

THE IMPLEMENTATION OF FREE LEGAL AID (PRO BONO) AS ACCESS TO JUSTICE IN CRIMINAL CASES IS REVIEWED BASED ON LAW NUMBER 16 YEAR 2011 ON LEGAL AID (Study at LBH Solo Raya Office)

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Abstract

Indonesia is a country based on law (*rechtsstaat*), and is not based on mere power (*machtsstaat*) where guaranteeing respect for the right to justice and equality before the law is an obligation of the state. However, in practice, access to justice and equality in the face of the law is not evenly distributed to all groups, especially for the poor or poor. Often, when dealing with the law, the rights of suspects / defenders are not able to be fulfilled properly, especially the right to obtain free legal assistance (*pro bono*). Based on this, Law No. 16 of 2011 on Legal Aid was born to guarantee the exercise of the right to legal aid and is arranged in an orderly order so that it is expected to realize justice and equality of standing before the law for the poor.

Abstrak

Indonesia merupakan sebuah negara yang berdasar atas hukum (*rechtsstaat*), dan tidak didasarkan pada kekuasaan belaka (*machtsstaat*) dimana menjamin penghargaan terhadap hak untuk memperoleh keadilan dan persamaan di muka hukum adalah suatu kewajiban negara. Namun, dalam prakteknya, akses terhadap keadilan (*access to justice*) dan persamaan di muka hukum belum merata bagi semua golongan, khususnya bagi rakyat miskin atau tidak mampu. Seringkali, sewaktu berhadapan dengan hukum, hak-hak bagi tersangka/terdakwa tidak mampu tidak terpenuhi dengan baik, terutama hak untuk memperoleh bantuan hukum secara cuma-cuma (*pro bono*). Berdasarkan hal tersebut, Undang-Undang Nomor 16 Tahun 2011 tentang Bantuan Hukum lahir untuk menjamin pelaksanaan hak atas bantuan hukum dan disusun dalam suatu tatanan yang teratur sehingga diharapkan dapat mewujudkan keadilan dan persamaan kedudukan di muka hukum bagi masyarakat miskin.

I. INTRODUCTION

The position of witnesses is very important in the process of examining criminal cases. This is proven by the formulation of Article 184 of the Criminal Procedure Code which places witness statements in the first order in the mention of valid evidence according to the Criminal Procedure Code. In criminal cases, witness testimony is the most important piece of evidence.

In Article 27 paragraph (1) of the 1945 Constitution it is explained that "Every citizen has the same position in law and government with no exceptions", then with Article 28 D, it is reaffirmed that "everyone has the right to recognition, guarantees, protection, and fair legal certainty and equal treatment before the law".

With this article, everyone will get equal recognition, guarantees, protection and law

without prioritizing differences in ethnicity, religion or caste, this also belongs to people who do not have the opportunity to access justice so that their rights to recognition, guarantees, protection, and fair legal certainty as well as equal treatment before the law can be realized as well as possible.

One of the important pillars in realizing access to justice is using the support of free legal aid, namely pro bono. One form of access to justice is by accessing legal aid that can be provided by legal aid agencies or LBH.

Law Number 16 of 2011 concerning Legal Aid was born, to better guarantee the implementation of the right to legal aid through the Law on Advocates and the Law on Judicial Power which have been inadequate to ensure the fulfillment of access to justice for the community and guarantee equality before the law. for the poor. This is especially true in Indonesia, where citizens have unequal levels of education, social and economic capacity, where this affects their ability to access justice. The arrangement is to complement not erase the pro bono concept that has been applied to the legal aid concept.

RESEARCH METHODS

One of the important pillars in realizing access to justice is through free legal aid, one form of access to obtain justice is by accessing legal aid that can be provided by legal aid institutions (LBH). Therefore, this research was conducted at LBH Solo Raya which is located at Sentra Niaga - Integrated Area The Park Mall Solo Baru. B 12A Jl. Ir. Soekarno, Hamlet II, Madegondo, Grogol, Sukoharjo Regency, Central Java.

In this study, the author uses 2 types of research, including: Normative law research, which is a study that examines a normative legal case, namely the product of legal behavior. One example is legislation (*law in books*), which has a subject of study, namely law with the concept as a rule that is implemented in society and something that is referred to by every member of the community. Therefore, normative legal research focuses on the process of taking a positive legal inventory of legal principles and doctrines, legal findings in cases in concreto, legal systematic processes, levels of legal synchronization, comparisons and legal history.¹ and Empirical law research (*applied law research*),² namely research that is based on the facts that exist in society in the form of products of legal behavior. This was analyzed using data sources obtained from observations and interviews with the management of LBH Solo Raya which did not follow the written positive law.

There are 2 sources of data used in this study, sure, secondary data is data that is not directly obtained from the source/object of research and primary data is data obtained by researchers directly from the source. The results of the data collected are then processed by an individual or an organization.

The data collection technique used is a literature study (*library research*) by analyzing secondary data and complemented by observations and interviews with parties who have a role in providing free legal aid (pro bono). At the stage of processing, analyzing, and constructing data, the researcher makes an analysis of the rule of law. Furthermore, the articles are related to categories with the basic understanding of the legal system. The data obtained by studying literature and the results of interviews with LBH Solo Raya were analyzed using a series of qualitative methods.

¹Abdul Kadir Muhammad, 2009, *Law and Legal Research*. Bandung: PT Citra Aditya Bakti, 2004, page. 40-41.

²*Ibid.*, page. 52.

DISCUSSION

1. The Implementation Of Free Legal Aid (Pro Bono) As Access To Justice In Criminal Cases Is Reviewed Based On Law Number 16 Year 2011 On Legal Aid.

The existence of Law Number 16 of 2011 concerning Legal Aid serves to provide a detailed regulation regarding the provision of free legal aid (*Pro Bono*) for the poor. However, the practice of implementing the law needs to be studied more deeply.

In 2011, the National Legal Development Agency led by Mosgan Situmorang conducted a study entitled "Legal Research on State Responsibilities and Advocates in Providing Legal Aid to the Community". Based on the results of this study, legal aid from the state for the poor is still very minimal.

This is because there are several influencing factors. The most influencing factor is the low public awareness of the existence of free legal aid. In fact, the poor who are involved in legal problems have the right to get free legal aid. They reasoned that if they were offered legal aid, they refused because there was no fee to pay.

Another influencing factor is the lack of collaboration with law enforcement officials. According to sources in the research by the BPHN team, investigators from the police did not provide information if they had the right to be given legal assistance. In addition, judges always ask whether they have a lawyer or not. In addition, there is no offer for free lawyer assistance.

This is really very disappointing because law enforcement authorities should have informed the defendant's rights when involved in legal cases. They have the right to obtain legal counsel to provide legal assistance to them at trial. The defendant's ignorance was due to the lack of information, education, and socialization that was obtained that there was free legal aid for the poor.

The existence of Law Number 16 of 2011 concerning Legal Aid is a new beginning regarding legal aid in Indonesia. Initially, legal assistance was only provided by private LBHs and lawyers' organizations that run their LBHs on a pro bono basis. Their activities on the pro bono principle are carried out in accordance with the Law on Advocates and Government Regulation No. 83 of 2008, after which there was a change that was the responsibility of the state.³

With the Law on Legal Aid, of course, Legal Aid Institutions really appreciate because they have struggled for so long, finally there is also a legal umbrella that regulates the procedure for providing legal aid which was previously the responsibility of the pro bono advocate profession, finally the state recognizes it as a constitutional right of citizens. With the existence of the Law on Legal Aid, it certainly opens up the role of the Legal Aid Institute (LBH) in how to fight for public access to justice through legal consultations, legal information and legal assistance.⁴

Legal aid consists of two parts, namely litigation and non-litigation legal aid, this is in accordance with the mandate of the Law on Legal Aid which states that legal aid is a legal service or service provided by legal aid organizations to the poor for free. The meaning of poor in the Law on Legal Aid means that cases experienced by poor people are civil, criminal, or state administrative. So not all people who come to the Legal Aid Institute (LBH) are given legal

³Muhammad Yasin, 2014, *Guide to Legal Aid in Indonesia, Your Guide to Understanding and Solving Legal Problems*. First Printing, Jakarta: Indonesia Torch Foundation, page 477.

⁴Interview with I Made Ridho, *Chairman of LBH Solo Raya*, at the LBH Solo Raya Office at Sentra Niaga - Integrated Area The Park Mall Solo Baru. B 12A Jl. Ir. Soekarno, Hamlet II, Madegondo, Grogol, Sukoharjo Regency, Central Java, September 25, 2020, 13:30 WIB.

assistance, LBH first chooses which cases have the right to be defended based on LBH's vision and mission as reflected in structural legal aid cases that prioritize social change.⁵

This means that each Legal Aid Institute (LBH) has its own considerations about who deserves legal assistance on a pro bono basis with a focus on the economic conditions of prospective legal aid recipients. This is in accordance with the provisions of Law Number 16 of 2011 which explains that a person will not receive legal assistance if he has a reason because he does not have knowledge of the law.

Article 14 of Law Number 16 of 2011 concerning Legal Aid stipulates several conditions for obtaining free legal aid (Pro Bono).

Legal Aid Institutions (LBH) usually determine the requirements in making judgments about providing pro bono legal assistance, including a Poor Certificate (SKTM) which is the main requirement attached to applying for legal aid. If the applicant does not have the letter, the applicant can attach a Community Health Insurance (Jamkesmas) card and a Poor Family Card (GAKIN). If the applicant does not have an SKTM or other documents as requirements that can replace the SKTM, then LBH Solo Raya cannot approve the application for legal aid.

This means that if the Petitioner is unable to provide the required documents to obtain pro bono legal assistance, the applicant will not be given legal assistance. From this point of view, we can conclude that the implementation of legal aid at the Legal Aid Institute is still based on administrative files. Whereas in Article 8 of Government Regulation Number 42 of 2013 concerning Terms and Procedures for Providing Legal Aid and Distribution of Legal Aid Funds as an implementing regulation of Law Number 16 of 2011 concerning Legal Aid, if the applicant does not have the administrative requirements file, then the legal aid provider should help the applicant to take care of these requirements. However, based on information obtained in an interview with LBH Solo Raya on September 25, 2020, LBH said there is no tolerance if the applicant does not have the documents, the requirements for filing for pro bono legal assistance. If applicants wish to apply for legal aid, then they must complete these requirements before applying for pro bono legal aid.

In criminal cases, the provision of legal assistance can be carried out from the stage of investigation in the District Court at the request of the defendant. While providing legal assistance, especially in criminal cases, LBH has the right to accompany the defendant during the investigation process. This is based on the implementing regulations of Law Number 16 of 2011 concerning Legal Aid, Government Regulation Number 42 of 2013 concerning Terms and Procedures for Providing Legal Aid and Distribution Legal Aid Fund. According to Article 27 paragraph (2), "legal assistance for criminal cases should have been provided from the investigation stage to the review".

According to Article 12 of Law Number 16 of 2011, "recipients of legal aid are entitled to legal assistance until the legal problem is resolved and/or the case has permanent legal force." Related to this, the LBH team must be committed to accompanying the defendant until the case has permanent legal force and even beyond that. The relationship between the legal aid provider and the defendant who was accompanied sometimes continued until the defendant was in the Correctional Institution (LP). For example, in the case of the possibility of parole after serving 2/3 of the sentence and providing social assistance to the defendant's family while the defendant is in the Correctional Institution (LP).⁶

⁵Interview with Dekka Ajeng, *Treasurer and Staff of LBH Solo Raya*, at the LBH Solo Raya Office at Sentra Niaga - Integrated Area The Park Mall Solo Baru.B 12A Jl. Ir. Soekarno, Hamlet II, Madegondo, Grogol, Sukoharjo Regency, Central Java, (22 September 2020), 13:00 WIB.

⁶Interview with Dekka Ajeng, *Treasurer and Staff of LBH Solo Raya*, at the LBH Solo Raya Office at Sentra Niaga - Integrated Area The Park Mall Solo Baru.B 12A Jl. Ir. Soekarno, Hamlet II, Madegondo, Grogol, Sukoharjo Regency, Central Java, (22 September 2020), 13:00 WIB.

Thus, even though there is already a legal umbrella in providing pro bono legal aid, namely Law Number 16 of 2011 concerning Legal Aid, it still leaves some fundamental problems, especially for the implementers of the legal aid law, namely the Legal Aid Institute.

2. Barriers To The Implementation Of Free Legal Aid (Pro Bono) As Access To Justice (Access To Justice) In Criminal Cases.

The implementation of pro bono legal aid in the community experienced irregularities which resulted in problems after problems in its implementation. This is very influential on getting access to justice, especially for the poor. According to the results of the data collected by the author, there are several problems that hinder legal assistance (pro bono) for the poor. The obstacles experienced by Legal Aid Institutions in providing legal aid are as follows:

1. Internal Barriers

a. Limited Funds

Funds are indeed one of the challenges for Legal Aid Institutions (LBH) in acting as legal aid providers. sufficient parties and/or other legal sources of funds and have no attachments. To find a solution, legal aid funds can be obtained from private funds from advocates, individual donors and community support. However, on the condition that outside interests cannot be oppressed, it means that they can provide assistance but the LBH movement cannot be regulated by them. If someone gives legal aid funds and then tries to regulate LBH's activities, LBH will firmly refuse.

b. Limited Human Resources In LBH

One of the barriers for the community to access justice at the Legal Aid Institute is the very limited human resources or legal aid workers at LBH. This happens because there are not many people who have legal awareness, political awareness and the courage to join the Legal Aid Institute. However, this can be circumvented by supporting staff as a complement to advocates, namely paralegals. Paralegals who have membership cards or training certificates issued by the Legal Aid Institute also have a role to provide legality to people who are dealing with the law, among others, by providing advice or services in the field of law on a non-litigation basis because paralegals do not have the authority to provide legal assistance. by litigation (talking in court)

c. Limited Supporting Infrastructure.

In carrying out the concept of access to justice, the state has a responsibility to provide good legal aid services to the community, including in terms of supporting infrastructure. The state must have the initiative to initiate the progress of legal aid institutions in Indonesia, namely by facilitating the existing infrastructure in legal aid institutions. Without supporting infrastructure from the state, legal aid institutions will not be able to run effectively in providing access to justice for the community.

2. External Barriers

a. Understanding of Law Enforcement Officials.

By realigning the understanding of law enforcement officers that in fact all problems in society, should not be solved with a legal approach. However, it can be through approaches outside the law that can actually be used by law enforcement officials. To straighten the understanding of law enforcement officers (police, prosecutors and judges) there must be synergy with the Legal Aid Institute in providing legal aid services to ensure access to justice (access to justice), because LBH itself does not necessarily have an attitude that is in line with law enforcement officials. . This difference in attitude, which is not necessarily in line with law enforcement officials, has become one of the challenges of the Legal Aid Institute.

b. Lack of Legal Awareness in the Poor.

Lack of awareness of the law causes a person to violate the law or even be fooled by certain parties who have an understanding of the law in seeking profit; What is even more surprising is that the parties who take advantage of these benefits come from parties who are supposed to be law enforcers, as well as the government.⁷ Actually, we need to worry that their acceptance may be part of the cultural values that consider the rulers to act as *primus inter pares* which means that they can never be disabled, they consider themselves to be more everything than ordinary people. Therefore, they assume that any attitude and action will be justified.⁸

From this opinion, it can be concluded that legal awareness of the poor is very important, this is a challenge for LBH, how to increase legal awareness of the poor themselves. The community must be aware first, because the community has the right to legal aid. When the poor are aware that they have the right to legal aid, of course, they must go through the education process, then the next challenge is whether they dare to use the rights they have.

c. Access to Justice is only a formality.

There is one sentence that says "the blade of the law is sharper down than up" which means that legal justice is no longer in favor of the lower classes. This is different from people with high social class, they will have easier access to justice and be treated better.⁹

Errors in the application of law in Indonesia are not taboo because of the many mistakes made by judges which represent errors in the application of law and legal subjects (*error in persona*). This causes a phenomenon called misguided justice.

There are many phenomena of this deviant judiciary that occur, especially in the underprivileged community who also become victims of the deviant judiciary. Although there is access to carry out further processes such as appeals, cassation and judicial review to overcome misguided trials, this access is not affordable for the poor. They only think that the process requires no small amount of money, both in the appeal, cassation, and review process.

Therefore, the provisions in Law No. 16 of 2011 are not a guarantee for the poor in obtaining access to justice in appeals, cassation, or judicial reviews. The reason is that the implementation of legal aid is in fact not carried out seriously by LBH and advocates. The majority of them only provide legal aid only up to the first stage of the judiciary. This is because the petition submitted by the applicant in requesting legal assistance. For people who can not afford, to file an appeal, cassation, or review requires a very large cost. They had no money to file for the justice process, so they didn't proceed.

One thing that becomes problematic is that the Law on Legal Aid requires providing legal aid for the poor free of charge sourced from the APBN and APBD and Perma No. 1 of 2014 which is sourced from the local court budget, normatively legal aid is purely free, without any other costs, but this is inconsistent in practice in the community, where the poor are still charged with fees such as administrative fees or transportation costs.¹⁰ This is not in accordance with Article 20 in conjunction with Article 21 of Law Number 16 of 2011 concerning Legal Aid.

d. Complicated Procedures in Funding Legal Aid

The issue of legal aid funds is interesting to study. Funding for legal aid should be

⁷Muhadi Zainuddin, 2004, *Role of Socialization of Law on Advocates in Empowering Community Legal Awareness*. Al-Mawarid Journal No. 12, Yogyakarta: Faculty of Religious Sciences UII, page 93.

⁸Adnan Buyung Nasution, 2007, *Legal Aid in Indonesia*. First Printing Revised Edition, Jakarta: Pustaka LP3ES Indonesia, page. 16-18.

⁹Alfan Biroli, 2015, *Problems of Law Enforcement in Indonesia (Study with a Sociology of Law Perspective)*. Journal of Dimensions, Vol. 8. No.2, page. 24.

¹⁰Interview with Dekka Ajeng, *Treasurer and Staff of LBH Solo Raya*, at the LBH Solo Raya Office at Sentra Niaga - Integrated Area The Park Mall Solo Baru. B 12A Jl. Ir. Soekarno, Hamlet II, Madegondo, Grogol, Sukoharjo Regency, Central Java, (22 September 2020), 13:00 WIB.

covered by the state budget. The state provides funding to LBH to provide legal assistance to underprivileged communities on a pro bono basis. This is the responsibility of the state to its citizens who are unable to access justice.

There are terms and procedures for complex funding that are described in the Law on legal aid. Only LBH can fulfill the given complex requirements. In the process of obtaining legal assistance, there is a long process in selecting LBH and advocates. This is done by applying for accreditation as a condition for obtaining legal aid funds from the APBN, because the biggest potential is obtained by LBH, this causes discrimination.

Based on these requirements, the distribution of legal aid funds nationally did not go well due to several things, namely the terms and procedures for accreditation as well as the complex and discriminatory system of disbursing funds. This has resulted in many LBHs and advocates charging fees from applicants for legal aid.

CONCLUSION

The implementation of free legal aid (Pro bono) which refers to the provisions of Law Number 16 of 2011 concerning Legal Aid is still facing obstacles. Regarding the administrative requirements to obtain legal aid, this is certainly an obstacle experienced by people who cannot afford it. get pro bono legal assistance. Because if the applicant is not able to show the administrative requirements file to get legal aid, the legal aid provider will not process the application for legal aid. In criminal cases, the provision of legal assistance can be carried out from the stage of investigation at the request of the defendant. While providing legal assistance, especially in criminal cases, LBH has the right to accompany the defendant during the investigation process even until the defendant is in the Correctional Institution (LP). This is done due to the possibility of parole after serving 2/3 of the sentence.

On the other hand, there are obstacles in the implementation of legal aid, among others, internally in the form of: 1) Limited Funds; 2) Limited human resources of LBH and externally in the form of: 1) Understanding of Law Enforcement Officials; 2) Lack of Awareness Level of Law in Underprivileged Communities; 3) Access to Justice is only a formality; 4) Complicated Procedures in Funding Legal Aid; 4) There is synergy and cooperation between legal aid organizations and the police, prosecutors and courts.

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