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Anak Agung Sagung Laksmi Dewi

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Legal Assistance by Advocates in Gender Mainstreaming: A Reflection

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Abstract

Gender mainstreaming has become one of the legal politics in Indonesia, this is in line with the nature contained in Law Number 17 of 2007 concerning National Long-Term Development of 2005-2025. Therefore, gender mainstreaming needs special attention in some of its supporting elements. One of the supporting elements is legal aid, as a form of preventive and repressive efforts in realizing gender equality in responding to discrimination that is often experienced by women in Indonesia. one of the supporters of these preventive and repressive efforts is legal aid which can normatively be carried out by advocates in Indonesia. This should be a common thread in the protection of women's rights and gender mainstreaming in Indonesia which is carried out through legal aid in Indonesia. When scrutinized again in the regulation regarding the concept of legal aid as stated in Law Number 18 of 2003 concerning Advocates and Law Number 16 of 2011 concerning Legal Aid, legal aid can only be given to "poor or incapable people". Meanwhile, women are one of the people who are often in a cornered/unfavorable/marginalized position in physical, opportunity and social status. So that it becomes an urgent condition to expand the interpretation of "poor or incapable people" so that legal aid that is the obligation of advocates or legal aid providers can also include assistance to women in an effort to realize gender mainstreaming in Indonesia.

Keywords: Legal Aid, Advocate, Gender Mainstream

I. INTRODUCTION

Social justice has been mandated in the Preamble of the 1945 Constitution of the Republic of Indonesia. That this goal includes a broad meaning in various sectors and perspectives. Of course, efforts to realize these goals require planned, strategic, and integrated steps in a unified national development policy. All levels of society without distinction must be based on the principle of balance to obtain the government's strategic policies in realizing the goals of the state.

As quoted from the explanation of Law Number 17 of 2007 concerning National Long-Term Development in 2005-2025 (hereinafter referred to as (UU PJP)), disclosed the terminology of National Development. The concept that needs to be considered is a series of sustainable development efforts. It can be seen that the series of development efforts are progressive and planned. Progressive contains the meaning of improvement, that there is no other purpose of the series of efforts in question is to improve the welfare of the people as a whole. While planned means that the current efforts are not only concerned with current conditions but also pay attention to the interests and rights of future generations, so that future generations will still receive proper rights without diminishing them from the current generation.

Observing the notion of national development, it is understood that an integrated effort must cover all perspectives, one of which is human resources. However, the community as one of the goals of national development must be involved concretely, in line with the phrase "from the people, by the people and for the people". People in the perspective of human resources must be considered to be able

to participate by upholding justice and equality in terms of both structural and gender. That in fact the distinction based on sex is a form of natural or natural distinction, without prejudice to social rights, nationality and the right to participate in national development. Therefore, gender equality is absolutely necessary, both in terms of access to rights, so that there is no gender inequality that can have implications for the active participation of the community.

Gender is intended as the innate difference in the roles of women and men as God's creation. Gender is the differentiation of roles, positions, responsibilities, and division of labor between men and women determined by the community based on the nature of women and men who are considered appropriate according to the norms, customs, beliefs or habits of the community. Of course, gender has a difference with the term nature. Nature is something that is determined by God, so that humans are unable to change or refuse. Meanwhile, nature is universal, for example giving birth, menstruation and breastfeeding is the nature of women, while having sperm is the nature of men. Stepping on the terminology, the term gender injustice can be described as an unfair condition as a result of the social system and structure, so that both women and men become victims of the system. Men and women are different only because the natures between men and women are different. Gender justice will occur if a condition is created in which the share and social cycle of women and men are equal, harmonious, balanced and harmonious. (<https://www.bps.go.id/subject/40/gender.html>)

The issue of gender as well as gender equality until now remains an interesting issue to be discussed in the context of human development as a whole as well as holistic national development. The scope of the topic of gender talks touches on various aspects, all of which must be considered in order to realize gender equality in society. So far, it can be noted that the government through various political and legal policies has attempted to strengthen the position of women in terms of gender. If we look back historically, it can be observed that the current journey of the struggle for gender equality in Indonesia has reached a certain point of progress. Which concretely we can take as an example that was previously entrenched in society that women are not entitled to higher education because they are considered to end up as technical implementers in the household. The same is the case with jobs that previously highly differentiated recruitment based on gender. These are just a few descriptions of past conditions that should be used as reflections to move forward.

The efforts to mainstream gender have not yet been said to have been completed. Various issues regarding physical and psychological violence against women often arise in society, which can be categorized as gender-based violence. As an illustration, it can be noted that women are still used as objects of exploitation to achieve sensationalism and commercialism, there is no guarantee of security and comfort for women to work in public spaces, there is no comprehensive sexual and reproductive health education according to the National Development Plan, and health services and facilities are not yet available. that is gender-equitable and equitable, fulfills the guarantee of menstrual and maternity leave without medical requirements for female workers, etc. (Dimas Jarot Bayu, Nasib Buruh Perempuan, Alami Diskriminasi di Seluruh Sektor Industri, <https://katadata.co.id/berita/2019/03/08/nasib-buruh-perempuan-alami-diskriminasi-di-seluruh-sektor-industri>)

The development of data regarding gender discrimination does not only occur in the industrial sector, casuistically in other sectors it can be noted that the Mira (transgender) case was burned on charges of stealing, then the case that started with the circulation of a prank video by Ferdian Paleka which injures the value of justice in society, which case some of these cases contain gender bias in them. (<https://www.komnasperempuan.go.id/read-news-siaran-pers-komnas-perempuan-about-violence-terhadap-transpuan-jakarta-6-mei-2020>).Based on data summarized by Komnas Perempuan, that in 2019 the number of reported cases increased by 6%. The number of KTP cases in 2019 was 431,471, this number increased compared to the previous year of 406,178. Domestic violence/RP (personal domain) which reached 75% (11,105 cases). The second position is VAW (Violence against Women) in the community/public domain with a percentage of 24% (3,602) and the last is VAW in the state domain with a percentage of 0.1% (12 cases). In the realm of domestic violence/RP, the most prominent violence was physical violence, 4,783 cases (43%), ranked first, followed by sexual violence with 2,807 cases (25%), psychological 2,056 (19%) and economic 1,459 cases (13%). In the public and community domains, there were 3,602 cases of violence against women. 58% of violence against women in the Public or Community Domain is Sexual Violence, namely Obscenity (531 cases), Rape (715 cases) and Sexual Harassment (520 cases). (DPN SBMI, Ringkasan Eksekutif Catatan Tahunan

Komnas Perempuan 2020, <http://sbmi.or.id/2020/03/ringkasan-eksekutif-catatan-tahunan-komnas-perempuan-2020/>)

The increase in the number of cases of violence against women in the last few years shows that the struggle for gender mainstreaming in Indonesia cannot be said to be over. This fact certainly cannot be ruled out and strategic and visionary steps must be sought both at the policy and practical levels to reduce the amount of violence against women which is summarized in legal politics in gender equality in Indonesia.

II. METHOD

This research is a doctrinal research that will discuss the regulation of legal aid and gender mainstreaming, with the hope that the existence of legal aid can help legal politics of gender mainstreaming in Indonesia. The legal materials used are primary legal materials and secondary legal materials. The collection of legal materials is done by using library research techniques. The approach used is the statutory approach and the concept approach. Furthermore, the analysis of legal materials is carried out qualitatively.

III. RESULT AND DISCUSSION

3.1 Legal Politics of Gender Mainstreaming in Indonesia

Before going far into the progress of Indonesian legal politics in terms of gender, the notion of gender needs to be grasped first. Mosse in the quote Rahmi Fitrianti & Habibullah, constructs gender as a set of roles assigned to women and men, not biologically and these roles can change according to culture, social class, age and ethnic background (Fitrianti & Habibullah, 2012). While gender mainstreaming is a strategy to achieve gender justice and equality through policies, programs and activities that take into account the experiences, aspirations, needs and problems of men and women in the process of monitoring and evaluating all aspects of life and development. (<https://www.kemenkeu.go.id/profil/pengarusutamaan-gender/>) The scope of the realm that has the potential for gender discrimination, gives a signal that efforts to mainstream gender must be carried out with appropriate and integrated steps in all sectors, so that integrated steps are sought in an appropriate legal policy.

The term legal politics by quoting Soedarto's opinion, that legal politics is a policy of the state through state agencies authorized to establish the desired regulations, which are expected to be used to express what is contained in society and to achieve what is aspired (Syaukani & Thohari, 2018). Understanding the terminology, that legislation as legal norms that are formed substantially must lay some philosophical, sociological and juridical foundations in their formation. The thing that needs to be emphasized in the context of gender is that the rule of law that is formed as an effort to equalize gender must look at various aspects and juridical views both at the national and international levels.

At the global level, there are several legal instruments related to gender issues. In addition to the women's convention document, there are also UN documents on the elimination of violence against women. Subsequently, these documents were ratified or adopted, thus becoming other national legal instruments that focus on gender-based issues. These legal instruments, including (Kelompok Kerja Convention Watch, 2012):

1. *Convention on The Elimination of All From Of Discrimination Against Women/ CEDAW;*
2. *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women;*
3. *General Recommendation No. 19 on Violence Against Women The 11th Session of 1992 United Nations Committee on the Elimination of All Forms of Discrimination Against Women;*
4. *General Recommendation No. 21 concerning Equality in Marriage and Family Relations Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (Thirteenth Session, 1994);*
5. *General Recommendation No.23 on Public and Political Life Articles 7 and 8 of the Convention on the Elimination of All Forms of Discrimination Against Women (Sixteenth Session, 1997);*
6. *General Recommendation No. 24 on Women and Health Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women (Twentieth Session, 1999);*

7. General Recommendation No.25 concerning Article 4 paragraph 1, Convention on the Elimination of All Forms of Discrimination Against Women concerning Temporary Special Measures (Thirtieth Session, 2004);
8. Declaration on the Elimination of Violence Against Women (Adopted by the General Assembly of the United Nations on 20 December 1993, Ga Res 48/104);
9. Law of the Republic of Indonesia No. 39 of 1999 concerning Human Rights;
10. Law of the Republic of Indonesia Number 23 of 2004 concerning Elimination of Domestic Violence;
11. Government Regulation of the Republic of Indonesia Number 4 of 2006 concerning Implementation and Cooperation in Recovery of Victims of Domestic Violence;
12. Presidential Instruction No. 9 of 2000 concerning Gender Mainstreaming in National Development;
13. General Recommendation No.26 concerning Women Migrant Workers 32nd Session, 2005;
14. General Recommendation No.27 on Elderly Women and the Protection of Their Human Rights (42nd Session, 2010);
15. General Recommendation No. 28 concerning Basic Obligations of States Parties to the Convention Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women 47th Session, 2010;
16. General Statement of the Committee on the Elimination of Discrimination Against Women on Rural Women (Stipulated on 19 October 2011 at the 50th session of the CEDAW Committee)

With the ratification of the document resulting from the CEDAW convention by Indonesia with Law No. 7 of 1984, this means that Indonesia is bound to carry out non-discriminatory treatment of the rights of women and men in all areas of life. The de jure implementation is that Indonesia should have legal instruments that directly regulate gender and legal instruments that regulate other sectors but are still gender-based.

As previously stated, the implementation of various legal instruments related to gender, both at the policy and technical levels, of course involves many sectors as well as many parties so that it becomes a unified system that is interrelated with each other to be effective. Through a theoretical approach there is a theory of the legal system, expressed by Lawrence M. Friedman that the elements of the legal system include (Ali, 2009):

1. The legal structure, namely the entire existing legal institutions and their apparatus, including among others the police and their police officers, the prosecutor's office with their prosecutors, the courts with their judges, and so on;
2. Legal substance, namely the entire rule of law, legal norms and legal principles, both written and unwritten, including court decisions; and
3. Legal culture, namely opinions, beliefs (beliefs), habits, ways of thinking, and ways of acting, both from law enforcers and from citizens, about the law and various phenomena related to the law.

Some of the legal instruments related to gender mentioned above are certainly influenced by the structure and legal culture. In this context, the legal structure can be in the form of law enforcement agencies as well as government and non-government institutions that have direct or indirect involvement with gender issues, such as: Police, Prosecutors, Courts, Corrections, Witness and Victim Protection Institutions, Ministry of Women and Children Empowerment, National Commission Against Violence Against Women, Deputy for Gender Mainstreaming, Deputy for Women's Protection, Deputy for Women's Quality of Life Improvement, Deputy for Child Protection, Deputy for Empowerment of Community Institutions, etc. Likewise, the support of legal culture, which requires ways of thinking, acting, habits and opinions from all levels of society to law enforcers themselves to support gender mainstreaming efforts. Therefore, the community is periodically given understanding through socialization, and various activities with gender-based themes.

Observing Presidential Instruction No. 9 of 2000 concerning Gender Mainstreaming in National Development, several instructions were directed to: Ministers, Heads of Non-Departmental Government Institutions, Secretariat Leaders of the Highest/Highest State Institutions, Commander of the Indonesian National Armed Forces, Chief of the Indonesian National Police, Attorney General of the Republic of Indonesia, Governor, and the Regent/Mayor. Whereas the instruction is aimed at several segments of the government, both executive and judicial, what needs to be observed is that in the

judicial segment in law enforcement there are also advocates whose organizations are not directed at the Presidential Instruction.

Then the question is to what extent can advocates contribute to the national strategy of gender mainstreaming?

If this question cannot be answered directly, then the next sub-discussion will systematically try to discuss legal aid in gender mainstreaming efforts, as well as the role of advocates in it.

3.2 Legal Aid by advocates as an Instrument for Gender Mainstreaming

In the layman's view, of course, assistance cannot be separated from the efforts of legal subjects to help facilitate the interests of other legal subjects with direct or indirect agreements. When looking more deeply into legal aid, the meaning can be seen in the Black Law Dictionary as follows: *Country wide system administered locally by legal services is rendered to those in financial need and who cannot afford private counsel* (Black & Garner, 2009). It is a simple explanation but with a clear intention that the legal protection is provided by the state for people who are classified as people who have financial deficiencies. Another opinion stated in The International Legal Aid is stated as follows: *“The legal aid work is an accepted plan under which the service of the legal profession are made available to ensure that no one is deprived of the right to receive legal advice or, where necessary legal representation before the courts or tribunal, especially by reason of his or her lack of financial resources”* (Winata, 2009).

Furthermore, it refers to the opinion of Adnan Buyung Nasution as well as the history and journey of the concept of legal aid in Indonesia. Adnan Buyung Nasution, provides an understanding of legal aid as follows (Winata, 2009):

“Legal aid is essentially a program that is not only a cultural action, but also a structural action directed at changing an unfair social order towards a social order that is more capable of providing a comfortable breath for the majority group. Therefore, legal aid is not a simple matter. It is an act of liberation of society from the shackles of the political, economic and social structure which is full of oppression.”

The important thing to remember here is that the poor majority who are on the periphery must be returned their basic rights to political, economic, technological, information and so on resources so that they can determine what kind of society they want (Pranoto, 2011). The definition of Legal Aid is then explicitly regulated in Article 1 of Law Number 16 of 2011 namely: Legal Aid is legal services provided by Legal Aid Providers free of charge to Legal Aid Recipients.

Recognition and protection of human rights of every individual or citizen, must be given by the state as a consequence of its stipulation as a state of law (*rechtsstaat*). This stipulation as a state of law is followed by another statement that every citizen has equality before the law (the principle of equality before the law) as stated in Article 27 paragraph (1) of the 1945 Constitution. Through this principle, the state may not discriminate for any reason, to any person or citizen. This principle is easy to learn, discuss or study academically, but not easy in practice. Even the United States, which is often regarded as the country that upholds human rights the most, still frequently violates this principle (Rhode, 2004).

Through this principle, a person has the right to be treated equally, including for the poor who are in trouble with the law. If rich people can afford to pay an advocate to accompany them in the judicial process, poor people also have the same right to be accompanied by an advocate in the framework of legal aid. This is also reinforced by the provisions of Article 34 paragraph (1) of the 1945 Constitution which stipulates that the poor and neglected children are cared for by the state. The word “maintained” is not only given the need for clothing and food, but also access to justice in the form of providing legal aid. In other words, the principle of equality before the law, in addition to containing the meaning of equality before the law, is also interpreted by Rhode as equal access to the legal system and justice (Rhode, 2004). The concept of access to justice does not only mean access to lawyers or courts, but also means access to the Ombudsman, and other “justice” institutions (Bedner, 2012). Addressing the problem of access to justice must be done comprehensively with the aim of achieving social justice and not only limiting itself to access to courts (MacDonald, 1990).

If you look at it from a historical perspective, legal aid has been carried out by Western society since Roman times where at that time legal aid was based on moral values and was more considered a noble job, especially to help people without expecting and/or receiving anything in return, or honorarium. After the outbreak of the French Revolution, legal aid then began to become part of legal

activities or juridical activities by starting to emphasize more on equal rights for citizens to defend their interests before the courts and until the early 20th century, this legal aid was more widely considered as a job providing services in the field of law without a reward (Harianto, 2009). In Indonesia, legal aid as a legal institution was not initially recognized in the traditional legal system. Legal aid has only been known in Indonesia since the entry or implementation of the Western legal system in Indonesia. It started in 1848 when in the Netherlands there was a big change in its legal history. Based on the principle of concordance, with the Word of the King dated May 16, 1848 No. 1, the new legislation in the Netherlands is also enforced in Indonesia, including regulations on the composition of the judiciary and judicial policy (*Reglement of de Regterlijke Organisaticeen het beleid der Justitie*), which is commonly abbreviated as R.O. (Abdurrahman, 1983), *Aspek-Aspek Bantuan Hukum di Indonesia*, Cendana Press, Jakarta: 40) These historical points then became a common thread in the formation of Law Number 18 of 2003 concerning Advocates and Law Number 16 of 2011 concerning Legal Aid which contained the concept of legal aid in it.

Taking into account the concepts contained in Law Number 18 of 2003 concerning Advocates and Law Number 16 of 2011 concerning Legal Aid, it can be understood that legal aid in its application in Indonesia adheres to the principle of “equality before the law” as a form of human rights every citizens to have equal rights in accessing justice and its supporting instruments, including legal aid. So that services or services in the form of legal assistance, legal consultation, etc. are not only rights for those who are capable in the economic field. So the ideal view is that every person/citizen regardless of their economic capacity has the same opportunity or right to access justice through legal aid provided by the legal aid provider, one of which is the advocate profession in Indonesia.

When observing the role of advocates in providing legal aid, it can be noted in Law No. 18 of 2003 concerning Advocates Article 1 number 2: Legal services are services provided by advocates in the form of providing legal consultation, legal assistance, exercising power, representing, assisting, defending, and take other legal actions for the client's legal interest. (underlined by the author) Furthermore, in Law Number 16 of 2011 Article 1 point 1 it is stated: Legal Aid is legal services provided by Legal Aid Providers free of charge to Legal Aid Recipients. (underline the author) then who is meant by the poor? Furthermore, if examined further, it can be seen again in Law aquo Article 1 point 2 which stipulates that the recipients of legal aid are poor people or groups of people. (author's underline) This arrangement is in line with Article 1 point 9: Legal Aid is a legal service provided by an Advocate free of charge to a Client who cannot afford it. (author's underline)

There is no authentic interpretation of the words “poor people” and “incapable clients” in the 2 laws as mentioned above as the explanation is stated as “sufficiently clear”. So that in grammatical interpretation it can be quoted from the Big Indonesian Dictionary, that poor means: not having wealth; underprivileged (very low income) (<https://kbbi.web.id/miskin>) The literal meaning of the word “poor” is of course only in the perspective of economic capacity. Whereas in the author's view, poor can be seen from the perspective of the ability to access feasibility both from an economic and social perspective. So that the definition of poor can be interpreted as people who are at a point or position that is socially weak, marginalized or sidelined (marginalized).

However, if it is analogous to the poor condition from an economic perspective, it is a condition experienced by legal subjects (people) with minimal access to economic feasibility. Whereas in fact in society, it is not only the economy that is the benchmark, but social status or social stigma in society. Departing from this, the social stigma that has developed so far has made conditions weak for some people/groups in community life, one of which is women. As it is known that in terms of gender, women have different characteristics in terms of physical, psychological, feminist appearance when compared to other genders, namely men. So that they are vulnerable / at risk of becoming victims of violence perpetrated by men. The author thinks that this is also in line with the legal politics of gender mainstreaming in Indonesia.

Again, reviewing the legal aid arrangements in Indonesia carried out by legal aid providers (one of which is an advocate), as stipulated in Law No. 18 of 2003 concerning Advocates and Law No. 16 of 2011 concerning Legal Aid, it is necessary to interpret the word “poor” in its regulation contains a clear and wider interpretation of poverty in the field of social stigma that is often experienced by women in Indonesia. So the estuary of this thinking is that legal aid which is one of the obligations of advocates and other legal aid providers can extend to marginalized women in order to realize one of the national strategic plans, namely gender mainstreaming in Indonesia.

IV. CONCLUSION

Gender mainstreaming has become one of the legal politics in Indonesia, this is in line with the nature contained in Law Number 17 of 2007 concerning National Long-Term Development of 2005-2025. Therefore, gender mainstreaming needs special attention in some of its supporting elements. One of the supporting elements is legal assistance, as a form of preventive and repressive efforts in realizing gender equality in responding to discrimination that is often experienced by women in Indonesia. One of the supporters of these preventive and repressive efforts is legal aid which can normatively be carried out by advocates in Indonesia. This should be a common thread in the protection of women's rights and gender mainstreaming in Indonesia which is carried out through legal aid in Indonesia. When examined again in the regulation regarding the concept of legal aid as stated in Law Number 18 of 2003 concerning Advocates and Law Number 16 of 2011 concerning Legal Aid, legal aid can only be given to "poor or incapable people". While women are one of the people who are often in a cornered/unfavorable/marginalized position in physical, opportunity and social status. So that it becomes an urgent condition to expand the interpretation of "poor or poor people" so that legal aid that is the obligation of lawyers or legal aid providers can also include assistance to women in an effort to realize gender mainstreaming in Indonesia.

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