

# NATIONAL REPORT

## LEGAL AID SYSTEM IN INDONESIA

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### A. BACKGROUND

Indonesia is a law country that acknowledges and protects human rights for each individual including legal aid right.<sup>2</sup> The legal aid to the citizens is an effort to fulfill and also the implementation of Indonesia as the law country that acknowledges, protects and ensures the citizens' human rights, access to justice and equality before the law. To meet those responsibility, the Law No. 16/2011 on Legal Aid was established.

With the passing of this Law has made the role of the state is very crucial in developing a legal aid system in order to reach the target: the poor and the poorest who seek for a justice in the regions, in particularly in providing sufficient budget to meet the public needs. The Law has assigned the Government to formulate the implementing regulations: the Government Regulation on Legal Aid Channelling Guideline, however, until now the Government Regulation is not yet passed. The Government has been verifying and authorising the legal aid organisations' accreditation that will receive the Government's fund. Few of the many challenges ahead are the availability of the legal aid organisations' lawyers, their distributions who are centrally located in big cities, and the mechanism to transfer the legal aid fund including the accountability reporting.

This report will present the state of legal aid system that will be developed in Indonesia based on the Law on Legal and its impact to the existing legal aid organisations. The

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<sup>2</sup> Article 28 D (1) 1945 Constitution stated everyone has the right for fair acknowledgement, assurance, protection and legal certainty and equal legal action before the law.

first part is the background contained the basic information about Indonesia. Second part will explain the legal aid delivery based on the Law including the beneficiary (recipient), provider of the legal aid, the types of services, and legal aid funding. The third part will analyse the implication of the Law to the structural cases. The paper will be concluded with overall conclusion of the presentation.

## **A. 1. Indonesia's Legal System**

Indonesia is often categorised as a country that follows the civil law system because the process of the legal development is initiated by legislatures (executives). The judges in Indonesia are only implementing the regulations according to the Law. In the common law system, the process to develop the law from cases to cases is called with "judge made law". Generally, the Indonesian laws can be categorised in three big categories: commercial law, criminal law and constitutional law.<sup>3</sup>

The judicial (court) system in Indonesia is classified into 4 judicial environments under the Supreme Court as the highest judicial institution. They are<sup>4</sup> :

- 1) Common Court has the authority to examine and making a decision on the crime and civil cases.
- 2) Religious Court has the authority to examine, making a verdict and decision in the first stage for the muslim citizens in the areas of marriage, inheritance, will/testament, endowment in Islamic law.
- 3) Military Court has the authority to trial the misconducts or crime conducted by military members.
- 4) Administrative Court has the authority to trial the dispute between citizen and the administrative officials.

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<sup>3</sup> Erni Setyowati, Memahami Sistem Hukum Indonesia in A. Patra M Zein, Daniel Hutagalung (editor), Paduan Bantuan Hukum di Indonesia : Pedoman Anda Memahami dan Menyelesaikan Masalah Hukum, edisi 2006, h. 26.

<sup>4</sup> Article 24 (2) 1945 Constitution.

Other than the four court systems above, there are other special court systems with their own authorities: Commercial Court, Human Rights Court, Child Court, Tax Court, Fishery Court, Corruption Court. The amendment of the Indonesian Constitution has enabled Indonesia to have a Constitutional Court that equals to Supreme Court. The Constitutional Court has the authority for a judicial review of a regulation against the Constitution Law 1945 at the first stage and final stage in which the decision is final, to make a decision of state institution's authority, political parties' dismissal and dispute of elections.<sup>5</sup>

## **A.2. Indonesia's Population**

Indonesia's population is totalling 251.857.940, consisting 129.563.463 male population, with the rest of 122.294.477 female population. The poor population as of March 2012 reached 29.13m people (11,96%), reduced by 0.89m people (0.53%) compared with 2011 data (30.02m or 12.49%). In the period of March 2011 to March 2012, the urban poor has decreased by 399.5 thousand people (of 11.05m in March 2011 to 10.65m in March 2012), while the rural poor has decreased by 487 thousand people (of 18.97m in March 2011 to 18.48m in March 2012). The percentage of the urban poor in March 2011 is 9.23 percent, decreased to 8.78 percent in March 2012. The rural poor has also decreased, from 15.72 percent in March 2011 to 15.11 percent in March 2012.<sup>6</sup>

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<sup>5</sup> Article 24 C 1945 Constitution

<sup>6</sup> Biro Pusat Statistik (Central Bureau of Statistics), <http://www.bps.go.id>

Figure 1. The map of Indonesia



### A. 3. Indonesia's economy growth portrait

The Indonesia's economy growth recorded a significant growth estimated around 6.2 percent in 2013 and will increase to 6.5 percent in 2015. The Gross Domestic Product (GDP) is escalating from \$2,200 in 2000 to \$3,563 in 2012 (data March 2013). The data from 2009 showed Indonesia's neonatal mortality is 307/100,000; while the MDG's target is 105/100,000 in 2015. The maternal mortality rate is also high and is one of the MDG target that is hard to attain. Although there has been good progress and access to sanitation facility is still 68% of population - below the MDG target (86% of the population). Doing the business indicator although is positive but still experiencing challenges, such as unclarity of regulations (weak regulatory framework), lack of infrastructure and minimum wage adjustment.<sup>7</sup>

<sup>7</sup> Iktisar Indonesia, <http://www.worldbank.org/in/country/indonesia/overview>, at 15 March 2013

## **B. THE LEGAL AID DELIVERY WITH THE PASSING OF THE LEGAL AID LAW**

The legal aid service delivery in Indonesia has entered a new chapter with the passing of the law of legal aid. The Government of Indonesia through the authorised institution (the Ministry of Law and Human Rights) has appointed the National Law Development Agency (BPHN) as the implementing agency for the Law No. 16/2011 on Legai Aid.

The authority of the Minister of Law and Human Rights in implementing the legal aid is enormous, that includes formulating, passing the policies and regulations of the legal aid, legal aid standards, planning and managing the budget, reporting the legal aid service delivery to the Parliament (DPR), and conduct the verification and accreditation. The enormous authority has the potential to cause abuse of power because the policy maker, implementer and budget manager are all in one hand. The authority to formulate and pass the legal aid policies and its funding/budgets can create the intervention and dependence over legal aid implementation. The verification and accreditation committee formed by the Ministry is concerned to be abused by the Ministry to utilise this mechanism to ban organisations handling sensitive cases – that confront the state and or can be used to control the legal aid organisations to not be critical to the Ministry's regulations.<sup>8</sup> It is hoped that the civil societies' concern that promoted the passing of this Law to have an independent legal aid commission but failed in the Parliamentary deliberation can be avoided.

At the moment, the BPHN has established a verification and accreditation team to open an opportunity for legal aid organisations' registration and conducting accreditation. The objective of this process is to receive legal aid fund from the Government in providing legal aid to the poor. The registrations started on 18 February and was closed on 8 March 2013, while the administrative and factual verification started on 18 March –

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<sup>8</sup> Erna Ratnaningsih, Independensi Penyelenggaraan Bantuan Hukum, <http://www.hukumonline.com/berita/baca/lt4ea544fa13bf9/independensi-penyelenggaraan-bantuan-hukum-oleh-erna-ratnaningsih>, at 14 February 2013.

18 April. The conditions for the legal aid providers are organisation with legal statutory, accredited, has a permanent office or secretariate, has staff and legal aid program.<sup>9</sup> The Parliament and Civil Society should be monitored towards the verification and accreditation process to ensure it is effectively reaches the poor and to provide inputs to the government regulation on the legal aid channeling guidelines – that currently still been formulated will provide the basis for the success of the legal aid to poor community in the future.

The following is the portrait of the Indonesia's legal aid based on the Law:

### **B. 1. The Provider and Recipient of the Legal Aid**

The current legal aid provider has not yet meeting the needs of the poor community as the number of non-government organisation such as YLBHI-LBH and LBH APIK only covering 16 provinces of 34 provinces in Indonesia. The passing of this Law will provide the opportunity to the Law Faculty in the Universities and the emergence of new legal aid organisation in the regions to also participate in providing legal aid to poor community funded by the Government. The legal aid in this term means as the legal service provided to the legal aid recipient for free. The poor community criteria is covering individuals or group of poor people who cannot meeting their basic rights appropriately and independently. The basic rights includes the food, clothing, health, education service, employment and rights to do small business and/or housing.

The mechanism to receive legal aid is the individual or group of people who has fulfilled the conditions by proposing a written or verbal request to an accredited legal aid organisation, submitting the documents relevant to the cases and a recommendation letter from the head of the village or its equivalent (noting that the applicant is poor). The legal aid request has to be answered at the maximum of three days after the request

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<sup>9</sup> Badan Pembinaan Hukum Nasional, [www.bphn.go.id](http://www.bphn.go.id)

submitted (accepted or rejected). In a case where the legal aid request is rejected, the provider must give the rejection reason.

Once the legal aid organisation accepts the cases, the recipient has to provide evidence, true information and/or data to the provider and assist the legal aid provision. Then the recipient has the rights to get the legal aid until its legal cases finished and/or the cases has a permanent legal standing/position, as long as the legal aid recipient's letter of representation is not withdrawn, receiving the legal aid according to the legal aid standard and or Lawyer Code of Ethics and receiving information and documents relevant to the legal aid provision.

The accredited legal aid organisation has the right to recruit lawyers, paralegals, lecturers, students of law faculty, conducting the legal aid, legal information dissemination, legal consultation and other activities relevant with legal aid provision, receive the funding from the state to conduct the legal aid, make opinions or statement in defending the cases in its responsibility in the court according to the laws and regulations, getting information or other data from the Government and also other institutions for the cases' its handle, and also receiving by-law's protection assurance, security and safety during the course of legal aid action. The legal aid provider cannot be litigated (civilian by law nor criminal by law) during the course of legal aid action (inside nor outside the court) according to the legal aid standard, regulations and/or Lawyer Code of Ethics.

They also have the responsibility to report to the Minister on their legal aid programs, report on the government's funding's expenditure used for the legal aid provision, training and education program for the recruited lawyers, paralegals, lecturers and students of the law faculty that they run/deliver, protect the confidentiality of the data, information and/or testimonies from legal aid recipients relevant to the cases handled,

providing legal aid to the legal aid recipients according to the guidelines and conditions regulated in the Law until the case ceased, unless it is by-law declared otherwise.

If a legal aid organisation and the justice seeker are failed to fulfill their responsibility as mentioned above, there are complaint handling and sanction mechanism. In the case the legal aid recipient does not get his/her right as per Article 12 Law No. 16/2011 on Legal Aid, the recipient can file a report against the legal aid provider to the Minister, to the headquarter of the legal aid provider or to the authorised agency. In the other side, taking fees from the legal aid recipients and or other parties of the cases is prohibited. The legal aid provider who is proven accepting or asking fees to the recipients and/or other parties (associated with the cases being handled) will be punished with maximum 1 year imprisonment or penalty at max IDR 50 m.

## **B.2. The Types of Legal Aid**

According to the Criminal Act, the State only could provide legal aid for criminal case with death penalty or 15 years imprisonment. The Legal Aid Law has extended the law problems or cases handled by legal aid providers not only criminal cases but also civil cases and state administrative cases. The cases can be handled by litigation and non-litigation. The provision of legal aid with litigation will be conducted by the lawyer(s) (who holds a position in the organisation and/or recruited lawyers) including assistance and/or representation from the investigation stage, prosecution stage; assistance and/or representation in the process of examination in the court; assistance and/or representation of the legal aid provider in the state administrative court.

The non-litigation legal aid includes activities of legal information dissemination, legal consultation, cases investigation electronically or non-electronically, legal research, mediation, negotiation, community empowerment, assistance outside of the court and or legal drafting. The assistance can be given by the lawyers, paralegal, lecturers and

students of the law faculty within the accredited and verified legal aid organisation's coverage.

### **B.3. Legal Aid Funding**

The source of legal aid funding is from the State Budget (APBN). Other source may include grant, donation and other untied and legal source of funding is permitted. The regional government can also allocate the legal aid in their regional budget (APBD). Currently, some regions have initiated a local regulation(s) on legal aid for the poor community. The regions are Palembang, Semarang Municipality, Sinjai Region in North Sumatera, etc. The regions oblige to report the legal aid provision sourced from their own budget to the Minister of Law and Human Rights and Minister of Home Affairs. The Government of Indonesia (the Minister of Law and Human Rights) will allocate IDR 53 billions to support the LBH (Legal Aid Agency) across Indonesia. The funding will over the litigation and non-litigation cases, that has fulfilled the accreditation and verification from BPHN (National Law Development Agency).<sup>10</sup> Not long after the government verification and accreditation, the Ministry of Law and Human Rights through BPHN will distribute the budget to the accredited organisations, not delivered directly to the lawyers who handled the poor community's cases.

## **C. THE IMPLICATION OF THE LEGAL AID LAW TOWARDS STRUCTURAL CASES**

The concept of legal aid in Indonesia is following the YLBHI-LBH concept is not pro-bono concept, that is, providing legal service for free for those who cannot afford it but

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<sup>10</sup> Bantu LBH Tangani Kasus Orang miskin, <http://news.detik.com/read/2013/02/22/203400/2177493/10/kemenkumham-kucurkan-rp-53-m-untuk-bantu-lbh-tangani-kasus-orang-miskin>, at 25<sup>th</sup> April 2013

more than that. This is different from the pro-bono legal aid concept in the Law<sup>11</sup> that the legal aid recipient is those individuals or group of poor people who cannot fulfill the basic rights appropriately and independently.

The legal aid movement in Indonesia originated by YLBHI was based on the structural legal aid idea (BHS) that see the poverty issues deeper from structural problems, i.e. unjust social and economy structure and poor people' interest. The law is more than the State's and dominant group's legitimate tools to overrule and control public resources. The public resources that supposed to be rights of the marginalised communities.<sup>12</sup> During its development, the structural legal aid is enriched with gender analysis conducted by LBH APIK in 1990-ish. The biggest contribution is the structural gender legal aid concept as a response on the gender imbalance from the gender power relations.<sup>13</sup>

YLBHI and LBH Apik are two legal aid organisations who have provided legal aid to thousands of poor people per year with limited numbers of lawyers and funding and vast regions (approximately 16 provinces). The limited resources has caused not all reported cases can be handled to the Court. With the support from the Government, the legal aid organisations can recruit lawyers and extend their service to regions.

The Government's criteria for the legal aid recipients will not adequately support all cases handled by the YLBHI and LBH APIK. Structural cases handled by YLBHI and LBH APIK will remain unsupported by the Government. In fact, the structural cases are the promoter and trigger of the policy change of the Government to the marginalised groups in Indonesia. And this is where the legal aid movement has succeeded to reform the democracy and human rights in Indonesia. The individual case by case handling without structural legal aid approach will continue and will not resolve the roots of the

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<sup>11</sup> Article 5 Law No: 16 / 2011 on Legal Aid

<sup>12</sup> YLBHI, [www.ylbhi.or.id](http://www.ylbhi.or.id)

<sup>13</sup> LBH APIK, [www.lbh-apik.or.id](http://www.lbh-apik.or.id)

problems. Through BHS the legal aid is directed to empower the role and bargaining position of the community groups being assisted so that they are more empowered to decide its own destiny and collectively promote and advocate the State's policy reform.

YLBHI and LBH Apik who has actively advocated for the passing of the Legal Aid Law has provided the inputs to the Government to extend the legal aid recipients criteria, to not only poor community, but also vulnerable and marginalised groups such as women, children and custom law community. This is based on the experiences of domestic violence cases done by the husbands to the wives, in which to avoid the repeated cases the wives have to move out from the house empty-handed. This woman cannot be categorised as poor because she has the collective marital assets with the rich husband, but because she is moving out of the house, she does not have any money to trial her domestic violence case and plea for divorce to the Court. In accordance to the Legal Aid Law, this woman does not meet the criteria as the legal aid recipient. Therefore for the structural cases, the legal aid organisation has to fund it using their own resources.

#### **D. CONCLUSION**

The implementation of the legal aid in Indonesia has changed through the passing of the Law No. 16/2011 on the Legal Aid, where the State has acknowledged and protected and assured the human rights to receive equal position before the law. The BPHN under the Ministry of the Law and Human Rights is now facing real challenges with a large number of poor people and small number of lawyers associated in the legal aid organisations that are centrally located at big cities, the mechanism of fund transfer and accountability by the legal aid organisations. For those challenges to be resolved, implementing regulations are currently being formulated by the Government to decide the legal aid provision system in Indonesia in the future that will serve the access to

justice to the poor. The Government will need the inputs and oversight from the Parliament, community and civil society organisation.