Journal Homepage: - www.journalijar.com
INTERNATIONAL JOURNAL OF ADVANCED RESEARCH (IJAR)
Article DOI: 10.21474/IJAR01/3674
DOI URL: http://dx.doi.org/10.21474/IJAR01/3674

*RESEARCH ARTICLE*

# LEGAL AID PRINCIPLE: (*DIGNIFIED JUSTICE THEORY PERSPECTIVE*)

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## *Manuscript Info*

***Manuscript History***

Received: 12 January 2017
Final Accepted: 01 February 2017
Published: March 2017

***Key words:-***
Legal Aid, Dignified Justice, Pancasila Legal System

## *Abstract*

It is a postulate in the Dignified Justice Theory perspective (Dignified Justice), that the law might only be found in the spirit of the people (*Volksgeist*, or the legal system, and in this case the Pancasila Legal System), in which the research of finding of the law has to be undertaken. The spirit of the people as such is manifested in the existing laws and regulations in the legal system in question. The same case apply in the effort to understand and describe the principle of legal aid in Indonesia, research has to be conducted in order to find it in the existing laws and regulations in the Pancasila Legal System. It has been found that an important principle of legal aid in the Pancasila Legal System is that, legal aid is the instrument of the state to protect stability in terms of close the gap between the haves and the have nots parties living in the country. Such efforts as to try as best as possible to close the gaps; may also be termed as the effort of the law in upholding human dignity (*nguwongke uwong*); in particular, serving those who has been strugling to have themself freed from entangled legal problems encountered in the process of the court or out of the court settlements.



## Introduction:-

Referring to the direction or perspective in the what we called the Dignified Justice Theory or Dignified Justice that legal norms and principles can only be found in a particular legal system or in the spirit of the people (*Volksgeist*) which has been set as the focus of an observation and a study. Therefore, the principle or rule which are related to the legal aid as a legal concept or legal institution in Indonesia can only be found in the existing laws and regulations. There are several existing laws and regulations in Indonesia (the Pancasila Legal System), in particular the Indonesian Criminal Procedures Act, (Law Number 8 of 1981) which governing or containing the principle on legal aid as such.

**Legal Aid in Laws and Regulatons in the Pancasila Legal System:-**

Norm and principle on legal aid in Indonesia could be found in the Definitional Section, Part 1 number (3) letter (e), of the Law Number 8 of 1981, it has been stipulated that: "every person which is connected with a criminal case is necessarily be given access to legal aid which is mostly given in order that the litigant is enabled to take every efforts in defending his or herself". This is the most important principle of legal aid in the Pancasila Legal System

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governing the due process of law stated in the Law Number 8 of 1981. This principle has a particular function, i.e. to give protection to the dignity of human being, or in other words to protect the human rights.

Concerning the issue of legal aid, an interesting issue must be discussed in this paper. The issue in question is the principle of protection to the dignity and self of human being. Accordingly, this principle is a derivative principle stated in the Indonesian Constitution, and it could also be termed as one of the manifestations of the spirit of the Indonesian people (the Indonesian *Volksgeist*) which is found it ultimate source in the Pancasila as the name of the First Agreement of the Indonesian people. Furthermore, with regard to the issue of principle of legal aid, there are also several legislations (Acts of Parliaments and several instruments) has to mentioned bellow.

In its history, legal aid has been regulated with clear stipulation in the Indonesian Law Number 14 of 1970 on The Basic Principles of Judicative Power. More than that, even when the Law Number 14 of 1970 was replaced by the Republic of Indonesia Law number 4 of 2004 on the same matter, in order to have it adjust to the Law Number 8 of 1981 on Criminal Procedures, the main principle of legal aid as mentioned above has still been uphold until the coming into force of the very recent Law Number 48 of 2009 governing all the Basic Principles of Judicial Power in the Pancasila Legal System.

The principle of legal aid which has justified the existing Indonesian legal aid system as mentioned above has become part of the Indonesian Criminal Justice System. To be viewed from the Dignified Justice Perspective, the principle of legal aid as such has become the principle of law, since it is derived from Pancasila. In this view, Pancasila is the supra-principle (*grundnorm*). Since the Dignified Justice recognizes that a scientific theory has various levels of application. The level is hierarchical, with lower levels subordinated to the higher ones. The highest is the core of the principle of law, and all other level are subordinated to Pancasila.

Although different with Kelsen (the Germany Jurist), in the Dignified Justice perspective once even the lowest level of principle has been derived from the highest principle (i.e. Pancasila), the (lowest) rule as such can also be termed as Pancasila, or *grundnorm*, since it contained the spirit of the people (*Volksgeist*) i.e., Pancasila. Some philosophers in Indonesia has considered Pancasila as an ideology, although in legal field it has to be called the First Agreement of the Indonesian People. Pancasila is the ultimate of all the sources of laws.[1]

Pancasila is the highest norm the place where all norms under it is depended. In this case, the principle that every person which has got involved in any legal cases is obligated to be granted rights to have access to legal aid which solely to be given to him in order that he or she can take every efforts to defend his or her interest.[2] This could be considered as the philosophy of legal aid in general, and also the principle of legal aid which apply to the have not litigants, those who are economically weak to pay the litigation or criminal justice process.

Juridicaly the existence of the Indonesian Criminal Procedures Code, in which the principle of legal aid is stipulated, would not only depend its being from the Pancasila as the spirit of law in Indonesia. It is also the derivative principle of rule of law, as clearly stated in the Indonesian Constitution (the Basic Act of the State of the Republic of Indonesia of 1945. Therefore the principle of legal aid has to be understood as a logical consequence that Indonesia is also recognizing the principle of Negara Hukum (the rule of law).

As it has been generally known that the principle of the rule of law in the Pancasila Legal System as stated in the General Definition Section of the Basic Act of the State of the Republic of Indonesia of 1945 concerning The System of Goverment. It has been stated there that: "The State of the Republic of Indonesia is based on (*rechtsstaat*), not to be based on mere power (*machtstaat*)". This principle has been underlined and restated in the Article 1 section (3) of the Basic Act of the Amendments to the Constitution of the State of the Republic of Indonesia of 1945 with several Decrees promulgated by the People Consultative Assembly of the Republic of Indonesia. It is stated that: "the State of the Republic of Indonesia is the state of law".

[1] *Pancasila the Ultimate of All the Sources of Laws* (*A Dignified Justice Perspective*), Journal of Law, Policy and Globalization, International Institute for Science, Technology and Education (IISTE), Vol. 54, October 2016.
[2] Teguh Prasetyo, *Hukum dan Sistem Hukum Berdasarkan Pancasila*, Cetakan Kesatu, Media Perkasa, Yogyakarta, 2013, hal., 69.

It has also been given a meaning to such a principle, that the State of Indonesia also strongly uphold the human rights and guaranting that all its citizens is equal to the law and government, and being obligated to upholding that law and the government without exceptions what so ever. The principle of legal aid has become fundamentally essential, and intrinsic, what a nation state has made a declaration that it is a state of law or based its principle on the rule of law. The principle of legal aid might also be found implicitly if further research has to be done to find it in another historical constitutional documents.

In the constitutional history of the Republic of Indonesia, stipulations on the concept of legal aid has been there for a very long time on the Document, called Five Year Term of National Development Plan. In that Document, legal aid was considered as part of national strategy stated in that Document. (the Third National Development Plan). The stipulation of principle of legal aid continue to be stated and implementing in the next national Plan, until the last National Plan, i.e. the fifth. On the lowest level of instrumental regulation, the principle of legal aid was stated in the Ministerial of Justice Decree Number: M.02 UM. 90.08 of 1980 on Guidelines for the Implementation of Legal Aid.

Latter on, the Ministerial Decree was replaced by Ministry of Justice Instruction of The Republic of Indonesia Number M. 08-UM.06.02 of 1992 on the Amendment to the Ministry of Justice Instruction Number M.24-UM.06.02 of 1985 on the Guidelines to the Implementation of Legal Aid for the Section of the Society which Has Been Considered as the Have Not.

While in the Ministerial Instruction Number M.24-UM.06.02 of 1985, legal aid was regarded as general, in the Minister of Justice Instruction Number M. 08-UM.06.02 of 1992 on the Amendment to the Justice Minister Instruction Number M.24-UM.06.02 of 1985, the principle of legal aid has put much weight as the legal aid program for the underprivileged of societies or the have not.

The meaning to the concept of legal aid has been enriched and also has been adjusted to the spirit of the Indonesian people to direct it to its mission as the tool for national stability. By national stability it meant, to maintain the balance in order that the increasing gap between the have and the have not in the society could be closed. This problem of economic segregation in the Indonesian society at that time was very large, and therefore was considered as dangerous to the national stability. Legal aid was given more emphasis in order to combat the economic gaps between the rich and the poor in the society.

Later on, the principle of legal aid has been given more emphasis on the help that also been given to the rich, and therefore the principle has been changed from structural principle to neutral principle. Legal aid has been given to all the people, without considering their social and economic background. Although still, legal aid is understood as legal instrument that containing the structural dimension. Legal aid has been conducted to serve the section of the society that was considered as marginalized and outcast.

The court has been used to channel the free of charge legal aid services to the section of the society, the marginalized society as mentioned above. In this case, the district court all over Indonesian has been appointed as the institutions that channels the legal aid service as such. This is understood, as when the legal aid was implemented, the judicial power was under the control of the executive, as made possible by the Law Number 14 of 1970 on the Judicial Power.

Its meaning has also been expanded, to cover the involvement of universities and law schools in the Archipelago. The doctrine of the higher education which has to be understood as universities has to get involve in teaching, research and serving the society (tri dharma) was utilised. Legal aid was placed under the higher education doctrine of serving the society. Many legal aid department at the universities all over the country was set up to serve the need of legal aid. Legal aid has been implemented via accompanying the parties in the disputes or any criminal cases, whether it is in or out-side the court. Private cases, criminal cases, including cases in which the individual has to face the Government in the Administrative Court has been the targets of the legal aid programme.

It is interesting to note, that legal aid at this stage has also been given to the Government who has to face the trial at the Administrative Court with the individual who has brought it to the court. This is the case which has been named as cases of abuse of governmental power. (*onrechtmatige daad zaken/onrechtmatigover heidsdad*).

**The Aim or Purposes of Legal Aid:-**

It must also be mentioned here regarding the aim and purposes of legal aid in the Pancasila Legal System. Firstly, for humanity. This particular purpose, is in line with the purposes postulated by the Dignified Justice perspective which has been constructed with the aim to create a dignified justice.[3] One, from many of the orientations of the Dignified Justice perspective is to make human as human or using the Javanese phraseology *nguwongke uwong*. The legal aid programme is given in order that it could lightening the burden of life of the section of the society which is considered as the have not. This will increase the opportunity for the most part of the society to have justice and also legal protections.

Secondly, the aim of legal aid is to risen the legal awareness. It is expected that legal aid would educate, or in terms used by the Dignified Justice theory, is *nguwongke uwong* for those part of the society which is considered as the have nots, and that it could make them manage to live as members of the society with the required level of understanding, with which they are aware of their rights and obligations as member of society and as citizens. Some has saidt, "through the increasing legal awarnes of the society, the people can understand their rights and obligations, and also the utilities of the legal aid itself"[4].

In the Era of President Joko Widodo, through the Ministry of Law and Human Rights, it has been alocated resources to manage and implementing the principle of legal aid. The emphasis has been back to the idea that legal aid has to be directed to help the marginalized and underprivileges part in the society. The task to undertake and implementing the legal aid program has been considered as a noble task, since it has been directly making contact with the neede part of the society. It has also interesting to submit here that the noble task of legal aid is associated with the term using in Part I Introduction, number (2) the Attachment of the Instruction of the Ministry of Justice of the Republic of Indonesia Number M.08-UM. 06.02 of 1992, on the Guideline of the Implementation of the Legal Aid Program for the Poor. In this regulation, the poor has been termed as *buta hukum* (*lay person*). In this particular aspect, legal aid has been considered as noble task since it has opened the "door" for justice to all of the people, particularly for the poor[5].

The concept of poor in the legal aid program has been connoted as the people who has no money, and live under the poverty line, as used by the economist. This understanding has been reiterated in the Law Number 13 of 2011 on the Poor. In this law, the concept poor have to be restricted to the people who has no money, and live under the poverty line. The laws have stated that the poor means the people who have no money to pay for legal services given by the legal practitioners. No indication that the term poor have to be related with the "legal blind" or person who does not have a clear understanding of the law.

In the past, however, as mentioned on the regulations stated above, the poor that has to be given legal aid was also related with the "legal blind". The person who was ask for his or her expertice to give legal aid, in the law at that time has been considered as those who do the noble task and this in the old Latin frase was *officium nobile*. It might be also interesting to mention it here that the structure in the relation between the giver of the legal aid and its receiver has been regarded as sub-ordinative, one is higher then the other.

In the beginning, the lower status as such was understood as a section in the society that does not have the ability to see the law ("legal blind"). Therefore, the concept poor at that time has been understood as similar to the meaning people who does not know the law. Meanwhile, the party that was regarded as having the higher status was called *officum nobile* since they understood the law, and that they were able to give their legal service. In the position as *officum nobile* as such, it has been overwhelmed with virtues such as *charitable*. Therefore, the State, as dictated by the Constitution has invited their readiness as *oficium nobise* to dedicate their live to the modern institution of the law with the task of legal aid.

[3]Teguh Prasetyo, *Keadilan Bermartabat Perspektif Teori Hukum*, Cetakan Pertama, Nusa Media, Bandung, 2015.

[4] Muhadar, *Beberapa Catatan tentang Bantuan Hukum dalam Perkara Pidana Prodeo dalam Kaitannya dengan Sosial Ekonomi*, Fakultas Hukum Universitas Hasanuddin, Ujung Pandang, Ujung Pandang, 1985, hal., 47.

[5] Ministery of Justice Instruction Republic of Indonesia Number: M. 08-UM.06.02 of 1992. According to Ismael Saleh, the Ministery of Justice at that time: "all person have always hope that poverty will not be the obstacle to have access to justice and law protection". *Ibid*., The Attachment of the Ministery of Justice Instruction Republic of Indonesia Number: M. 08-UM.06.02 Tahun 1992.

Apart from those meaning of legal aid as mentioned above, legal aid has also been considered as a part of the criminal policy to prevent the what so called criminogenic factor. It mens that legal aid has become an institution to prevent people become the criminal perpetrator or victims. Again, in this aspect, legal aid has been linked to the function of protecting the *national security*. This has been reflected in the frase used in the Constitution that: "The state protecting all the Indonesian nation and all one's birthplace Indonesia...".

Such a formulation is used as a principle statement in the Preambule of the Indonesian Constitution, that legal aid is not monopoly the bussiness of the state alone. The task has been linked with the concept outsourcing the sovereignty with the tight control still at the hands of the Government as the holder of the sovereign power. The task has been transfered to the practising lawyers (*Advokat*), as they have the skills, knowledges and expertice to be given power in oreder to accompany their client before the law (the court).

**Practising Lawyers in Structural Legal Aid:-**

*Advokat* or practising lawyers are the profession who give legal services, whether in or out-side the court of law. This principle has been formulated in the Article 1 Number (1) the Law Number 18 of 2003 on Practising Lawyer (*Advokat*).

According to Article 56 section (1) of the Criminal Procedures Act:
In case if the defendant or the accused was charged with the crime that threatened with the capital punishment or imprisonment up to fifteen years or more or for those who are poor which was threatened with five years or more which does not have their own legal council, the officer in charged on all level of investigations and court proceeding is obligated to appoint legal counsel for them.

It has to be added that legal services is alsi to be understood as legal aid, and it could be given by a legal counsel or practising lawyer (*Advokat*) to give legal advice, legal consultation, legal opinion, legal audit, defend either in or out of the court and also accompanying in the criminal cases, including handling of trade matters, arbitration and labour.[6] For all of that functions, the practising lawyer has now been regarded in Indonesia as law enforcement officers. This was not the case before the Act. Therefore the Practising Lawyers as part of the "Law enforcement as a system has several components", that they must mastered: a) legal substance; b) legal structure; and c) legal culture[7]. The Law Number 18 of 2003 on Practising Lawyer (Advokat) is the Indonesian *Volksgeist* that dictating all of the aspects in the law enforcement system as mentioned above. This has strenghthening their character as *officium nobile*.

It has to be noticed that now in Indonesia, as law enforcement officers, the practising lawyers are now having the same status as the police, public prosecutors, and also judges. At the same time, when they give legal aid to their client, they have to face the other law enforcement officers as such; which is tend to sided with those in society who have influence and economic power. Therefore it is important for the practising lawyers to understand the concept of structural legal aid. The meaning of structural legal aid is that the legal aid has to side with the individual or part of the society which is marginalized, as this is the postulate in the Dignified Justice as well. If they have to defend workers (employees) who are in conflict with the employers the lawyer has to side with the employees according to the law[8].

In the structural legal aid, the mind set (the system) of the lawyers has to be changed. The change of legal culture for the benefit of the client has to be seriously considered. They have to think about the new legal culture, which is purely based on law, not in the political power as happened in the past Indonesia. They have to be consistent, for example with the dictate of the law to conduct the legal process with speedy, low cost, and also simple and opened or transparent procedures. They have to change the bureaucratic culture of the court and criminal justice system to side with their poor client.

In the structural legal aid, the practising lawyers have to be concerned with the broad approach in their tasks. They have to considered aspects such as conflicts dimensions between centre vs. peripherals and also aspects such as

[6] Ropaun Rambe, *Teknik Praktek Advokat*, Grasindo, Jakarta, 2001, hal., 10.
[7] Teguh Prasetyo dan Abdul Halim Barkatullah, *Filsafat, Teori dan Ilmu Hukum Pemikiran Menuju Masyarakat yang Berkeadilan dan Bermartabat*, Cetakan Kesatu, RajaGrafindo Persada, Jakarta, 2012, hal., 312.
[8] T. Mulya Lubis, *In Search of Human Rights*, Gramedia Pustakan Utama, Jakarta, 1993, hal., 55.

social, politics, economy, and also cultural. Legal formal approach has to the main priority, but material aspects in laws such as social factors must not be forgotten. Legal aid has to be constructed as a social movement.

They have to create a short of *power resources* to face the sections in the society which is tended to oppress the poor.[9] The vision of structural legal aid as seen above is important. Particularly, since the legal culture, and also legal structure recognized by the Indonesian Criminal Procedures Law is based on the principle of *aqusatoir*. With this system in mind, the suspects, accused or convicted criminal, for example has all the rights to have legal aid. Since the process of investigation in the Police office, the suspects have to be accompanied by legal counsels.

This in order that they may give proper treatment in that legal process. It has been stipulated in Article 69 of the Indonesian Criminal Procedures Act that: "legal council has the right to have contact with the suspects since he or she is got caught by the police or detained in every stage of the proceedings according to ways that has been stated in the Act". This principle has been provided in order that the legal counsel has every opportunities to implement his duties and noble task accordingly.

## Conclusion:-

Legal aid, in particular the service to providing support for or assist parties which has been involved in disputes or criminal charges in the court in the Pancasila Legal System is by its nature a legal institutiuon which has been provided in the legal system to protect society as a whole and in particular protecting the weaker section in the society. In the Pancasila Legal System, legal aid has to side with the poor, wheter those who are weak economically and also those who lack knowledge about the law and all its complexcities. This task of the lawyer (Advocates) who give the legal aid as such must be regarded as a noble task. This task is in line with the ideal of justice in the Dignified Justice, i.e. to make human as human within the Law.

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[9]T. Mulya Lubis, *Loc. Cit.*