

## Research Article

# LEGAL AID BY THE STATE AS A CONSTITUTIONAL RIGHT OF THE POOR: PROBLEMS AND CHALLENGES IN INDONESIA

**Ari Wibowo**

*Saumlaki District Court, Maluku, Indonesia  
Jl. Ir. Soekarno, Saumlaki, Olilit, Tanimbar Selatan, Kabupaten Maluku  
Tenggara Barat, Maluku, Indonesia*

**Michael Hagana Bangun\***

*Center for Constitutional Rights (CCR), Ambon, Indonesia*

\*Email: michael\_hagana@gmail.com

*The provision of legal aid is one way to realize access to law and justice for the poor people provided by the state on the mandate of the constitution. Several regulations regarding legal aid have been issued by the state through the Act and its implementing regulations as well as from the Supreme Court or the Constitutional Court through the Supreme Court Regulations and the Constitutional Court's decisions. Legal aid is the constitutional right of every citizen to guarantee legal protection and guarantee equality before the law stipulated in Law Number 16 of 2011, the State is responsible for recognizing and protecting the human rights of every individual without differing backgrounds, so that everyone has the right to be treated equally before the law is contained in Article 28D*

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*of the 1945 Constitution of the Republic of Indonesia. For the poor who experience legal problems in the form of injustice, they can request legal assistance from legal aid institutions that are regulated in legislation. The purpose of providing legal aid is to guarantee and fulfill the right for Legal Aid Recipients to gain access to justice, to realize the constitutional rights of all citizens in accordance with the principle of equality in law, to ensure the certainty that the implementation of Legal Aid is carried out equally across the territory of the Republic of Indonesia. , and to create an effective, efficient and accountable court.*

Keywords: *Legal Aid; Constitutional Rights; State; Human Rights*

## I. INTRODUCTION

Recognition, protection, and legal certainty as well as equality before the law is a state responsibility to make it happen as an implementation and stipulation Indonesia is a state of law and the embodiment of the sound of the Constitution and Special Laws that regulate legal aid. The concept of the sound of Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which formulates that every citizen has the same position before the law, known as the principle of equality before the law is the concept that every Indonesian citizen has the right to be treated equal to anyone before the law without exception for the poor, middle and rich. Moreover, the State of Indonesia has a responsibility towards the poor to take care of them as stated in Article 34 paragraph (1) of the 1945 Constitution which reads “*the poor and neglected children are cared for by the state*”. The meaning of the word nurtured is to have a phrase to provide everything good, food, clothing, education and justice.<sup>1</sup>

Getting legal aid services is something that is expensive, because the poor are unable to pay for an advocate to provide assistance or to fight back in the legal process experienced by a suspect or defendant. The inability to obtain their rights in accordance with legal procedures requires the holding of a policy, therefore the state issues a special law to carry out state responsibilities in terms of maintaining the constitutional rights of poor citizens on the part of justice, namely using legal aid. Law Number 16 of 2011 concerning Legal Aid. The content of the law is to require law enforcers, especially advocates, to provide free legal aid to the poor in Indonesia. In addition, in Law no. 18 of 2003 concerning Advocates is mandated to provide defense and assistance for everyone when guilty of the law regardless of background, individual, race, class,

<sup>1</sup> Frans Hendra Winarta, 2000, *Bantuan Hukum: Suatu Hak Asasi Manusia Bukan Belas Kasihan*, Elex Media Komputindo, Jakarta, p. 102.

belief, politics, social strata, economy and gender. This is done because the provision of legal aid for the poor is an effort to realize one of the goals of access to law justice.<sup>2</sup>

In an effort to realize the principles of the rule of law in the life of society and the state, the role and function of advocates as free, independent, and responsible professions is important, in addition to judicial institutions and law enforcement agencies such as the police and prosecutors. Through the legal services provided, advocates carry out their professional duties for the sake of upholding justice based on the law for the benefit of the justice-seeking community, including efforts to empower the community to realize their fundamental rights before the law. So noble is the profession of advocate that advocates are dubbed “*officium nobile*” or noble profession which means a noble and honorable profession.

So that it can be understood why the state is responsible for everything poor people both in terms of the economy, education, food, clothing and justice of a person because right or wrong the suspect or the defendant is only the panel of judges at the trial that can decide the case through evidence and the judge's conviction but in the direction of There are several rights that must be protected in both pre-adjudication and adjudication processes.

Based on this background, the formulation of the problem in this study includes two important things, namely the *first* regarding the implementation process of providing legal aid to the community, and *secondly* regarding what are the problems in providing legal aid to the poor. The research method used in the text of State Responsibility in Maintaining the Constitutional Rights of the Poor to Provide Legal Aid is the normative research method by seeking data from library materials which are secondary data or library research materials. The materials used were obtained from legal journal materials, the internet, laws and regulations and other articles/writings related to this research paper.

## II. THE PROCESS OF PROVIDING LEGAL AID TO THE COMMUNITY

Frans Hendra Winarta stated that legal aid is a special legal service provided to the poor who need a free defense, both outside and inside the court, in criminal, civil and state administration, from someone who

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<sup>2</sup> Frans Hendra Winata, 2009, *Probono Publico, Hak Konstitusional Fakir Miskin Untuk Memeperoleh Bantuan Hukum*, PT. Gramedia Pustaka Utama, Jakarta, p.xii. See also YLBHI, 2014, *Panduan Bantuan Hukum di Indonesia*, Yayasan Obor Indonesia: Jakarta, p. 462.

understands the ins and outs of defense. law, principles and rules of law, and human rights. Based on the ratification of the 1945 Constitution of the Republic of Indonesia, the Universal Declaration of Human Rights, the ICCPR and the 1999 Human Rights Law mentioned above, it appears that Indonesia provides the right to guarantee equal treatment before the law for every individual, and one of these forms of guarantee is conceptualized in the provision of free legal aid, only for underprivileged people or groups of people.<sup>3</sup>

The concretization of the provision of free legal aid at the regulatory level in the history of its development has been derived from various laws and regulations, thus affecting the conception of legal aid that has occurred so far. Provision of legal aid according to Legal Aid Law is carried out by legal aid implementers who must have had a legal entity, are accredited, have offices, have administrators, have work programs, in terms of providing legal aid in accordance with article 8 of the Legal Aid Law.

The activities of providing legal aid were then developed by means of public awareness and organizing, through campaigns and in collaboration with journalists, as well as seeking the participation of partners, adjudicating and analyzing cases that have not yet manifested, and relying on the cooperation of informal figures, both individually and collectively. . In carrying out the provision of legal aid, it can include advocates, paralegals, lecturers and law faculty students who have met the requirements. Then the advocate itself is a person whose profession is to provide legal assistance both inside and outside the court based on the Law on Advocates, this is especially for underprivileged clients.

There is another thing, namely a paralegal is someone who is not a lawyer and also not an advocate but has the ability and legal skills as evidenced by the existence of a certificate issued by a legal aid provider so that he can assist advocates and lawyers in providing legal aid services. In its implementation, the provision of legal aid can be through several factors including legal assistance to community organizations, legal assistance to legal aid institutions or often referred to as LBH, legal assistance to advocate offices, and also the provision of legal assistance in general.

Legal aid has 4 (four) concepts in its application, namely as follows:

1. The concept of legal aid, is legal services provided to the poor individually, the nature of legal aid is passive and the approach is very formal-legal.
2. The concept of Constitutional Legal Aid, is legal aid for the poor that is carried out within the framework of broader efforts and goals such as: awareness of the rights of the poor as legal subjects, enforcement

<sup>3</sup> Frans Hendra Winarta, 2009, *Lo.cit.*; Frans Hendra Winarta, 2000, *Op.Cit.*, pp. 56-57.

and development of human rights values as the main pillar for the establishment of the state. law.

3. The concept of Structural Legal Aid, is an activity that aims to create conditions for the realization of a law that is able to change the unequal structure towards a more just structural one, where legal regulations and their implementation can guarantee equality of position both in the legal and political fields. The concept of structural legal aid is closely related to structural poverty.
4. Responsive legal aid is provided to the poor free of charge and covers all areas of law and human rights and does not differentiate between individual and collective defense cases.

The services provided in responsive legal aid are in the form of legal counseling on human rights and the legal process for the right to be defended by legal aid organizations and/or advocates, defense in overcoming concrete legal problems, quality defense in court in order to produce a more firm and clear jurisprudence. and true, legal reform through court decisions that favor the truth and the formation of laws that are in accordance with the value system and culture that exists in society to make this concept successful, legal aid must become a national movement supported by the state and society. The concept of legal aid that can help realize access to law and justice for the poor is the concept of responsive and structural legal aid. If the concept of providing legal aid is combined with the concept of access to law and justice, it is not impossible for the poor to access the law and get justice.<sup>4</sup>

### III. PROBLEMS IN PROVIDING LEGAL AID TO THE POOR

The provision of legal aid in the implementation in the community there is an irregularity which in the end causes problems in its application so that as a result there is no realization of access to law and justice for the poor. Based on the results of research that has been carried out on five issues that hinder the application of legal aid for the poor<sup>5</sup>, namely:

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<sup>4</sup> Kelompok Kerja Paralegal Indonesia, *Kritisi Rancangan UUBH dari Aspek Paralegal dan Pemberdayaan Hukum (Legal Empowerment)*, (Jakarta: KKPI, 2014), pp. 15-16.

<sup>5</sup> Agus Raharjo, Angkasa, & Rahadi Wasi Bintoro, “Akses Keadilan Bagi Rakyat Miskin (Dilema Pemberian Bantuan Hukum oleh Advokat)”, *Mimbar Hukum*, Vol. 27 No. 3, 2015, pp. 442-443; Andry Rahman Arif, “Pelaksanaan Pemberian Bantuan Hukum Terhadap Terdakwa Yang Tidak Mampu Dalam Perkara Pidana Di Kota Bandar Lampung”, *Jurnal Fiat Justitia*, Vol. 9 No. 1, 2015, pp. 106-107.

## **A. The Normative Legal Framework for the Provision of Non-Working Legal Aid**

Quoting from Satjipto Rahardjo's opinion "*Laws that were created and never implemented have essentially ceased to be laws*". The normative legal framework regarding the provision of legal aid at the level of practice in the community, especially for the constituents of the regulation, namely the poor are still not carried out optimally by advocates as one of the legal aid providers. There are three things the behavior of advocates in dealing with the problem of assistance for the poor, namely avoiding for various reasons, accepting the case on the condition that the case must attract the mass media so that it raises the prestige of the advocate, and finally fully accepting the provision of legal aid.

Some advocates are more inclined to defend their clients regarding upwards than the poor, this can reduce the advocate profession as a noble profession into a commercial profession. Based on the results of the study, there are almost some advocates who are reluctant to provide legal assistance/defense on a pro bono publico basis to the poor by rejecting cases that are not objective. The objective thing referred to here is the rejection of cases that are not legal problems, meaning that the problem does not fall into the category of legal problems that do not cause legal consequences. Advocates are not objectively refusing based on research results such as rejecting cases of sexual harassment, fighting the government, or even refusing the case because the case is not a big case that will not be published by the mass media. The non-objective rejection of cases experienced by the poor by advocates is a deviation from the normative legal framework of providing legal aid, because normatively legal aid is given without knowing what legal problems will be handled and who will be defended, but how the poor get the right to access. to law and justice when the poor are in trouble with the law. When the normative framework for providing legal aid is not carried out by advocates, the law regarding legal aid does not become law, in other words, regulations regarding legal aid are just a myth created by the state.

## **B. Lack of Legal Awareness in the Poor**

Ignorance of the law will result in someone breaking the law or someone will be fooled by the person to take advantage, and what is more surprising is that the person is usually from law enforcement or the government. To quote John Rawls, "*all legal systems will fail if they are not encouraged by a genuine personal moral attitude (justice as fairness) in society.*" Based on this opinion, if it is clashed with the application of legal aid for the poor, if the poor in practice still lack legal awareness and

legal knowledge of the importance of legal aid, then the provision of legal aid will not function optimally. The perspective of the application of providing legal aid for the poor is not only seen as meeting the community's need for assistance in every legal process, but more than that, namely making the community understand the law and be able to criticize existing legal products, namely by providing legal and citizenship education for the community (civic education).<sup>6</sup>

This perspective can ideally solve this problem, but it is not yet appropriate at the level of implementation. Based on the results of the research conducted, it was found that several lawyers and legal aid institutions still tend to view the provision of legal aid as passive. The perspective of providing passive legal aid can become a parasite that can reduce the optimization of legal aid provision. Perspectives here can be illustrated such as, the provision of legal assistance provided by advocates/LBH on appointments from the police or court as legal advisors due to the provision of funds from the court and cases whose sentences are above 15 years in prison as recommended by the Criminal Procedure Code. Based on Perma No. 1 of 2014 concerning Guidelines for Providing Legal Services for Underprivileged Communities in Courts, court institutions provide a budget to provide free legal aid and establish a Legal Aid Center (*Pos Bantuan Hukum*, Posbakum).

Access to legal aid provided by the court by appointing an advocate/LBH funded by the court, this is called institutional cooperation (Article 26 of Perma No. 1 of 2014) while Posbakum itself functions to provide legal consulting services, making the required legal documents and information on advocates/LBH who receive legal assistance (Article 25 of Perma No. 1 of 2014). The presence of access to legal aid is not without problems, the problem that arises is the 'limitation of the budget provided so that if the allotted budget has been absorbed then there are cases of poor people who need free legal aid or the case needs to be brought to the court of appeal, cassation or reconsideration can be simply ignored, because the budget provided has been completely absorbed. This will raise the next problem. Based on the perspective that the provision of legal aid is passive and the limited access provided by the court will reduce the optimization of the provision of legal aid for the poor. This makes the urgency of the sensitivity of advocates/LBH to view the provision of legal aid actively and not rely too much on the access provided by the court.

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<sup>6</sup> Ispurwandoko Susiolo, "Pendidikan Hukum Klinik (Clinic Legal Education) dalam Pelaksanaan UU No. 16 Tahun 2011 Tentang Bantuan Hukum", *Jurnal Hukum dan Masyarakat*, Vol. 13 No. 2, 2014, pp. 22-24.

### C. Access to Justice is only a Formality

Starting from a sarcastic sentence, namely “*the blade of the law is sharper down than up*” which means that the sense of justice from the law does not touch the lower class, while those who have a higher social class will easily get more preferential treatment. Errors in the application of law and legal subjects (*error in persona*) committed by judges as controllers of the court process are not rare in judicial practice in Indonesia, this is what is called a misguided trial. Often in practice in the community, especially the poor people experience/become victims of a deviant judiciary, although there is access to an appeal, cassation or judicial review to avoid a misguided trial, it is not possible for the poor to use this access because it will cost the poor a lot of money to be paid.<sup>7</sup>

Based on this, the existence of the Legal Aid Law is not a guarantee for the poor to get access to appeal, cassation or review. This is because at the level of practice in society, the application of legal aid is only a formality by some advocates and LBH. Based on the results of the research conducted, some of the provision of legal aid is carried out to the courts of the first instance. From the point of view of an advocate/LBH, this is done at the request of the client (the poor), but from the point of view of the poor the request (no appeal, cassation, review) is based on submission and does not have the cost to access it. A matter that becomes a dilemma, where the Legal Aid Law requires to provide legal aid for the poor free of charge sourced from the APBN and APBD and Perma No. 1 of 2014 which is sourced from the local court budget, normatively legal aid is purely free, without any other costs, but this is inconsistent in the world of practice in society, where the poor are still charged with fees such as photocopying fees, summoning witnesses and experts. , as well as transportation costs are the responsibility of the poor in receiving legal aid.

The fee collection is carried out on the basis of supporting the work of an advocate or LBH. In fact, collecting fees for legal aid is a prohibition with a maximum imprisonment of 1 year and a fine of fifty million rupiah (Article 20 in conjunction with Article 21 of the Law on Legal Aid). This becomes a dilemma in the application of legal aid for the poor.

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<sup>7</sup> Rahmat Efendy Al Amin Siregar, “Studi Tentang Peradilan Sesat (Rechterlijke Dwaling) dan Hubungannya dengan Memudarnya Kepercayaan Masyarakat Terhadap Hukum”, *Jurnal FITRAH*, Vol. 8 No. 1, 2014, pp. 22-25.



## **D. Discrimination and Complicated Procedures in Funding Legal Aid**

Talking about funding or money is an interesting thing, because with it all work activities will be easy and because it can also change an ideology. Funding in legal aid is a form of responsibility and enthusiasm given to the state to advocates/LBH because it is obligatory to provide legal aid to the poor. The Law on Legal Aid provides funding for advocates/LBH with a variety of complicated requirements and procedures. The conditions given are more likely to be fulfilled by LBH alone, and even then there must be a selection process commonly referred to as accreditation as legitimacy to absorb the legal aid funding, this has the tendency of discrimination. Based on the results of verification and accreditation in 2013, there were only 310 organizations that passed.

This figure is very small, so there are still LBHs that do not pass accreditation, especially in the areas of Papua, Bali, NTT, NTB. Not to mention that the procedure for absorbing these funds is very complicated, because the funding is delegated to the Ministry of Law and Human Rights whose legal position (office area) only exists in each province. This means that LBH domiciled in cities far from the province will find it difficult to access these funds. Based on the requirements, the process of accreditation and absorption of funds is complicated and tends to be discriminatory, which can result in the absorption of legal aid funds nationally being ineffective. This tends to cause many advocates/LBH to collect other fees in providing legal assistance.<sup>8</sup>

## **E. There is no supervision in the application of legal aid**

Supervision is the most important thing to keep from overstepping or abusing. Negligence for legislators, especially the Legal Aid Law, normatively does not accommodate the provisions of Supervision in the application of legal aid. Supervision in the application of legal aid plays an important role in maintaining the balance of legal aid relations according to their designation. Loose supervision can open up gaps for

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<sup>8</sup> Please also compare to others previous researches, *see* Wulandari, C. (2018, July). The Pro Bono Publico Prodeo Legal Aid System Model for the Poor Society in Indonesia. In *1st International Conference on Indonesian Legal Studies (ICILS 2018)*. Atlantis Press; Wulandari, C., Wicaksono, S. S., & Khikmah, U. F. (2019). Paralegal Existence In Providing Access to Justice for The Poor in Central Java. *IJCLS (Indonesian Journal of Criminal Law Studies)*, 4(2), 199-206; Arifin, S. (2016). Commitment of Local Government in Providing Legal Aid for the Poor Society. *Jurnal Dinamika Hukum*, 16(1), 8-16.

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misappropriating state money (corruption) or even sacrificing hopes for the realization of access to law and justice for the poor.

#### IV. CONCLUSION

The services provided in responsive legal aid are in the form of legal counseling on human rights and the legal process for the right to be defended by legal aid organizations and/or advocates, defense in overcoming concrete legal problems, quality defense in court in order to produce a more firm and clear jurisprudence. and true, legal reform through court decisions that favor the truth and the formation of laws that are in accordance with the value system and culture that exists in society to make this concept successful, legal aid must become a national movement supported by the state and society. The concept of legal aid that can help realize access to law and justice for the poor is the concept of responsive and structural legal aid. If the concept of providing legal aid is combined with the concept of access to law and justice, it is not impossible for the poor to access the law and get justice. The provision of legal aid in the implementation in the community there is an irregularity which in the end causes problems in its application so that as a result there is no realization of access to law and justice for the poor.

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