

# Discriminatory Policy of the Indonesian Government toward Advocate and Poor People, Funding Solution for Legal Aid

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## Abstract

*Constitutionally, obtaining legal aid for the poor is a right, whereas for advocates, legal aid is an obligation. The rich can select the desired advocate, while the poor should be defended by an advocate under the principle of pro bono publico. Legal aid for the poor is the answer to the principle of equality before the law. Although the poor have a right to be defended by an advocate, some of them do not get legal aid, due to either the factor of the advocate or the poor themselves who do not have access to justice. Government policy to allocate legal aid funds in the Ministry of Law and Human Rights only to accredited legal aid institution further complicates the procedures of legal aid obtaining, both for the poor and advocate. This government discrimination should be ended by removing the policy and seeking legal aid fund alternatives by exploring the resources available in the community, both private institutions and the having individuals.*

*Keywords: legal aid, advocates, pro bono publico, access to justice, the poor.*

## I. INTRODUCTION

There are several consequences that have to be upheld by the next generation of this nation concerning the decisions taken by the Founding Fathers. First, a decision determining that Indonesia is a country of law (*rechtstaat*) as stated in Article 1 paragraph (3) of the 1945 Constitution. This decision carries wide consequences in the life of the nation, more specifically in the ordinance of law. Structuring and implementation of state and government should not be separated from the basic law (constitution) and other mutually agreed rules, so the violation or deviation from established rules is something intolerable.

Second, is the determination and the recognition that all people have the right to be treated equally before the law (equality before the law) as listed in Article 27 paragraph (1) of the 1945 Constitution. This stipulation gives the responsibility to the state to ensure equality before the law for all people, not just in the abstract sense (the norm), but in practical terms in the form of equal treatment, particularly in judicial proceed-

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ings regardless of socio-economic status, political, and group or ethnic.

Third, is related to the ideals of the founders to bring this country into a just and prosperous state as stated in the opening of the 1945 Constitution. One of the goals of the state that must be realized is to improve the general well-being; of course, the focus of this objective is the economic aspect. Unlike the first and second consequence, the third one has been anticipated by the founders of the state by establishing Article 34 paragraph (1) of the 1945 Constitution that the effect of people welfare realization is the emergence of poverty. As a result of the failure of the state in running its constitutional duty, the state guarantees them to be cared. However, the meaning of poverty is not limited to mere economic size; there are other measures of poverty that are actually owned by the people who are not economically poor.

All people do not want to have legal problems (in a negative sense), and if they have any, they will try to solve in a way they think is good (litigation or non-litigation). For the poor, having a legal problem is a disaster in the hardship of economic they face. Poor people have rights to get access to justice so that their legal problem is solved, regardless their limited economic and social resources. Poverty is not merely caused by the people themselves, but is also a failure of the state in realizing welfare for them.

State - as the consequences described above - has an obligation to help the poor people who are dealing with the law as its constitutional responsibilities. State does not only provides the rules, but also funding and advocate to give legal aid for the poor. There are two problems arising in this regard, namely how far is the ability of the state to provide legal aid in the budget limitations and whether advocates provided by the state are chosen by the poor to assist the completion of their case. The further meaning of this is whether the right to obtain legal aid is accompanied with the right of poor people to choose their own desired advocates, and whether the advocates they select have met the criteria of the state to get legal aid.

In 2013, the government launched a new policy to allocate legal aid funds within the budget of the Ministry of Law and Human Rights. In practice, the management is then coordinated at the provincial level through the Regional Office of the Ministry of Law and Human Rights.

Legal aid organizations or institutions that want to get the fund, must apply to the regional office, and the feasibility of this application will be verified by the National Law Development Agency (BPHN). It should be noted, that registration is only allowed for legal aid organization, so it must be a legal entity. In other words, advocates who practice independently or individually can not do so, thus meaning that there is no chance to get legal aid from the government.

Everyone has the right to obtain legal assistance if he is in trouble with the law. The interpretation of this right is not only limited to the acquisition of legal aid, but also the right to choose their own desired advocates to accompany him in the judicial process. For the poor, this right to choose becomes a problem, if the choice goes on the advocates who do not have or do not join an accredited institution of legal aid. In other words, the chosen advocates do not have access to government legal aid funding provided for the poor. Therefore, it is necessary to think about the legal aid that can be given to the advocates, without affecting the rights of the poor to obtain legal assistance. This article will discuss the two issues mentioned above.

## **II. RESULTS AND DISCUSSION**

### **A. RIGHTS OF THE POOR TO GET LEGAL HELP**

Poverty is not a situation that is expected by every person. State also helps to think, establish, and do efforts to eradicate it through many programs. This is one form of state responsibility to its people. But not all of the government programs running successfully, so that poverty emergence is inevitable.

The responsibility of the state toward the existence of poor people has been stated in Article 34 paragraph (1) of the 1945 Constitution. This article implies a broad protection of state to poor people, and creates rights for them to demand accountability from the state as well. In addition, citizens also deserve enjoying other rights granted by the state as stated in the constitution, one of which is the right to be treated equally before the law (equality before the law).

Criminology studies on the causes of crime put poverty as one source.

Poverty can cause someone committing a crime. The responsibility of the state towards the poor who commit crimes as stated in the constitution is giving the rights promised. In the practice and based on social research on law, the poor have always been under legal pressure. Law indeed always press the poor down and treat the rich well. The jargon *justice for all* turns into *justice for not all*, even *justice for sale*, so that anyone who is able to buy will get it.

Poverty is inevitability, especially in developing countries like Indonesia. Often, the rights of the poor are neglected due to the lack of power to struggle it, or even be used as a commodity to be exploited for certain political purposes. Poor means having no wealth, underprivileged or very low in income. The poor means those who are very needy; people who are very poor; or those who intentionally make themselves suffer disadvantages to achieve inner perfection.<sup>2</sup>Based on data from the Central Statistics Agency (BPS) on September 2012, the number of poor people in Central Java is 4,863,400 or 14.98% of the total population of Central Java. The number is potential, and if they are in trouble with law, it will absorb a lot of the legal aid budget.

In such conditions they do not have power and access to justice when they have legal problems. State sees that weaknesses, and based on the constitution gives the right to the poor to receive legal aid. Although not directly determined, but from what is stated in Article 27 paragraph (1) and Article 34 paragraph (1) of the 1945 Constitution, the right of the poor to obtain legal aid gets firm legal ground.

Explicit legal basis of this legal aid is in Act No.16 year 2011 about Legal Aid. In the preamble of the Act, it is stated that the state guarantees the constitutional right of every person to get recognition, security, protection, and fair legal certainty and equal treatment before the law as a means of protection of human rights. It is also stated that the state is responsible for the provision of legal aid to the poor as the realization of access to justice. The provision of legal aid must be oriented to the realization of a just social change.

Article 1 paragraph 1 of Act no. 16 year 2011 determines that legal

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<sup>2</sup> Tim Penyusun Kamus Pusat Pembinaan dan Pengembangan Bahasa, 1999, Kamus-Besar Bahasa Indonesia, Jakarta: Depdikbud-Balai Pustaka, p. 660 and 273.

aid is a free legal service provided by legal aid institution to the recipient of legal aid. Legal aid recipient is person or group of poor people (number 2), and legal aid provider is legal aid institutions or social organizations that provide legal services under the Act (number 3). Based on this article it is clear that legal aid is an organizational entity, not individual. This organization is populated by people who have professions as advocate. In other words, institution or organization providing legal aid is actually a collection of people or resources consisting of advocates and of course the property they own.

Other provisions that can be used as a basis to provide legal aid to the poor is Article 22 paragraph (1) of Act No. 18 year 2003 about Advocate which determine that advocate is obliged to provide legal assistance freely to unfortunate justice seekers. Based on this article, there is an obligation imposed on advocates to provide legal assistance, both individually, and as members of legal aid organizations or institution. Of course, this provision is rather different from the previous one, which specifies that the legal aid provider is organization identity or legal aid institution. In paragraph (2) it is mentioned that the rules on the requirements and procedures for the provision of free legal assistance as stated in paragraph (1) shall be further regulated by Government Regulation.

The Government Regulation in discussion is Government Regulation (PP) no. 83 year 2008 about Requirements and Procedures for Free Legal Assistance. Article 2 of this regulation determines that advocate is obliged to provide free legal assistance to justice seekers. This obligation for advocates is followed by the provision of Article 12 paragraph (1) which prohibits advocates to reject the request of free legal assistance. In case there is refusal from advocates, the applicant may propose an objection to the lawyers' organization or legal aid institution where the advocate ensconces (paragraph (2)). While the general legal basis for the granting of legal aid (either for the poor or the haves) is Article 54 of Act no. 8 year 1981 on Criminal Procedure Code (KUHAP).

The implementation of legal aid has the real effect when someone goes into a series of legal proceedings, when dealing with state interests in a lawsuit or state instruments that hold judicial power in judicial process.<sup>3</sup>The right to get defense of a lawyer or public defender (access

<sup>3</sup> BinziadKadafi, et.all, 2002, Advokat Indonesia Mencari Legitimasi: Studententang-

to legal counsel) is a basic human right and is one of the elements to get justice for all people. The presence of an advocate is very important for the people to defend the rights of a person (individual) in facing legal problems. If an individual faces criminal charges from the state that has police, prosecutors, judges, and penitentiary, advocates are obviously needed to defend the interests of the individual with the status of a suspect or defendant who is facing an inquiry, investigation, prosecution, examination in court. Defense of advocate a suspect or defendant dealing with the state that has a complete device will create a balance in the proceedings so that justice for all can be achieved.<sup>4</sup>

The right to be defended is human right of every citizen, which is guaranteed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the Basic Principles on the Role of Lawyers. Every individual should have the freedom to choose his own defenders he wants. This right applies to every individual regardless of their background. If individual freedom is recognized, then the equality before the law must also be recognized. Basically, everyone has the right to obtain the legal services of advocates to protect the rights of economic, social, cultural, civil, and political.<sup>5</sup>

Based on the consideration of Article 27 paragraph (1) of the 1945 Constitution, the poor have a constitutional right to be represented and defended by an advocate or public defender both in and out of court (legal aid), like the haves getting legal services of advocates. Although the poor have a right to be defended by an advocate or public defender, the possibility to get the defense is very small. This can be caused by a lack of advocate's opportunity, low willingness to provide *pro bono* public defense, and a lack of understanding about the public *pro bono* defense itself.<sup>6</sup>

Legal beneficiary is person or group of poor people. The problem is who is considered the person or group of poor people. Recipient or legal aid applicant is justice seeker who has limited economical ability

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TanggungjawabProfesiHukum Indonesia, Jakarta: PusatStudiHukumdanKebijakan Indonesia, p. 182.

<sup>4</sup> FransHendraWinarta, 2009, Pro Bono Publico, HakKonstitusional Fakir MiskinuntukMemperolehBantuanHukum, Jakarta: GramediaPustakaUtama, p. 2

<sup>5</sup> *Ibid*, p. 4

<sup>6</sup> *Ibid*, p. 5

and must prove that he is poor and is entitled to get legal aid. In Article 5 of Act No 16 year 2011, the definition of a poor person or a group of poor people, is those who can not appropriately and independently meet the basic rights such as: the right of food, clothing, health services, education services, job and employment and/or housing. Requirement to obtain legal assistance is determined in Article 14, namely:<sup>7</sup>

- (1) To obtain legal aid, legal aid applicants must meet the following requirements:
  - a. propose a written application which contains at least the identity of the applicant and a brief description of the subject being applied for legal aid;
  - b. submit the documents pertaining to the case; and
  - c. Attach poverty letter from the village head or equivalent officials at the legal aid applicant's residence.
- (2) In case the applicant is not able to compile the legal aid application in writing, a request may be made orally.

Based on the above provision, the acquisition of legal aid from legal aid institution provided embraces active system, meaning that the poor—even though it is a right—do not automatically get legal aid if they do not apply. The problem is, not all poor people are able to write and submit and meet the desired requirements. Thus, poor people who do not apply will not get legal aid. If this happens, then it is an irony in a lawful country.

Legal aid for the poor has a strategic position in the criminal justice system in Indonesia which adopts *akusatur* (due process of law) system, but in everyday practice *inkuisitur* (crime control model / arbitrary process) system is still used so that the poor often be object of torture, inhuman treatment and humiliation of human dignity.<sup>8</sup>In addition, the

<sup>7</sup> Compare to result of study by Tata Wijayantaone of which about the requirements of proposal for legal aid at Posbakum PN Yogyakarta in Tata Wijayanta, "BantuanHukumGolonganTidakMampudalamPerkaraPerdata di PengadilanNegeri Yogyakarta", JurnalMimbarHukumVol. 24 No. 1 Februari 2012, p. 116.

<sup>8</sup> *Ibid*, p. 7. Also see FransHendraWinarta, 2000, BantuanHukum, SuatuHakAsasi ManusiaBukanBelasKasih, Jakarta: Elex Media Komputindo-KelompokGramedia, p. 43; Frans H. Winarta, 2011, BantuanHukum di Indonesia: HakuntukDidampin giPenasihatHukumBagiSemuawarga Negara, Jakarta: Elex Media Komputindo-KompasGramedia, p. 56 and 110; and Adnan BuyungNasution, 1988, BantuanHukum di Indonesia, Jakarta: LP3ES, p. 95. Look and compare to AgusRaharjoabout



provision of legal aid for the poor is a form of balance in justice from the dominance of state in law enforcement.

## 2. Discriminatory Policy of the Government in Legal Aid Funding

It should be understood that the provision offer legal assistance to the poor does not mean costless. People indeed do not pay anything (*prodeo*) to advocator legal aid institution (LBH) that accompany them but it is the state that pays the advocate or LBH through the estate budget that has been set.<sup>9</sup> Thus, aspect which is also important in terms of legal aid is funding. Financial condition is very important in determining the development of legal aid programs.

When observed, previously, funding for legal aid is partial, meaning that police, prosecutors, and the courts have the budget to fund legal aid, while the funds are from the same source, namely the state budget. Therefore, for the existence of discipline and unity of the budget, since 2013 the government allocated this fund in the budget of the Ministry of Law and Human Rights, which in practice is distributed through the Regional Office of Ministry of Law and Human Right in every province in Indonesia.

As mandated by the constitution, the government with the approval of House of Representative (DPR) passed Act no.16 year 2011 on Legal Aid. Article 6 of this Act determines that the provision of legal assistance to recipients of legal aid is organized by the Minister and executed by legal aid institution. Another task of the minister is preparing the legal aid budget plan (Article 6, paragraph(3) letter c). Legal aid funding is imposed to the state budget (Article 16 paragraph(1)). However, government gives permission to other parties to seek legal aid funding sources that can be derived from grants or donations; and/or other

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violence in investigation on AgusRaharjo and Angkasa. "Perlindungan Hukum terhadap Tersangka dari Kekerasan yang Dilakukan oleh Penyidik dalam Penyidikan di Kepolisian Resort Banyumas". *Jurnal Mimbar Hukum* Vol. 23 No. 1 Februari 2011; and AgusRaharjo, Angkasa, "Profesionalisme Polisi dalam Penegakan Hukum". *Jurnal Dinamika Hukum* Vol. 11 No. 3 September 2011;

<sup>9</sup> Compare to the opinion of Frans H. Winarta stated that legal aid is *prodeo*, free of charge/cost because it is provided for poor people, and thus is non commercial. However, He does not deny that fund is still needed for the operational for legal aid agency providing legal assistance. Look in FransHendraWinarta, 2000, op.cit, p. 29.



funding sources that are legal and unbinding(Article 16 paragraph(2)). Then, Article19 paragraph(1) stipulates that local government can allocate a budget for the organization of legal aid in the local government budget. If it is really done by local governments, it can be called double funding, because the central government has allocated the fund in the state budget (APBN) and the local government stipulates it in the local budget (APBD), whereas the source of fund is the same, namely the people. However, Article19 is not to be construed as an obligation, but rather something that is complementary, depending on the income of the local government.

Other policy that needs to be observed is the determination of legal aid recipients, namely legal aid institutions or community organizations that provide legal aid services meeting certain conditions, namely: legal, accredited under this Act, have a fixed office or secretariat, have administrators, and legal aid programs (Article 8, paragraph (1) and(2)). Based on this provision, legal aid institution and community organizations that provide legal services which want to get legal aid fund must apply to the Ministry of Law and Human Right through the Regional Office. Based on the proposal, the National Law Development Agency(BPHN) which was tasked by the ministry verifies the request. Only accredited legal aid institutions and community organizations that provide legal aid services are entitled to legal aid fund.

Based on study results, the determination of legal aid institutions and community organizations that provide legal aid services to get legal aid fund from the government is based on their previous actions that show a commitment to defend the poor in various forms of legal assistance. The existence of legal aid organizations which is important to help the poor in dealing with legal matters, plays an important role in distribution of justice, so that the poor have access to legal assistance and to obtain equal treatment before the law. The legal aid organizations can increase the opportunity of poor to obtain legal aid to defend their legal interests, both inside and outside the court. Legal aid organization can help the poor to gain knowledge of law, human rights, civil and political rights, social rights, cultural rights and economic rights.<sup>10</sup>

Since the birth, the Legal Aid Institution (LBH) has succeeded not

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<sup>10</sup> Frans H. Winarta, 2009, op.cit, p. 6 and41.

only in promoting and popularizing the idea and concept of legal aid to the public, but also through the activities and success has become famous and got the trust of the people.<sup>11</sup>LBH was established with the initial concept to protect the public from the legal oppression that often befall them. The concept is then incorporated into the Articles of Association in which is mentioned that the purposes of LBH are:<sup>12</sup>

- a. providing legal services to the poor;
- b. developing and improving the people's awareness of law, especially regarding their rights as subjects of law; and
- c. Seeking legal changes and improvements to fill the new needs of the growing community.

The role of LBH especially to the underprivileged society is very meaningful. It is seen from the benefits of legal aid services, among others, as follows:<sup>13</sup>

- a. seeking ease for disadvantaged communities in facing legal matters;
- b. making efforts so that case principal can be applied objectively;
- c. starting from legal process they are not abused by law enforcement agencies, the police, prosecutors, and judges;
- d. accelerating the legal settlement;
- e. struggling for whatever that become the rights of the underprivileged;
- f. helping the poor people in the legal settlement because it will not charge anything;
- g. representing the underprivileged in the trial court; and
- i. disadvantaged communities will get satisfaction.

Not all LBH are successful in defending the interests of the poor or disadvantaged. Some of them failed to carry out the mission that is caused by various reasons. Several reasons for the lack of role of LBH in handling cases involving the disadvantaged people, among others are:<sup>14</sup>

- a. Public ignorance on the existence of legal aid institution;

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<sup>11</sup> Nirwana Yunus and Lycuana Djafaar, "Eksistensi Lembaga Bantuan Hukum (LBH) dalam Memberikan Layanan Hukum Kepada Masyarakat Di Kabupaten Gorontalo", *Jurnal Mimbar Hukum* Vol. 20 No. 3 Oktober 2008, p. 548

<sup>12</sup> Look in Adnan Buyung Nasution, *op.cit*, p. 53

<sup>13</sup> Nirwana Yunus and Lycuana Djafaar, *op.cit*, p. 552-553

<sup>14</sup> *Ibid*, p. 552

- b. lack of public understanding on the function and role of legal aid institution;
- c. there are many law illiterate people;
- d. false understanding that using services through legal aid agencies spends extra money; and
- e. resignation of disadvantaged communities to accept whatever decision for the reasons of incompetence in any case.

Based on historical studies of LBH role in the provision of legal aid to the poor or the disadvantaged people, it can be logically accepted when Act No.16 year 2011 more entrust the distribution of legal aid fund for the poor at LBH which are recognized through verification process and are accredited. But this step taken by the government leads to discriminatory treatment on the two sides, the unaccredited LBH and independently practicing advocate.

Based on the results of researches conducted in Yogyakarta, Surakarta and Semarang, poor people who are in trouble with law and who know their rights of legal assistance, even by their own initiative come to legal aid agencies or independently practicing advocates, of course, in addition to the appointment of the police, prosecutors, and courts. The appointment by the judicial authorities in the future will indeed be based on the results of accreditation, but the poor people who wish to use a legal aid agency or advocate of his own choice, will cause problems.

The government's discriminatory policy causes consequences in some cases and in the same time a violation of the provisions made by the government it self. First, the government's decision to conduct accreditation for legal aid agencies precludes the possibility of unaccredited legal aid agencies to receive legal aid from the government. In other words, if there is an unaccredited legal aid agency which provides free legal assistance to the poor, then this institution will not receive any penny of money from the government. Whereas, every legal aid agency as a social community organization has the same status in the view of law, so this is a violation of the principle of equality before the law.

Secondly, independently practicing advocates are not feasible to apply for accreditation because they are not legal entities. It closes the opportunity for them to defend or provide legal assistance for the

poor. It is said to close the opportunity because lawyers who do not get anything—even a little—will be doubt to remain whole heartedly defending the interests of the poor. Money is not everything, but without money everything cannot be smooth. The discriminatory attitude of the government towards independently practicing advocates violates the provisions of Article 22 paragraph (1) of Act No. 18 year 2003 in conjunction with Article 2 of Regulation No. 83 Year 2008 concerning liability of advocates to provide free legal assistance to justice seekers, while rejecting the request of judicial assistance is prohibited by the Act and Regulation. This means that the government is not consistent with the rules made and limits the actions of advocates who practice independently to implement the above provisions.

Third, the government's discriminatory policy precisely limits the poor or disadvantaged people to receive or use their rights to seek legal assistance. Poor people can only ask legal assistance to accredited legal aid agencies. This could be a problem, because in a certain region or a city accredited legal aid agency can not be found or because certain reasons the region is not covered by accredited legal aid agency working area. The government policy should not restrict poor people to choose their own desired legal aid advocates. It may occur that the poor choose unaccredited advocates to provide legal assistance, or because of personal and social ties choose advocates who practices independently. If the poor use one of these two options, does it mean the right of legal aid provider to get legal aid fund from the government disappear? There is a right of the poor to seek legal assistance on legal aid agencies or advocates they desire, along with the use of the rights, there is an obligation for the state to provide legal aid fund for legal aid provider. Preventing to provide legal aid fund to unaccredited legal aid agencies or advocates is a state or government effort to abort obligation, in the same time a denial to the mandate that has been stipulated in the constitution.

This discriminatory government policy should be removed, or in other words, statutory or other provisions relating to legal aid funding by simply limiting the accredited legal aid agencies as recipients should be revised. Do not give right, but the use of that right is limited. If the discriminatory policy is removed, it will provide greater opportunities for the poor to use the right to seek legal assistance more broadly, as

well as provide an opportunity for all legal aid agencies or advocates who practice independently to be submissive in the social field to help the poor and the government to carry out its constitutional duty.

### 3. Solution of Legal Aid Funding for the Poor

Funding of legal aid for the poor by the government has some limitations. First, the amount of rupiahs allocated in the state budget is limited. The sum of budget allocation is determined by the relative amounts of income earned by the state during a specified period of time. Secondly, the number of poor people in trouble with law and are entitled to legal aid (which is consequential on the beneficiary legal aid agencies) is unpredictable from year to year. This will affect the amount of budget allocated to legal aid. Third, the limitations created by the government to “only” designate or define an accredited LBH to be are entitled to legal aid fund. This discriminates unaccredited LBHs or independently practicing advocates to be not entitled to receive legal aid fund from the government.

Various attempts to reduce or overcome the limitations of legal aid funding have been made by various parties. Local governments, such as South Sumatra allocate funds for legal aid in their local budget; the same things are also done by some regencies and municipalities. The problem is whether funding through the local government budget does not overlap with the central government budget, while the funds are from the same source, namely the people.

Based on these limitations, and to accommodate the desire of the poor to choose their own advocate, it is necessary to find solutions for legal aid funding so that bureaucracy constraints created by government can be overcome. Of course, the discussion in this section will begin with the philosophy of legal aid itself, followed with administration of solution that is in accordance with the philosophy.

In essence, legal aid is a form of social services provided, either by the state, organizations, corporations, or individuals. Social service is often identified with social welfare services provided to disadvantaged, depressed, and vulnerable groups. This is consistent with the concept of legal aid which is always associated with the ideals of the welfare state. In this concept, legal aid is one program to improve the welfare of the

people in social, political, and legal fields. At this stage then comes the concept of welfare legal aid.<sup>15</sup>

Social service is defined as the act of producing, allocating and distributing social resources to the public. Social resources include all goods and social services needed by individuals or communities to achieve the level of welfare. This has been one of the focuses in the discourse of welfare theory that raise the question of how to do the three big activities and what its impact on individuals and society.<sup>16</sup> It is clear that this definition gives a broad implication for the planning, implementation and evaluation, even specifically for the aspect of social welfare.<sup>17</sup>

There are 5 fields that occupies a central position in social service activities, namely education, health, housing, social security, and social work which are all resources for social welfare. Social resources is an important component in the sustainability of a community, even economists realize social resources as a component in the production process of economy that needs to be created to ensure the survival of any corporate activity.<sup>18</sup>

Guarantee on the availability of social resources is a must for a society. There are three strategic reasons proposed by Spicker on this regard. First, social resources are the basis for maintaining the status quo, in the sense that the social and economic life of the community does not deteriorate over time. Secondly, social resources function to repair the real situation, in the sense of improving the quality of social and economic life of the people. Once again experts want to confirm

<sup>15</sup> By Daniel S. Lev, welfare legal aid is defined as a right of welfare as a part of social protection frame given by a welfare country. Welfare legal aid as part of social direction is needed to neutralize poverty uncertainty. Look in Daniel S. Lev, 1990, *Hukum dan Politik di Indonesia: Kesenambungan dan Perubahan*, Jakarta: LP3ES.

<sup>16</sup> T. Fitzpatrick, 2001, *Welfare Theory: An Introduction*, Houndmills: Palgrave, p. 4

<sup>17</sup> Janianton Damanik, "Menuju Pelayanan Sosial yang Berkeadilan", *Jurnal Ilmu Sosial dan Ilmu Politik*, Vol. 15 No. 1 Juli 2001, p. 2-3

<sup>18</sup> Compare to the opinion of Elkington who states that business world need to measure their success not merely from the financial performance (profit), but also from the effect to the environment and wide society. Look in A.W. Savitz & K. Weber, 2006, *The Triple Bottom Line: How Today's Best-Run Companies are Achieving Economic, Social, and Environment Success – and How You Can Too*. San Fransisco: Jossey-Bass, p. xii. Look also in Janianton Damanik, *op.cit*, p. 3

a verification that quality of life can not depend solely on minus achievement of economic growth, moreover at the expense of social resources. Third, social resources serve to equalize or balance the social and economic life of citizens. Social reality is always characterized by relations between citizens that are very complex and even tends to be lame, depending on the” class, status, power appears in the form of economic inequality, race and ethnicity and gender”.<sup>19</sup>This can be reduced by redistributing social resources in fair way.<sup>20</sup>

In practice, social services evolve from services which emphasize on aspects of distribution, i.e. the provision of aid to vulnerable groups unilaterally,<sup>21</sup>now extends to the activities of capacity building or community empowering. Here the target group of social services is not positioned as the sole beneficiary and the nature of the assistance is no longer charity, but also as an organizer and planner of development and empowerment, in the sense that they are able be independent.<sup>22</sup>The approach used in such social services is the empowerment that emphasizes autonomy, independence, participation, and potential strengthening.<sup>23</sup>However, the empowerment approach to social services in the form of legal aid for the poor does not seem to fit. It is very difficult to make the poor independent and autonomous in the matters of law. Poor people still position state as institution of Santa Claus that distributes resources (legal aid) to the target group on the basis of compassion. When social services are still regard the country as Santa Claus with a limited budget, and the weakness of community empowerment approach, it is actually a strategic opportunity for the private sector to develop social service programs which are more progressive. External demands and internal drive to the private sector to be present as one of the pillars of social service producers is not without logical reasons. First, the demands

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<sup>19</sup> P. Spicker, 1995, *Social Policy: Themes and Approaches*. Hertfordshire: Prentice Hall, p. 26 and 70.

<sup>20</sup> JaniantonDamanik, *op.cit.*

<sup>21</sup> I.R. Adi, 2005, *IlmuKesejahteraanSosialdanPekerjaanSosial: PengantarpadaP- engertiandanBeberapaPokokBahasan*, Jakarta: UI Press, p. 128-137

<sup>22</sup> N. Lunt, “The Rise of a ‘Social Development’ Agenda in New Zealand”, *International Journal of Social Welfare*, Vol. 18, 2009, p. 6-7.

<sup>23</sup> H. Mulyanto, *StrategiPemberdayaanMasyarakatDesaMenyongsongOtonomi Dae- rah*; dalam A. Sunartiningsih (ed), 2004, *StrategiPemberdayaanMasyarakatDesa*, Yogyakarta: Aditya Media, p. 22. Look also JaniantonDamanik, *op.cit.* p. 3-4.



of the spirit of welfare pluralism welfare (welfare pluralism) are driven by limitations in the ability of state to produce increasingly complex social services on the one hand.<sup>24</sup> Secondly, the spirit and business ethics express interdependence and fairness in economic transactions between producers and consumers or society.<sup>25</sup> Third, the strength of the global political mobilization sponsored by the United Nations through a new institution, the UN Global Compact to promote the agenda of corporate social responsibility (CSR).<sup>26</sup> Parallel to this, World Bank then made a working definition of CSR, as “a corporate commitment to encourage sustainable economic development in cooperation with employees, their families, local communities and the general public to improve the quality of life in a way that is mutually beneficial for both corporate business and the development.”<sup>27</sup>

CSR movement spear headed by the World Bank and was followed by multinational companies, if done seriously will give a multiple effect for regional and local corporations. Role as a promoter and mentor and financier owned by multilateral development agencies facilitate the ideas and principles of CSR to be more easily adopted by any corporation regardless of national boundaries.<sup>28</sup> Indonesian government in this case was quickly responsive to the changes incorporate behavior by enacting Act No.25 year 2007 on Investment, and in Article 15 obligates investors to implement CSR.

If the concept of social services performed by the private sector is reduced to the form of community development activities, or more specifically, CSR, then we will find the growing trend of allocation of financial resources available for social service activities. Through the regulation of some state-owned companies (BUMN) provide billions of

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<sup>24</sup> P. Spicker, op.cit; W. McKeen, “Diminishing the Concept of Social Policy: The Shifting Conceptual Ground of Social Policy Debate in Canada”, *Critical Social Policy*, Vol. 26 No. 2, 2006, p. 860-870

<sup>25</sup> A.W. Savitz and K. Weber, op.cit, p. 48-49.

<sup>26</sup> A. Kuper, “Harnessing Corporate Power: Lesson from the UN Global Compact”, *Development*, Vol. 47 No. 3, 2004, p. 11

<sup>27</sup> H. Ward, 2004, *Public Sector Roles in Strengthening Corporate Social Responsibility: Taking Stock*, Washington: The World Bank, p. 3. Look all in Janianton Damani, op.cit. p.6.

<sup>28</sup> A. Vives, “The Role of Multilateral Development Institution in Fostering Corporate Social Responsibility”, *Development*, Vol. 47 No. 3, 2004, p. 46-49.

rupiahs each year for community development programs.<sup>29</sup>

According to Erman Rajagukguk, the concept of corporate social responsibility includes corporate compliance to labor protection, environmental protection, consumer protection, and the protection of human rights as a whole. There are three things to note from the development of CSR. First, corporate social responsibility, among others, has always been associated with the interests of share holders versus stakeholders in relation to labor. Second, corporate social responsibility has always been associated to environmental protection. Third, the new paradigm of companies in relation to corporate responsibility not only how to maximize shareholder profits in the short term, but also how these advantages bring benefits to the community and the company itself.<sup>30</sup>

Based on broad definition of CSR that is protection of human rights as a whole, and new developments in the paradigm of CSR, it is possible that CSR funds are allocated for funding legal aid for the poor. The study on the use of CSR has not touched this aspect of legal aid, because the funding poor people who are in trouble with law is certainly not a popular move in company imaging. However, steps to take and determine a portion of the CSR funds will ease the burden on the poor who have no part or share of legal aid for the poor to pay for advocates.

To that end, steps and procedures need to be made so the poor or the advocates who accompany him can access the legal aid funds through CSR. Of course the bureaucracy should not be made too complicated as that of the government bureaucracy, because it will make the poor or the lawyers who accompany lazy to take care of it. It should be made as short and light as possible.

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<sup>29</sup> Compare to Nursahid's study on the social generosity of three big state-own corporate (BUMN) showing at least Rp 1,57 billions of fund for the society each year provide by each corporation in discussion. In 2004 PT Telkom for example, distribute Rp 11, 4billions funds for community development activities, increasing five times from the previous year. For this year 2007, the BUMNs announce that they are going to allocate at least Rp 60 billions for community development program in Sumatra Island. Look in F. Nursahid, 2006, *Tanggungjawab Sosial BUMN*, Jakarta: PIRAC-Ford Foundation, p. 77-78

<sup>30</sup> Erman Rajagukguk, "Konsep dan Perkembangan Pemikiran tentang Tanggung Jawab Sosial Perusahaan", *Jurnal Hukum* Vol. 15 No. 2, April 2008, p. 175-179

Although this step seems to be unpopular, it should be done as an alternative solution to several problems. The problems in question are as follows: First, the limitations of budget funds allocated by the state for legal aid to the poor. Second, the limitations of legal aid organizations that are entitled to provide legal aid, because it is only accredited legal aid agency that have the right. Third, complicated and convoluted procedures set by the government for legal aid applicant. Fourth, the disbursement of legal aid fund which must go through several stages corresponding to the stages in the management of public finance and expenditure normally takes quite a long time.

Efforts to make the CSR funds as funding solutions in the provision of legal aid for the poor based on some thinking. First, it reduces the uncertainty of the legal aid budget by the state highly dependent on economic, social and other relevant conditions. Secondly, it is time for corporate social responsibility that is outside the mainstream of CSR to allocate some funding for legal aid for the poor. Third, for the poor who can not access legal aid from the government, the CSR fund is a source of new hope that could be a candle in the dark. Fourth, through the CSR funding, poor people can choose their own desired advocate to provide legal assistance without plagued with technical requirements set by the government. Fifth, legal aid funding through this CSR provides an opportunity for legal aid organizations that are not accredited or advocate who practiced independently (not belonging to any legal aid agency) to obtain funding for the provision of legal aid for the poor. Thus, discrimination by the government to legal aid agencies or advocates can be resolved.

## **V. CONCLUSIONS**

Several conclusions that can be drawn in regard to the matters discussed above are as follows. First, the right of the poor to obtain legal assistance with government funding is guaranteed by the Constitution, which is outlined later in a variety of legislation. Second, government policies based on Act No.16 year 2011 on the Legal Aid along with the implementation of the legislation causes discrimination for legal aid recipients, because only a credited legal aid agencies are eligible

to receive the funds. This implies that unaccredited legal aid agencies or independently practicing advocate can not access and receive the funds. Furthermore, this also limits the right of the poor to choose an advocate they want to assist them in settling disputes in court, because advocates that are chosen are not necessarily advocate who are members of accredited legal aid agencies. Third, alternative solutions to the weaknesses of the government's discriminatory policy are needed so that the right of the poor to obtain legal is maintained. Legal aid funding through Corporate Social Responsibility is one solution that can be offered, because the funds that are allocated by corporation for CSR is fairly big in amount.

Recommendations that can be given as the problem solving are as follows. First, government should transparently announce to the audiences about the amount of legal aid funds allocated for poor people through printed and electronic media that can be accessed by the public, including the details of the acquisition. Second, the government needs to revise the discriminatory policy, by amending or changing the Act No.16year 2011,so that there are equal rights for all legal aid agencies without exception (accredited or not),as well as independently practicing advocates to access and obtain the legal aid fund. Third, a strong foundation is needed to push corporations to put some of the CSR funds for funding legal aid for the poor, also the creation of bureaucratic procedures necessary to raise CSR that is concise, straight forward, and transparent.

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