

# Existence of Paralegals in Providing Legal Aid in Indonesia

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Abstract: Right to Justice (Access to Justice) is the constitutional right of every Indonesian citizen as mandated and guaranteed in Article 27 (1) of the 1945 Constitution. The manifestation of the right to justice is, among others, through legal aid to the poor and marginal. Legal aid in accordance with Law No. 16 of 2011 concerning Legal Aid formulates the role of paralegals, but the law does not regulate the definition and duties of paralegals in providing legal aid. This study aims to discuss the existence of paralegals in the provision of legal aid in Indonesia. This research is theoretical with a type of library research based on literature and combined with bibliographic research that focuses on ideas contained in the theory. Result of this research showed that the existence of paralegals in the provision of legal aid in Indonesia continues to experience ups and downs. To be able to carry out its role in providing legal aid paralegals do need an identity status and symbol recognized primary by the competent authority. But dilemma might occurs at the level of government policy regarding the definition and position of paralegals in the legal system in Indonesia; whether paralegals should be declared as a legal profession that has a place as a legal aid actor recognized by the state like other private professions. Although the benefits that come from formal recognition by the state can be accepted, this will eliminate independence and paralegals will enter the administrative and bureaucratic trap; there is standardized training, certification and membership given or removed by institutions that have authority based on government regulations.

## 1 INTRODUCTION

Right to Justice is the constitutional right of every Indonesian citizen as mandated and guaranteed in Article 27 (1) of the 1945 Constitution and the manifestation of the right to justice is, among others, through legal aid to the poor and marginal. The provision of legal aid based on principle of equality before the law.

The poor and marginalized need to get legal aid because when they are dealing with the law, they often face various obstacles to accessing justice. To help the obstacles faced by the poor and marginalized in accessing justice, the role of intermediaries in this case paralegals who provide assistance, support and service to the poor and marginalized are very important. Especially in Indonesia, when trained lawyers are very expensive, paralegals are an important “tool” to improve access of the poor to justice. Therefore the existence of paralegals is needed in providing legal aid to the

poor and marginalized. But in practice, the involvement of paralegals as stipulated in the law on legal aid often faced problems. For example, there are not a few judges and other law enforcers who reject paralegals when providing legal aid to accompany the judicial process and proceeding in a trial.

Lack of recognition of paralegals in providing legal aid severely impedes the achievement of access to justice, especially for the poor and marginalized. This paper will elaborate the dynamic of existence of paralegals in providing legal aid in Indonesia.

## 2 THE PROBLEM

How is the existence of paralegals in providing legal aid in Indonesia ? Based on the formulation of the problem this study aims to discuss the existence of paralegals in the provision of legal aid in Indonesia.

### 3 METHOD

This research is theoretical with type of library research based on literature or based on library<sup>1</sup>, focusing on reading and analysis of the primary and secondary materials and combined with bibliographic research that focuses on ideas contained in the theory. This research used a statutory approach (statue approach) and concept approach.<sup>2</sup>The legislative approach is carried out the examine various laws and regulations ranging from the constitution to various legislative regulations governing legal aid and paralegals. While the concept approach is carried out to explore various related concepts in this case legal aid and paralegals.

### 4 LEGAL AID

Mauro Cappelletti said that legal aid had actually been carried out in Western societies since Roman times, when legal aid was in the moral field.<sup>3</sup> After the outbreak of the French Revolution, legal aid the began to become part of legal activities or yuridik activities, which began to emphasize the equal rights of citizens to defend their interests in court proceedings, and until the beginning of the 20<sup>th</sup> century this legal aid was considers more as a job of providing services in the legal field without a reward.<sup>4</sup>

The concept of legal aid appears to be closely related to the fulfillment of access to justice, especially for the poor and marginalized. In fact, it is expressly stated that the concept of legal aid is one of the newest alternatives raised in an effort to protect the weak from the pressures imposed by the strong (to hold back the strong from oppressing the weak).

<sup>1</sup> Library based, focusing on reading and analysis of the primary and secondary materilas. See Jhony Ibrahim. 2006. Teori dan Metodologi Penelitian Hukum Normatif, Malang : Bayu Media Publishing, page. 46.

<sup>2</sup> Abdulkadir Muhammad. 2004. *Hukum dan Penelitian Hukum.Bandung* : PT.Citra Adiyta Bakti, page. 113.

<sup>3</sup> Sr Mauro Cappelletti, Earl Johnson Jr dan James Gord Ley, 1976, *Towards Equal Justice, A Comparative Study of Legal Aid in Modern Societies*, Dobbes Ferry, New York, page.6.

<sup>4</sup> Bambang Sunggono dan Aries Harianto, 2009, *Bantuan Hukum dan Hak Asasi Manusia*, Mandar Maju : Bandung, pege.11.

Reginald Heber Smith in Akmal Adicahya<sup>5</sup> define legal aid (legal aid work) as a comprehensive term that intends to describe all procedural reform efforts carried out either by public bodies or private entities whose purpose is to help the poor and the marginalized get the assistance they need, especially in dealing with legal issues.

In Indonesian context, there are at least three categories of concepts of legal aid. *First*, the concept of traditional legal aid that describes legal aid as legal service to the poor and marginalized given individually, the ingredients are only certain individulas. Legal aid bades on this concept is very procedural, normative and only looks at the legal issues experienced by the poor and marginalized as a legal problem. *Second*, the concept of constitutional legal aid is more active and views the poor and marginalized as not individuals but groups. The purpose of the implementation of contitutional law assistance is an effort to raise awariness of the rights of the poor and marginalized as legal subjects and the teaching of the velue og human rights. *Third*, the concept of structural legal aid whose scope is far wider than the two previous concepts. Stuctural legal aid sees all activities need to be carried out to the extent that they can create conditions for the realization of a law that is able to change unequal structures to a more just structure.

Based on the description above, legal aid can be understood as all efforts made to fulfill the rights of the poor and marginalized with various activities, even the aid providers can be anyone as long as it can change the lame structure that ensnares the poor and marginal.

### 5 PARALEGAL

According Black's Law Dictionary in Mulyana W. Kusuma, paralegal is "a person with legal skills, but who is not an attorney, and who works under the supervision of a lawyer or no is otherwise authorized by law to use those legal skills. Based on this understanding, the so-called paralegal is someone who has legal skills but is not a legal counselor (professional) and works under the guidance of an

<sup>5</sup>Akmal Adicahya, 2017, Pengakuan Terhadap Pihak Non-Advokat Dalam Pemberian Bantuan Hukum (Politik Hukum Bantuan Hukum Dalam Peraturan Perundang-Undangan di Indonesia), *Jurnal Hukum dan Peradilan*, Vo. 6 No. 3.

advocate or who is judged to have the legal capacity to use his or her skills.<sup>6</sup>

D.J. Ravindran formulates the definition of paralegal as follows: “a person who has basic knowledge of law, both formal and informal law and the motives, attitudes and skills to: implement educational programs so that disadvantaged people are aware of their rights; facilitate the formation of popular organizations so that they can prosecute and fight for their rights; assist in mediation and reconciliation in the event of a dispute; conducting preliminary investigations into cases that occurred before being handled by lawyers; assist lawyers in making statements (lawsuits / pleadings), collecting necessary evidence and other information relevant to the case at hand”.<sup>7</sup>

Meanwhile, the definition of paralegal among perpetrators of Legal Empowerment for example used by Stephen Golub, “paralegals are laypersons, often drawn from the group they serve, who receive specialized legal training and who provide various forms of legal education, advice, and assistance to the disadvantaged”.<sup>8</sup> Vivek Maru provides a formula that is not much different based on his experience developing paralegal program in Sierra Leone. It offers the definition of paralegal as, ‘laypeople with basic training in law and formal government who assist poor and otherwise disempowered communities to remedy breaches of fundamental rights and freedom’.<sup>9</sup>

It can be concluded that a paralegal is someone who specifically helps the community (the poor and the marginal), who because of special skills and have legal knowledge (basic) and able to provide services, legal education, guidance to the community. The term paralegal describes a person who has received special training in the field of legal knowledge and skills to provide information and assistance to resolve legal issues. Paralegals are a name that emerges as a reaction to the powerlessness

of law and the legal profession to understand, capture and fulfill various social needs (community rights).

## 6 RESULTS AND DISCUSS

Law Number 16 of 2011 concerning Legal Aid raises the term paralegal as a legal aid provider. In Article 9a of Law Number 11 of 2011 stated that “Providers of legal aid have the right to recruit recruiters, paralegals...”. Furthermore, Article 10d regulates the obligation of the Legal Provider to provide education and legal aid training for paralegals who have been recruited by Legal Providers. These provisions form the basis of juridical legitimacy for the existence of paralegals as legal aid providers. Unfortunately this law does not specify what authority these legal aid providers have, especially in terms of providing legal aid. This law only gives general authority as stated in Article 9b and c of Law Number 11 of 2011.

It was only in Government Regulation Number 42 of 2013 concerning the Terms and Procedures for Giving Legal Aid and Distribution of Legal Aid Funds, there are details of the authority to provide legal aid as what can be done by lawyers, paralegals, lecturers, and the law students. Referring to Article 13 of the government regulation, the provision of legal legal aid in litigation is carried out by an advocate who is a legal aid provider. However, if the number of lawyers is inadequate, paralegals, lecturers, and law faculty students can also provide legal aid by attaching written evidence as assistance from lawyers. Because it is mentioned in the same article, it can be interpreted that “legal aid” referred to in paragraph 3 is litigation legal aid as stated in paragraph 1 below :

Article 13 Government Regulation Number 42 of 2013

1) Litigation of Legal Aid is carried out by the Advocate status as administrator of Legal Aid Provider and/or Advocate recruited by the Legal Aid Provider.

2) In the case of the number of Advocate collected in the contribution of Aid Provider The Law is not adequate with the large number of Legal Aid Recipients, Legal Aid Providers can recruit paralegals, lecturers and students faculty of law.

3) In providing legal aid, paralegals, lecturers, and law faculty students as referred to in paragraph (2) must attach written evidence of assistance from Advocates as well referred to in paragraph (1).

<sup>6</sup> Mulyana W. Kusumah, at all, (ed), 1991, *Paradigma dan Akses Masyarakat Terhadap Keadilan*. Yayasan LBH Indonesia, Jakarta, page. 27.

<sup>7</sup> Ravindran, D.J. 1989. *Buku Penuntun untuk Pelatihan Paralegal*. Yayasan Lembaga Bantuan Hukum Indonesia. page.1.

<sup>8</sup> Golub, Stephen. 2006. “A House Without a Foundation, “ dalam Thomas Carothers (ed), *Promoting the Rule of Law Abroad in Search of Knowledge*, Washington, DC: Carnegie Endowment for International Peace, page.171.

<sup>9</sup> Vivek Maru. 2006. “Between Law and Society : Paralegals and the Provision of Justice Service in Sierra Leone and Worldwide”, *The Yale Journal of International Law*, vol 31. page.29.

4) Law faculty students as referred to in paragraph (2) must have pass the course law and paralegal training courses.

Meanwhile, Article 16 explains that non-litigation legal aid can be carried out by lawyers, lecturers, paralegals, and law students. In contrast to litigation law assistance, the implementation of non-litigation legal aid does not require lecturers, paralegals, and law faculty students to show written statements or mentoring from lawyers. From the formulation of the article it can be concluded that in fact the non-advocate legal aid provider in this context especially by paralegals can convene before the trial or carry out litigation remedies if the number of lawyers gathered in the legal aid organization is not adequate.

On January 26, 2018 the Minister of Law and Human Rights promulgated the Minister of Law and Human Rights Regulation (Permenkumham) Number 1 of 2018 concerning Paralegals in Giving Legal Aid. This Ministerial Regulation is a derivative of Law Number 16 of 2011 concerning Legal Aid. Menkumham's regulation aims to achieve access to justice for everyone, especially the poor or incapable in order to obtain guarantees in fulfilling their rights to legal aid. One of the considerations issued by Permenkumham is the ratio of the population with the number of lawyers still very unequal especially in remote areas of Indonesia. Therefore, it has an impact on the difficulty of people's access to justice.<sup>10</sup>

In addition to the imbalance of these ratios, other factors that are taken into consideration by the Ministry of Law and Human Rights, there are still minimal advocates who carry out legal aid for free (pro bono) which is mandated by Law Number 18 of 2003 concerning Advocates.

But in April 6, 2018 a number of Advocates registered a judicial review to the Supreme Court (MA). Requests for judicial review that the Supreme Court declare the Minister of Law and Human Rights regarding Paralegals null and void. At least deciding Article 4, Article 7 paragraph 1, Article 11

<sup>10</sup> Based on data from the National Law Development Agency (BPHN), the number of advocates in Indonesia is 1,117. While the number of paralegals was 1,018 and 310 Legal Aid Organizations (Organisasi Bantuan Hukum/OBH), in 2013-2015. While in the 2016-2018 period there was an increase, a number of 2,070 lawyers and 2,130 paralegals, as well as 405 OBH. From the data it can be seen that there is an imbalance between the number of OBH, lawyer and paralegals compared to the total population of Indonesia in 81,253 villages.

and Article 12 of the Minister of Law and Human Rights contradicts the Advocate Law. Finally, the Supreme Court issued a Supreme Court Decision Number 22 P/HUM/2018 of 2018 concerning the case for a petition for judicial review of Permenkumham 1/2018, and stated that Article 11 and Article 12 of Permenkumham 1/2018 concerning paralegals in the provision of legal aid contradicted legislation -higher invitation, namely Law Number 18 of 2003 concerning Advocates. Thus, paralegals cannot provide legal aid in litigation.

This decision is certainly a step backward efforts to expand legal aid services and the principle of access to justice. This is based on the fact that there is a need to increase human resources that provide legal aid services. Up to now there are at least 405 Legal Aid Organization (Organisasi Bantuan Hukum/OBH) which provide service to 28,005,410 poor people. With this amount, one of OBH must serve 67,000 poor people. Furthermore, the 405 Legal Aid Organization (Organisasi Bantuan Hukum/OBH) are spread in 127 Regencies and Cities. Even though there are at least 516 regencies and cities recorded throughout Indonesia. That is, there are still 389 Regencies and Cities that are not covered by Legal Aid Organization (Organisasi Bantuan Hukum/OBH).

In addition, the National Legal Development Agency (BPHN) as the executor of providing legal aid by the state also has limited budgets to be allocated to 405 Legal Aid Organization (Organisasi Bantuan Hukum/OBH) throughout Indonesia. As a result, the handling of cases by Legal Aid Organization (Organisasi Bantuan Hukum/OBH) was limited by the quota set by the National Legal Development Agency (BPHN) so that it could not serve all requests for legal aid .

## 7 CONCLUSION

The existence and contribution of paralegals as one of the legal aid actors for the poor and marginalized is very much needed considering the ratio of the availability of Legal Aid Organization (Organisasi Bantuan Hukum/OBH) to the number of the poor people and their distribution in the regions shows a great need in the availability of legal aid services. However, the existence of paralegals in the provision of legal aid has not been fully recognized and legally protected.

To optimize paralegals in providing legal aid, the following are suggested :

1. Updating the Legal Aid Act concerning the definition of paralegals, the scope of paralegals, and legal protection for paralegals in work.
2. The Ministry of Law and Human Rights revises the Minister of Law and Human Rights Regulation No. 1 of 2018 in order to keep providing public access to legal aid by paralegals by clarifying the definition, function and scope of work while still considering the Supreme Court Decision Number 22 P/HUM/2018 related to paralegals.
3. Advocates and advocate organizations affirm their commitment to providing free legal aid (pro bono) to the poor and marginalized as mandated in the Advocate Law and Government Regulations.
4. The government ensure good standards for the quality of legal aid services carried out by paralegals while still coordinating with lawyers who are members of legal aid organizations.

Government Regulation Number 42 of 2013 concerning the Terms and Procedures for Giving Legal Aid and Distribution of Legal Aid Funds.

The Minister of Law and Human Rights Regulation (Permenkumham) Number 1 of 2018 concerning Paralegals in Giving Legal Aid.

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### Legislation

- The Indonesian 1945 Constitution (After Amendments).
- Law No 18 of 2003 concerning Advocates.
- Law No 16 of 2011 concerning Legal Aid.