

## Research Article

# EQUALITY BEFORE THE LAW PRINCIPLE IN THE IMPLEMENTATION OF LEGAL AID IN INDONESIA

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*Legal aid is a legal services provided to the beneficiaries of legal aid according to Law No. 18 of 2003 on Advocates. Considering there are still many people who do not understand that in Indonesia there is also a legal aid provided by lawyers at no cost. The ineffectiveness of the application in providing legal aid in Indonesia is a legal issue that is interesting to study more in order to determine the main problems causing lack of effectiveness in the provision of legal aid in Indonesia, which will look for solutions from idea into a formulation as optimization of legal aid in Indonesia. Issue will be seeking legal issues in the implementation of judicial assistance and formulation of how the application of legal aid may be optimized. This article reviews the development of legal aid as legal services provided by lawyers to people who are not able to freely in Indonesia.*

**Keywords:** *Legal Assistance; Advocacy; Community; Development*

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## I. INTRODUCTION

The protection and recognition of human rights of every individual or citizen is an obligation for the state as a logical consequence of its stipulation as a state of law.<sup>1</sup> Indonesia is a legal state (Article 1 paragraph (2) of the 1945 Constitution) which has an obligation to protect and recognize the human rights of every individual or citizen. This stipulation was followed by a statement that every citizen has the same position before the law, known as the principle of equality before the law<sup>2</sup> as enshrined in Article 27 paragraph (1) of the 1945 Constitution.

The consequence of the principle of equality before the law, a person has the right to be treated equally before the law, including poor people who are in trouble with the law. Moreover, the Indonesian state constitutionally in article 34 (1) of the 1945 Constitution states that the poor and neglected children are cared for by the state. The phrase "maintained" is not just providing the need for food and clothing, but also the need for access to law and justice, in other words, the principle of equality before the law is not only interpreted as equality in the eyes of the law, but according to Rhode it is interpreted as equality of access to the system. law and justice.<sup>3</sup> Based on this, a concept and purpose was created called access to law and justice (access to law and justice). Based on these principles and the objectives of access to law and justice, the Government of Indonesia issued a regulation to realize these principles and objectives through Law 16 of 2011 concerning Legal Aid (hereinafter referred to as the Law on Legal Aid). The substance of the regulation requires law enforcers, especially advocates as legal aid providers, to provide free legal aid for the poor in Indonesia, moreover, this obligation is a normative obligation for advocates as officium nobile (noble profession) and mandated by law. Law No.18 of 2003 concerning Advocates (hereinafter referred to as Law on Advocates) is to provide a defense for everyone when in trouble with the law regardless of individual background, race, ethnicity, political belief, social strata,

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<sup>1</sup> Sri Rahayu Wilujeng, "Hak Asasi Manusia: Tinjauan dari Aspek Historis dan Yuridis", *Jurnal Humanika*, Vol. 18 No. 2 Edisi Juli-Desember 2013, Fakultas Ilmu Budaya UNDIP: Semarang, h. 162.

<sup>2</sup> A.V. Diecy, 2007 Pengantar Studi Hukum Konstitusi, terjemahan *Introduction to the Study of The Law of the Constitution*, penerjemah Nurhadi, M.A Nusamedia : Bandung, hlm. 251. Lihat juga didalam Ahmad Ulil Aedi dan FX Adji Samekto, "Rekonstruksi Asas Kesamaan Di Hadapan Hukum (*Equality Before The Law*)", *Jurnal Law Reform*, Vol. 8 No. 2 Tahun 2013, Program Magister UNDIP : Semarang h. 2.

<sup>3</sup> Deborah L. Rhode, *Access to Justice*, Oxford University Press : New York, 2004, h. 3.

economy and gender.<sup>4</sup> Based on this, the right to obtain legal assistance for the poor is one of the objectives of access to law and justice.

Talking about the principle of equality before the law, human rights, and access to law and justice is an easy and fun thing, but when it comes to the level of practice in the reality of society, it will all be a slap in the face. The reality in society regarding equality before the law, human rights and access to law and justice is not at all what was discussed. All of these are almost not implemented, ignored and openly violated either from the government, law enforcement or even to justice seekers.

In order to enforce material legal regulations, the need for an institution that is able to function continuously and with full time as a channel to accommodate complaints, problems, demands of the community, especially those who are poor and then defend and demand them through legal route, it is felt. In Black's law Dictionary, by Garner A. Bryan Black Eight Edition,<sup>5</sup> the definition of legal aid is stated as, "Country wide system administered locally by which legal services are rendered to those in financial need and who cannot afford private counsel". In its development, the concept of legal aid is always associated with the ideals of a welfare state where the government has an obligation to provide welfare to its people. Legal aid is included as one of the programs to improve people's welfare, especially in the socio-political and legal fields.

Welfare legal aid is defined as a right to welfare which is part of the social protection framework provided by a welfare state. Welfare legal aid as part of the social policy is needed to neutralize the uncertainty of poverty.<sup>6</sup> Therefore, social development or social improvement has always been part of the implementation of welfare legal aid. The implementation of legal aid actually feels right when community members are included in a series of legal processes, when dealing with the interests of the state in a legal case or when dealing with state instruments that administer judicial power and the judicial process.<sup>7</sup> In order for legal aid to be beneficial to the entire community, its implementation needs to be carried out evenly by distributing it through

<sup>4</sup> Frans Hendra Winarta, 2009, *Pro Bono Publico, Hak Konstitusional Fakir Miskin untuk Memperoleh Bantuan Hukum*, Gramedia : Jakarta, h. 1-2, lihat juga didalam Frans Hendra Winarta, 2011, *Bantuan Hukum di Indonesia, Hak untuk Didampingi Penasihat Hukum Bagi Semua Warga Negara*, Elex Media Komputindo : Jakarta, h. 101.

<sup>5</sup> Garner A. Bryan, 2004, *Black's Law Dictionary*, Eighth Edition, West Thomas Business, United States of America, hlm. 80.

<sup>6</sup> Daniel S. Lev, 1990, *Hukum dan Politik di Indonesia; Kesenambungan dan Perubahan*, Cetakan Pertama, Lembaga Penelitian, Pendidikan dan Penerangan Ekonomi dan Sosial (LPES), Jakarta.

<sup>7</sup> Binziad Kadafi, dkk, 2002, *Advokat Indonesia Mencari Legitimasi, Studi tentang Tanggung Jawab Profesi Hukum Indonesia*, Cetakan Ketiga Pusat Studi Hukum dan Kebijakan Indonesia, Jakarta, hlm. 82.

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various existing law enforcement institutions such as courts, prosecutors, practicing lawyers/advocates, as well as community organizations engaged in legal aid.

Concrete law enforcement is the application of positive law as it should be obeyed. In the law enforcement process, the law is not an independent entity but is closely tied to other sub-systems in society. This is as stated by W Friedmann, at least there are (three) factors that are quite dominant that affect the law enforcement process which consists of First, legal substance, Second, legal structure or legal structure or legal material/content, Third legal culture or legal culture.<sup>8</sup>

The spirit contained in the Law on Legal Aid is clearly different from the provision of legal aid regulated in the Law on Advocates. The provision of legal aid in the Advocates Law is an inherent matter for professions whose function is to serve the public interest, especially advocates known as *officium nobile*.<sup>9</sup> This is stated in the Decision of the Constitutional Court Number 067/PUU-II/2004.

The state forms an important aspect in carrying out Legal Aid through the Law on Legal Aid and has the right to determine who can provide legal assistance to groups of poor people in order to achieve access to law and justice, one of which is the advocate profession. The existence of the Law on Legal Aid is not a legal insecurity for the implementation of Legal Aid, because the Law on Legal Aid is a tool of the state for the implementation of legal aid, not mixing up the terms of providing legal aid as is the case in the Law on Advocates.

## II. ACCESS TO LAW AND JUSTICE: THE ROLE OF GOVERNMENT

The law exists, where the community is. This has become an old theory that is often heard by people who study law. Basically, the law will be good if the community accepts it voluntarily, on the other hand the law will be bad if the community cannot accept it because they cannot protect the interests of the community. The spirit contained in the Law on Legal Aid is clearly different from the provision of legal aid regulated in the Law on Advocates. The provision of legal aid in the Advocates Law is an inherent matter for professions whose function is to serve the public interest, especially advocates known as *officium nobile*.<sup>10</sup> This is stated in the Decision of the Constitutional Court Number 067/PUU-II/2004. The state forms an important aspect in carrying out Legal Aid through

<sup>8</sup> Lawrence M. Friedman, 975, *The Legal System; A Social Science Perspective*, Russel Sage Foundation, New York, hlm. 4-5

<sup>9</sup> *Ibid.*, pp. 148-149.

<sup>10</sup> *Ibid.*

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The Advocate Law is a regulation that regulates the requirements, rights and obligations of becoming a member of the advocate profession, which includes supervision of the implementation of the advocate profession in providing legal services, both inside and outside the court. Meanwhile, the Law on Legal Aid is a state legal instrument to implement the logical consequences as a State of Law, namely the existence of access to law and justice. The Law on Legal Aid is a regulation that regulates the requirements and technicalities of legal aid for the poor, as well as the classification of who can become a legal aid provider.

Access to law and justice is a vital and most important mandate of the United Nations Development Program to reduce poverty and strengthen democratic governance.<sup>11</sup> Access to law and justice is not just about increasing access to courts and ensuring one's legal representation.<sup>12</sup> Access to justice is defined as the ability of people to seek and obtain remedies through formal or informal institutions of justice for complaints in accordance with human rights standards.<sup>13</sup> This is access for the community, especially the poor to fair, effective and accountable mechanisms to protect rights, avoiding abuse is the community's ability to obtain and obtain settlements through formal and informal mechanisms in the legal system, as well as the ability to obtain and be involved in the process of making and the application and institutionalization of law.<sup>14</sup> Access to justice in the Indonesian context refers to the circumstances and processes in which the state guarantees the fulfillment of basic rights based on the 1945 Constitution and universal principles of human rights, and guarantees access for every citizen (claim holder) to have the ability to know, understand, realize and use these basic rights through formal and informal institutions, supported by the existence of a public complaint mechanism that is easily accessible

<sup>11</sup> United Nations Development Programme, UNDP, 2013, "Strengthening Judicial Integrity through Enhanced Access to Justice (Analysis of the national studies on the capacities of the judicial institutions to address the needs/demands of persons with disabilities, minorities and women)", Thailand, p. 6.

<sup>12</sup> United Nations Development Programme, UNDP, 2004, "Access to Justice Practice Note", Thailand, p. 3.

<sup>13</sup> United Nations Development Programme, UNDP, 2005, "Programming for Justice: Access for All: A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice", Thailand, p. 3.

<sup>14</sup> *Ibid.*

to the public and responsive, in order to obtain optimal benefits to improve the quality of their own lives.<sup>15</sup>

One of the government's efforts to achieve access to law and justice is by issuing an affirmative action policy. Affirmative action is the method chosen by the state as a response to discriminatory social conditions, inequality, and marginalization in all areas of life due to patriarchal structures at the public and private levels.<sup>16</sup>

Elizabeth S. Anderson defines affirmative action broadly including all policies that have a purpose. First, seek to remove barriers in systems and norms against groups as a result of historical injustice and inequality, and/or, Second, seek to promote an inclusive society as a prerequisite for democracy, integration, and pluralism; Third, seek equality on the basis of identity classification (race, gender, ethnicity, sexual orientation, etc.).<sup>17</sup> One of the most important means for implementing affirmative action is the law and guarantees for its implementation there must be a constitution and laws. 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. Some of the problems that hinder the implementation of legal aid for the poor are as follows.

1. The Normative Legal Framework

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.

2. 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.*"<sup>18</sup> Based on this opinion, if it is

<sup>15</sup> PEKKA dan AusAID, "Akses terhadap Keadilan: Pemberdayaan Perempuan Kepala Keluarga di Indonesia", 2010, p. 57.

<sup>16</sup> Hendri Yasuti. "Hakikat *Affirmative Action* dalam Hukum Indonesia (Ikhtiar Pemberdayaan yang terpinggirkan)" *Jurnal Menara* Vol. 12 No. 1 Januari – Juni 2013, p. 41.

<sup>17</sup> Elizabeth S. Anderson, "Integration, Affirmative Action, and Strict Scrutiny" *Newyork University Law Review*, Vol. 77:1195, November, 2002, p. 1207.

<sup>18</sup> Masnur Marzuki, "Affirmative Action dan Paradoks Demokrasi" *Jurnal Konstitusi*, PSHK-FH UII, Vol. II, No. 1, June 2009, p. 14.

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.

3. 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) made 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. 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.<sup>19</sup>
4. 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.
5. 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 misappropriating state money (corruption) or even

<sup>19</sup> Alfian Biroli, "Problematisasi Penegakan Hukum di Indonesia (Kajian dengan Perspektif Sosiologi Hukum)", *Jurnal Dimensi*, Vol. 8. No.2, 2015, p. 24; 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, p. 22; Edy Sunarto, 2011, "Bantuan Hukum Bagi Tersangka dalam Proses Peradilan Pidana Pada Tingkat Penyidikan di Mapolresta Padang", *Thesis*, Pasca Sarjana Universitas Andalas: Padang, p 12. *See also* Dony Michael, "Peran Pemerintah Daerah dalam Pemenuhan Hak Atas Keadilan (Studi Tentang Akses Bantuan Hukum Bagi Rakyat Miskin di Provinsi Jawa Timur)", *Jurnal Hak Asasi Manusia*, Vol. 3 No. 2, 2012, BPHN: Jakarta, p 50.

sacrificing hopes for the realization of access to law and justice for the poor.<sup>20</sup>

The application of providing legal aid in practice in the community is not optimal because it still has various kinds of problems that are systematic so that it has an impact on the lack of realization of access to law and justice for the poor. Therefore, we need an idea that can solve problems in the application of providing legal aid for the poor, so that the realization of access to law and justice is not just a myth or a sweet promise made by the state. Referring to the definition and strategy for the realization of access to law and justice, there are several efforts in optimizing the implementation of providing legal aid for the poor as follows.

1. Stimulants for Advocates/LBH in Providing Legal Aid

According to the World Organization of Advocates, namely the BAR Association, stimulants are one way to make advocates consciously want to provide legal assistance, because repressive methods are not effective in making lawyers aware of providing legal assistance. This stimulant method is carried out such as holding an award to inspire other advocates to provide legal assistance to the poor. Based on this, this method is an alternative way to solve the first problem.

2. Active, Responsive and Structural Legal Aid.

The urgency in changing the orientation of legal aid so that it is active, responsive and structural is needed because of the limitations of clients (poor people) who do not have knowledge and awareness of the law and budget provided by the courts and the state. Being active-responsive means that advocates must know more about the needs of clients (the poor) when they have legal problems without having to wait for requests from clients, law enforcement officers, or courts. Structural nature here means that advocates in providing legal assistance are not only to solve problems in court (legal advisors), but advocates / LBH make their clients understand the law more so that a structural legal awareness is created, this places advocates other than as advisors. law as well as legal mentor.

3. Full access to justice is reached.

When the advocates/LBH have agreed that the orientation of legal aid must be active, responsive and structural, it will become a necessity that all access to justice (such as courts of first instance, appeal, cassation, and judicial review), will be able to exercise their rights in full. to access law and justice.

4. Refining the Meaning of Free in Providing Legal Aid.

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<sup>20</sup> Muhammad Rustamaji, "Menakar Pengawasan Pemberian Bantuan Hukum Dalam Pandangan Richard A Posner, *Jurnal Rechtsvinding*, Vol. 2 No. 1 Edisi April 2013, h. 100.



The provision of free legal aid is not something that is impossible to achieve, when a policy and procedure mechanism can be changed to make it easier to absorb legal aid funds, both from the APBN, APBD and the court (Supreme Court). These changes can be started from the accreditation procedure and the mechanism for the absorption of legal aid funds to make it easier without compromising the quality, so that it can be accessed by every advocate/LBH and advocate organization. When the accreditation procedure and the mechanism for the absorption of legal aid funds have been simplified, it is not impossible to realize the meaning of free legal aid for the poor. This means that advocates/LBH will not hesitate in providing free legal aid, because the absorption of funds can help revive their work activities.

5. Supervision in the Implementation of Providing Legal Aid

Starting from the absence of supervision in the application of legal aid both normatively and in implementation in the community, it is necessary to have a supervisory system to oversee several components of the application of legal aid. The supervision includes, whether or not legal aid is provided, whether or not access to justice is used, the performance of advocates or LBH in providing legal assistance, in this case of course it requires opinions from the public and clients who have been recipients of legal aid, and the final supervision regarding the absorption of legal aid. funds that see whether the funds used for legal aid are appropriate or not, so that there is no embezzlement or corruption of legal aid funds. After the material under supervision is known, what is no less important is the supervisor, which can consist of the government, advocate organizations and the community.

### III. CONCLUSION

The conclusion contains a summary of answers to research problems that are a contribution to scientific development. There are several ideas in the form of an effort that can optimize its application. First, a stimulant for advocates/LBH in providing legal assistance. Second, legal aid that is active, responsive and structural. Third, all access to justice is reached. Fourth, purify the meaning of free in the provision of legal aid. Fifth, Supervision in the implementation of the provision of legal aid. These efforts are an idea that can optimize the provision of legal aid, so that it is not impossible to realize access to law and justice for the poor. The government should revise the laws and regulations regarding legal aid related to accreditation and funding procedures and add supervision in its implementation. Advocates and LBH and OBH should prioritize the interests of clients rather than personal interests, which are morally

oriented, not just economic gain. Third, the community should be able to understand the importance of legal aid so that they have legal awareness so that together (the state and advocates/LBH) realize access to law and justice. And in the sub-chapter "Optimizing the Provision of Legal Aid for the Poor" becomes a suggestion and input to realize the meaning of Access to Law and Justice in Indonesia.

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### **Judicial Decision**

Mahkamah Konstitusi, Putusan Nomor 006/PUU-II/2004  
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