supreme Court Rules and Supreme Court Circulars. Guidelines for restorative justice in the general judicial environment are regulated in the Decree of the Director General of the General Court Agency issued on December 22, 2020. The purpose of the Supreme Court's restorative justice guidance is to encourage increased application of the concept and the fulfillment of the principles of fast, simple and low-cost justice with balanced justice.

The Attorney General's Office issued a policy on restorative justice through Attorney General Regulation (PERJA) Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. Based on Article 2 of Perja Number 15 of 2020, consideration for implementing the concept of restorative justice is carried out based on the principles of justice, public interest, proportionality, crime as a last resort, and the principle of fast, simple, and light costs. The Public Prosecutor has the authority to close cases for legal purposes, one of which is for the reason that there has been an out-of-court settlement of the case. In this case, it is regulated in Article 3 paragraph (2) letter e of Perja Number 15 of 2020. In the Attorney General's Regulation in Article 3 paragraph (3) there is a provision if you want to settle cases outside the court for certain crimes with a maximum fine paid voluntarily or there has been a restoration of the original situation through restorative justice (Van Wormer, 2009).

The State strongly guarantees the constitutional rights of every citizen in the 1945 Constitution of the Republic of Indonesia. The fulfillment of citizens' rights, including women's rights in front of the law, is an effort by the state to achieve the objectives as stated in the Preamble to the Constitution of the Republic of Indonesia in 1945. Citizens' rights include women's rights in conflict with the law, including Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia which specifies "Everyone has the right to recognition, guarantee, protection, and fair legal certainty and equal treatment before the law." Furthermore, Article 28I specifies "The right to life, the right not to be tortured, the right to liberty and mind and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted on the basis of retroactive law are human rights that cannot be abridged under any circumstances." The elaboration of the rights of suspects or defendants includes women's rights that conflict with the law, including in Law Number 8 of 1981 concerning the Code of Criminal Procedure (hereinafter referred to as the Criminal Procedure Code). The rights of suspects and defendants are regulated by the Criminal Procedure Code in Articles 50 to 68. The Criminal Procedure Code accommodates the rights of suspects and defendants more than the rights of witnesses and/or victims (Naqvi, 2006).

The rights of suspects and defendants include the right to immediate examination at the level of investigation, prosecution and court, the right to know what is alleged or charged, to

receive the help of interpreters, the right to legal assistance, the right to visit (doctors, clergy and relatives), the right to raise witnesses, the right to file legal remedies, to the right to apply for compensation and rehabilitation. Furthermore, Law Number 39 of 1999 concerning Human Rights.³ Every person who commits a criminal offence, including women in conflict with the law in the criminal justice process, has the right to be presumed innocent until a judge's decision with permanent legal force declares his guilt. The principle of presumption of innocence as one of the principles in criminal procedural law is part of human rights, especially for people suspected of committing criminal acts.

Similarly, if there are changes in laws and regulations, then to protect the rights of suspects or defendants, regulations are used that benefit the suspect or defendant. In addition, any person cannot be prosecuted a second time in the same case for acts that have obtained a court decision of permanent legal force. Women who are in conflict with the law, in accordance with the principle of legality, should not be punished without being based on laws and regulations that existed before the crime was committed. In addition, women in conflict with the law are entitled to legal assistance at every stage of the examination.

Justice is a goal for society, including women facing the law, so that in the criminal justice process the state is obliged to provide access for women facing the law to obtain justice. Access to justice is part of the state's efforts to realize the state's goal of protecting its people. The Convention on the Elimination of All Forms of Discrimination Against Women, in Article 15 paragraphs (1) and (2) provides: States Parties shall grant women equality with men before the law; States Parties shall grant women, in civil matters, the same legal capacities as men and equal opportunities to exercise such capacities.

In particular, States shall grant women equal rights to covenant and manage wealth, and shall treat them equally at every stage of proceedings and tribunals. Under these provisions, Indonesia is obliged to provide equal opportunities for women before the law, including the right to equal treatment during court hearings. The right to obtain justice, including for women facing the law in the judicial process, among which has been regulated in Law Number 39 of 1999 concerning Human Rights Article 17 which stipulates: Everyone without discrimination, has the right to obtain justice by filing applications, complaints, and lawsuits, both in criminal, civil, and administrative cases and tried through a free and impartial judicial process, In accordance with the procedural law that guarantees objective examination by honest and fair judges to obtain a fair and correct verdict.

Judges in trying women face the law while maintaining and respecting the dignity and dignity of women, by not discriminating or non-discrimination, and maintaining a balance of gender equality. Gender equality is the equality and balance of conditions between men and women to obtain opportunities and rights as human beings to be able to play and participate in various fields (Article 1 number 4 Perma No.3 of 2017). In accordance with Article 3 of Perma No.3 of 2017, guidelines for adjudicating women's cases facing the law are made so that judges: a. Understand and apply the principles referred to in Article 2; b. Identify unequal treatment resulting in discrimination against women; and c. Ensure women's right to equal access to justice (Waugh, 2015).

In the criminal justice process at the examination stage in court, women face the law, according to the provisions of Article 5 of Perma No.3 of 2017, judges may not: a. Showing attitudes or issuing statements that demean, blame and/or intimidate women in the face of the law;

b. Justify discrimination against women vis-à-vis using culture, customary rules and other traditional practices as well as using gender-biased expert interpretations.

Based on the provisions of Article 5, judges must be objective in examining women against the law by considering gender equality and avoiding discrimination based on customary rules or traditional practices. In this case, women's access to justice is faced with the law, namely judges in case hearings must not justify discrimination using culture, customary rules and other traditional practices. In the examination of women as victims, judges are not allowed to ask about the background of the victim's sexuality which is then used as a basis for acquitting or giving a sentence that relieves the perpetrator. The judge bases the verdict on the facts at trial and the value of community justice. In addition, judges are prohibited from giving statements or opinions or views that contain gender stereotypes, namely general views or impressions about attributes or characteristics that should be owned and acted by women or men (Article 1 number 7 Perma No.3 of 2017).

4. CONCLUSION

Access to justice as legal protection for women facing the law has been accommodated in laws and regulations. In prosecuting women facing the law, judges have considerations based on the facts at trial, exploring the values that live in society, international conventions and agreements related to gender equality that have been ratified. The state makes regulations for judges as a guideline in prosecuting women against the law, to ensure gender equality, equal protection and non-discrimination.

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