

# The Ideal Relationship between Legal Knowledge and Actual Legal Actions in Indonesia

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**Abstract**— Rule of law refers to a principle of governance in which all persons, institutions and entities, public and private including the state itself, are accountable to law are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. This article will discuss the issue of access to social justice for the poor and marginalized. Social justice refers to the idea of a structure of social life based on the principles of equality and solidarity. In the concept of social justice contained recognition of the dignity of human beings who have rights are rights and egalitarianism. This concept involves a greater degree of egalitarianism in the economy, for example, through a policy of progressive taxation, income redistribution, or even redistribution of wealth. Therefore, in practice, the concept of social justice is often discussed in terms of economic justice. Such policies are intended to create a more equal opportunity than what is in the structure of society and to create equal outcomes can overcome inequality system formed as a result of the application of procedural justice.

**Keywords**— *Legal Knowledge, Actual Legal Action, Indonesia.*

## I. INTRODUCTION

This paper begins with the author concerns the enforcement of economic rights and human rights for the people in the social sphere. Some rights are yet to be fought, from the status of *ius contituendum* to be *ius constitutum*. During the realization of this right is likely discriminatory to the poor and weak, thus empowering the people through processes called "reverse discrimination or positive discrimination" should be pursued, either at the stage of reform legislation *in abstracto* and at this stage in the decision-making *concreto*, in the public service counters everywhere.

At the stage of law, access disparity for some people to tap into the knowledge of the rights and obligations can lead to a lot of people who are "marginal" to be discriminated against and uninterrupted rights to gain access to new sources of revenue to ensure a decent living standard. As a socio-cultural institution which is based on ideals of justice, the law (*act*) is technically a very political and exploitative. Act of nuanced liberal-capitalistic, for example regarding the protection of property (material or intellectual) is one more example that the law works for the rich rather than the "orphans". Here the law (*act*) will be very functional for upper-class life in a well-established political and economic power structure, but very dysfunctional for the life of "the lower classes" were weak and trapped in poverty.

This paper is intended to set forth the particulars the gap between the normative expectations that constitute the essence of the rule of law, namely, that "everybody is equal before the law", but the fact is, the socio-economic reality always just show a picture of the stratification of the last to claim that in daily life on this earth "not everybody is equal

before the law". Following the theoretical controversy-paradigm who try to speculate about the cause of the wide gaps between the normative and the factual is it. At the end of the conversation will be widely presented suggestive ideas about what can be considered to be taken to overcome the problem of disparities in access to justice rights of socio-economic rights for the community.

## II. LEGAL KNOWLEDGE AND LEGAL ACTION

Schuler and Kadirgam-Rajashingam in Herbin M. Siahaan (Ed.) legal knowledge defines as "(the) acquiring of critical awareness about rights and the law, the ability to assert rights, and the capacity to Mobilize for change".<sup>1</sup> It is clearly, that the term legal knowledge implicitly intended advokatif thrusting a new idea about the law as a political force that was expected to be able to drive the wheels of change, which in turn may favor the interests of groups of people who had been marginalized.

Legal knowledge is not just latent a picture of a person's koginitif status, but is really a process of socio-political manifestatif. That is, the process is deliberately planned and systematically sought to build awareness of the rights knowledge among them. This effort is based on the idea that there should be a balance of bargaining power between the marginal lay audiences (for *legal blindness* and *blind right*) with the parties 'power', and too dominant in every area of life.

<sup>1</sup> Margaret Schuler and Shakuntala Kadirgam-Rajashingam (ed.), *Legal Knowledge: A Tool for Woman's Empowerment*, (New York: UNIFEM, 1992), p. 3-8.

The balance of bargaining power that can only be realized if the people are fully aware of his legal rights in compliance with all laws and regulations. Awareness of people's rights are believed to be able to arouse their courage to question their rights. Awareness must be supported by a healthy organization, to be a driving force for change for the sake of the well-established so that the interests of the people avoid bargaining prone.

Legal rights knowledge through knowledge program intended to build community awareness of the constitutional rights of public confidence that woke both individually and collectively. Self-confidence is a prerequisite for advancing the welfare level of the truth of his life on the rights that they are aware of. Awareness of rights can generate the courage to question their legal rights in the face of the rulers of the country, so as to encourage transparency and accountability of public officials in carrying out government duties.

Extensive legal knowledge among citizens will eventually culminate in the number of legal actions, when there is a lot of denial of the rights of the people. However, from field observations, at least in the experience of Indonesia, the relationship between legal knowledge and legal action was not a causal relationship that is mechanistic. There are two variables that take effect interrupters and a prerequisite for the establishment of a causal relationship between the intervening variables. First, is the structure while the second variable is culture.<sup>2</sup>

Configuration structure "otokratisme" hegemonic society by feudal culture weakens the ideal relationship between the actual legal knowledge and legal actions. Thus, legal knowledge programs aimed at eradicating blind they should be coupled with empowerment programs, such as increasing the ability of people in the organization and the ability of people together in any effort to fight for their rights. Community organizations must grow flowers at the level of the bottom, or 'grassroots organization' (GRO). GRO require comprehensive assistance by the government as well as 'non-governmental organizations' (NGO).<sup>3</sup>

At this stage of development, the eradication program could be a blind rights movement rights awareness and empowerment of the people. Awareness movement right of the people to reduce their limitations and powerlessness. Movement "rights knowledge" is the strengthening of human rights systematically to uphold the Constitution and the various international covenants on human rights.<sup>4</sup>

### III. ACCESS AND SOCIAL JUSTICE PARADIGM

The term of social justice, not a foreign term for Indonesia. The five precepts of the Pancasila reads "*Social Justice For*

*All People of Indonesia*", and the fourth paragraph of the Preamble of the Constitution 1945 states as follows:

"... It is Indonesia's national independence drafted in a constitution of Indonesia, which is formed in an arrangement of the Republic of Indonesia based on the sovereignty of the people with Belief in God Almighty, just and civilized humanity, the unity of Indonesia, democracy and the guided by the wisdom of deliberation/representation, and the realization of social justice for all Indonesian people."

The Preamble of the Constitution 1945 states 5 (five) the word "fair", the rest of "fairly justice", "fairest", "fair and prosperous society," "social justice" and "fair and civilized". Even the explanation of the Constitution 1945 explicitly states the purpose of the state "was about social justice for all citizens". Thus, social justice is a value defined explicitly in the Pancasila, Preamble of the and Constitution 1945 and Content of the Constitution 1945 itself.

If traced the meaning of social justice values with the other values of Pancasila, then the value of social justice is one of the values that made the goal of a system of values. The substance of the basic values of Pancasila which consists of the value of divinity, humanity, unity, democracy, and social justice is a value system. The basic principle is that it contains a certain quality goals and expectations or things to be achieved by the people of Indonesia. When viewed from the stratification of lay values, values of social justice is the peak value of the pyramid of the value system of Pancasila. This means that social justice is a fundamental norm that must be the center of every political regime that came to power under the constitution. Social justice as a norm, meaningful two-way. The positive direction is a primary obligation of anyone who holds the power and ability of the state to mobilize all policy measures to achieve social justice, in the negative direction, is the primary obligation of anyone who holds the power of the state to prevent the development of growth especially injustice.<sup>5</sup>

The idea of justice does contain many aspects and dimensions, ie legal justice, economic justice, political justice, and even social justice. In essence, the latter, the term social justice, is a node of all the dimensions of justice. The term usually refers to the idea of a structure of social life based on the principles of equality and solidarity. In the concept of social justice contained recognition of the dignity of human beings who have rights that are fundamental.

The concept of social justice is distinguished from the common law concept of justice commonly used and applied in public policy demanded by the coercive power of the state. But the concept of social justice must also not only about the question of morality in public life different from one culture to another so that the degree of universality is uncertain. Social justice should be distinguished from other dimensions of justice, such as legal justice, political justice, economic justice, and so on. Although it should also be understood that the idea of justice will eventually be included

<sup>2</sup> Herbin M. Siahaan (ed.), *Pemberdayaan Hukum Untuk Meningkatkan Tata Pemerintahan Yang Baik dan Mengurangi Kemiskinan*, (Jakarta: The Asia Foundation dan Asian Developing Bank, 2003), p. 12.

<sup>3</sup> Michael Shifter, "Weathering The Storm: NGO's Adapting to Major Political Transition" in Mary McClymont and Stephen Golub, *Many Roads To Justice*, (The Ford Fondation, 2000), p. 327-337.

<sup>4</sup> David Hulme dan Michael Edwards, *NGOs, State And Donors: Too Close For Comforts?* (New York: St. Martin's Press, 1997), p. 313.

<sup>5</sup> Bur Rasuanto, *Keadilan Sosial; Pandangan Deontologis Rawls dan Habermas*, (Jakarta: Gramedia, 2011), p. 200.

in the notion of social justice. Because in the end, legal and economic justice must produce the final result in the realization of social justice for all. In it, embodied the sense that (i) there has been injustice must be addressed to the lowest point, (ii) redistribution of wealth, power and status of the individual, community, and social wealth (*societal good*), and (iii) State c.q. the government is responsible government to ensure basic quality of life for all citizens.

The concept of social justice based on the principles of human rights and egalitarianism. This concept involves a greater degree of egalitarianism in the economy, for example, through a policy of progressive taxation, income redistribution, or even redistribution of wealth. Therefore, in practice, the concept of social justice is often discussed in terms of economic justice. Such policies are intended to create a more equal opportunity than what is in the structure of society and to create equal outcomes can overcome inequality system formed as a result of the application of procedural justice. Because of the importance of social justice is, then the constitution of the ILO (International Labour Organisation) stated that a lasting peace can only be achieved if based on social justice. In fact, in the Vienna Declaration and program of action, social justice is defined as goals to be achieved in human rights education.

The concept of social justice developed along with the development of human rights (in Indonesia known as HAM), especially after the formulation of the International Covenant on Economic, Social and Cultural Rights (ECOSOC). The concept of social justice is "An order of society, the nation, and the state's diverse that distributes equal rights and obligations of individuals or social groups marginalized by the legal and social system, an effective and sustainable".<sup>6</sup>

Formulation of the concept of social justice has five variables, and each variable has an indicator. 5 (five) variables are<sup>7</sup>:

- a. An order of society, the nation, and a nation of diversity. This variable has four indicators, namely (1) the principle of pluralism, (2) the principle of inclusiveness, (3) the principles of tolerance, and (4) the principle of coexistence;
- b. Distribution of rights and responsibilities equally. This variable has several indicators, including: (1) awareness of the distribution of natural resources in a fair, (2) political affirmation, (3) decentralization, (4) a participatory social system, and (5) the recognition and strengthening of local institutions. Equality has dimension equal to the opportunity (*equal opportunity*) and treatment (*equal treatment*). Equality of opportunity relating to procedural social justice, while equality of treatment related to the substance of social justice. Equality of treatment and opportunity should complement each other. To achieve equality there is positive discrimination, in which groups of *the least well-off* are entitled to a special treatment and opportunity because they have constraints and limitations in achieving social justice;

- c. Portions implementation of social justice should be directed more to individuals or social groups are marginalized. Group of *the least well-off* are those who do not have access to resources, and minorities. Minority groups in culture, language, ethnicity, religion, and others should get a non-discriminatory treatment in access to resource distribution;
- d. Distribution of rights and obligations should be implemented effectively. That is, the distribution of rights and obligations should be implemented optimally beneficial to individuals and groups so that there are legal guarantees, both norms and enforcement. Effective also implies that both individuals and groups must have the capacity to access the distribution of social justice. Subsequently, on the other hand the state should have a strong position to implement its responsibilities in the distribution of rights and obligations. State responsibility includes compliance, respect, and protection rights of individuals and groups. In this efficacy variables are indicators, namely (1) the legal guarantees, (2) the capacity of individuals, marginal social groups and the state, (3) the suitability of the needs of individuals and marginalized groups;
- e. Distribution of rights and obligations should be implemented on an ongoing basis (*sustainable*). Social justice needs to look at the sustainability, in which there is respect for local knowledge and national levels, then the bias holder of natural resources of individuals and marginalized groups, as well as the consistency of policy and implementation. Social justice does not negate the existence of national and local wisdom, in which individuals and groups do not do the destruction of the environment.

The concept of access to justice at its core focus on the two basic objectives of the existence of a legal system that is<sup>8</sup>: (1) the legal system should be accessible to all people from all walks of life, and (2) the legal system should be able to produce the provisions and decisions that are fair to all people, either individually or in groups. The basic idea was about to take precedence in this concept is to achieve social justice for citizens from all walks of life.

Access to justice in the context of Indonesia is defined as a state and a process in which the state guarantees the fulfillment of their basic rights by the Constitution 1945 and the principles of universal human rights, and ensure access for every citizen (*claim holders*) in order to have the ability to know, understand, recognize and use basic rights through formal institutions and informal, supported by public complaints mechanism is good and responsive, in order to obtain the resources and improve the quality of life of their own. In this definition, directly said that access to justice contains prevention and poverty reduction goals. An important element in this definition is the ability of people from disadvantaged groups to access justice through formal and non-formal institutions. That is, the state justice institutions

<sup>6</sup> The Indonesian Legal Resource Center (ILRC), *Mengajarkan Hukum yang Berkeadilan*, (Jakarta: ILRC, 2009), p. 36.

<sup>7</sup> *Ibid*, p. 37-42.

<sup>8</sup> Mauro Cappilietti, J. Gordley and E. Johnson Jr, *Toward Equal Justice: a Comparative Study of Legal Aid in Modern Societies*, (Milan and New York: Giuffre/Oceana Publications, 1975), p. x.

and the public gets the same place as the provider of justice for the people, when they need redress.

Furthermore, it is important also to see that the citizens, especially the poor, should have access to a mechanism that is fair, effective and accountable to protect the rights, avoiding abuse of power and conflict resolution. These include the ability to acquire and obtain settlement through formal and informal mechanisms in the legal system, and the ability to acquire and engage in the process of making, implementation and institutionalization of the law, as stated below:

"The ability of people to seek and obtain a remedy through formal institutions and informal justice in accordance with human rights standards. Access to the community, especially for the poor to the mechanism that is fair, effective and accountable to protect the rights, avoiding abuse of power and conflict resolution. These include the ability to acquire and obtain settlement through formal and informal mechanisms in the legal system, and the ability to acquire and engage in the process of making and implementation and institutionalization of the law" (UNDP, 2006).<sup>9</sup>

People's access to justice is addressed to the community as a whole with an emphasis to the poor (indicating access to justice as *affirmative action*). This definition also indicates the achievement of justice by the legal system is only one part of achieving justice from a broader perspective. This is consistent with the definition of justice approved by the Security Council of the United Nations. Emphasis is made on two key points of bottom-up and top down: (i) that people should have legal awareness, awareness of their rights, awareness forums 'to seek and obtain a remedy' as well as a vehicle to implement their rights them, (ii) the competent authorities, in this case the government and other parties concerned, especially in poverty eradication, has an obligation to 'awaken' the people of their rights and provide them *effective remedy* for the recovery of the rights that have been violated. Human rights standards in this regard is also crucial as a guide and basis for the restriction of access to justice for the poor.

This definition also underlines the importance of access to justice for the people of the restoration of the right to protect themselves from losses that may be incurred by others when involved in a dispute or a conflict of interest. Recovery is giving corrective action for any losses suffered. To get the needed restoration of the legal guarantee of the customs or norms. Recovery is called restoration of law (*legal remedies*) and the restoration of justice (*justice remedies*). Legal remedies typically involve a third party (the mechanism or *judicial institutions*), which function is also regulated by norms in resolving disputes. Justice systems act to recognize the people's right to a remedy when rights are being disputed.

#### IV. THE IDEAL RELATIONSHIP BETWEEN LEGAL KNOWLEDGE AND ACTUAL LEGAL ACTIONS IN INDONESIA

Access to justice is one of the manifestations of the rule of law and recognition of human rights as guaranteed by the Constitution 1945. Overall the rights and obligations set out in the Constitution 1945 is a collective effort to achieve the establishment of the Republic of Indonesia which achieve social justice for all Indonesian people. The achievement of social justice is also a concept of the purpose of access to justice.

Destination state as mandated by the constitution is achieved through the implementation of the National Long-Term Development Plan (RPJPN). One vision RPJPN 2005-2025 is "Indonesia's self-reliance, Forward, Just and Prosperous", which means that all people have equal opportunity to improve their lives, obtain employment, obtain social services, education and health, express opinions, implement political rights, as well as securing and maintaining the protection and equality before the law. Nation Fair means no discrimination in any form, whether between individuals, gender, and region.<sup>10</sup>

In the Indonesian context, what is needed is a balanced contribution between all parties involved in implementing the concept of access to justice (*government or other parties are closely related*). Providing access to justice were also guaranteed by the Constitution 1945 through Article 28D (1) and 28I (1), as a form of human rights that must be met. The Constitution 1945 also affirms the Government's obligation to fulfill and protect the rights of citizens to have access to justice. Overall the rights and obligations set out in the Constitution 1945 is a collective effort to achieve the establishment of the Republic of Indonesia which achieve social justice for all Indonesian people, which is also the objective conception of access to justice. Therefore, the determination of the definition of the concept of access to justice for the most important elements that Indonesia requires balancing the role of the parties concerned as well as the consideration of typical conditions faced by Indonesia.

Preparation of National Strategy on Access to Justice based on the recommendations of the study "Access to Justice" and followed through the project LEAD, including six (6) main problems, as follows<sup>11</sup>:

- a. Access to Services and Government Assistance;
- b. Ownership and Management of Land and Natural Resources;
- c. Violence and Gender Discrimination;
- d. Labour Rights and the Right to Decent Work;
- e. Crime and Law Enforcement are not Sufficient;
- f. Post-Conflict Security, Rights of Property and Other Issues.

When discussing the issue of access to justice of the above issues, in essence there is a slice of a targeted group of people, namely the poor and marginalized. This group

<sup>10</sup> Looking for Act No. 17 Law 2007

<sup>11</sup> Bappenas and UNDP, *Project Document: Legal Empowerment and Assistance for the Disadvantage*, Jakarta: July 2007, p. 8.

<sup>9</sup> UNDP, *Access to Justice Practitioner Guide, 2005*, p. 13.

experienced the greatest obstacles in accessing justice, both when discussing the reform of the judiciary, legal aid, and local governance of land and natural resources. The group is present in all the legal issues and women, children and labor. Therefore, as an effort to strengthen the message of the national strategy, the discussion of the poor and marginalized is placed in a separate section.

Poverty in Indonesia and elsewhere in the world is poverty created by the political, economic and legal indeed impoverish and marginalize a group of people than other groups. Similarly, the problems of achieving justice for the poor in essence not just technical legal issue but rather a socio-political problem of how to strengthen the bargaining position of the poor to obtain medical and legal protection.

Achieving access to justice can be done by analyzing the 6 (six) elements of the approach are: (i) the normative framework, (ii) legal awareness, (iii) access to appropriate dispute resolution forum, and (iv) an effective complaints handling; (v) recovery outstanding rights, (vi) completion of the problems of poverty, oppressed and marginalized groups.

These elements is a reference to assess the 8 (eight) issues of access to justice in Indonesia, among others: (i) Access to Justice Reform on Legal and Judicial Affairs (ii) Access to Justice in the Fields of Justice Assistance (iii) Access to Justice in Field of Local Governance, (iv) Access to Justice in the field of Land and Natural Resources, (v) Access to Justice for Women, (vi) Access to Justice for Children, (vii) Access to Justice for Labor and (viii) Access to Justice for the Poor and Marginalized.

Principles of the national strategy of access to justice is a synthesis of the various strategies in 8 (eight) issues above. Discussion of any issue refers to the same component, ie: normative frameworks, legal awareness, access to the appropriate forum, the effective handling of complaints, redress satisfactory, issues concerning the poor, and a national strategy.

National strategy must be accompanied by an action plan that integrated and sustainable. For that, there are 4 (four) working principle that must be present in subjects of national strategies, namely:

- a. Each component is equally important;
- b. Synergistic cooperation between central and local government;
- c. The balance between the justice system and alternative justice system; organizers justice and seeking justice;
- d. Supervision, monitoring and transparency.

To support the principle of access to justice for the poor and marginalized, there are 6 (six) points to the proposed national strategy, namely:

- a. Changes in the law of the development paradigm and the role of legal education in Indonesia;
- b. Recognition and support for legal aid and paralegal development in Indonesia;
- c. Improvement of legislation and budget politics that support access to justice;
- d. Formulation and implementation of Minimum Service Standards in the public service;
- e. Strengthening mechanisms of complaint and settlement/recovery for disadvantaged communities within the framework of the public service;

- f. Strengthening and empowerment of community-based justice system.

## V. CONCLUSION

Upholding the principle of justice is one of the characteristics of the state law. Justice is a basic human right in line with the principle of equality before the law. Every person has the right to obtain reparation (*remedy*) for violations they suffered, while the state has a duty to ensure the fulfillment of these rights. The accumulation of such rights affirmed that justice has become a basic human right that must be respected and guaranteed. There is a need to put the concept of access to justice as an affirmative action based on the perspective of human rights in order not to give rise to any discrimination, but as 'aid' are temporary for the poor and marginalized until they are in a position to be able to gain access to justice.

The paradigm of justice in the legal perspective needs to change the paradigm of social justice where law and justice reform should have the principal purpose of which is to protect the economic, social and cultural rights of the poor and strengthen their bargaining position to obtain justice through both formal and informal mechanisms. To support the achievement of the ultimate goal, this article recommends 3 (three) strategy of strengthening access to justice for the poor and marginalized. *First*, the paradigm shift in the Indonesian legal education from formal legalistic paradigm toward social justice promotes education with attention to the problems and experiences of the community in efforts to achieve justice. *Second*, to address the challenges of geography and access to legal information for the poor, it is recommended to perform a variety of efforts to support the development of para-legal in Indonesia. *Third*, government and non-government parties to integrate access to justice in Indonesia in various community development programs implemented so far in various sectors such as health, education, roads and water supply and economic assistance programs and community empowerment.

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