

## THE ROLE OF JUDGES IN THE BROKEN MARRIAGE PROMISES CASE TO ANSWER THE VICTIMS' NEED OF JUSTICE

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### ABSTRACT

*The broken marriage promises legal event in which a man and a woman are dating, but when the woman gets pregnant, the man refuses to marry her and refuses to take a responsibility for the child. Many women are trapped in this situation, but they find it difficult to resolve this broken marriage promises case through the formal justice process. This situation makes the cases gets higher. This breach of promises of marriage harms women and children. The data from women organizations, especially in the East Nusa Tenggara (NTT), shows that almost all cases of the broken marriage promise cannot be prosecuted due to limited legal substance, especially civil law that regulates this case. A doctrinal study is applied to trace various verdicts of the Supreme Court (MA) in Indonesia. It was revealed that several verdicts of the Supreme Court won the victim of the broken marriage promises in the Civil Court. There are some verdicts of the Supreme Court that punish the defendant with criminal charges. Judges plead the defendant guilty by referring to not only Criminal Law and Civil Law, but also social law such as customary law and tradition. The Law on Judicial Power in Indonesia gives authority to judges so that they are obliged to explore the laws within society in hearing cases. This type of judges is called progressive judges because they are not merely legal speaker. Progressive judges always use their conscience in deciding cases so that they have the courage to make legal breakthroughs.*

Keywords: the role of Progressive judges, broken marriage promises case, victims' need of justice

### INTRODUCTION

Every human being is longing for justice. One of the places where people seek justice, specifically legal justice is inside the courtroom. One of the problems faced by female victims of the broken marriage promises is not getting a fair trial decision in the legal process. In the judicial process, judges have different decision on a case. There are judges who plead the offenders of the broken marriage promises guilty and punish them. On the other hand, there are judges who plead the offenders not guilty because of insufficient evidence. In this context of law enforcement, <sup>1</sup>Sudjito Atmoredjo, reminded that substantive justice in the framework of Pancasila must be a reference for law enforcement. Therefore, it requires progressive law in its application.

Broken marriage promises in this case means that a man is in a relationship (dating) with a woman, then, the man promises <sup>2</sup> to marry the woman. But, when the woman gets pregnant, the man backs out of their agreement. The National Commission on Violence Against Women (*Komnas Perempuan*) reported 2073 cases of dating violence (KDP) in 2018. This number was higher than the previous year, where 1873 cases of dating violence were reported in 2017. According to *Komnas Perempuan*, one form of violence in dating is a case of broken marriage promises.<sup>3</sup> Three women's NGOs in West Timor-NTT reported that in 2017 they assisted 69 cases of broken marriage promises. They recorded the following same conditions on the case. First, cases of the broken marriage promises do not reflect the actual number of cases of the broken marriage promises. The actual number of cases is higher than the number of reported cases. Secondly, none of the cases of the broken marriage promises reported to the NGOs were resolved in legal court, as criminal law or civil law. Third the broken marriage promises negatively impacts social and economic life of women, children and families. In their status as widows, women are more prone to various negative stigmas and low social respect by the community. Children who are born will get the stigma of being "illegitimate children". From an economic aspect, women's burdens are also increase because they have to support their own children.

Substantially, the legal regulations on breaking the promise of marriage have not provided protection to women and children who are victims. In this situation, a wise judge is needed in making decisions for women and children who are in a very disadvantaged position. A Dutch legal expert, Taverne, stated: "Geef me goede rechters, goede officieren van justitie, goede Rechters Commisarissen en goede ambtenaren, en ik zal met een slecht Wetboek van strafprocesrecht het goede bereiken. Which means "give me good judges, good prosecutors, good commissioner judges, and good police officer, then I will turn a bad law into a good one".<sup>4</sup> In This study, the problems can be formulated : 1) How is the judge's decision in the case of broken marriage promises 2) What is the role of the judge in adjudicating cases of breach of the promise of marriage to answer the victim's sense of justice.

<sup>1</sup> Sudjito Atmoredjo, 2018, *Law in the Rainbow of Life*, Yogyakarta, Linkar Media Group, 2018, 119

<sup>2</sup> Komnas Perempuan annually issues reports to the public regarding cases of violence against women that occur in Indonesia. This data was taken from reports of Komnas Perempuan published in March 2017 in Jakarta.

<sup>3</sup> Three NGO are Rumah Perempuan, Sanggar Suara Perempuan, Yabiku are non-government organization in west Timor --East Nusa Tenggara that works to assist female victims of violence. Every year, Rumah Perempuan released reports to the public on the assistance it provided. The data above was taken from the Assistance Report published at the end of 2017 in Kupang City.

<sup>4</sup> Wicaksono, Sonny S, Widyawati, Anis, 2017, The effectiveness of the role of ad hoc judges in corruption eradication in central Jawa. South East Asia Journal of Contemporary Business, Economics and Law, Vol. 13, Issue 4 (August) ISSN 2289-1560 2017, hal 28

## DISCUSSION

### Legal Regulations on Promise of Marriage in Indonesia

The promise of marriage in Indonesia is explicitly regulated in Article 58 of the Civil Code, which stated that “The promise of marriage does not give the right to sue before the Judge for the marriage, nor does it give the right to demand reimbursement of costs, losses and interest, due to failure to keep this promise, all agreements for compensation loss in this case is null and void. However, if this marriage notification has been followed by an announcement, then, it can serve as a basis for claiming reimbursement of expenses, losses and interest based on the actual losses suffered by one party for the goods after other party’s refusal; in the meantime, it should not calculate the lost profits. This demand is overdue with an elapsed time of eighteen months, starting from the announcement of the marriage” It is clear that not all promises can be prosecuted in a civil manner. This article does not formulate promises from men to marry women who get pregnant. This means that in cases like this, women cannot sue the men for their material or immaterial losses.

Another article that is usually used as a basis for contesting cases of the broken marriage promises, is Article 1365 of the Civil Code, which reads as follows: “Every act of violating the law, which brings harm to others, obliges the person who due to his wrongdoing to issue the loss, to compensate the loss.” According to <sup>5</sup>Rosa Agustina, “acts that go against the law” (Perbuatan Melawan Hukum) is: 1) in contrary to the legal obligations of the offenders 2) in contrary to the subjective rights of others 3) in contrary to social norms 4) in contrary to propriety, thoroughness and prudence. <sup>6</sup>

The opinion of Rosa Agustina is supported by Wirjono Prodjodikoro. In the context of the relationship among legal subjects, especially the rights of the victims, Wirjono Prodjodikoro extends its meaning. It is not only limited to individual rights as argued by Rosa Agustina, but explicitly mentions the rights of the community by using the phrase “shocks in the social life”. This means that these acts do not only violate individual legal rights but also the legal rights of a group or community.

In order to use article 1365 of the Civil Code concerning acts that go against the law to demand for a promise to marry, it must still refer to Article 56 of the Civil Code regarding the promise to marry. This means that the intended promise to marry must have been announced. Thus, in the case of a promise to marry where the man backs out the agreement due to pregnancy, the woman cannot sue the man unless it has been announced

### Judge Decision in the case of breaking the promise of marriage

In 2010, the Kupang District Court decided a case with a registration number of 75/PDT-PN-2010-PN <sup>7</sup>regarding the broken marriage promises. The judge pleaded the man not guilty even though the woman already got pregnant and would suffer from giving birth and caring for the child along with consequences in social life. Violence against women in Indonesia is not only about acts of (physical) violence or physical threats.

There was a case in Ambon Military Court III-18 in Ambon<sup>8</sup> In 1996 about military personnel who had sexual relations with the victim ‘S’ by promising her to get marriage and they lived together. The defendant did not marry the victim so the victim sued the defendant. The verdict is based on the article 378 of the Criminal Code, the jury returned a verdict of guilty of manipulation and seduction that cause “S” to give up her property (virginity) to the defendant. The verdict number 33/MMT-III/X/AD/87 of the Military High Court upheld the verdict that the defendant was found guilty of fraud. At the Cassation level, the judge cannot associate meaning of genitals or the virginity to goods. The intercourse is consensual and it is the reason for not plead the defendant guilty in the Supreme Court.

The verdict of Supreme Court Number 522 K/Sip/1994<sup>9</sup>, decided to punish a man ‘D’, who had intercourse with a woman ‘R’. He promised to marry the woman which causes a pregnancy. This pregnancy caused D to force R to abort it because it was an unexpected pregnancy. R forced D by hitting and kicking her. The Supreme Court Sentenced R to a criminal offense of attacking moral honour, theft by force, and persecution with serious injury. In this case, the Supreme Court stated that it was against the law to breach a promise to marry. The defendant was punished by paying compensation to the plaintiff in this case the restoration of the plaintiff’s reputation.

The Supreme Court stated that D violated law and moral norms in society. The promise to marry is seducing women to give up her virginity.<sup>10</sup>The verdict of the Supreme Court in this case is a breakthrough in article 1365 of the Civil Code that also referred to the article on acts that go against the law. This is as an award to women regarding their legal protection. However, the term ‘go against the law’ has a broad meaning and can also asked for compensation for these acts.

<sup>6</sup> Wirjono Prodjodikoro in Budi Untung, 2012. *Business Law and Ethics*, Yogyakarta, Andi Offset Publisher, page 45.

<sup>7</sup> <http://mell-benu.blogspot.com/2012/04/peraturan-yang-belum-berpartial-pada-hak.html>, accessed on 15 October 2019 at 21.36 WIB

<sup>8</sup> Satjipto Rahardjo in Lusiana Margareth Tijaw, 2017, *Legal Protection for Female Victims of Promises to Marry*, Malang, Media Intelligence, page 13

<sup>9</sup> <https://www.hukumonline.com/berita/baca/lt4b2a4256a32ea/tidak-menepati-janji-menikahi-adalah-pmh/> accessed on 16 October 2019 at 18:21

<sup>10</sup> Lusiana Margareth Tijaw, op cit, p. 17

The three examples of judge decision indicated that it is not easy for a female victim of broken marriage promises to seek justice. In similar cases, judge decision is different. Some judge decided that it is against the law, so that the offender is sentenced. In other similar cases, the offenders are acquitted because they were not proven to violate the law.

### **The Role of Judges in Executing the Broken marriage promises to Respond to a Sense of Justice for the Parties**

#### ***Legal Justice for Women***

Justice is a condition desired by all human beings in the world. Justice is a basic moral principle for maintaining human dignity. There are various definitions of justice. According to Magnis Suseno, justice can be interpreted as a condition or state of a human being that is treated equally, which also shares equal rights and obligations of each individual. Rudolph Helmanson<sup>11</sup> stated that justice is a concept to achieve a legitimate outcome to satisfy proper lawsuits, correct a mistake, find a mistake, find a balance between legitimate but conflicting interests. Thomas Houl<sup>12</sup> said justice is the principle of fair treatment along with the practices and consequences associated with it (The Liang Gie, 1982).

Justice contains a demand to treat people according to their rights and obligations. According to Kahar Masyhur<sup>13</sup> Fair is to give someone's rights completely without giving more or less for those who are entitled to it in the same situation, and punishment of bad people or those who violate the law, in accordance with the mistakes and violations. Law becomes one of the means or tools to achieve it.<sup>14</sup> Gustav Radbruch reaffirmed the value of justice as the crown of every legal system.<sup>15</sup> Jhon Rawls also made the same point. According to Jhon Rawls, the principle of justice must guide us in developing policies and laws to correct injustices in the basic structure of a particular society.

Legal justice for all Indonesian citizens is stipulated in the Article 28 paragraph 3 of the 1945 State Constitution that "All citizens have equal position in law and government". The 1945 State Constitution guarantees, "Every person has the right to be free from discriminatory treatment on any basis and is entitled to protection against such discriminatory treatment". Guarantee through the principle of non-discrimination is an important basis, that any discriminatory provisions or actions, including discrimination on the basis of sex, can be categorized as a violation of the constitutional rights of Indonesian citizens. The guarantee of the fulfilment of rights in the 1945 State Constitution is contained in Article 28H Paragraph (2) of the 1945 State Constitution that "Every person has the right to receive special facilities and treatment to obtain equal opportunities and benefits in order to achieve equality and justice".

The reality of society and state life shows that legal justice for women has not complied with a mandate in the 1945 State Constitution.<sup>16</sup> Sulistiawati Irianto stated that in the context of Indonesia, it needs a voice about justice for disadvantaged groups, including the poor, women and children. In various schools of study on women, it is agreed that the existence of women as parts of the disadvantaged group is not only because of their sexuality as women alone, but is closely related to issues of race, class, colonialism and naturism (Tong, 1998; Harding, 1987; Moore, 1998)<sup>17</sup>. According to Sulistiawaty Irianto<sup>18</sup>, Often people forget to ask women whether the law has guaranteed her basic rights as a dignified human, has the law guaranteed women to be able to express themselves as they are and control their own bodies?

In the case of the broken marriage promises as described in the civil law regulations and court verdicts above, it is seen that women are parts of the disadvantaged group. The dignity of women in this context is degrading due to unwanted pregnancies by men. Women are victims of seduction and fraud by men, but unfortunately the substance of the law governing the broken marriage promises and court verdict is unfair to women.

The Indonesian government has ratified Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) through Law Number 7 of 1984 concerning the Elimination of All Forms of Discrimination against Women. The ratification of this convention shows the government's commitment to eliminate discrimination against women in all areas of life, including in law. However, there is a deep gap between what the law enforces (*das sollen*) and the application in everyday life (*das sein*) so that the law can only be seen as an umbrella of fantasy.<sup>19</sup> This situation is a big question in upholding the principle of "equality before the law" in legal practice.

<sup>11</sup> Suraijiyo, 2017 in Justice in the Pancasila Legal System, Journal of IKRAITH-humanira Vol 2 No. 3 November 2018, pp 21-29

<sup>12</sup> Thomas Hold in The Liang Gie (1982) in Suraijo, ibid

<sup>13</sup> Kahar Mansur in Ferry Irawan Febriansyah, 2017, Justice Based on Pancasila as the Philosophical and Ideological Basis of the Nation, in Journal of Law Volume 13 Number 25 February pp. 1-27

<sup>14</sup> Tanya Bernard L., Sim Continak Yoan N., Hage Markus Y., Legal Theory; 2013, *Human Order Strategy across Spaces and Generations*, Yogyakarta, Genta Publishing, 2013, pp. 116 - 117.

<sup>15</sup> Rawls Jhon, *A Theory of Justice-Theory of Justice; The Basics of Political Philosophy to Achieve Social Welfare in Society*, Yogyakarta, Student Library, 2019 p. 116.

<sup>16</sup> Sulistiawati Irianto in a paper

<sup>17</sup> ibid

<sup>18</sup> Sulistiawaty Irianto, Questioning "Neutrality" and "Objectivity" of Law: An Experience of Women in the Book of Women and Law Towards Law with a Perspective of Concern and Justice, Editor Sulistyawati Irianto, This book is published in the framework of the 22 Years of the CEDAW Convention in Indonesia, through the collaboration of The Convention Watch, the University of Indonesia and the Obor Foundation, Jakarta 2006, p. 30.

<sup>19</sup> Gandhi in Sulistiawaty Irianto, ibid

### *The role of the judge in the judicial process*

Judicial power is an independent power to administer justice in order to uphold law and justice. This affirmation is also contained in Law Number 48 of 2009 concerning Judicial Power which regulates that judicial power is the power of an independent state to administer justice for law enforcement and justice based on Pancasila for the implementation of the constitutional state of the Republic of Indonesia. To realize this mandate, the Supreme Court of the Republic of Indonesia is committed to being a noble judicial body. One of the ways in bureaucracy reformation that being campaigned by the Supreme Court is to increase the quality of verdicts and the professionalism inside the institution and all the justice institution under the supreme court jurisdiction.

The role of judges in Indonesia is regulated in Law Number 48 of 2009 concerning Judicial Power. The role of the judge in the court refers to the role of the court in this case helping justice seekers and trying to overcome all obstacles and barriers in order to achieve a simple, fast, and low-cost trial.<sup>20</sup> In assisting justice seekers, judges exercise their authority to examine, judge and decide a case. Article 5 of the Law on Judicial Power obliges judges to explore, follow, and understand the legal values and the sense of justice that live in society in examining, hearing and deciding cases.

The judge's decision should contain several aspects. First description of the process of social life as a part of the social control process; second embodiment of the applicable law and is essentially useful for any persons or groups as well as the state; third represents a balance between legal provisions and reality on the ground; fourth picture of the ideal awareness between law and social change; fifth beneficial to every person in a case; sixth does not create new conflicts for the litigant parties and the community<sup>21</sup>.

One form of improving the quality of judges' verdicts and the professionalism of the judiciary is when judges are able to decide by taking into account three very essential things. justice (*gerechtigheit*), certainty (*rechsecherheit*) and benefits (*zwachmatigheit*)<sup>22</sup> Three essential points can be explained as follows. <sup>23</sup>First, Judges' decision in resolving cases has a duty to find the right law. Judges, in finding the law, do not only find it in the law, because the law may not regulate clearly and completely, so that the judge must explore the legal values that live in society.<sup>24</sup>Second, Judges' verdict should reflect justice. In fact, the concept of a fair decision is difficult to measure for the disputing parties. Fair essentially means putting something in its place and giving to those who entitled to it based on the principle of equality before the law. *Third*, the judge's decision will reflect benefits, when the judge does not only apply the law textually and only pursue justice alone, but also leads to benefits for the interests of the parties in litigation and the interests of society in general<sup>25</sup>. Considering that the judge's decision is a law, the judge must maintain balance in society by restoring the public order to its original state (*restitutio in integrum*)<sup>26</sup>.

Referring to the explanation above, in the case of broken marriage promises, the decisions between one judge and another judge should not be contradicting. The law on judicial powers authorizes judges to consider legal values and a sense of justice that live in society. Justice that lives in society is rooted in the fairness of Pancasila which is the basis of the state and the source of all sources of law. The justice of Pancasila recognizes human dignity and does not discriminate citizens against ethnicity, religion and gender. The broken marriage promises is an act that does not respect the dignity of women and is a form of discrimination against women. If the judge's decision does not punish the offender, the decision does not respond to the victim's sense of justice.

### *Progressive Judge for a fair verdict*

#### *For victims of The Broken marriage promises*

One of the well-known Indonesian judges, Bismar Siregar once stated, "If I sacrifice legal certainty to uphold justice, I will sacrifice the law. Law is only a means while the goal is justice, why is the goal is sacrificed for the means". This situation shows that our world of justice longs for the presence of judges who are not only funnel of law but also strive to bring justice to the legal process. Justice seekers (*justiciabellen*) certainly desire that cases submitted to court can be decided by professional judges and have high legal integrity, so that they can produce decisions that do not only ensure legal certainty, but also legal justice, moral justice and social justice. Justice is the main goal of the process resolving disputes in court.<sup>27</sup>

Sudjito<sup>28</sup>Atmodiredjo also strongly criticizes our world of justice. It is said that the reality around us shows that there are still many judges who are mere "mouths of the law". They are deaf to the voice of public justice. They are constantly busy examining and adjudicating cases, but their decision is law-oriented. Sulistyawati Irianto<sup>29</sup> also expressed the same thoughts that law enforcers in carrying out their duties generally only rely on what is written in the law and do not examine cases and community experiences.

<sup>20</sup> Law Number 48 of 2009 concerning Judicial Power article 4

<sup>22</sup> Abdul Manan, 2012 Application of Civil Procedure Law in Religious Courts. Kencana, 2012, p 291

<sup>23</sup> Rommy Haryono Djojarahardjo, 2019 Realizing Justice Aspects in Judges' Verdicts in Civil Courts, Legal and Judicial Media Journal, Postgraduate Program, Sunan Giri University Surabaya, Volume 5, Number 1, May , pp. 88-100

<sup>24</sup> *ibid*

<sup>25</sup> Abdul Hakim 2017, Measuring a Sense of Justice in Civil Judges' verdicts Against Third Parties Who Are Not Parties Based on the Perspective of the Pancasila Law State', Law and Judiciary Journal, 6.3 , p 361  
<<https://doi.org/10.25216/jhp.6.3.2017.361-378>>

<sup>26</sup> Rommy Haryono Djojarahardjo, op, cit

<sup>27</sup> Bambang Sutiyoso, 2019, Looking for Ideal Format, Judicial Justice in Court, Journal of Law Number 2, Volume 17, April

<sup>28</sup> Sudjito Admodirejo, op cit,

Sudjito Atmodiredjo concerns about our current world of justice because some justice seekers find it difficult to find justice in the world of justice. Several decisions on the broken marriage promises mentioned above are examples of how difficult it is for female victims of the broken marriage promises to get justice. This situation occurs because the judges only rely on what is written in the law when they make a verdict. In the case of the broken marriage promises, the judges have not used their powers to explore and find law in society. In fact, this step is very important in helping female and child victims of the broken marriage promises to get justice.

Since a long time ago,<sup>30</sup>Sajipto Rahardjo, has reminded and encouraged the need for progressive judges. Within this concept, the judge should work with a conscience and not with a mere brain. In such a quality, the idea of progressive law does not merely pursue the legal system in its dogmatic nature, but also consider the aspects of social behaviour in its empirical nature. So, we will see humanitarian problems holistically in presenting justice-oriented law.

Sudjito Atmodiredjo<sup>31</sup> stated that intelligence quotient is not enough, it needs social intelligence and spiritual quotient to complete it. Judges are expected to be able to find substantive justice of social justice for all Indonesian people. Here, the judges work through contemplation, using his conscience to place themselves “as the social ear” so that they can hear the voice of public justice and embody it in the verdict they make.<sup>32</sup> Progressive judges who are conscious in heart, professional in work, friendly in their service, able to share various joys and sorrows with society and whose decisions are in line with the conscience of the people, both for those who are seeking justice and the wider community as a nation. The relationship between law and judges as central in law enforcement as described above greatly affects the achievement of substantive justice in accordance with the values of justice. It is important for us to encourage progressive judges who can bring about justice through substantive justice. The judges should refer to Article 5 of Law Number 48 concerning Judicial Power, which principally given the freedom to explore the values lives in society when faced with a legal impasse. This basis must be taken by the judge in realizing justice through his decision.

## CONCLUSION

1) A case broken promises of marriage, some decisions plead the man guilty for breach the promise of marriage and they will be punished, but there are also some contrary decision. The judge’s decisions does not answer the sense of justice of women, children and their families 2) In this context, a progressive judge is needed to make legal discovery in responding to the sense of justice of female victims of the promise to marry. The Law on Judicial Power gives the role and authority to the judge in examining, explore, follow, and understand legal values and a sense of justice that live in a society. Judges are needed to be progressive.

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<sup>30</sup> Sajipto Rahardjo in, Sudjito Atmodiredjo, op.cit, p. 212.

<sup>31</sup> Sudjito Atmodiredjo op cit, 213

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