

## Legal Assistance for Underprivileged Communities to Access Justice within the Human Rights Perspective

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<b>Keywords:</b> Legal Aid, Justice, Human Rights.  <b>DOI:</b> 10.25041/lajil.v5i2.3258	<i>Legal aid promotes justice and human rights, which the central and local governments should provide. Unfortunately, the provision of legal aid for underprivileged communities still requires improvement. Legal aid provided by legal aid activists, institutions, mass organizations, political parties, and non-governmental organizations is still not optimal due to administrative problems and the legalization of legal aid practices. This research provides insights into the significant benefits of legal assistance for underprivileged communities. This research also proposed a novel legal perspective and reform regarding equal distribution of justice.</i>

### A. Introduction

Legal aid traces its roots back to the Roman era, during which it was primarily seen as a moral duty and considered a noble undertaking aimed at helping others without the expectation of compensation or honorarium.<sup>1</sup> In the early days of Ancient Rome, legal aid manifested through orations and pleas made by advocates on behalf of those incapacitated or legally illiterate, often victims of unjust legal accusations despite their innocence. Advocates were driven by a call of conscience to defend these individuals, earning great respect and honor for their work, leading to the term *officium nobilium*, or noble profession.<sup>2</sup>

<sup>1</sup>Bambang Sunggono and Aris Harianto, *Legal Aid and Human Rights*, Mandar Maju, Bandung, 2001, p. 11.

<sup>2</sup>Azmi Syahputra, *Legal Assistance as Protection of the Human Rights of Suspects and Defendants in the Criminal Case Examination Process Connected with Law No. 18 of 2003 concerning Advocates*, Thesis, Postgraduate Program at Padjadjaran University, Bandung, 2005, p. 1.

Access to Legal Aid is crucial for the effective provision of legal counsel, thereby ensuring an accused person's right to a fair trial.<sup>3</sup> The right to legal assistance holds such fundamental importance that, without it, all other rights pertinent to a fair trial might be compromised, rendering them ineffective.<sup>4</sup>

In Indonesia, legal aid first emerged in the early 1970s along with the enactment of Law No. 14 of 1970 concerning Principles of Judicial Power as amended by Law No. 35 of 1999 and amended again by Law No. 4 of 2004 concerning Judicial Power.

Indonesia has guaranteed every citizen equal treatment before the law in its constitution, including the right to access justice through legal assistance. Unfortunately, the judiciary is quite bureaucratic, expensive, complicated (procedural), and *isoteric in nature* (understandable only by legal people). This situation inhibits everyone from obtaining equal access and treatment in dealing with the law. On the other hand, people who own money and power easily obtain access by hiring professional lawyers to provide legal assistance. This disparity remains unresolved since no significant efforts have been made to address this issue despite the equality before the law without exception (*justice for all/accessible to all*) stipulated in the constitution.

The enactment of Law No. 18 of 2003 concerning Advocates, as a law regulating the Advocate profession, is also considered inadequate in optimizing the efforts to provide legal assistance to disadvantaged groups. The law does not provide for the widest possible expansion of access to free legal aid (*pro-bono*) for disadvantaged groups. While esteemed as noble, the legal profession functions in reality more as a corporate entity than a non-profit organization. This hypothesis gains further support from current practices, where legal services remain inaccessible to disadvantaged and vulnerable groups. The commercialization and elitist mindset within the legal profession have significantly widened the gap, undermining the principle of justice being accessible to all.

As a constitutional state, Indonesia sets all regulations based on law under the principle of equality, ensuring a professional defender assists every defendant. People without the resources to afford private lawyer services are provided legal assistance by the state.

Indonesian government has ratified the International Covenant on Civil and Political Rights (ICCPR) into Law Number 16 of 2011 regarding Legal Aid, which states that the state guarantees the constitutional rights of every citizen to obtain recognition, guarantees, protection, and fair legal certainty as well as equal legal treatment before the law as a means of protection of human rights.<sup>5</sup> Article 1 paragraph (3) of the 1945 Constitution emphasizes that Indonesia is a constitutional state that has to protect human rights (HAM). The Law Number 16 of 2011 concerning Legal Aid is expected to protect the constitutional rights of each individual to obtain legal assistance. It accommodates the protection of underprivileged people in dealing with legal cases.<sup>6</sup>

<sup>3</sup> Asher Flynn, et.al. Legal Aid and Access to Legal Representation: Redefining The Right to a Fair Trial. *Melbourne University Law Review*. Vol. 40. No. 207. 2016. P. 206.

<sup>4</sup> Charika Marasinghe. The Right to Legal Assistance In International Law, With Special Reference to the ICCPR, The ECHR and the ACHR. *Asian Yearbook of International Law*. 1995. p. 15.

<sup>5</sup> Yustika Irianita Fanty. The Effectiveness of Providing Legal Aid to the Poor in West Kalimantan Province During the Covid-19 Pandemic. *Journal Dinamika Hukum*. Vol. 22. No. 2. 2022. P. 351-352.

<sup>6</sup> Fachrizal Afandi. Implementasi Pengabdian Masyarakat Berbasis Access to Justice Pada Lembaga Bantuan Hukum Kampus Negeri Pasca Pemberlakuan Undang-Undang Bantuan Hukum. (Community Service Implementation Based on Access to Justice on Legal Aid Institution of State University Post-Enactment the Law of Legal Aid). *Jurnal Rechtvindig*. Vol. 2. No. 1. 2013. P. 32.

Law Number 16 of 2011 on Legal Aid outlines the duties of lawyers in offering legal assistance to individuals who are financially unable to afford it. Specifically, Article 10 letter e mandates that legal aid providers must deliver assistance to recipients following the terms, conditions, and procedures established by this law, continuing until the case's resolution, unless legally justified reasons prevent this. Based on the Regulation of the Indonesian Advocates Association Number 1 of 2010 concerning Guidelines for the Implementation of Providing Free Legal Assistance of 50 hours/year, these provisions show that advocates must provide legal assistance for underprivileged defendants.

The public grows apprehensive about legal aid or access to law and justice. Based on the current data, the legal knowledge in Indonesia is low, where 56% of the community failed to name their rights. The percentage is even significantly higher among women (66%) and respondents who did not attend formal education (97%).<sup>7</sup>

Legal aid is a constitutional right of every citizen that guarantees legal protection and equality before the law as a protection of human rights. Legal assistance should be available for every person to access justice and legal protection and to enforce equality before the law.

To uphold human rights, *equality before the law*, and *due process of law*, the government is responsible for respecting the human rights of people who cannot afford to hire private lawyers. This research provides valuable insights into the benefits of effective provision of legal aid and highlights the forms of legal reform to guarantee equal distribution of justice.

## B. Discussion

### 1. The Rights of Underprivileged Communities to Obtain Legal Assistance

Legal aid encompasses the provision of legal guidance to individuals who are financially disadvantaged, impoverished, or lack legal literacy and may feel unable to assert their rights due to external pressures. It aims to facilitate impartial access to justice without discrimination in litigation and non-litigation matters.<sup>8</sup> The theoretical underpinning of the right to legal aid intersects with the principles of human rights and is intertwined with notions of natural law and divine entitlement. Human rights, inherent and bestowed by a higher power, cannot be infringed upon or revoked by fellow individuals.<sup>9</sup> Consequently, states are urged, and in some cases obligated, to furnish free legal assistance, particularly in non-criminal contexts, to those unable to afford it. Legal aid is commonly understood through two principal frameworks: traditional legal Aid and constitutional legal Aid.<sup>10</sup> Traditional legal aid entails individualized legal services catering to the indigent. It adopts a passive approach with a formal-legal orientation, focusing primarily on legal matters within the confines of established law. Such legal aid aims to pursue justice according to the law, underpinned by a spirit of compassion.<sup>11</sup>

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<sup>7</sup>Suyogi Imam Fauzi and Inge Puspita Ningtyas, *Optimizing the Provision of Legal Aid for the Realization of Access to Law and Justice for the Poor*, Journal of the Constitution, Vol. 15 No.1, 2018, p. 53.

<sup>8</sup>Iwan Wahyu Pujiarto, Et.al. Pelaksanaan Pemberi Bantuan Hukum Dikaitkan Dengan Undang-Undang No. 16 Tahun 2011 tentang Bantuan Hukum. *Arena Hukum*. Vol. 8. No. 3. 2015. P. 319.

<sup>9</sup>Martha F. Davis. In the Interest of Justice: Human Rights and the Rights to Counsel in Civil Cases. *Touro Law Review*. Vol. 25. No. 1. 2013. P. 162.

<sup>10</sup>Banrbang Sunggono and Aries Harianto, *Legal Aid and Human Rights*, Mandar Maju, Bandung, 2009, Pg. 26

<sup>11</sup>Sarah Paoletti. Deriving Support from International Law for the Right to Counsel in Civil Cases. *Penn Carey Law: Legal Scholarship Repository*. 2006. P. 656.

The concept of constitutional legal aid represents a more encompassing approach to assisting the economically disadvantaged. It aims to elevate the legal awareness of the poor as rightful participants in the legal system and to foster and uphold human rights values as fundamental to the legitimacy of state laws. This form of legal aid is characterized by its proactive nature, extending services not just to individuals but also collectively to community groups. The specific rights of the community to access legal aid, as a measure to ensure equality before the law, are articulated within the International Covenant on Civil and Political Rights (ICCPR). Article 16 of the ICCPR states:

“Everyone has the right to be recognized as a person before the law wherever he is.”

Furthermore, Article 26 reads:

"All people are equal before the law and entitled to the same legal protection without discrimination. In this respect, the law must prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

The Indonesian government plays a crucial role in adhering to and enforcing international law, particularly ensuring equal rights by providing legal assistance to those who cannot afford it. As a rule of law country, Indonesia has made clear arrangements in the 1945 Constitution,<sup>12</sup> where the enforcement of human rights is absolute. A state of the rule of law means that Indonesia relies on all its problems through legal channels. The mechanism of social affairs among individuals, community groups, and the state is regulated by law. Hence, all citizens have the same position before the law, and governance and development programs are based on legal norms.

The concept of legal Aid in Indonesia has been implemented since establishing the Indonesian Legal Aid Institute (LBH) on October 28, 1970, in Jakarta. The legal aid program has been constrained, particularly during the colonial era. Indonesian lawyers have offered legal assistance since then, but it has been limited to the trial level. It is necessary to refer to relevant national and international laws to ascertain whether the right to early access to legal assistance is a regulation that encourages compliance or a norm that could lead to contradictory behavior.<sup>13</sup> In its development, the Legal Assistance Institute-Indonesian Legal Aid Foundation (LBH-YLBHI) introduced the concept of structural legal aid. According to M Zaidun,<sup>14</sup> structural legal aid is a type of legal aid that strives for a change in the pattern of equal legal relations, which is not oppressive or exploitative (equality and structural similarity), reflecting equality *before the law* and equal access to economic resources. Structural legal aid is a concept based on a paradigm, vision, and orientation that empowers people and can create a pattern of just social relations.

<sup>12</sup>Article 1 paragraph (1) of the 1945 Constitution states that Indonesia is a country based on law.

<sup>13</sup> Maxwell Abbott. The Right of Early Access to Criminal Legal Aid in Indonesia Rule, Clearer Violations. *Indonesia Law Review*. Vol. 8. No. 1. 2018. P. 4.

<sup>14</sup>M. Zaidun, *Structural Legal Assistance Movement in Indonesia*, Airlangga University Postgraduate Program, Surabaya, 1996, Pg. 41.

From a humanitarian perspective, the legal aid program is designed to alleviate the financial burden of legal proceedings for the economically disadvantaged, both in and out of court. This ensures that those who cannot navigate the legal system still have access to legal assistance and protection. Additionally, the program aims to enhance public legal awareness, encouraging a deeper respect for the law as demonstrated through behaviors and actions that reflect an understanding of their legal rights and responsibilities.

Technically, the criteria for providing legal aid in this context are administered by the Supreme Court of the Republic of Indonesia, specifically through the Directorate General of the General Judiciary Agency and in collaboration with the Ministry of Law and Human Rights. This assistance targets individuals (belonging to certain disadvantaged groups) engaged in criminal and civil legal proceedings in the courts.<sup>15</sup> The legal aid funds are not distributed directly to the beneficiaries. Still, they are instead allocated as compensation for the services of Advocates who have successfully handled cases for the concerned individuals.

Any person who is facing legal process in the court is allowed to obtain information from local agencies, such as:

- a. District/High Court;
- b. State/High Court;
- c. Legal Aid.

The Directorate General of the General Courts and the Ministry of Law and Human Rights requires the underprivileged community dealing with legal processes to prepare:

- a. Certificate of Indigency from the local village head; or
- b. Declaration of Indigency from the applicant and justified by the local District Court or
- c. Statement of Indigency from the applicant and justified by the local Legal Aid Institute.

The constitutional right to legal aid is regulated in Article 28 D, paragraph (1) of the 1945 Constitution, which states that: "everyone has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law." Other laws also regulate it, including

1. Article 18 paragraph (4) of Law no. 39 of 1999 concerning Human Rights states that: "everyone who is examined has the right to receive legal assistance from the time of investigation until a court decision that has permanent legal force is obtained"
2. Article 37, Law no. 4 of 2004 concerning Judicial Power states that: "everyone who is involved in a case has the right to obtain legal assistance."
3. Article 54, Law no. 8 of 1981 concerning the Criminal Procedure Code, states that: "for defense, a suspect or defendant has the right to receive legal assistance from one or more legal advisers during and at each examination, according to the procedures specified in this law."

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<sup>15</sup> Ajie Ramdan. Bantuan Hukum Sebagai Kewajiban negara untuk Memenuhi Hak Konstitusional Fakir Miskin. *Jurnal Konstitusi*. Vol. 11. No. 2. 2014. P. 235.

In the criminal justice process, which addresses both substantive and procedural law, there are principles to ensure the law serves its rightful purpose.<sup>16</sup> Therefore, Law No. 4 of 2004 concerning Judicial Power, which outlines the requirements for charging and sentencing an individual through a court, asserts in Article 6 paragraph (1) that: "No one can be brought before a court other than in the manner prescribed by law." Further elaborations are provided in Article 6, paragraph (2):

"No one can be sentenced to a crime, except when the court, because of valid means of proof according to law, is convinced that someone considered responsible has been guilty of the act he is accused of."

It is further stated in Article 8 that: "Everyone who is suspected of being arrested, detained, and presented before a court must be presumed innocent before there is a court decision stating his guilt and having obtained permanent legal force." Likewise, Article 37 states that "Every person who is involved in a case has the right to obtain legal assistance."

In relation to Article 56 of the Criminal Procedure Code, there is a stipulation concerning the requirement for legal advisors to accompany individuals accused of criminal acts that are punishable by a sentence of up to five years. Based on these provisions, a legal advisor must accompany every perpetrator of a crime threatened with more than five years of imprisonment. Suppose the perpetrator of the crime is unable to pay for a legal advisor. In that case, the court must appoint a legal advisor to assist the perpetrator of the crime as regulated in Article 56, paragraph (1) of the Criminal Procedure Code.

In the civil justice process, which covers both substantive and procedural law, there are established principles to safeguard the legal interests of the parties involved (plaintiff and defendant) during court proceedings. These legal principles include:

1. Whereas Law Number 4 Year 2004 concerning Judicial Power adheres to the principle of low-cost justice and the principle of equality of treatment of parties to a case, namely:
  - a. Courts judge according to law without discriminating between people (Article 5 paragraph (1)).
  - b. Courts assist justice seekers and try to overcome all obstacles to achieve a simple, fast, and low-cost trial (Article 5 paragraph (2)).
2. Whereas the Civil Procedure Code (HIR/RBG) adheres to several principles concerning the civil interests of the litigants, namely:
  - a. The parties in a civil case (plaintiff and defendant) can choose one of the efforts to resolve civil disputes, namely efforts made through the court or efforts made outside the court (through peace efforts).
  - b. In the event that dispute resolution is carried out through court:
3. The litigants can face the trial process themselves or seek legal assistance from an Advocate (Article 18 HIR / 142 RBG).
4. The head of the District Court gives advice and assistance to the suing or his representative regarding submitting his claim (Article 119 HIR / 143 RBG).

<sup>16</sup> Isidore Kwadwo Tufour. Greasing the wheels of Legal Aid in Criminal Proceedings in Ghana: An Evaluation of the Legal and Regulatory framework. *African Human Rights Law Journal*. 2019. P. 268.

5. If the person suing is not good at writing, the claim may be made orally to the Chairperson of the District Court. The chairman records the claim or orders it to be recorded (Article 120 HIR / 144 RBG).
6. Before examining a case in the first trial, the Chairperson of the Session Council or the Judge present at the trial must seek to achieve a settlement between the litigants (Article 130 HIR / 154 RBG).
7. If the plaintiff or defendant cannot afford the costs of the case, they can obtain permission to hear the case free of charge (Article 237 HIR / 273 RBG).
8. Based on the aforementioned civil law principles in Article 237 HIR / 1273 RBG, the Legal Aid Program for Underprivileged Communities is the realization of the legal principles in civil justice processes.

## **2. The Government's Responsibility in Providing Legal Assistance for Poor Communities**

Article 18 of the 1945 Constitution of the Republic of Indonesia, alongside Law Number 23 of 2014 on Local Government, essentially assigns the responsibility of fulfilling the state's duty to guarantee and protect the constitutional rights of its citizens. Despite this mandate, the provision of legal aid has yet to reach many economically disadvantaged individuals or groups, leaving them struggling to access justice due to barriers to realizing their constitutional rights. To ensure the constitutional rights of every citizen, including legal protection, legal certainty, equality before the law, and the protection of human rights, the Government and the DPR (People's Representative Council) ratified Law Number 16 of 2011 on Legal Aid on October 4, 2011.

The enactment of the Legal Aid Law necessitates that the Government allocate funds for legal aid in the State Budget. The financing for legal aid implementation is included in the budget of the ministry responsible for legal and human rights affairs, specifically, the Ministry of Law and Human Rights of the Republic of Indonesia. This allocation underscores the government's obligation to provide legal assistance, ensuring broader access to justice for its citizens. Based on Law Number 16 of 2011 concerning Legal Aid, Article 1 point 1 states that Legal Aid is legal services provided by Legal Aid Providers free of charge to Legal Aid Recipients. The implementation of Legal Aid aims to:

- a. guarantee and fulfill the rights of legal aid recipients to get access to justice;
- b. realize the constitutional rights of all citizens based on the principle of equality before the law;
- c. ensure certainty that the implementation of Legal Aid is carried out fairly throughout the territory of the Republic of Indonesia and
- d. realize an effective, efficient, and accountable judiciary.

Furthermore, Article 6, paragraph (1) of Law Number 16 of 2011 Concerning Legal Aid, states that legal aid is organized to help resolve legal problems faced by legal aid recipients. Furthermore, paragraph (2) explains that the provision of legal aid to recipients of legal aid is organized by the Minister and implemented by legal aid providers based on the Legal Aid Law.

The allocation of legal aid funds from the state budget is often insufficient to provide legal assistance to underprivileged communities across Indonesia. Therefore, later in Law Number 16 of 2011 in Article 19, it is stated that the local governments can allocate budgets for the

implementation of Legal Aid in the Regional Revenue and Expenditure Budget and further provisions regarding the implementation of Legal Aid as regulated by Regional Regulations. These provisions open up opportunities for Local Governments to participate in the constitutional obligation to provide legal aid for underprivileged communities.

Local Government is the executor of the decentralization program in which the Central Government delegates the handling of some affairs to the local governments. Local Government is given the freedom to regulate its autonomy. This authority enables the Local Government to provide legal aid for underprivileged communities.

Law Number 16 of 2011 on Legal Aid authorizes local governments to allocate budgets for legal aid within their Regional Revenue and Expenditure Budgets, as stated in Article 19 paragraph (1). Detailed provisions on the administration of Legal Aid, as mentioned in paragraph (1), are to be further regulated by Regional Regulations. Since what is set is merely a budget allocation, the implementation of legal aid provision by the regions falls under the regulatory framework established by Law Number 16 of 2011. Any uncertainty among local governments regarding whether the Legal Aid Budget should be classified as a Grant or Social Assistance has been clarified by the budgeting laws in *Permendagri* (Minister of Home Affairs regulation) Number 33 of 2019 and *Permendagri* Number 64 of 2019 concerning Guidelines for the Preparation of the Regional Revenue and Expenditure Budget for the Years 2020 and 2021. With these regulations established, doubts concerning the local government's authority to provide legal aid services should be eliminated.

The allocation of funds from the Regional Budget (APBD) represents the Local Government's active participation in providing legal assistance. This involves the Local Government's authority to allocate budgetary resources from the APBD for the organization of legal aid, thereby playing a pivotal role in its implementation. This process follows Regulation No. 64 of 2020 issued by the Ministry of Home Affairs, which outlines the Guidelines for Preparing Revenue and Expenditure Budgets for the 2021 Fiscal Year. Specifically, point 51 of the regulation allows Local governments to set aside budgets for Legal Aid Implementation in the 2021 Fiscal Year APBD, following Article 19 of Law No. 16 of 2011 on Legal Aid. However, in administering legal assistance, Local governments must adhere to policies and standards set by the Central Government.

The central and local governments share a common goal, with the President bearing the ultimate responsibility as the head of the state. This stems from the nation's commitment to provide legal aid to the underprivileged to ensure access to justice, placing responsibility on the Central and Local Governments. The local government's authority can allocate funds for legal aid through the Regional Budget (APBD) to fulfill

### C. Conclusion

Legal aid is a part of Human Rights (HAM), and the state should provide it for underprivileged communities as stipulated in laws and regulations.

The provision of Legal Aid in the regions as mandated by Law Number 11 of 2011 concerning Legal Aid, specifically Article 19 paragraph (1), states that local government can allocate its budgets for organizing legal aid in the regional Revenue and Expenditure, including in Palu City. Legal assistance, particularly in Palu City, guarantees legal certainty for underprivileged communities when dealing with legal processes.



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