

# legal aids

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## LEGAL AID FOR MARGINAL COMMUNITIES

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Legal aid is needed for someone who is experiencing legal problems and is unable to pay for advocate or lawyers services. Law 16/2011 provides a guarantee of legal protection in the form of providing free legal aid to the community in need. The aid provider is limited to an accredited legal aid agency. The recipients of legal aid are limited to the poor and does not cover marginal society so that it is not maximally utilized by the community. The purpose of this research is to analyze legal aid system for marginal society in Surabaya. This legal research is normative by using statute approach and editing analysis style related to the provision of legal aid in Surabaya City. The result of the research is the legal aid system in Indonesia still contains the weaknesses in the substance and the procedure. The substance of the subject of the legal aid recipients is the poor resulting in multiple interpretations so as to resulting in legal uncertainty. The substance of the object in legal aid is the difference between rules and practices. In Surabaya City, only limited to the poor defendant. Should be according to the rule of law can be given for civil cases, criminal and administrative state. As a result, more and more of the other marginal communities are difficult to assist, for example in the public policy victim community. Procedures for providing legal aid are still inefficient. The conclusion of this study is the existence of multiple interpretations on the substance and procedure of legal aid. The legal subject of the legal aid recipient has not touched the non-poor marginal society in the city of Surabaya. Objects of legal aid law experience narrowing of meaning, limited to impoverished criminal actors. Procedures for providing legal aid still need to be simplified. The recommendation is that the revision of legal aid arrangements to be accessible to the marginal society, both the substance and the procedures.

**Keywords:** legal aid; marginal society; poverty.

### INTRODUCTION

Legal aid is needed for someone who is experiencing legal problems and is unable to pay for advocate or lawyers services. The position of legal aid is very important in a state of law. Indonesia is a state of law. There are thirteen characteristics of the legal state: the supremacy of law, equality before the law, due process of law, limitation of power, the independence of mixed organs, the free judiciary, the state administrative court, the Constitutional Court, the democratic *rechstaat*, welfare *rechstaat*, transparency and social control, Godhead is the One God.<sup>1</sup> One of the obstacles of providing free legal aid (*pro bono publico*) is that only a few people who know what and how to get legal aid.<sup>2</sup> Legal aid agencies have an important role in overseeing the course of the judicial process.<sup>3</sup> The judiciary does not yet have humanity to humanize the judicial system, almost all the offenders are punished by imprisonment after going through the judicial process.<sup>4</sup>

The existence of legal aid is a manifestation of the effort to organize human rights in the field of law. Legal aid as one of the manifestations of the state of law. Subject to the provisions of Article 28 D Paragraph (1) of the 1945 Constitution.

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everyone is entitled to the recognition, guarantee, protection and legal certainty of justice and equal treatment before the law. The provisions on equal treatment before the law are carried out by the establishment of rules relating to the provision of legal aid.

The provision of Legal Aid to citizens is an attempt to fulfill and at the same time be the implementation of a legal state that recognizes and protects and guarantees citizens' human rights on the need for access to justice and equality before the law. Furthermore, the provisions of Article 28D paragraph (1) of the 1945 Constitution are implemented in Law 16/2011 about legal aid (LNRI Number 104, TLNRI Number 5248) is a manifestation of equality before the law.

So far, the provision of Legal Aid has not yet touched many people groups of poor people, so they have difficulties accessing justice because they are hampered by their inability to realize their constitutional rights. The regulation on the provision of Legal Aid in Law 16/2011 is a guarantee of the constitutional rights of the poor people or groups.

Law 16/2011 provides a guarantee of legal protection in the form of providing free legal aid free the society in need. This provision only touches the surface area and fails to find the root of the problem.<sup>5</sup> Implementation of free legal aid by the local government with Kemenkumham is still not maximized. The lack of socialization of legal aid provision to the poor, at least the number of accredited Legal Aid Organizations (OBH) that can provide legal aid, insufficient legal aid costs in the trial process (examples of funds to present expert witnesses), administrative requirements related to Certificate of poverty (SKTM) which is misused by some people and not suitable for it.<sup>6</sup> Difficulties of asking for or getting a derivative news file of a suspect.<sup>7</sup>

Factors that Impeded the Implementation of Legal Aid to the Poor in Surabaya City are: (a) Legal factors which include the lack of legal protection for legal aid, (b) Human Resources Factors related to the quality and quantity of legal aid providers, (c) Cultural Factors of the community related to the lack of public information on legal aid and the reluctant of society to report to the Legal Aid Agencies.<sup>8</sup> Recipients of legal aid are limited to the poor, not marginal society, so that the society has not been fully utilized.

From the above description it is known that the implementation of legal aid provision for the poor in East Java Province, especially in the Surabaya City is still not maximal, so the problem arises, namely: are the substances and procedures of the legal aid policy for the marginal society appropriate?

## METHODOLOGY

This research is normative law research. The data used in this research are secondary data and primary data as supporting. Primary data came from information received from informants, while secondary data was obtained from library materials, namely in the form of primary legal materials, secondary legal materials and tertiary legal materials. Primary legal materials in the form of legislation governing legal aid,

policy of providing legal aid services. Secondary legal materials in the form of journals, both national and international, and reference books that discuss legal aid. While tertiary law material is dictionary. The instruments of data collection were literature study and interview. Interviews used were structured interviews and literature study which was done by means of content identification. Triangulation of the data was used to maintain the validity of the primary data, i.e. data that has been obtained from a source compared with data from other sources. Meanwhile, to maintain the validity of secondary data then conducted the criticism on the sources. Data analysis was done by editing analysis style technique.<sup>9</sup>

### DISCUSSION

Legal aid is legal services provided by legal aid agencies free of charge to legal aid recipients (Article 1 of Law No. 16 Year 2011). Legal aid is implemented on principle basis of:

1. justice, which means putting each person's rights and obligations proportionally, properly, correctly, well, and in order.
2. equality within the law, meaning that everyone has equal rights and equal treatment before the law and the obligation to uphold the law;
3. openness, meaning giving access to the public to obtain complete, correct, honest and impartial information in obtaining a justice guarantee on the basis of constitutional rights;
4. efficiency, meaning maximizing the provision of legal aid through the use of existing financial resources;
5. effectiveness, which means determining the attainment of the objective of providing legal assistance appropriately and
6. Accountability of each activity and the final result of the activities of the provision of legal aid shall be accountable to the public (Article 2 of Law No. 16 Year 2011 along with its explanation).

The six principles contained in Law No. 16/2011 are in accordance with the principle of universal legal aid, which is accessible, financed by the State (affordability), sustainable, credibility, and accountability.<sup>10</sup> The purpose of providing legal aid is to:

1. guarantee and fulfill the right of legal aid recipients to gain access to justice;
2. realize the constitutional rights of all citizens in accordance with the principle of equality of positions in the law;
3. ensure the certainty of the implementation of legal aid is carried out equally throughout the territory of Indonesia; and
4. realizing an effective, efficient, and accountable judiciary (Article 3 of Law No. 16 Year 2011).

Legal aid is provided to assist in the settlement of legal issues faced by legal aid recipients (Article 6 paragraph (1) of Law 16/2011). The absence of free legal

aid is a barrier to equitable access to justice.<sup>11</sup> The birth of Law No. 16 of 2011 is expected to provide legal protection for the people on access to legal aid with ease. The rules contained in Law No. 16/2011 show that the legal aid system still contains weaknesses on the substance and procedures.

The legal substance in the legal aid system consists of two elements, namely the legal subject and the object of legal aid law. The legal aid subject is the party involved in the process of providing legal aid. Legal aid procedure is a procedure that must be taken for legal subjects in the provision of legal aid, including procedures for providing or receiving legal aid.

#### 1. The Substance of Legal Aid

##### 1.1. The subject of the law

The related legal subjects in the process of organizing legal aid are divided into three categories:

- a) legal aid agencies,
- b) recipients of legal aid and
- c) the agencies of legal aid.

*1.1.1. Legal aid providers:* Legal aid providers are legal aid agencies or community organizations providing legal aid services (Article 1 number 3 of Law 16/2011). Terms of legal aid providers are incorporated, accredited, have a permanent office or secretariat, have a board and have a legal aid programs (Article 8 of Law 16/2011). Eligible legal aid providers have rights and obligations. The right of legal aid for:

- a) recruitment of advocates, paralegals, lecturers, and law faculty students;
- b) conducting legal aid services;
- c) organizing legal counseling, legal counseling, and other program activities related to the provision of legal aid (case investigation, legal documentation, legal research, mediation, negotiation, and community empowerment);
- d) receiving the state budget to carry out legal aid under this law;
- e) issuing opinions or statements in the defense of case under their responsibility in the trial in accordance with the provisions of laws and regulations;
- f) Obtaining information and other data from government or other agencies, for the sake of defense case; and
- g) Obtaining legal, security, and safety safeguards while undertaking legal aid (Article 9 of Law 16/2011).

The obligations of the legal aid providers are to:

- a) Report to the minister on legal aid programs;
- b) report any use of the state budget used for the provision of legal assistance under this law;



- c) Organize education and legal aid training for advocates, paralegals, lecturers, and law students recruited;
- d) Maintaining the confidentiality of data, information and or information obtained from the legal aid recipient in relation to the matter being handled, unless otherwise provided by law; and
- e) Provide legal assistance to legal aid beneficiaries under the terms and ordinances prescribed in this law until the case is completed, unless there is a valid legal reason (Article 10 of Law 16/2011).

Legal aid providers may obtain funds for the provision of legal aid derived from the state budget (APBN), regional budgets (APBD), grants or donations; and / or other authorized and non-binding source of funding. Legal aid providers are prohibited from receiving or requesting payment from legal aid recipients and / or other parties related to the case being handled. Criminal threats may be granted to prolific legal aid providers, which can be punished with a maximum imprisonment of 1 (one) year or a maximum fine of Rp. 50,000,000.00 (fifty million rupiah). (Article 16 jo Article 19 jo Article 21 of Law 16/2011).

To date, based on the Decree of the Minister of Justice and Human Rights of the Republic of Indonesia Number M.HH-01.HN.03.03 OF YEAR 2016 dated January 7, 2016 About Legal Aid Institutions / Organization Passed Verification and Accreditation as Legal Aid for the Period of 2016 to 2018 are 405 (four hundred five) OBH. For East Java, there are 44 (forty four) OBH. For the area of Surabaya City amounted to 10 (ten) OBH, namely:

No	Name	Address	Province	Accredited
1	Yayasan Bantuan Hukum Lacak	Jl. Wonorejo 1/27 Manukan Kulon Surabaya	East Java	B
2	Perkumpulan Lembaga Bantuan Hukum Tiara Yustisia Jatim	Jl. Bendul Merisi Selatan IX/18a Surabaya	East Java	B
3	Yayasan Lembaga Perlindungan Konsumen Jawa Timur	Jl. Karah Agung VI/1 Surabaya	East Java	C
4	Surabaya Children Crisis Centre	Jl. Raya Bungkal No. 41 Sambikerep Surabaya	East Java	C
5	LBH Sunan Ampel	Jl. Ahmad Yani No. 117 Surabaya	East Java	C
6	Yayasan Orbit	Jl. Bratang Binangun 5c No. 19 Surabaya	East Java	C
7	Yayasan Legundi Keadilan Indonesia	Jalan Legundi 31 Kota Surabaya	East Java	C
8	Yayasan Lembaga Bantuan Hukum Indonesia-Lembaga Bantuan Hukum Surabaya	Jl. Kidal, No. 6 Surabaya	East Java	C
9	Asosiasi Pengacara Syariah Indonesia Jawa Timur	Jl. Bibis Karah No. 4-A Kota Surabaya	East Java	C
10	Perkumpulan Lembaga Bantuan Hukum Taruna Indonesia	Jl. Dukuh Pakis Gang 6 B No 64 Surabaya	East Java	C

From the data above, it can be seen that the percentage of OBH in East Java compared to the number of OBH in Indonesia is 10.86%. The percentage of OBH in Surabaya compared to the number of OBH in Indonesia is 2.47%. In 2014, the population of Indonesia amounts to 130 million people.<sup>12</sup> The population of Surabaya is 2,853,661 people.<sup>13</sup> The percentage of total OBH in Indonesia compared to the total population of Indonesia is 0.003%. The percentage of total OBH in Surabaya compared to the population of Surabaya is 0.035%. This figure shows that on average, from legal aid needs to 28,536 residents in Surabaya City, will be handled by one OBH. This amount is very far from the fulfillment of the principle of good legal aid.

For the area of Surabaya City, the existing OBH are still in accredited B and C status. There is no accredited A. The differentiation of accreditation A, B and C are as follows:

No	Indicators	Accredited		
		A	B	C
1	Minimum cases per year	35	25	15
2	Minimum amount of non-litigation of legal aid program	7	5	3
3	A number of advocates	10	5	3
4	A number of paralegals	10	5	3
5	Minimum education of advocates	S1	S1	S1
6	Follows paralegals training for paralegals	✓	✓	✓

Source: Noor Prpto (Legal Counselor of Expert in Madrasah Kemenkumham East Java), in the FGD Model Legal Aid for Marginal society in Surabaya City, Muhammadiyah University of Surabaya Date 14-8-2017.

**1.1.2. Recipients of legal aid:** Legal aid recipients are persons or groups of poor who face legal problems and who can not fulfill basic and appropriate rights (including the right to food, clothing, health services, education services, employment and business, and or housing) (Article 1 Number 1 jo Article 4 paragraph (1) jo Article 5 of Law 16/2011).

Law 16/2011 limits the meaning of poverty to the non-fulfillment of basic rights. The definition of poor is defined differently by the Central Bureau of Statistics (BPS) and the United Nations. BPS defines poor as a poverty line.

1. The Poverty Line (GK) is the sum of the Food Poverty Line (GKM) and the Non-Food Poverty Line (GKNM). The population with average per capita expenditure per month under the Poverty Line is categorized as the poor.
2. Food Poverty Line (GKM) is the value of minimum food expenditure realized by 2.100 kilocalories per day. The basic food commodity package is represented by 52 types of commodities (whole grains, tubers, fish, meat, eggs and milk, vegetables, beans, fruits, oils, fats, etc.)

3. The Non-Food Poverty Line (GKNM) is the minimum requirement for housing, clothing, education and health. The basic food for non-food commodity package is represented by 51 urban commodities and 47 rural commodities.<sup>14</sup>

2 The poor definition according to BPS lies in the basic food needs parameter of 2.100 kilo per capita per day and non-food basic needs.

Understanding the poor according to BPS is different from the universal impoverishment of the UN. In the United Nations Millennium Declaration, in United Nations General Assembly resolution 55/2 of 18 September 2000 on the United Nations Millennium Declaration / MDGs (A / RES / 55/2),<sup>15</sup> This Declaration is followed up in the World Summit Outcome.<sup>16</sup> The poor parameter of MDGs lies in earnings of less than US \$ 1 per day. Poverty alleviation policies in Indonesia have not been harmonious with the MDGs Targets due to differences in defining poverty.<sup>17</sup>

The Supreme Court defines the poor as an incapable person. In Perma no. 1 Year 2014 on Guidelines for the Provision of Legal Services for incapable People in the Court. Legal Services Provision for incapable People in Courts consists of waiving court fees, court proceedings outside courts, court postal courts within the General Courts, Religious Courts and State Administration Courts (Article 1 point 1 in conjunction with Article 4 of Perma 1/2014). The cost components resulting from the waiver of the court fee consist of stamp duty, calling costs of the parties, notification of contents, seizure costs, local examination fees, witness fees / expert fees, execution fees, office supplies, copying of files and letters in relation to the case file, duplication of the copy of the verdict, the transmission of the notice of the register number to the Court of Appeals and the Parties, the copy of the decree, the case files and other letters deemed necessary, the filing and binding of the dossier and the photocopy use of the State (Article 11 paragraph (1) of Perma 1/2014).

Provision of legal aid is provided only given to the poor people who face legal problems, not touching women, children, laborers, farmers, victims of environmental pollution of marginal communities.<sup>18</sup> Not all people in need can enjoy legal aid facilities free of charge from the State, including marginal communities. The marginal grassroots community is the lowest society that experiences poverty and exclusion and has no access to the labor market, land, product distribution and certain rights.<sup>19</sup> In Surabaya City legal aid can not be felt by the disability<sup>20</sup>, workers,<sup>21</sup> citizens dispute of water pump at Keputih.<sup>22</sup> They can be classified into marginal communities in Surabaya.

1.1.3. *Legal Aid Provider*: Legal aid provider is the Minister who administers government affairs in the field of law and human rights (Menkumham), conducted by the Legal Aid. The authority of Menkumham are to:



1. supervise and ensure the provision of Legal Aid and Legal Assistance is carried out in accordance with principles and objectives
2. perform verification and accreditation (performed every 3 years) to legal aid organizations or community organizations to meet the feasibility of being a Legal Aid

To conduct verification and accreditation, the Minister shall establish a committee consisting of Kemenkumham, academics, community leaders; and institutions or organizations providing legal aid services (Article 1 point 4 jo Article 6 paragraph (2) in conjunction with Article 7 of Law 16/2011).

### 1.2. Object of legal Aid

Object of Legal Aid is divided into three areas, namely the civil, criminal, and state administrative matters, both litigation and non-litigation. Legal aid provisions include exercising power, accompanying, representing, defending, and or carrying out other legal actions for the legal benefit of the Legal Aidee (Article 4 of Law 16/2011).

Non-litigation law assistance includes legal counseling, legal consultation, case investigation, electronic or non-electronic, legal research, mediation, negotiation, community empowerment, outside court assistance and or drafting of legal documents. Litigation legal aid includes:

- a) Criminal cases, including investigations, and trials in court I, appellate court, appellate hearings, and review;
- b) Civil cases, including peace efforts or court decisions I, appellate court judgments, appellate court decisions, and review; and
- c) State administrative cases, including preliminary hearings and court decisions I, appellate court judgments, appellate court decisions, and review.

The cost of litigation fee is Rp. 8.000.000 as the following details:

<i>Criminal Cases</i>	<i>Civil Cases</i>	<i>State Administrative Cases</i>	<i>Cost value</i>
Stage of Lawsuit	Stage of Lawsuit	Stage of Lawsuit	Rp. 2.000.000
Court Decision Level	Court Decision Level	Court Decision Level	Rp. 3.000.000
Stage I	Stage I	Stage I	
Court of Appeal	Court of Appeal	Court of Appeal Decision	Rp. 1.000.000
Decision Stage	Decision Stage	Stage	
Court of Appeal	Court of Appeal	Court of Appeal	Rp. 1.000.000
Decision Stage	Decision Stage	Decision Stage	
Review Stage	Review Stage	Review Stage	Rp. 1.000.000
Total unit cost	Rp. 8.000.000		

The unit of expense will be given by reimbursement and done in phases, although in practice the amount is not fully accepted by the Legal Aid. There is a unit cost cutting up to Rp. 750,000 per case. This according to the Court of First Level can be justified because it meets the unit cost that can be deducted due to the exemption of court fee based on the provisions of Article 11 paragraph (1) Perma 1/2014.

The substance of the object in legal aid is the difference between rules and practices. In Surabaya City only limited to the poor defendant. Should be according to the rule of law can be given for civil, criminal and state administration cases. In practice in the Surabaya area, for criminal cases, it is restricted to the legal aid recipients who meet the criteria of poverty and as criminals (defendants) are not domiciled as victims of criminal acts.<sup>23</sup> This is not in accordance with the provisions of Article 22 paragraph (3) of Perma 1/2014, namely the recipient of legal aid is the party who will / has acted as:

1. Plaintiff / applicant, or
2. Defendant / pleaded, or
3. Defendant, or
4. Witness.

This provision does not give a sense of justice, considering there is a criminal case of labor, it is possible to criminalize workers for labor disputes.<sup>24</sup> As a result, more and more of the other marginal communities are difficult to assist.

## 2. Procedures of Legal aid provision

Procedures of Legal aid provision consist of:

1. Applying for legal aid to legal aid providers meet with the following requirements:
  - a) Applying in written form (can be done verbally) containing at least.
    - i) the identity of the applicant (full name, sex, place and date of birth, complete address, and work as evidenced by identity cards, temporary address certificate and / or other documents issued by the authorized institution) and
    - ii) a brief description of the subject matter applied for legal aid.
  - b) Submit documents pertaining to the case; and
  - c) Attach a poor letter from the head of the village, or official who is at the level of the applicant's residence (Article 14 paragraph (1) of Law 16/2011)
2. within a maximum period of 3 (three) working days after the complete application for legal assistance shall provide an answer to accept or reject a request for legal assistance.

3. in the event that a request for legal assistance is received, the legal aid provider provides legal aid based on a special power of attorney from the legal aid recipient.
4. in case the request for legal aid is denied, the legal aid provider includes the reasons for the refusal

Provision procedures of legal aid can be executed after a legal aid recipient can prove that he / she belongs to a poor person or group. Proof of incapacity is:

1. Letter of poverty (SKTM) issued by the head of Village or Head of district of the same level stating that the concerned can not afford the cost of the case, or
2. Other social security certificates such as Poor Family Card (KKM), Public Health Insurance Card (Jamkesmas), Rice Poor Card (Raskin), card of Keluarga Harapan Program (PKH), card of Bantuan Langsung Tunai (BLT) KPS) or other documents relating to the list of poor people in an integrated government database or issued by other agencies authorized to provide inadequate information, or
3. The statement of incapacity on the services of an advocate made and signed by the applicant of the Court Postal Service and approved by the Court Post of legal aid Officer if the Court's Post of legal aid service applicant does not have the document (Article 22 paragraph (2) of Perma 1/2014.

## CLOSING

### 1. Conclusion

The existence of multiple interpretations on the substance and procedure of the substance of legal aid in legal subjects receiving legal aid has not touched the non-poor marginal communities in the city of Surabaya. The substance of legal aid on legal aid objects is narrowed in meaning, limited to impoverished criminal actors. Procedures for providing legal aid still need to be simplified.

### 2. Recommendations

Revision of legal aid arrangements to be easily accessed to the marginalized, both substance and procedure.

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