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## **GLOSARY/ SINGKATAN**

BBH	: Biro Bantuan Hukum
B.W	: <i>Burgelijk Wetboek</i>
H.I.R	: <i>Herziene Inlandsch Reglement</i>
HAM	: Hak Asasi Manusia
ICCPR	: <i>International Covenant on Civil and Political Rights</i>
<i>I. R</i>	: <i>Inlandsch Reglemen</i>
LBH	: Lembaga Bantuan Hukum
LSM	: Lembaga Swadaya Masyarakat
<i>Legal Aids</i>	: Bantuan Hukum Cuma-Cuma
KUHP	: Kitab Undang-Undang Hukum Pidana KUHAP
: Kitab Undang-Undang Hukum Pidana Permenkumham	:
Peraturan Menteri Hukum dan Hak Asasi	
Manusia	
OBH	: Organisasi Bantuan Hukum
Orla	: Orde Lama
Orba	: Orde Baru
UU	: Undang-Undang
UUD	: Undang-Undang Dasar
R. R	: <i>Reglement op de Rechtsvordering</i>
SPP	: Sistem Peradilan Pidana
W.v.K	: <i>Wetboek van Koophandel</i>
W.v.S	: <i>Wetboek van Strafrecht</i>

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## A. Background Issues

Justice is a hope for every human being, therefore law is needed as an order that regulates various human interests, because the law essentially regulates the rights and obligations of each individual or group in society. Justice is the last joint of the ultimate goal of law.<sup>1</sup>

In order for justice to be achieved, the law created must be based on morals, because in fact the law is considered moral, meaning that the law and all legal norms must be in accordance with morals. Indonesia as a state of law, means that there is a desire of the state to guarantee equality before the law, which is characterized by equal treatment before the law as an effort to guarantee access to justice for all citizens (justice for all).<sup>2</sup>

The concept of the rule of law, the state recognizes and protects the rights of every individual, so that all people have the right to be treated equally before the law (equality before the law). Equality before the law must be interpreted dynamically and not statically. That is, equality before the law must be balanced with equal treatment.

The principle of equality before the law and guarantee of access to justice for all citizens is an important principle in the rule of law. Because the state is always faced with the fact that there are groups of people who are poor or unable, so often they cannot realize their right to justice (which should be carried out in relation to the concept of the rule of law).<sup>3</sup>

Social inequality, both from the political, economic and legal aspects is very visible in the community. Social inequality has a correlation in achieving justice, where those who come from poor communities, with all the limitations that exist will be more difficult to obtain access to justice, when compared with those who come from upper-class community groups.

The correlation of poverty with the achievement of access to justice for the poorest people can be seen from the opinions expressed by Bambang Sunggono, who stated that:

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<sup>1</sup> Sudikno Mertokusumo, 2011, *Law Theory*, Yogyakarta: Cahaya Atma Pustaka, h. 16.

<sup>2</sup> Agus Santoso, 2012, *Law, Moral And Justice*, Jakarta: Prenada Kencana Media Group, h. 5.

<sup>3</sup> Frans Hendrawinata, 2009, *Probono Publico, the poor's constitutional rights to obtain legal assistance*, Jakarta : Gramedia Pustaka Utama, h. 1.



Poverty suffered by a person or group of people has a very big impact on law enforcement, especially in relation to efforts to maintain what has been his right. This seems consistent with the fact that poverty itself has brought disaster to humanity, not only economically, but also legally and politically. Meanwhile, for those who are wealthy, they are usually more familiar with power, and at the same time they easily translate that power into justice. Maybe it has become history in human life that power is always closer to wealth, and this in fact causes a lot of injustice, and conversely the law must also be close to poverty. Therefore, even someone who is poor in wealth, should still be rich in justice.<sup>4</sup>

Responding to inequality in law enforcement, then it should not be trapped in negative perceptions of law related to existing law enforcement processes. In other words, perceptions of the law must remain neutral. Because the law has a noble purpose, namely to realize justice, certainty and benefits for the community,<sup>5</sup> but in its implementation is influenced by various factors so that the law does not achieve its ultimate goal, namely to provide justice for the community.

Social inequality that occurs between the lower community groups and upper community groups ultimately causes unbalanced conditions in all aspects of social life. The upper community groups will dominate every aspect of social life, compared to marginal community groups.

The presence of this Legal Aid at least answers the high expectations of the community, the resolution of the legal aid problem in Indonesia, where until now there are still many Indonesians who do not get access to legal assistance.<sup>6</sup>

Starting from the various problems above, it is necessary to review the concept of providing legal aid and reconstructing the concept of providing legal aid, both from the aspect of legal substance, legal structure and legal culture in the implementation of legal aid in Indonesia. Through the reconstruction of the concept of legal aid and the articles in the Legal Aid Law, it is hoped that the ideal concept of legal aid can be obtained so that it can truly expand access to justice

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<sup>4</sup> Bambang Sunggono dan Aries Harianto, 2009, *Legal Aid and Human Rights*, Bandung : Mandar Maju, h. 62.

<sup>5</sup> Sudikno Mertokusumo, 2007, *Know the Law of An Introduction*, Yogyakarta : Liberty, h. 57.

<sup>6</sup> Adnan Buyung Nasution, dkk, 2007, *Legal Aid for Marginal Community Access to Justice, Historical Overview, Concepts, Policies, Implementation and Comparison*, Jakarta ;LBH Jakarta, h. 3.

and of course provide justice for the poor. Because legal aid is not only fulfilling the formality of the state's obligation in fulfilling access to justice for the community, but is also expected to truly realize justice for the poor, and even achieve essential justice, namely dignified legal justice in accordance with values Pancasila.

Based on the above background, in this dissertation research will be discussed further on the reconstruction of the concept of providing legal assistance in criminal cases in realizing access to justice for the poor, with the title of dissertation: *"Reconstruction Of Providing Legal Aid In Realizing Justice Access For The Poor. "*

## **B. Problem Formulation**

Based on the background above, several main issues were formulated as the object of study in this study, namely:

1. What is the nature of the implementation of legal aid for disadvantaged people?
2. How are the obstacles in the implementation of providing legal assistance in realizing access to justice for the underprivileged?
3. How to reconstruct the provision of legal aid to disadvantaged communities based on the value of dignified justice?

## **C. Research Objectives and Benefits**

Based on the predetermined problem formulation, this study has several objectives, namely to:

1. Analyze the nature of the implementation of legal aid for disadvantaged people.
2. Analyzing obstacles in the implementation of providing legal assistance in realizing access to justice for the poor.
3. To build or reconstruct the provision of legal aid to disadvantaged communities based on the value of dignified justice.

The expected benefits of the results of this study are:

1. Theoretical benefits:
  - a. Expected to be able to find new theories/new ideas in the field of criminal law.

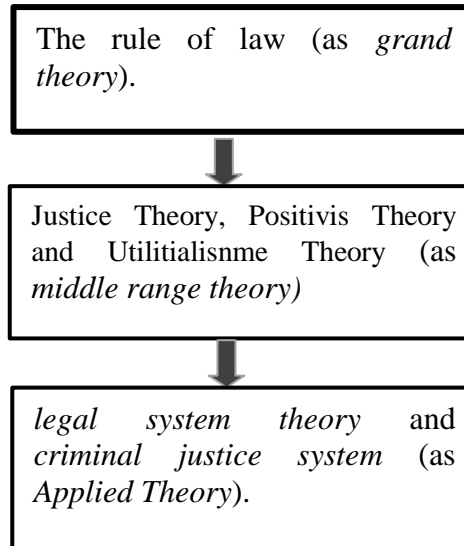
- b. It is expected to be able to add reference material and input material for further research.
2. Practical benefits:
- a. It is expected to contribute thoughts on the implementation of providing free legal assistance to suspects who are unable.
  - b. It is expected to be used as input for the implementation of providing free legal assistance to suspects/defendants who cannot afford it.

**D. Conceptual Framework**

In this study, there are several legal theories (legal theory) used to analyze research problems, which include: The Law Sovereignty Theory as a basic theory (grand theory), the theory of justice and the theory of legal certainty as a middle theory, and the legal system theory (legal system theory) and the theory of the criminal justice system serve as application theory (applied theory). The theoretical framework in this study can be seen in the following scheme:

**Skema 1.**

**Landasan Teoritis**



**1. Grand Theory: The rule of law**

Sovereignty can be interpreted as the absolute and highest power in a country. Jean Bodin explained that "sovereignty is an absolute and sustainable

power in a country that is above positive law.<sup>7</sup> Furthermore Jean Bodin, argued that sovereignty is single, original, eternal and cannot be divided.<sup>8</sup>

The theory of the rule of law postulates that law is born from individual consciousness, whereas the theory of the rule of state states that the state is higher than the law which can also be interpreted that the state is not subject to the law because the law is an order from the state itself. The theory of legal sovereignty having the highest authority in a country is the law itself, both the king, the ruler, and the people even the country itself is subject to law. All attitudes, behavior and actions must be according to law "<sup>9</sup>

The essence of the theory of the rule of law teaches that the state is subject to law, which carries the consequence that every power in the state must be subject to the law. So the law is the highest authority in the country, this concept is very much in accordance with the concept of the rule of law (*recht staat*) adopted by the Indonesian state.

## **2. Theory of Justice as Middle Theory**

Various philosophers and law experts try to parse thinking about the meaning of justice, so that several theories of justice emerge that become the reference or frame of mind for jurists in interpreting justice. Among the theories of justice, among others: Plato's theory of justice, Aristotle's theory of justice, Jhon Rawls's Social Justice Theory, Hans Kelsen's theory of justice.

Aristotle's view of justice can be found in his *nichomachean ethic*, political and rethoric. Specifically seen in the book *nichomachean ethic*, the book is entirely devoted to justice based on Aristotelian legal philosophy, which states "law can only be established in relation to justice".<sup>10</sup>

Justice in Aristotle's view is essentially a gift of equality, but not equality. Where Aristotle distinguishes between equal rights according to proportional rights. Equal rights are seen by humans as a unit of the same container. This is what can be understood that all people or every citizen are equal before the law.

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<sup>7</sup> Fuad Hasan, 1996, *Introduction to Western Philosophy*, Jakarta: Pustaka Jaya, h.73.

<sup>8</sup> Soehino, 2008, *State Science*, Yokyakarta: Liberty, h. 151.

<sup>9</sup> H. Salim, HS, 2012, *The Development of Theory in Legal Studies*, Jakarta: Rajagrafindo Persada, h. 135.

<sup>10</sup> Carl Joachim Friedrich, 2004, *Historical Philosophy of Historical Perspective*, Bandung: Nusa Media, h. 239.

Justice in Aristotle's view is divided into two types of justice, namely distributive justice and commutative justice. Distributive justice is justice that gives each person a portion according to his achievements. Commutative justice gives as much to each person without distinguishing his achievements in this regard as the role of the exchange of goods and services.<sup>11</sup>

Distributive justice in Aristotle's view focuses on the distribution, honorarium, wealth and other goods that are equally obtainable in society. Leaving aside mathematical proof, it is clear that what is in Aristotle's mind is the distribution of wealth and other valuables based on values prevailing among the citizens. fair distribution may be a distribution in accordance with the value of goodness, namely its value to society.<sup>12</sup>

### **3. Legal certainty theory (positivism theory) and utility theory (utilitarianism theory) as middle theory**

In addition to the theory of justice, as explained in the initial part of the theoretical framework, the other legal goals to be achieved by law are the existence of positivism theory and the utility of law (utilities theory). Based on the purpose of the law, in the legal science doctrinal developed several legal theories, such as the theory of legal certainty (positivism theory) and the theory of the usefulness of law.

Legal certainty can be divided into two types, namely certainty because of the law and certainty in or from the law. Certainty in the law is achieved if the law is as much as the law and that in the law there are no conflicting provisions, the law was made based on "rechtswerkelijkheid" (legal reality) and in that law cannot terms that can be interpreted differently.<sup>13</sup>

Legal certainty is synonymous with understanding legal positivism. Legal positivism believes that the only source of law is the law, whereas the judiciary means solely the application of the law on concrete events.<sup>14</sup> Laws and laws are

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<sup>11</sup>L. J Van Apeldoorn, 2010, *Introduction to Legal Studies*, edisi revisi, Jakarta: Pradnya Paramita, h. 11-12

<sup>12</sup>Marwan Effendi, *Op. cit.*, h. 76

<sup>13</sup>Peter Mahmud Marzuki, 2008, *Introduction to Legal Studies*, Jakarta: Pranada Kencana Media Group, h. 35

<sup>14</sup>Lilik Rasyidi dan Ira Thania Rasyidi, 2004, *Fundamentals of Philosophy and Legal Theory*, Bandung: PT. Citra Aditya Bhakti, h. 42-43.

identified,<sup>15</sup> positivist judges can be said as mouthpieces of the law. That is, every legal event that occurs in the community must have the means or laws that govern it, so that the event can have legal force and obtain legal protection.

The essence of other legal objectives is the legal usefulness. The process of law enforcement, then naturally the public expects to benefit from the implementation of the law enforcement. Because the law is essentially for humans, not vice versa.<sup>16</sup> The theory of legal usefulness confirms that law is not synonymous with justice. Because the law is general, binding on everyone, it is generic. Whoever steals must be punished, where anyone who steals must be punished, regardless of who steals.<sup>17</sup>

The theory of the usefulness of the law was conceived and developed by Jeremy Bentham, who is famous as one of the figures of legal utilitarianism. Bentham's legal thinking was inspired by the work of David Hume who was a thinker with extraordinary analytical skills, which undermined the theoretical basis of natural law, where the essence of Hume's teaching that something useful would bring happiness.

#### **4. Legal System Theory (legal theory system) as applied theory**

Functional theory is a theory that studies and analyzes issues related to the functioning of institutions or legal norms or customs that apply to the life of society, nation and state.<sup>18</sup> To see the functioning of a norm in society, this research uses the legal system theory (legal theorie) developed by W. Friedman, which includes: legal structure, legal substance and legal culture.<sup>19</sup>

Based on the legal system theory proposed by Lawrence M. Friedman, it can be seen that in the legal system there are sub-legal systems as a single unit that interact with each other. A legal system in its actual operation is a complex organism in which structure, substance, and culture interact. The legal sub-system in this case is the legal substance, legal structure, and legal culture. These three sub-systems determine whether a system can work or not.

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<sup>15</sup> Pontang Moerad, 2005, *Formation of Laws through Judicial Decisions in Criminal Cases*, Bandung: Alumni, p.120.

<sup>16</sup> *Ibid*, h.120.

<sup>17</sup> Achmad Ali, *Op.cit.*, h. 86.

<sup>18</sup> Salim HS, dan Erlies Septiana Nurbani, *Op.cit.*, h. 2.

<sup>19</sup> Soerjono Soekanto, 2010, *Factors That Influence Law Enforcement*, Jakarta: Rajawali Pers, h. 59.

## 5. Theory of the Criminal Justice System

The criminal justice system is essentially a criminal law enforcement process. Therefore it is very closely related to criminal law itself, both substantive law and criminal procedure law, because criminal law is basically an enforcement of criminal law "in abstracto" which will be realized in law enforcement "in concreto".<sup>20</sup>

The implementation of the criminal justice system (criminal justice system) there are various theories that are used, some are using a dichotomy approach and or trichotomy approach. The dichotomy approach is commonly used by criminal law theorists in the United States. Herbert Packer, a legal expert from Stanford University, uses a normative approach that is oriented towards practical values in implementing the criminal justice process mechanism.

There are two models in the dichotomy approach. First, crime control model, eradication of crime is the most important function and must be realized from a criminal justice process, so that the main concern must be directed to the efficiency of the criminal justice process. An important emphasis on this model is effectiveness, namely speed and certainty. Proof of the suspect's error has been obtained in the examination process by police officers. Presumption of guilty is used to speed up the processing of suspects or defendants in court. The values that underlie the crime control model are repressive actions against a criminal act which is the most important function of a judicial process.<sup>21</sup>

The second approach used in the criminal justice system is the due process model, this model emphasizes all the factual findings of a case, which must be obtained through formal procedures established by law. Each procedure is important and should not be ignored, through a stringent examination stage starting from the investigation, arrest, detention and trial and there is a reaction for each stage of the examination, it can be expected that a suspect who is obviously innocent will be able to obtain freedom from accusations commit crime.<sup>22</sup>

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<sup>20</sup> Romli Atmasasmita, *Op.cit*, h. 19.

<sup>21</sup>Tholib Efendi, 2010, *Criminal Justice System, Comparison of Components and Processes of Criminal Justice Systems in Several Countries*, Yogyakarta: Pustaka Yustisia, h. 21.

<sup>22</sup>Heri Tahir, 2010, *Fair Legal Process in the Criminal Justice System in Indonesia*, Yogyakarta: Laskbang Pressindo, h. 24.

## **E. Framework for Thinking**

The concept of legal aid seen from the social reality in the community, can be distinguished in 3 (three) concepts, which include:

1. The concept of traditional legal aid is legal services provided to the poor individually. The nature of legal aid is passive and the way the approach is very formal-legal. This concept also means seeing all the legal problems of the poor solely from the point of applicable law, which is called the normative concept. The orientation in this concept is to uphold justice for the poor according to the applicable law, which is based on the spirit to gain influence in society. This concept is basically the provision of legal assistance to the poor who are unable to resolve disputes in court.
2. The concept of constitutional legal aid is legal assistance for the poor carried out within the framework of broader endeavors and objectives such as: awareness of the rights of the poor as legal subjects, enforcement and development of human rights values as the main joint for upholding state law. The nature and type of legal aid in this concept are more active, meaning that legal aid is given to community groups collectively.
3. The concept of structural legal aid is an activity aimed at creating conditions for the realization of the law which is able to change the unequal structure towards a more equitable structure, where the rule of law and its implementation can guarantee equality both in the legal or political field. The concept of structural legal aid is closely related to structural poverty. All activities of providing legal assistance in this concept are solely to defend the interests of the community or the legal rights of people who are unable to process justice.<sup>23</sup>

The concept of legal aid is divided into 3 (three) forms, traditional legal aid, constitutional legal aid and the concept of structural legal aid, and the three concepts of legal aid have been and are also being practiced in Indonesia. Therefore, in building a legal aid system in Indonesia, the three concepts of legal aid need to be combined, giving rise to an integrative legal aid concept.

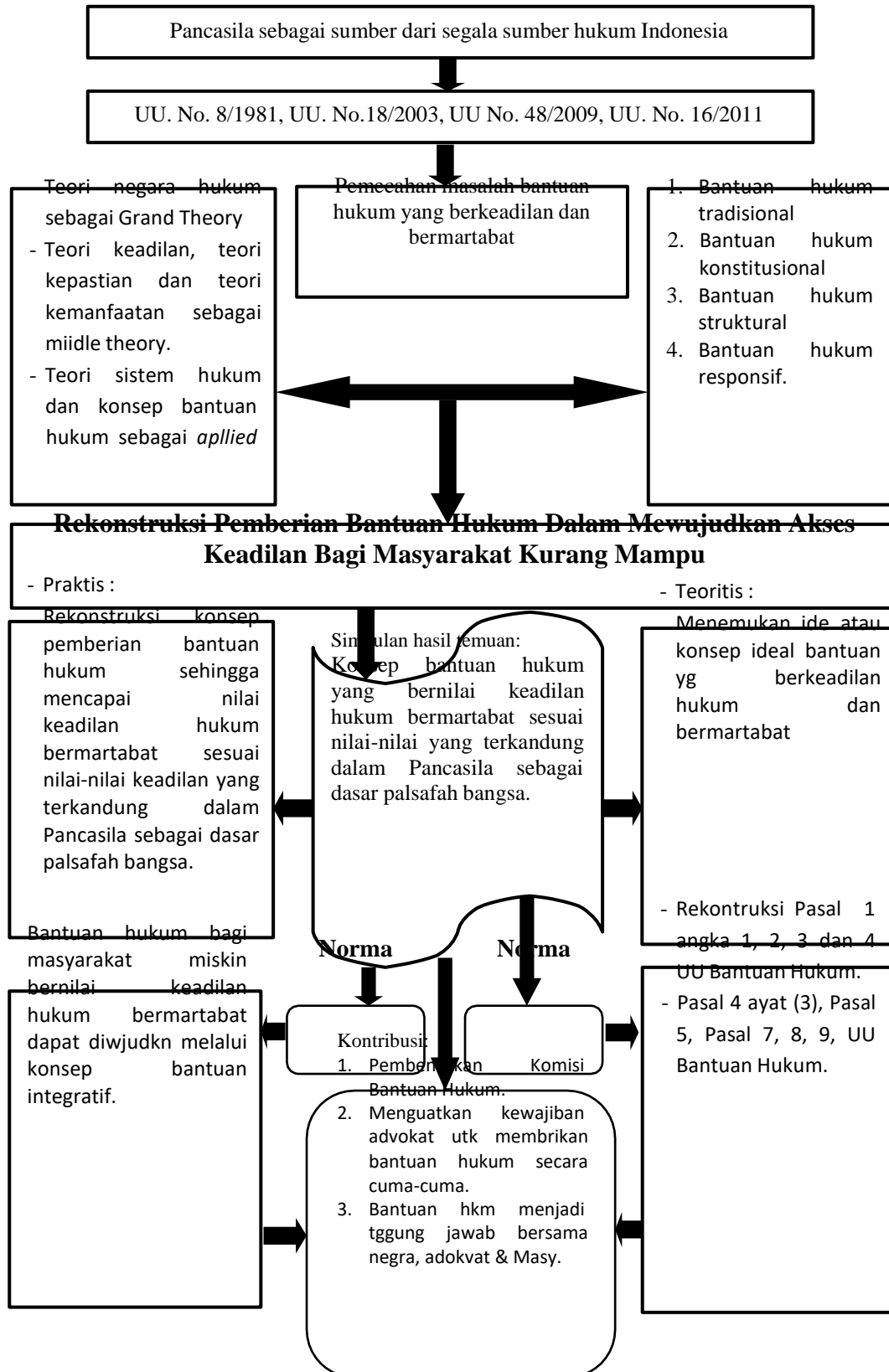
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<sup>23</sup> *Ibid.*, h. 251.



Based on the description above, the conceptual framework of this dissertation research can be concluded in the following scheme:

**Skema. 2**  
**Kerangka Pemikiran**



## **F. Research Methods**

### **1. Research Paradigm**

Promovendus in this study uses the constructivism paradigm. The operational of the constructivism paradigm in this study aims to obtain material and empirical data. Ontologically, the flow of this research paradigm states that reality exists in the form of mental constructions that are based on social experience, are local and specific in nature, and depend on the parties doing it.

### **2. Type of Research**

In accordance with the objectives of this study, the research is a combination of normative legal research with empirical research. Normative legal research is research that is focused on examining the application of rules or norms in positive law.<sup>24</sup>

### **3. Approach Methods.**

In this study several approaches are used, namely the statutory and regulatory approaches, a conceptual approach. This approach moves from the views and doctrines that develop in the science of law. This approach is important because understanding the views/doctrines that develop in the science of law can be a platform for building legal arguments when resolving the legal issues at hand. This view/doctrine will clarify ideas by providing legal understandings, legal concepts, and legal principles that are relevant to the issues examined in this dissertation.

### **4. Research Data Sources**

The data in this study were sourced from primary data and secondary data. According to Soerjono Soekanto and Sri Mamuji, primary data sources were obtained through field research results in the form of information related to the subject matter.<sup>25</sup> Primary data is data sourced from field research, namely data obtained directly from the first source in the field, both from respondents and from informants. Secondary data consists of primary legal materials, secondary legal materials, and tertiary legal materials.

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<sup>24</sup> Johnny Ibrahim. 2006. *Theory and Methodology of Normative Legal Research*, Malang: Bayumedia Publishing, h. 295

<sup>25</sup> *Ibid*, h.13

Secondary data is data sourced from library research that is data obtained not directly from the first source, but sourced from data that has been documented in the form of legal materials, namely primary legal materials, secondary legal materials, and tertiary legal materials.<sup>26</sup>

## **5. Data Collection Techniques**

Data collection techniques used in this dissertation research include: study documentation and interviews. The document study according to Sugiyono is a record of events that have already passed. Documents can take the form of writings, drawings, or monumental works of a person. Documents in the form of writing such as diaries, life history (life histories), stories, biographies, regulations, policies.<sup>27</sup> In addition to library/document study, this research is also supported by interview results. Interview according to Sugiyono is a meeting of two or more people to exchange information and ideas through questions and answers, so that it can be constructed of meaning in studying or analyzing a particular topic.<sup>28</sup>

## **6. Data Analysis**

Data analysis in this study used qualitative data analysis. The process of data analysis in this study includes several stages, namely: Data analysis; Data reduction; Presentation of data; Data interpretation and conclusion drawing / verification.

## **G. Tinjauan Pustaka**

### **1. History of Legal Aid in Indonesia**

Legal aid as a legal institution known today is a new item in Indonesia. Legal aid is not known in the traditional legal system. Legal assistance has only been recognized in Indonesia since the entry or enactment of the Western legal system in Indonesia. It began in 1848 when the Netherlands experienced major changes in its legal history. Based on the principle of concordance, then with the word of the King on May 16, 1848 No.1, the new legislation in the Netherlands also applies to Indonesia, including regulations on the composition of the

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<sup>26</sup> Amiruddin dan Zainal Asikin. 2014. *Introduction to Legal Research Methods*. Jakarta: RajaGrafindo Persada, h. 28.

<sup>27</sup> Sugiyono, *Quantitative, Qualitative, and R&D Research Methods*, Alfabeta, Bandung, 2013, h. 240.

<sup>28</sup> *Ibid.*

Judiciary and Court Policy (Reglement op de Rechterlijke Organisatie en bet beleid der Justitie) which is commonly abbreviated as RO.<sup>29</sup>

After independence, Indonesia only began to recognize "legal aid" as a legal institution when Indonesia began to apply western law that began in 1848 when there was a major change in the history of the Netherlands in the Netherlands. New laws in the Netherlands were also applied to Indonesia, including regulations on the Judicial Arrangement and Judicial Policy (Reglement op de rechterlijke Organisatie et het beleid der justitie) commonly known by the abbreviation R.O (Stb, 1847-23 jo 1848-58).<sup>30</sup>

Legal aid during the independence era was still carried out by lawyers and procureurs. The implementation of legal aid remains based on H.I.R. still not well organized, in the sense that it is not yet in the form of a special institution for that, there are only social organizations such as "Tjandra Naya" in Jakarta and state law faculties, and law consulting agencies in a simple form. Legal assistance at this time, is very limited, which is only given to descendants, Group clients, or limited to providing legal advice and legal consultation.

The reform movement has opened a massive faucet of democracy. The demands for a more democratic life have toppled the authoritarian regime in the new order. After the reformation of the demands of the community for fair law enforcement is the main agenda that must be implemented immediately. In the reformation era, the life of the state is more democratic, so that in this era the Indonesian state really wants to make a fundamental change in the arrangement of the life of the nation and state.

The fundamental change in the reform era is the amendment to the 1945 Constitution of the Republic of Indonesia. The change is based on the consideration that the 1945 Constitution of the Republic of Indonesia is no longer in accordance with the demands of the people who want a more democratic national and state life. One of the fundamental changes in the reform era is the return of state sovereignty to the people, where the sovereignty of the people is represented in the rule of law. This is precisely what underlies the amendment to

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<sup>29</sup>Adnan Buyung Nasution, *Op.cit.*, h. 23.

<sup>30</sup> Paul S. Baut, 1980, *Legal Aid in Developing Countries*, Jakarta: Yayasan Lembaga Bantuan Hukum Indonesia, h. 7.

the 1945 Constitution of the Republic of Indonesia, these changes can be seen in Article 1 Paragraph (3) of the 1945 Constitution which states that the Indonesian state is based on law.

The state of Indonesia as a state of law contained in Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia, has consequences for the implementation of the government system, particularly in the law enforcement policy (rule of law) which is the main agenda of the reform movement. However, the reform movement which wishes to restore the rule of law and uphold the values of justice, does not have a major effect on the implementation of legal aid and is inversely proportional to the demands of society to gain access to justice and justice.

After the reforms, new communities have emerged in the midst of society, such as workers, farmers, fishermen, urban poor communities, where each of them organizes themselves to get demands for justice. The existence of a new community in that community is based on the common interests and goals of each community, which ultimately encourages the emergence of inter-community law firms. The labor community, for example, creates its own labor struggle institutions and in it stands legal bureaus which are laborers' efforts to obtain legal protection. The same thing happened and was done by other communities.<sup>31</sup>

Reforms indirectly led to a revolution in legal aid in Indonesia. For a long time the group of legal aid service providers who were originally incorporated in the Peradin organization exiled themselves and made small groups in an association of legal service providers. Some associations that are a forum for legal aid providers such as: Ikadin, AAI, IPHI, SPI, AKHI, HAPI encourage the birth of the Advocate Law. In 2003, with the advent of the Advocate Law, then advocating the return of advocates to a single association association such as the 1960s.<sup>32</sup>

After the birth of the Advocate Law, the association of lawyers/legal counsel then merged into one under the auspices of the Indonesian Advocates Association (PERADI). The merger of 7 (seven) legal advisory/advocate

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<sup>31</sup> Adi Mansar dan Ihkwaluddin Simatupang. 2005. *Indonesian Criminal Procedure Law in the Advocate and Legal Aid Perspective*. Medan : Jabal Rahmat, h. 28.

<sup>32</sup> *Ibid*, h. 29

associations into PERADI, is a concrete step towards the progress of legal aid in Indonesia.

This progress is not only seen in the action of legal aid activities, but also in the advancement of the administrative system of advocates both organically and the existing legal aid offices. However, lately the advocate's association has again been divided into several organizations that have begun the re-establishment of a new association known as the Indonesian Advocates Congress (KAI). Since then, the advocate association has again split into several organizations (multi baar).

Post-reformation has also changed the new order in the field of justice with the emergence of several special courts, such as the Commercial Court, Human Rights, PHI and others. As a result, the need for legal assistance has increased and demanded that legal aid providers must have more specialized expertise in accordance with the existing court. In the labor sector, for example, legal assistance can be provided by labor organizations such as: SPSI, KASBI, and others.

## **2. History of Advocates and Legal Aid**

Understanding the existence of the Indonesian advocate profession, is inseparable from the history of the birth of the advocate profession in Indonesia. The birth of the advocate profession began in the Dutch colonial era in Indonesia. The Dutch government is a milestone of "the mother" (the Dutch colonial government) which gave birth to the forerunner to the Indonesian Advocate. However, at that time, the presence of the advocate profession could not grow and develop due to the lack of attention of the mother who gave birth to it, so the condition of the advocate profession at that time was like a child who was just born, but abandoned by his mother.

The Dutch colonial government's policy of opening a law school in Batavia was the first step towards the emergence of native Indonesian advocates (native advocates). The idea of opening a law school in Batavia when it was rejected by Dutch legal experts, many feared that the dignity of the law would be tainted with the presence of native people.

When the Dutch colonial government opened legal education (*rechtschool*)<sup>33</sup> in Batavia in 1909, the opportunity was later exploited and most of it fell on the Javanese *priyayi*. Because legal education is seen as preparation to become a government employee, therefore only high-class *priyayi* boys such as: *Bupati*, are encouraged to study law. However, once the opportunity to obtain legal education opened up, a number of lowly *priyayi* families also took advantage of the opportunity.

Initially, graduates of legal education from the "native" class were prepared by the Dutch colonial government to occupy positions in government. So that 80-90% of Indonesian nation's legal education graduates receive positions in government. In other words, the thought of being an advocate is not something that has ever been thought of and imagined before. According to one of the first-class advocates, Mr. Iskaq Cokroadisuryo:

He left Java with the strong intention of returning home to become a Judge. However, in the Netherlands it was an experience that had a profound effect on it. He in the Netherlands gained self-respect. In Java the Javanese were looked down upon, especially according to the Dutch. In the Netherlands, Javanese are valued by humans. He learned to respect himself, and began to understand that he could no longer work for the government.<sup>34</sup>

A more free atmosphere in the Netherlands gave attention to work as advocates among the earliest Indonesian law students. No less than 16 of the first students to get a degree in Leiden's law faculty at that time chose to become an advocate after his ticket to Indonesia. This is also what underlies Iskaq's thinking, that working as an advocate is the right choice rather than having to work as a government employee.

The development of Indonesian native advocates is inseparable from the role and influence of Mr. Besar Martokoesoemo, who started his advocate career by establishing an office in Tegal. Even though it's hard, it's like breaking ice and even though the water feels cold, Mr. Great is able to develop advocate practices successfully. Mr. Step This major was followed by Iskaq, born in 1986 in the city

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<sup>33</sup> *Rechtschool* is a secondary school, where students enter their mid-teens to attend six years of education. The lessons are given in Dutch, which means that the sons of the *Priyayi* family are the ones who follow. Look, Daniel. S. Lev., ... *Continuity and Change* ..., *Op.cit.*, P. 305.

<sup>34</sup> Daniel. S. Lev., ... *Sustainability and Change*..., *Op.cit.*, h. 310-311.

of Surabaya. The desire to cultivate advocacy practices also emerged from Sumatran law graduates. Sumatra's social trading environment does not prevent children of the aristocracy or middle class children from becoming advocates. Eventually all Sumatran and non-Javanese who want to study law must go to Batavia or the Netherlands. One of the scholars from Sumatra who at that time attended education in Batavia was Muhammad Yamin. Then Muhammad Yamin grew to become a prominent nationalist scholar and ideological thinker in Indonesia.<sup>35</sup>

The professionalism of Indonesian advocates needs to be listened to in order to better understand the role of advocates in Indonesia's modern history. Indonesian advocates, although at that time still as a small group, they had great influence in the revolution and especially during the parliamentary period (1950-1957) which more or less became a golden age for Indonesian advocates, and when this system collapsed, the advocates disappeared. with him. During the Guided Democracy (Soekarno) advocates existed only politically, while in the professional aspect they were very depressed.<sup>36</sup>

In the new order period there began to shed some light on the function of advocates by the issuance and enactment of Law Number 14 of 1970 concerning the Principles of Judicial Power, which has now been replaced with Law Number 48 of 2009 concerning Judicial Power. The enactment of the Judiciary Law opens wider doors for advocates to enter the judicial power system.

Article 35 to Article 37 of the Principal Judicial Power Law stipulates that any person who is engaged in legal assistance. especially in criminal cases, a suspect from the moment of arrest and / or detention has the right to contact and ask for legal counsel.

Provisions of Articles 35 to 38 of Law No. 14 of 1970 concerning the Principal of the Judiciary which saved the arrangements of "Legal Counselor" and "Providing Legal Aid" then became the basis of the struggle of Indonesian advocates to demand that the government make special regulations governing his profession (Advocate Law).

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<sup>35</sup> *Ibid*, h. 321.

<sup>36</sup> *Ibid*, h. 327.



At the second Peradin congress in 1969, the Central Java Peradin began introducing the Advocate Profession Bill. However, the advocate efforts incorporated in the advocacy organization (Peradin) were not entirely successful. Because the House of Representatives at that time did not visit the Advocate Profession Bill that was carried out by the Peradin. However, some legal aid material was introduced in the Criminal Procedure Code.

The Advocate Law was only formed after the fall of the new order and then the Indonesian state at that time entered the reform era with a more democratic life. No less than 5 years of the fall of the new order, which is around 2003, the government and the Parliament succeeded in formulating the Advocate Law, with the enactment of Law No. 18 of 2003 concerning Advocates. The passing of the Advocate Law is the state's legitimacy of the position of advocates in the justice system in Indonesia.

The legitimacy of advocates in the Indonesian justice system is that advocates are placed on equal footing with law enforcement. In accordance with the provisions of Article 5 Paragraph (1) of the Advocate Law which states: "Advocates are law enforcers, free and independent who are guaranteed by laws and regulations."

### **3. LBH and Legal Aid Movement in Indonesia**

The formation of advocate unity in Indonesia which is incorporated in the Peradin is the first step for Indonesian advocates to unite themselves in a professional association, by formulating the Articles of Association, Domestic Regulations, Code of Ethics, and provisions for the settlement of advocacy code of ethics.<sup>37</sup> With regard to providing legal assistance, as a realization of the provisions of Article 6 sub e of the Articles of Association of the Judiciary, concerning legal aid for those who are unable, the Peradin based on Decree of October 26, 1970 No. 001/Kep/DPP/10/1970 formed a Legal Aid Institution or public defense institution more commonly called LBH.

Peradi's big project at the time was the formation of the Jakarta Legal Aid Foundation led by Adnan Buyung Nasution, the Jakarta Legal Aid Foundation,

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<sup>37</sup> *Ibid*, h. 32.

which was established in 1970. Adnan Buyung Nasution stated that the legal aid program in Indonesia was institutionalized and with a broad scope had only begun since the establishment of the Legal Aid Institute in Jakarta on October 28, 1970.<sup>38</sup> Therefore, it can be said that LBH has an important role in providing legal assistance to the poor, and the establishment of LBH was a major project initiated by Adnan Buyung in the early establishment of LBH Jakarta.

Legal aid is a right for a person or group of poor people who have been legitimized in both national and international instruments. National instruments and international instruments governing legal aid have given legitimacy and recognition and guarantee of legal aid rights better than in previous periods.

#### **4. Development of the Concept of Legal Aid in Indonesia**

The concept of legal aid in Indonesia has a long history, starting with the concept of traditional legal aid that is individualized, which then shifts to the concept of constitutional legal assistance to the idea of structural legal aid that was sparked by Adnan Buyung Nasution and friends through the legal aid movement implemented by YLBHI.

Each legal aid concept has a different motivation and model in providing legal assistance to the poor. In its development, the concept of legal aid is always associated with the ideals of the welfare state.

In Indonesia, there are three concepts of legal aid that have been in effect and to date the three concepts of legal aid are still applied simultaneously in the implementation of providing legal aid to the poor, namely: The concept of individual legal aid, constitutional and structural legal aid. Yesmil Anwar and Adang, explained the differences of the three legal aid concepts, as follows:<sup>39</sup>

1. Traditional Legal Aid Concepts, are legal services provided to poor people individually, the nature of passive legal aid and the very formal approach. This concept also means in seeing all the 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 problem for the poor solely from the perspective of the applicable law. This concept is an old

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<sup>38</sup>*Ibid*, h. 36.

<sup>39</sup>Yesril Anwar, 2009, *Op.cit.*, h. 250-251.

concept, which emphasizes cases which according to the law must get a defense.

2. The concept of Constitutional Legal Aid, is legal assistance for the poor carried out within the framework of broader endeavors and objectives such as: awareness of the rights of the poor as legal subjects, enforcement and development of human rights values as the main joint for the rule of law. the nature and type of legal aid is more active, meaning that legal aid is given to community groups collectively.
3. The concept of Structural Legal Aid, is an activity that aims to create conditions for the realization of the law that is able to change the unequal structure towards a more equitable structure, where the rule of law and its implementation can guarantee equality both in the legal or political field. The concept of structural legal aid is closely related to structural poverty.

In its development, Frans Hendra Winata tried to offer a new concept of legal aid, which is different from the concept of legal aid that already exists and has been applied in Indonesia. The idea or concept of legal aid that was sparked by Frans Winata is the concept of responsive assistance.

According to Frans Hendra Winarta, responsive legal assistance is provided to the poor for free and covers all fields of law and human rights and without differentiating the defense of both individual and collective cases. Services provided in responsive legal assistance in the form of legal counseling on human rights and legal processes are the right to be defended by legal aid organizations and/or advocates, defense in dealing with concrete legal problems, quality defense in the courts to produce clearer, more precise jurisprudence and true, legal reform through court decisions that favor the truth and the formation of laws that are in accordance with the existing system of values and culture in society to succeed the concept of legal aid must become a national movement supported by the state and society.<sup>40</sup>

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<sup>40</sup>Frans Hendra Winata. *Op.cit*, h. 7.

## H. Research Results and Discussion

### 1. The Nature of the Implementation of Legal Aid for Underprivileged Communities

Fair trial records, determine that to realize a fair and impartial trial, the following conditions must be met:<sup>41</sup>

- a. Implementation of fast and certain or "quick" and "certain enforcement" in examining a case.
- b. Accommodate the values of a sense of justice that lives in the community.
- c. The protection of the rights of suspects / defendants is in accordance with human rights conventions.

The Criminal Procedure Code as a provision of criminal procedure law in Indonesia and as a guideline in the implementation of criminal justice turns out to have accommodated the principles of due process law and fair trial in accordance with the requirements of the tenth UN Congress on Prevention of Crime and the Treatment of Offenders held in Vienna April 10-17, 2000.

The presence of the Criminal Procedure Code which rejects the inquisitorial system and is more pro to the acquisitiveness system, has indirectly introduced the Criminal Procedure Code to the principle of due process. In other words, the principle of due process more or less has obtained juridical legitimacy which is mandatory (imperative). The requirements in a fair legal process and the judiciary do not take sides in the Criminal Procedure Code are accommodated in the criminal justice legal principles.

The principles contained in the Criminal Procedure Code are efforts to regulate the protection of the dignity of human dignity. Therefore, in the implementation of the criminal justice process, the Criminal Procedure Code determines several legal principles that must be upheld by every law enforcement institution incorporated in the criminal justice system. The principles contained in the Criminal Procedure Code include:<sup>42</sup>

- a. The principle of justice is carried out "for the sake of justice based on a Godhead";

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<sup>41</sup>Lawyer Committe For Human Right, 1997, *Fair Trial (prinsip-prinsip Peradilan yang adil dan tidak memihak)*, Jakarta: YLBHI, h. xii.

<sup>42</sup>Andi Sofyan dan Abd. Azis, 2010, *Criminal Procedure Law An Introduction*, Jakarta: Prenada Kencana Media Group, h. 16

- b. The principle of equality before the law
- c. Principle of legality;
- d. The principle of premature is innocent;
- e. The principle of justice is fast, simple, and low cost;
- f. The principle of obtaining legal assistance to the maximum extent;
- g. The principle of examination is open to the public;
- h. The principle of reading decisions in a hearing is open to the public;
- i. The principle of direct and oral examination of judges.
- j. The principle of the decision must be accompanied by reasons, meaning that each court decision, in addition to having to contain the reasons and grounds for the decision, also contains specific articles and legislation that are used as the basis for hearing.

If examined carefully, the substance contained in the Criminal Procedure Code in general has guaranteed the rights of the suspect/defendant. The protection and guarantee of the rights of the suspect or the defendant can be seen in several articles that regulate the rights of the suspect/defendant such as: the principles of equality before the law, contained in general explanation in item 3, the right to be immediately examined, submitted go to court and be tried (Article 50 Paragraphs 1, 2 and 3), the right to get legal assistance for the suspect/defendant (Article 54), the right to be notified by law enforcement officials about the allegations directed at him (Article 51), the right to give freely (Article 52), as well as the principle of presumption of innocence contained in general explanation of item 3c of the Criminal Procedure Code.

Considering that not every person is economically capable to use lawyers/legal advisors in obtaining legal assistance, Article 56 Paragraph (1) of the Criminal Procedure Code, determines for those who are unable to pay legal counsel to assist them, in the case they commit a criminal act which is threatened with the threat of capital punishment or threatened 5 (five) years or more, then officials of all levels of examination in the judicial process are required to appoint legal counsel for them.

The existence of legal advisors (advocates) in providing legal assistance to suspects/defendants, starting from the investigation stage to the trial before the trial is expected to be a fair legal process for suspects, both those who are classified as able or underprivileged or those who do not understand the law. In addition, legal assistance provided by advocates/lawyers will open opportunities

and confidence in suspects /defendants, especially those classified as economically disadvantaged to defend themselves before the trial.

The presence of lawyers/lawyers to provide legal assistance to the poor in criminal justice processes is urgently needed. Legal assistance provided by lawyers can be a control over the implementation of the rights of suspects/defendants. The existence of legal assistance provided by advocates aims to ensure that the criminal justice process is in accordance with the principles of due process law, which will ultimately create an impartial justice principle.

Based on the description above, it can be said that legal assistance is a right owned by the suspect and the defendant in the interests of his defense which serves to ensure the fulfillment of the rights owned by the suspect and the defendant in criminal justice. Through the provision of legal assistance, the ongoing legal process will reflect due process (due process of law) and fair and impartial trials (fair trial). In order to become that criminal justice as a process of determining the truth of a suspicion, then the entire judicial process must be based on due process.

Historically advocates are one of the oldest professions. In its journey, this profession was even named as *nobile officium*, a noble position. However, it is important to remember that advocates are not the only law enforcement institutions that are considered noble, each law enforcement institution basically holds a noble or honorable predicate. The court institution is given the honor of being a noble institution, because of the task of judging autonomously and impartially so that truth and justice are found. Whereas advocate institutions are given the honor of being *officium nobile* (noble profession), because their job is to help "the weak" and seek or ensure a fair legal process.<sup>43</sup>

The position of an advocate as a noble profession must be maintained by every advocate/lawyer. In the context of *officium nobile* advocates are those among the primaries (*primus inter pares*), not those among the bad, therefore the main value that must be held is honorable life (*honeste vivere*).<sup>44</sup>

Each of the honorary predicates demands different responsibilities. Advocates in their position as law enforcers are not only responsible for assisting

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<sup>43</sup> Theordorus Yosep Parera, *Op.cit.*, h. 122.

<sup>44</sup> *Ibid*, h. 132

clients, but at the same time advocates must also take positions as control or correction functions for other law enforcement partners. The advocate's function as a means of control or correction for other law enforcement partners is to avoid the occurrence of misleading or arbitrariness in the ongoing legal process.

Advocate profession as a noble profession (*officium nobile*), requires the holder of the profession to act according to the demands of his profession. The phrase also contains the obligation to do the honorable, generous and responsible, and this is only owned by those who are noble. The demand for the honor of the advocate profession causes the behavior of an advocate to be honest and highly moral in order to gain public trust. In accordance with the opinion expressed by Artijo Alkotsar, that:

Advocates carry out the task of upholding justice and increasing human dignity so that the work of advocates is said to be *officium nobile*, a noble work. As an elegant profession, advocates are required to be able to work in a professional manner, bound by professional ethics and scientific standard responsibilities. The image of an advocate as a graceful profession will be determined by the professional ethos in the sense of the extent to which the advocate community is able to apply ethical standards and professional technical skills.<sup>45</sup>

The professional advocate as *officium nobile* has the responsibility to provide legal assistance to all members of the community, especially for the poor. This responsibility is no longer in the form of moral responsibility, but has become a legal responsibility that must be carried out by every advocate in carrying out his profession. The legal responsibility of lawyers in providing legal assistance to the poor, is clearly and unequivocally regulated in Article 22 Paragraph (1) of the Advocate Law, free legal assistance must be given by advocates to justice seekers who are unable.

One of the many problems faced by people in Indonesia is access to justice (access to justice), especially for those who are in trouble with the law. Access to justice is one of the dimensions of poverty, where access to justice for the poor is very minimal. Although the state in legal matters has determined that a due process of law must be created as a legal principle in criminal justice, but the

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<sup>45</sup>Alkotsar, Artidjo, 2010, *The Role and Challenges of Advocates in the Globalization Period*. Yogyakarta: FH UII Press, h. 151.

practice of realizing it is not as easy as saying it and as simple as that in the legal principle.

The right to obtain access to justice is a consequence of the state of Indonesia as a state of law followed by another statement that every citizen has an equal position before the law (the principle of equality before the law) contained in Article 27 Paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Through this principle, the state must not discriminate for any reason from any person or citizen. This principle is easy to learn, discuss or study academically, but not easy in practice.

To overcome the problem of the difficulty of accessing justice by the poor, comprehensive efforts need to be made so that the poor can get as much access to justice as possible. Access to justice has broader dimensions, that is not only interpreted as fulfilling one's access to justice or legal representation, but must provide a guarantee that the law and its final outcome are fair, and fair.<sup>46</sup>

Adnan Buyung Nasution provides three main points of access to justice, namely, the right to use and/or benefit from the law and the justice system to obtain material justice and truth, guarantees and availability of systems and means of fulfilling rights (law) for the poor, and methods or procedures that can expand access to justice for the poor.<sup>47</sup>

Legal aid is an instrument that opens the gates into justice channels by providing legal assistance to the poor. The legal aid program organized by the state is a manifestation of the principle of the rule of law based on the constitution (UUD RI 1945) in which it recognizes and guarantees basic rights (HAM) for each citizen.

The history of legal aid shows that legal aid initially began with the charity of a group of church elites towards their followers. This philanthropic relationship also existed with traditional leaders with the surrounding population at that time. The definition of legal aid here is not so clear that there is an impression, legal aid is interpreted as assistance in all matters, social economy, religion and customs.<sup>48</sup>

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<sup>46</sup>Ellin Yunita, *Legal Justice for the poor*, <https://www.viva.co.id>, acces at date 21 November 2018. Pukul. 21. 30 Wib.

<sup>47</sup>Adnan Buyung Nasution. *Op.cit.*, h. 81.

<sup>48</sup>Todung Mulya Lubis, 1983, *Legal Aid and Structural Poverty*, Jakarta: LP3ES, h. 2.



Todung Mulya Lubis stated that the legal aid movement in Indonesia is no longer a matter of generosity, but a person's right and a very important ideological demand for an assumption of equality before the law of all citizens.<sup>49</sup>

The right to legal assistance is a fundamental or fundamental right for someone who is affected by a legal problem. Because getting legal assistance is a form of access to justice for those who are or are dealing with legal issues.

Legal aid is an expression of equality before the law. The principle of equality before the law has been contained in article 28D Paragraph (1) of the 1945 Constitution, namely that every person has the right to recognition, guarantee, protection, and legal certainty that is fair and equal treatment before the law.

Based on the above provisions, it can be understood that substantively guaranteeing access to justice through legal assistance is the mandate and constitutional order. Legal aid, which is seen as one of the basic human rights, must be given free of charge, such as the right to life, the right to work, the right to health, the right to think and think, all of these rights. must be guaranteed by the state to be carried out properly. The nature of legal aid for the poor in the criminal justice system is an effort to realize the balance of the position of the suspect/defendant and investigators and public prosecutors.

The existence of legal assistance, the suspect/defendant has more confidence and ability to defend themselves. In addition, legal aid is a requirement for realizing a fair legal process (due process law) and an impartial trial (fair trial), so that in law enforcement in criminal justice is really done to find the truth that ultimately the creation of legal justice.

Legal aid is basically not compassion, but a basic right guaranteed by the constitution which is the responsibility of the state and must be obtained for every citizen, especially those who come from the poor (poor).

## **2. Barriers to the Implementation of Providing Legal Aid in Achieving Access to Justice for the Poor**

The inhibiting factors for the implementation of legal aid for poor people or groups in criminal cases in North Sumatra Province, if examined from the legal

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<sup>49</sup>*Ibid.*, h. vx.

system theory from Lawrence M. Friedman and the concept of factors that influence the rule of law from Soerjono Soekanto, with reference to the results the research obtained can be classified and divided into 3 (three) factors namely, legal substance, legal structure, and legal culture.

**a. Legal Substance Factor**

The issuance of the Legal Aid Law is a major change in the administration of the state in the field of legal aid. However, it must be admitted that it is indeed difficult to present an effective legal aid sector legislation system, this is because there are a number of regulations governing legal aid, besides that not all conditions have been regulated in technical legislation as regulated in the Law Invite Legal Aid and its derivatives.<sup>50</sup> This is where the problem then arises in the level of practice, where the legal substance governing legal aid is still confusing.

Legal substance factors in this case include statutory regulations. Article 1 number 2 of the Law of the Republic of Indonesia Number 12 of 2011 concerning the Formation of Regulations of Laws states that legislation is a written regulation that contains generally binding legal norms and is formed or established by state institutions or authorized officials through established procedures in legislation.

Legislation is a written regulation that contains legal norms, which includes the type and hierarchy of the legislation as stipulated in Article 7 Paragraph (1) of the Republic of Indonesia Law No. 12 of 2011 concerning the Formation of Laws and Regulations.

The legal substance factor, described by Lawrence M. Friedman, can be seen that the legal substance is composed of regulations and provisions regarding how these institutions must behave, which in this case is in the form of laws and regulations. With regard to the substance of the law, Soerjono Soekanto limits this factor to the law. Law in the material sense is "written regulations that are generally accepted and made by the Central and Regional Authorities".

The substance of good laws and regulations should be compiled in a comprehensive and responsive manner. With regard to the substance of the law but the laws and regulations governing legal aid, it can be said that the legal substance regulating legal aid in the Legal Aid Law still contains many

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<sup>50</sup> Frans Hendra Winarta., *Op.cit.*, h. 2.

weaknesses and shortcomings, which certainly can hamper the implementation of legal assistance to the community, especially the public or poor people group.

Substantially, there has not been a synchronization of laws governing the provision of legal assistance. It can be seen from the contradiction between the substance contained in the Criminal Procedure Code and the Legal Aid Act, which can be seen from the requirements and mechanism for providing legal aid as stipulated in the Legal Aid Act. The Criminal Procedure Code requires the provision of legal assistance in terms of the length of criminal threats that will be given for acts committed by suspects. Meanwhile, the Law on Legal Aid requires that legal aid be only given to the community or groups of the poor.

According to Promovendus, the provision of legal aid in criminal cases should not be limited, especially restrictions based on economic status. Providing legal assistance to suspects/defendants is a necessity for the realization of a fair criminal trial. Thus, the recipients of legal aid aimed only at people or groups of poor people, need to be further expanded.

#### **b. Legal Structure Factors**

Soerjono Soekanto, revealed several things that became obstacles that were encountered in the application of the role that should be from law enforcement, perhaps originating from himself or from the environment. Obstacles that exist in law enforcement officials, which become obstacles in the effectiveness of law enforcement.

In terms of law enforcement officials, the factor that law enforcement affects the implementation of legal aid, especially in criminal cases is the lack of advocate's passion in providing free legal assistance for the poor (poor).

Based on the results of the study it was noted that out of 100 lawyers who are members of advocate organizations in the Indonesian Advocate Congress (DPD) DPD office spread across several districts of North Sumatra province, no less than 80% of them have never provided free legal assistance.

The low enthusiasm of advocates in providing legal aid for free (*pro bono publico*) is due to the absence of clear rules regarding the mechanism for providing free legal assistance that becomes the legal obligation of the advocate profession. In addition, legal sanctions against violations of lawyers' legal

obligations in providing free legal assistance are not explicit, so that many lawyers ignore these obligations.

In addition, another obstacle is the concentration of LBH in the district/city capital. This condition clearly impedes access to justice for the community, because there are still many rural communities who are unreached and touched by the legal aid program provided by the government through LBH/OBH which has been accredited. This is certainly a separate study that needs to be evaluated in developing future legal aid policies.

### **c. Legal Culture Factors**

The paradigm of thinking that develops in the community, namely the emergence of distrust of legal aid providers, particularly advocates in practice raises the attitude of the community's refusal to use legal aid rights, which of course is a separate obstacle in providing legal aid. This was stated by Director of PK-Persada LBH, Riswan Harahap, as follows:

In developing societies opinions that view legal aid or legal services as advocates are "luxury goods" and expensive, so that people are reluctant to use legal aid. The existence of this view is finally reduced to the conclusion that the existence of legal aid will further complicate the legal settlement process that is being faced.<sup>51</sup>

The statement above shows that public opinion or views that consider legal assistance or legal services as an "luxury" and expensive advocacy, as well as people's attitudes with a lack of understanding of the law especially the right to legal assistance can lead to pessimism and skepticism towards the implementation of aid the law itself, so this legal cultural factor can hamper the implementation of legal aid.

### **d. Community Factors**

The community is one of the factors that influence the implementation of legal aid. According to Soerjono Soekanto, "Law enforcement comes from the community, and aims to achieve peace in the community. Therefore, viewed from a certain angle, the community can influence the enforcement of the law."<sup>52</sup> Negative public views or opinions on the delivery of legal aid can indirectly

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<sup>51</sup> Interview with Riswan Siregar, chairman LBH Persada-PK, at the date of 22 Februari 2019, in the Office LBH Persada-PK Medan.

<sup>52</sup>Soerjono Soekanto, *Factor-Factor...*, *Op.cit.*, h. 48

influence the implementation of legal aid. As stated by Soerjono Soekanto as follows:

Of the many insights given to the law, there is a great tendency for the community to interpret the law and even identify it with the officers (in this case law enforcement as a person). One result is that the merits of the law are always linked to the pattern of law enforcement behavior, which in his opinion is a reflection of the law as a structure or process.<sup>53</sup>

Community factors that influence the implementation of legal aid in criminal cases, namely the emergence of pessimism, skepticism, and lack of trust in legal aid providers, especially to advocates who are part of legal aid providers.

An attitude of lack of trust in law enforcement officials, especially to advocates who incidentally are legal aid providers who are under the OBH become obstacles in providing legal aid. Some have basically started to understand and understand that legal assistance is a right that they must obtain, especially in the criminal justice process. Where legal assistance is a right owned by a suspect or defendant and must be given and guaranteed by law (KUHAP) guaranteed. In fact, some of the suspects or defendants undergoing criminal justice proceedings in the courts in North Sumatra, particularly in the city of Medan, have not yet fully obtained or used their rights.

### **3. Reconstruction of Providing Legal Aid to Underprivileged People Based on Justice Value**

The presence of the Law on Legal Aid must be able to bridge the human rights of citizens to gain access to justice, and the country's human rights obligation to realize the rights of citizens especially those who are economically incapable, through the provision of Legal Aid. So that the Law on Legal Aid is not only as a collection of words that form sentences, which have a caricative and symbolic meaning that is scattered in its articles.

In establishing a comprehensive and responsive and just national legal aid legal system, a reconstruction of the substance of the Legal Aid Law needs to be carried out. Some of the articles that need to be reconstructed concern the institutional structure of legal aid providers, regarding legal aid recipients, and the concept of legal aid.

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<sup>53</sup>*Ibid.*, h. 11.

Reconstructing legal aid organizers, it is necessary to reconstruct Article 1 number 4 of the Legal Aid Law, which states: "Ministers are ministers who carry out governmental affairs in the fields of law and human rights".

Amendments to Article 1 number 4 of the Legal Aid Law, after being reconstructed, are then formulated as follows: "The National Legal Aid Commission is a state institution that in carrying out its duties and authorities is independent and free from the influence of any power."

Furthermore, Article 6 paragraph (2) of the Legal Aid Law is formulated as follows: "Providing Legal Aid to Legal Aid Recipients is organized by the National Legal Aid Commission carried out by Legal Aid Providers." Article 6 Paragraph (3), the formation of a national legal aid commission is regulated further in Government Regulations ". Paragraph (4), the National Legal Aid Commission as referred to in paragraph (2) has the duty: ... "

To reconstruct the provisions of the Law regarding the Giver and Receiver of Legal Aid, it is necessary to reconstruct Article 1 numbers 3, 7, 8, and Article 9 of the Legal Aid Law.

Article 1 number 3 of the Legal Aid Law states: "Providers of Legal Aid are legal aid institutions or social organizations that provide Legal Aid services under this Law". The results of the reconstruction of Article 1 number 3 of the Law on Legal Aid, are then formulated as follows: "Providers of Legal Aid are Independent Advocates who provide free legal assistance and Public Advocates who are under the auspices of OBH or Social Organizations that provide Legal Aid services under the Law This."

Article 7 paragraph (1) of the Legal Aid Law, states:

- 1) To carry out the tasks referred to in Article 6 paragraph (3), the Minister is authorized:
  - a. supervise and ensure that the implementation of Legal Aid and the provision of Legal Aid are carried out in accordance with the principles and objectives set out in this Law; and
  - b. conduct verification and accreditation of legal aid institutions or social organizations to fulfill their eligibility as Legal Aid Providers based on this Law.
- 2) To carry out verification and accreditation as referred to in paragraph (1) letter b, the Minister forms a committee consisting of:
  - a. Ministry....
  - b. Academics

- c. Public figure; and
- d. Legal aid institutions/organizations.

After being reconstructed, Article 7 of the Legal Aid Law is formulated as follows:

- 1) To carry out their duties as referred to in Article 6 paragraph (3), the Legal Aid Commission is authorized:
  - a. supervise and ensure that the implementation of Legal Aid and the provision of Legal Aid are carried out in accordance with the principles and objectives set out in this Law; and
  - b. conduct verification and accreditation of legal aid institutions or social organizations to fulfill their eligibility as Legal Aid Providers based on this Law.
- 2) For verification and accreditation in paragraph (1) letter b, the Legal Aid Commission forms a committee consisting of:
  - a. Commission supervisory board
  - b. Academics
  - c. Advocate organization
  - d. Community leaders, and
  - e. Institutions or organizations that provide legal aid services.

Article 8 paragraphs (1) and (2), it is necessary to make changes, in paragraph (1) the implementation of providing legal assistance is carried out by Independent Advocates and Public Advocates under the auspices of OBH who have fulfilled the conditions specified in this law. Next, in paragraph (2) which regulates the requirements of legal aid providers, so it is formulated as follows:

- a. Prioritized for OBH in the form of a legal entity, and for OBH who are not yet a legal entity can still provide legal assistance with the terms and conditions stipulated further in the National Legal Aid Commission regulations.
- b. Accredited, and for OBH who have not been accredited can still provide legal assistance with the terms and conditions stipulated further in the National Legal Aid Commission regulations.
- c. Have a permanent office or secretariat;
- d. Has a caretaker;
- e. Has a legal aid program.

Article 9, after reconstructing is formulated as follows:

Legal Aid Organizations or Community Organizations under the Legal Aid Commission, have the right:

- a. Conduct retraining of lawyers, paralegals, lecturers and law students.
- b. Paralegal recruitment was carried out after the recruitment efforts of lawyers and law school students did not meet up to provide legal aid services.

- c. ...
- d. ...
- e. ...
- f. ...
- g. ...
- h. ...

The results of the reconstruction of Article 1 number 3, Article 7, 8, and Article 9 of the Legal Aid Law, the legal aid providers are distinguished between independent advocates and public advocates who are members of the Legal Aid Organization. The provision of legal assistance by advocates independently is not included in legal aid funded by the state, but rather as a form of carrying out the obligations of the advocate profession. So, in principle, legal assistance provided by Advocates is free, without any cost at all. Whereas legal aid services by Public Advocates under the auspices of OBH, are the implementation of legal aid held by the state, where all costs incurred in the implementation of legal aid are borne by the state.

Based on the reconstruction of legal aid arrangements that have been described above, a concept of legal aid that is more valuable and worthy of justice emerges, which is not only providing legal assistance to the poor, and limiting legal aid providers only to accredited OBHs, but a concept legal assistance involving all elements and elements of society to participate in providing legal assistance.

The results of the reconstruction of legal aid also encourage advocates to carry out their professional obligations to provide free legal assistance to poor communities. Therefore, legal assistance is not only the responsibility of the state in terms of being the constitutional rights of its citizens, but has become a shared responsibility to achieve a noble life of the ideals of Indonesian independence, namely to create a just and prosperous society.

The results of the legal aid reconstruction finally concluded that in the development of the national legal aid legal system, it was necessary to regulate the concept of legal aid that had been running, namely individual legal aid, constitutional legal aid, structural legal aid and the concept of responsive legal aid that was discussed by Frans Hendra Winata, into one legal aid concept that integrates all the legal aid concepts. From the results of the unification of the three



legal aid concepts, then Promovendus tried to formulate a new legal aid concept, namely the concept of integrative legal aid.

The concept of integrative legal aid is based on the consideration that all concepts of legal aid each have weaknesses and strengths. At the basis of these considerations, all of these concepts must be integrated, so that each concept of legal aid can cover each other's weaknesses.

The idea of integrative legal aid concept promovendus stated above is based on the following paradigm:

1. Legal aid starts from generosity or care for the underprivileged people which is manifested in the concept of traditional (individual) legal aid.
2. Legal aid is a constitutional right for every citizen that is the responsibility of the state, which is manifested in the concept of constitutional legal aid.
3. Legal aid is a shared responsibility, so it requires public legal awareness and the ability of the community to defend their rights, which is manifested in the concept of structural legal aid.
4. Legal aid must be present in concrete cases faced by the community, especially the poor and marginalized and vulnerable groups, such as women and children, which are manifested in the concept of responsive legal assistance.

Based on the above paradigm, it can be stressed that the concept of "integrative" legal aid is a concept that collaborates with existing legal aid concepts. Thus, the shortcomings of each of the existing legal aid concepts can be refined.

The concept of "integrative" legal aid is a very simple concept. Like the "integrative" theory put forward by Romli Atmasasmita who tried to combine the two existing theories, namely the theory of positivism with the theory of progressiveness put forward by Satjipto Rahardjo.

The concept of "integrative" legal aid can only be realized by organizing independent legal aid by a legal aid agency or commission. Where the advocate's role is more empowered by recruiting advocates as legal aid providers under the Legal Aid Commission in each provincial or district/city area and forming a channel for the legal aid commission structure to the villages. Thus, providing

legal assistance is not mere formality, but rather the fulfillment of the substantive justice expected by justice seekers by providing quality and fair legal aid services.

## **I. Conclusions and Suggestions**

1. The nature of the implementation of legal aid for disadvantaged people is a constitutional right guaranteed by the constitution. In criminal law enforcement, legal aid is a condition in determining fair and impartial legal processes and compliance with the principles contained in the Criminal Procedure Code.
2. As a legal system, the provision of legal assistance as regulated in the Legal Aid Act still encounters various obstacles. These constraints are greatly influenced by subsystems in the legal aid system itself, which includes the legal substance, legal structure and legal culture. Substantially the Legal Aid Law has not been able to encourage a comprehensive and responsive legal aid system. The implementation of legal aid is only a caricative form of the process determined in the Law on Assistance. Structurally, advocates who have an obligation to provide legal assistance have not been encouraged and have the passion to carry out their obligations in providing legal assistance free of charge to the poor. Seen from the aspect of providing legal aid, the provision of legal aid has not yet been able to reach the poor, especially those in rural areas. Because most of the accredited OBHs are in the district / city capital. Judging from the legal culture, legal awareness has not yet emerged from all elements of the nation, that legal aid is a necessity in obtaining access to justice and obtaining justice from the final outcome of a legal process.
3. Reconstruction of the provision of legal aid for disadvantaged people based on the value of dignified justice, it is necessary to make an effort to create an integrated or integrative concept of legal aid, by combining the existing legal aid concepts, namely: the concept of individual legal aid, constitutional legal aid , structural legal aid and responsive legal assistance. Through the concept of integrative legal aid, in providing legal aid is not only the responsibility of the state constitutionally, but also a shared responsibility, be it an advocate in carrying out his professional obligations which are the concept of individual legal assistance, LBH by carrying out legal legal assistance, the state with

fulfilling its responsibilities constitutionally. Where as a whole, must be able to respond to any injustices that occur in the community, because actually the provision of legal assistance is based on the existence of injustice or inequality, which is a manifestation of the implementation of responsive legal assistance. With integrative legal assistance, legal aid is not only focused on providing legal assistance to the poor, but also striving to create a just and prosperous Indonesian society. The articles that were reconstructed included: Article 1 number 1, 2, 3 and Article 4 paragraph (3), Article 5, Article 7, 8, 9, and Article 19 paragraph (1) of the Legal Aid Law.

Some suggestions given by the author include:

1. It is necessary to reconstruct the Legal Aid Law, specifically the substance governing legal aid providers, legal aid providers and legal aid recipients. This is because the implementation of legal aid currently carried out based on the provisions of the Legal Aid Law still does not provide access to justice for the underprivileged.
2. The need to establish a national legal aid commission, so that the implementation of assistance can be held independently. Thus, the implementation of legal aid remains in accordance with its decree, namely as a social movement that seeks to fight injustice from an unjust social structure so as to achieve the ideals of independence of the Indonesian people, namely to create a just and prosperous society.
3. It is necessary to encourage Advocates to carry out their obligations as officium nobile professions, so that the predicate is not just a myth. This of course can be done by making legal rules governing the implementation of free legal assistance by Advocates.

## **J. Implications and Dissertation Study**

On the theoretical level, a study that has been conducted on the provision of legal aid in realizing access to justice for disadvantaged people has given birth to a new concept of legal aid, namely the concept of responsive comprehensive legal aid. This concept is a concept that tries to integrate the concept of legal aid that has been running, namely, the concept of individual legal aid, the concept of

constitutional assistance, the concept of structural legal aid, and the concept of responsive legal aid in a new concept, the concept of integrative legal aid.

The concept of integrative assistance is a concept of legal aid that encourages all elements to be involved in efforts to uphold justice, especially in providing legal assistance to the community. The concept of integrative legal aid, views that the responsibility of providing legal aid is not only the responsibility of the state as an embodiment of the concept of constitutional legal aid, but must also be able to encourage advocates to carry out their professional obligations to provide legal assistance free of charge to the poor. from implementing the noble profession of an advocate (individual legal assistance).

Providing legal aid in the concept of integrative legal aid not only focuses legal aid on the poor, but also seeks to fight injustices that occur in society, including injustices created from a social system and structure as applied in the concept of structural legal aid. In the concept of integrative legal aid, all parties must respond more to injustices that occur in society. Where the attitude of response to injustices that occur in society is a form of implementing the concept of responsive legal assistance. On a practical level, this study has managed to find a solution to the problem of providing legal assistance. Where granting access to justice through legal assistance cannot be carried out by only making legal assistance the responsibility of the state, but legal assistance must be the responsibility of all elements of the nation. With this concept, the implementation of legal aid must involve all elements, including encouraging the obligation of lawyers to provide free legal assistance and provide legal awareness for all parties regarding the importance of legal aid in achieving a fair and impartial legal process in the judicial process criminal.