

International Conference on Clinical Legal Education, is an International Proceedings and equivalent with scientific journal, published annually by [Faculty of Law](#), Universitas Negeri Semarang, Indonesia. *International Conference on Clinical Legal Education* published both online and printed version. This conference intended to be international forum for legal practitioners and stakeholders discussing and debate on contemporary issues on clinical legal education and legal clinics. The conference held in cooperation between Faculty of Law Universitas Negeri Semarang, Law Clinics, Bridges Across Borders South East Asia Community Legal Education (BABSEACLE), and Indonesian Clinical Legal Education Associations.
Print ISSN 2614-1809 Online ISSN 2614-3224

Article Online Version

For online version, check: <https://journal.unnes.ac.id/sju/index.php/iccle>

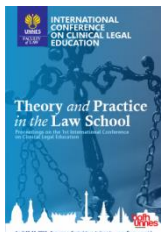
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BOOK Version



The proceedings also published in Book Version with special and standardized number **ISBN 978-602-61382-3-1** by BPFH UNNES (Faculty of Law Publishing House). For more information, please contact:

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HOW TO CITE THIS ARTICLE (APA Style)

Ismi, Hayatul. (2017). "Legal Aid Advocacy for the Poor in Law of Welfare States", *International Conference on Clinical Legal Education*, Vol. 1 No. 1, 2017. Semarang: Faculty of Law Universitas Negeri Semarang, pp. 159-166.

Ismi, Hayatul. (2017). "Legal Aid Advocacy for the Poor in Law of Welfare States", on Ridwan Arifin, Saru Arifin, Rahayu Fery Anitasari. (eds). (2017). *Theory and Practice in the Law School: International Proceedings of International Conference on Clinical Legal Education*, April 2017. Semarang: BPFH UNNES.

Legal Aid Advocacy for the Poor in Law of Welfare States

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ABSTRACT

Indonesia is a lawful welfare state, which means that the government has a duty and responsibility in realizing the social justice and the general welfare of the people. Paragraph (1) of the 1945 Constitution, stated that The State must ensure the implementation of equality in the standing before the law. Nowadays it seems only the lower class that must obey the law, while the upper class seems to be immune to the law. They are hiding from the law behind the layers of their own money. As if the law can be sold using money, even for those who commit major crimes, corruption for example. While the lower classes who commit minor crimes can be imprisoned. Our country is a country of law, then the law should be enforced, for all people and not just for Reviews those who have the money. To realize the implementation of the idea of a lawful welfare state then the State should guarantee the right of every person to reach justice. In other words, the State must guarantee the implementation of legal aid to the impoverished or Reviews those who cannot afford so that none has no access to justice that is mandated by the constitution. Legal aid advocacy for the impoverished in the concept of a lawful welfare state is certainly to be important in realizing the ideals of the lawful welfare state that achieve social justice and general welfare of the people. Therefore, it is important to know the concept of advocacy suitable for the impoverished in a welfare state.

ARTICLE HISTROY

Received 12 February 2017

Accepted 12 April 2017

KEYWORDS

Welfare State; Constitution;
Legal Aid

Introduction

The legal state places the highest authority on the law and not on the absolute ruler, the State of Indonesia is a State of law, the State of law as set forth in Article 1 Paragraph 3 of the 1945 Constitution is closely linked to the welfare state (*welvaarstaat*) or the understanding of a material law State in accordance with the sound of the fourth paragraph. In this case the notion of the State law includes not only the administration of the State, but also touched the life of the nation and the community.¹ In order to realize the principles of the rule of law in the society and state, the state recognizes and protects the rights of every individual regardless of his background so that everyone has the right to be treated equally before the law.² Indonesia as a *negara hukum* (*recht state*) in the sense of the State of welfare, the concept of this welfare State means that the government as the main bearer of responsibility in realizing social justice, public welfare and the greatest prosperity of the

¹ Zulkarnaian Ridwan, Negara Hukum Indonesia kebalikan Nachtwachrestaat, Fiat Justitia Jurnal Ilmu Hukum, Volume 5 Nomor 2 Mei-Agustus 2012, ISSN 1978-5186, p. 149.

² Nikomang Sutrisni, Tanggungjawab Negara dan Peranan Advokat dalam Pemberian Bantuan Hukum Terhadap Masyarakat Tidak Mampu, Jurnal Advokasi, Volume 5 Nomor 2 September 2015, p.155.

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people. This welfare state implies that the government must actively participate in social interaction so that the justice of all Indonesian people can be realized.

Inauguration of Indonesia as a State of the law is set forth in the constitution of the State of Indonesia namely in Article 1 paragraph (3) and Article 28D paragraph (1) of the 1945 Constitution as the State welfare law of the Republic of Indonesia gave a message of strong desire that the State guarantee the establishment of equality of positions in law, among others, marked by the creation of a state where everyone's right to equal treatment before the law and guarantees to every person entitled to access to justice (*justice for all*). It is even a fundamental right of everyone who is universal. This concept is important because the State is always confronted with the fact that a group of poor or disadvantaged communities often cannot realize their right to justice.

The case of three cocoa seeds thief was sentenced to one month and a half. In this case Minah's grandmother stole because of poverty driven. The case of Minah's grandmother drew the public's attention, for touching the core of humanity, injuring people's justice. This case should not need to be done with green work done by deliberation. Besides, three seeds of cocoa seeds to be replanted are not to the detriment of PT RSA. Here we learn that in our country to obtain justice is very difficult, whereas the right to obtain legal justice is regulated in the 1945 Constitution Article 28D paragraph 1.

Article 28D of the 1945 Constitution in paragraph 1 can be enforced by upholding the rule of law for every society. Law plays an important role in the life of nation and state. The law functions to regulate all things should run orderly and in accordance with the rule of law. The law is made to be obeyed and obeyed. Not to be broken. However, what happens is the law in this country like the two sides of the blade. Blunt for the upper and sharp for the lower classes. Nowadays it seems only the lower classes who have to obey the law, while the affluent at them as immune to the law. They hide from the law behind the text- his bills. It is as if the law can be sold using money, even for those who commit major crimes, for example corruption. While the lower circles who commit minor crimes can be imprisoned. Our country is a country of law, the law should be enforced, for all people and not just for those who have money.³

To realize the implementation of the idea of the State welfare law, the State should intervene because it becomes the States obligation to guarantee the right of every person to get justice. In other words, the State must ensure the implementation of legal aid to the poor or those who cannot afford so that no escape of access to justice is a

³ www.kompasiana.com, accessed on 18 September 2016

constitutional mandate.⁴ So in this case the authors want to review related to advocacy of legal aid for the poor in the State welfare law.

Legal Aid for the Poor

The birth of Law No. 16 of 2011 on legal aid provides new hope for the poor to gain access to justice and equality before the law. The provision of Article 1 Paragraph (3) of the 1945 Constitution stipulates that the Indonesian state is a constitutional state in the context of a state law state recognizing and protecting human rights for every individual including the right to legal aid. Implementation of legal assistance to citizens in the form of an attempt to meet as well as the implementation of state laws that recognize and protect and guarantee the rights of citizens will need access to justice and equality before the law. The guarantee of such constitutional rights has not received fundamental attention, so the establishment of Law No. 16 of 2011 on legal aid becomes the basis for the State to guarantee the citizens, especially for the people or groups of the poor to gain access to justice and equality before the law.

If we see the world in both Europe and America, there are two models (system) legal aid, namely:

1. A Juridicial Right (model-individual juridical)
Model A Juridicial Right emphasis on individualistic nature. This individualistic nature means is that everyone will always have the right to obtain legal assistance. In the model there are individual juridical characteristics of the classic pattern of legal aid, means that the demand for legal assistance or legal protection depends on citizens who need it. Citizens who need legal aid to lawyers, and the lawyers will get a reward for services rendered to that State. So, when a person is unable, then someone is going to get legal aid free of charge (without cost).
2. A Right Welfare (welfare model)
The legal system in the United States is somewhat different. Legal aid in the United States is under the regulation of criminal justice act and economic opportunity act. Both regulations direct legal aid as a tool to get justice for all people, especially for those who cannot afford. When you look at both models of legal aid, which on the one hand legal aid can be seen as a right granted to citizens to protect the interests of the individual and on the other as a right to welfare that are part of the framework of social protection afforded a State welfare. Both models of legal aid are then the basic models of some

⁴ Nasakah Akademik Rancangan Peraturan Daerah Kabupaten Rokan Hulu tentang Bantuan Hukum oleh Kantor Wilayah Kemenkumham Riau, Pekanbaru, 2016.

sense of legal aid developed in the western world at large. Further explanation of legal aid:

- a. Traditional Concept of Legal Aid, was made of law given to poor people individually, the passive nature of the legal aid and his approach is very formal-legal. This concept also means that in view of all legal problems of the poor solely from the perspective of applicable law, which is called by Selnick is a normative concept. In the sense of seeing everything as a legal matter for the poor simply from the point of view of the law in force. This concept is a long-standing concept that focuses on cases that, by law, must get a defense.
- b. Concept Assistance Constitutional Law, is legal aid for poor people who do in order businesses and the broader goals such as: to realize the rights of the poor as subjects of law, enforcement and development of the values of human rights as the main joints for the establishment of the State law. The nature and type of legal aid is more active meaning that legal aid is given to collective groups of people.
- c. The Concept of Structural Legal Aid, is an activity aimed at creating conditions for the realization of a law that is capable of transforming unequal structures towards a more just structural, where the rule of law and its implementation can ensure equality of positions both in law and politics. This concept of structural legal aid is closely related to structural poverty.

This concept of traditional individual legal aid is essentially an old concept in line with the existing legal system in which legal aid is provided in any case which is legally grounded to be defended. However, the emphasis on the concept of legal aid over the law itself, which always presupposes a neutral law, the same taste and equally. This raises problems often occur where laws do not provide justice and the law even in a neutral position would benefit the powerful and the propertied and detrimental to the majority poor.

Concept of Constitutional Legal Aid The concept of constitutional legal aid is the concept of providing legal assistance to the broader poor such as awakening the rights of the poor as legal subjects, enforcement and development of human rights values as the main joint for the establishment of the State of law.

In contrast to the concept of traditional legal aid, the nature of the more active types of constitutional legal aid where legal aid is provided not only individually but also to political groups. how the approach taken in addition to the formal-legal, also by way of political negotiation. This means that solving legal problems is not always pursued through legal channels but through political channels and negotiations. Therefore, activities such as campaigns for the abolition of

legal provisions deemed to limit the space for active participation of the poor, control of government bureaucracy, community law education become an essential part of the concept of constitutional legal aid.

Thus, the scope of legal aid activities is broad enough, not limited to legal services within and outside the court. The orientation and objectives are the efforts to create a State of law based on the principles of democracy and human rights. Legal aid for the poor is seen as an obligation in order to sensitize them as legal subjects that have the same rights to other groups.

Recht State Concept

According to Socrates the state is not an organization made for self-interest in private but the state is: "An objective order based on the nature of human nature, therefore it is tasked to implement and apply objective laws which contain" justice for the public "and not only serve the needs of the rulers of the alternating State."⁵

Socrates argues that true justice should be the basis for the guidance of the state.⁶ Plato in his book *Politeia* (The Republic or on the state) says that the origin of the country because of the many needs of life and human desire. Humans cannot make ends meet on his own, so they need to work together, he said, the state should be able to maintain and is one unit.⁷

The goal of a human being according to Plato is to achieve a happy life. The State has power over its people and if it is necessary for the State to act by force against its citizens to comply with existing norms or rules, hence a State may be said to run smoothly, if social intercourse in the institution no conflicts were found and did not get interference.⁸

According to the 1945 Constitution states that Indonesia is a state of law, meaning that in national life and state and society must be based on law. This means that the law has a high status and every person, whether government or citizen, is subject to the law. The notion of a State of law is a State which stands above a law that guarantees justice to its citizens, on the basis of this, the State of law shall ensure justice to all levels of society without exception. Within the State the law respects and protects human rights, and it is an institutional mechanics of a democratic State, the existence of a legal system and the existence of free judicial power.⁹

All this should not deviate from the principle of democracy, namely the government of, by and for the people, which concludes the

⁵ Jum Anggriani, *Hukum Administrasi Negara, Graha Ilmu, Yogyakarta, 2012, p.35.*

⁶ Sjahrhan Basah, *Ilmu Negara, PT Citra Aditya, Bandung, 1994, p.86.*

⁷ Jum Anggriani, *Op.Cit*

⁸ *Ibid.*, p.36.

⁹ *Ibid.*, p.38.

principle of supreme authority in the hands of the people. This principle becomes the rule for all applicable order, including the order of law, thereby providing the basis for the principle of "sovereignty law" and the rule of law derives from the people's sovereignty.¹⁰ The application of the State of law is the recognition of human rights, the existence of equality according to the law for all people and the principle that the law overcomes everything. Sri Soemantri explains that the most important elements in the State of law one of which is the guarantee of human rights, in a State law, the highest power is the rule of law. In Indonesia the rule of law must be based on Pancasila the source of all sources of law.¹¹

Welfare State

The concept of a welfare state is an embodiment of a State of law that has the characteristic principle of equality in law. In a welfare state (State of Law Simplified) Muchsan stated as follows: "The main objective of the State does not lie in maintaining law (positive), but the aim of achieving social justice (*sociale gerechtigheid*) for all citizens. Therefore, if necessary, the state can act beyond the law to achieve social justice for all citizens. Tool state administration in carrying out its functions (*bestuurszorg*) were given the freedom to act (*Freis ermissen*), without violating the principle of legality and not act arbitrarily."¹²

With this authority, the task of the state in the welfare state is to maintain security in the broad sense of the word, namely social security in all fields of public life. The concept of the welfare state according to Bagir Manan is a state or government that is not merely a security guard or public order but also as a primary bearer of responsibility in realizing social justice, public welfare and the greatest for the welfare of the people. In line with the opinion of Bagir Manan Sjahran Basah argued that the purpose of government is not solely in the field of government aja, but also must implement social welfare in order to achieve the goals of the State through national development.¹³

The two opinions above, in line with the opinion of E. Utrecht which states that the scope of duty of the State welfare is to maintain security in the widest sense until the social security in all fields of community life. The government must participate actively in social interaction so that social welfare for all people can be maintained.¹⁴

The concept of a modern/material (Welfare State) state is embraced by Indonesia, with the aim of creating a just and prosperous

¹⁰ Padmo Wahyono, Indonesia Negara berdasarkan atas Hukum, Ghalia Indonesia, Jakarta, 1997, p.10

¹¹ *Ibid.*, p.12.

¹² Ida Nurlinda, Prinsip-Prinsip Pembaharuan Agraria Perspektif Hukum, Jakarta, Rajawali Press, 2009, pp.14-18.

¹³ *Ibid.*

¹⁴ *Ibid.*

society both spiritual and material based on Pancasila and the 1945 Constitution, so that it is called the Pancasila State law. Muhammad Yamin said that the newly created Republic of Indonesia is a new welfare state, stating that:¹⁵ “The welfare of the people is the basis and purpose of the State of independent Indonesia is the sum of public justice or social justice is this new welfare state.”

At the time Indonesia was founded, the founders of the State confirmed the promise of the people to realize the ideals of the nation that is social welfare for all the people of Indonesia. The ideals are formulated in the preamble of the 1945 Constitution, namely the obligation of the government is to protect the entire nation and the entire blood of Indonesia, promoting the general welfare and the intellectual life of the nation.

Defining Indonesia as a welfare state as contained in Article 33 of the 1945 Constitution, the function of the State of the Republic of Indonesia is as follows:¹⁶

1. The first function is in charge of security, defense and order (*defense, security and protectional function*). The elaboration of this function The State shall defend against any external and internal attacks or insurrections, prevention of theft of property in the oceans and other natural resources, both at sea and in the air, territorial violations by foreign forces, and so on. Also included in this function the protection of life, property and other rights in accordance to be stipulated in legislation.
2. The second function is a task well-being or *welfare function*. This task is in the widest sense, including social services and social welfare, such as natural disaster relief, poverty, unemployment, wage determination, health care, orphanages and others.
3. The third function is the job of education (*educational function*), it must be interpreted in the sense that as widely as possible. Included in this function such as the task for general information, *nation and character building*, improvement of culture, and others.
4. The fourth function is the duty of the State to bring order and prosperity of the world (*world peace and human welfare*) in the broadest sense as well. In free and active politics, the State of the Republic of Indonesia contributes to eternal and lasting peace for human life. Thus, in the State of Indonesian law based on Pancasila and the 1945 Constitution, there is a balance and integration between regular function and development function.

The integration of these two functions causes the obligation of the State of Indonesia to its people to become more widespread, in which the State has the authority to regulate and direct all aspects of

¹⁵ Muhammad Yamin, Naskah Persiapan UUD 1945, Jilid 1, Siguntang, Jakarta, 1971, p.106.

¹⁶ Ida Nurlinda, *Op.Cit*

community life to achieve social justice for all Indonesian people. Country was also referred to as a social legal state (*sociale rechtsstaat*).

According to Sri Soemantri Martosoewignjo, elements or characteristics of the rule of law found and applied in the process of governance in Indonesia are as follows:

1. The Government in performing its duties and obligations must be based on the laws and regulations of the legislation
2. The existence of a guarantee of human rights (citizens)
3. The existence of power sharing within the State
4. Lack of oversight and judicial bodies (*rechtsterlijke controle*)

Slightly different from the opinion of Martosoewignjo and Bagir Manan argues that the minimal characteristics of a State law are as follows:

1. All actions must be based on the law
2. The existence of provisions that guarantee basic rights and other rights
3. The existence of a free institution to assess the actions of the authorities against the public (free judicial body)
4. The existence of power sharing.¹⁷

Based on the opinions of experts on the welfare state it is illustrated that in the welfare state the guarantee of human rights and equal treatment shall be the aim of a welfare state, therefore within the framework of the welfare State undertaking an attempt to provide equal legal treatment is obligations of a welfare State. Satjipto Rahardjo said that the Indonesian state law is to make people feel happy in the State of Indonesian law.¹⁸

Conclusion

The state of welfare law is a State that has a purpose and is responsible for the welfare of its people, even giving happiness to its people, one of the characteristics is the guarantee of human rights and also guaranteed to get social justice for all people of Indonesia because the welfare state of Indonesia is the State welfare law Pancasila, and equality before the law so that the concept of this welfare state means that no longer should there be people who feel not treated unfairly in the eyes of the law.

Thus the concept of constitutional legal aid is to provide legal aid for the poor in the broad sense means not only to help solve legal cases through the court but also through the efforts outside the court as well as the political path and negotiation and also do legal education for the

¹⁷ *Ibid.*

¹⁸ Satjipto Rahardjo, Negara Hukum yang Membahagiakan Rakyatnya, Genta Publishing, Yogyakarta, 2009, p.107.

community, is a concept appropriate legal assistance applied within a State welfare law in order to achieve the objectives of the welfare State.

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