

Assessing Development of Access to Justice in Indonesia Through Capability Approach

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ABSTRACT

Over a decade, Indonesia economic growth is rising gradually and has made remarkable progress across a broad range of economic and social dimensions. The number of HDI has been growing significantly since earlier 2000, followed by decrease of total amount of poverty from 40 to 8 percent¹. Nevertheless, this number of growth has not been distributed equally, as in the past 20 years the disparity between the richest and the rest has increased faster than any other country in South East Asia². These data shows that the development measured by a mere number in aggregate level is not reflecting an intrinsic growth. The Indicator of life decency should be portrayed by the condition where all people can have equal access to health, bodily integrity, bodily health, education, and justice system³. The last thing, access to justice, can be viewed as an essential element of development indicator because when the people have an equal access to justice they will be able to improve their functioning in society and enhance their power of choice. This is in line with ‘Capability Approach’⁴ which try to assess the development trough theorizing about basic social justice and opportunities to each person focusing on the distribution of freedom and choices for every people to live the life they value.

Keywords: *access to justice, ‘Capability Approach’, rule of law development*

1. INTRODUCTION

Over a decade, Indonesia economic growth is rising gradually and has made remarkable progress across a broad range of economic and social dimensions. The number of HDI has been growing significantly since earlier 2000, followed by decrease of total amount of poverty from 40 to 8 percent⁵. Nevertheless, this number of growth has not been distributed equally, as in the past 20 years the disparity between the richest and the rest has increased faster than any other country in South East Asia⁶. These data shows that the development measured by a mere number in aggregate level is not reflecting an intrinsic growth. The Indicator of life decency should be portrayed by the condition where all people can have equal access to health, bodily integrity, bodily health, education, and justice system⁷. The last thing, access to justice, can be viewed as an essential element of development indicator because when the people have an equal access to justice they will be able to improve their functioning in society and enhance their power of choice. This is in line with ‘Capability Approach’⁸ which try to assess the development trough theorizing about basic social justice and opportunities to each person focusing on the distribution of freedom and choices for every people to live the life they value.

Capabilities approach can be defined as a well-being assesment approach which is not only focusing on total average of well being and on what happens at ‘culmination’ but also the opportunities available to each person by set a wider range of indicators to

evaluate poverty (such as deprivation to access to justice).⁹ When all people have an equal access to justice, they will be able to enhance their capability in two ways: first, people can maximize their ‘functioning’ by struggling trough right and public policy, second, people can enhance their power of choice, therefore, it can broaden their capability itself.¹⁰ By this line of reasoning, failure of capability approach may be indicated by the institutionalisation of discriminated legal instrument and unequal accessibility to the justice system. Therefore, because the nature of this approach is interdisciplinary, capability approach is reasonably well suited to measures process of access to justice particularly in the developing countries where access to justice is often not well distributed.¹¹

In Indonesia, access to justice struggle has been something of all time.¹² With more than three hundred different cultural groups with their own cultural identities matched with enormous geographical diversity¹³ and several periods of political regime changes¹⁴, it can be instantly imagined that an effort of achieving equal access to justice will never an easy task. There have been many approaches to this goal particularly after the collapse of Soeharto’s new order regime in 1998. One of this approach is ‘top to bottom’ rule of law reform with aid from International donors namely the World Bank, UNDP, and IMF to pave the way in restoring the function of formal justice sectors (strengthening judiciary institutions and legislative instruments), nevertheless a decade later this effort was not showed

a positive impact to overcoming unequal access to justice in Indonesia.¹⁵ To sum up, achieving justice in Indonesia is really not only a matter of developing steady formal legal system and instruments but the main problem is to ensure that the legal instruments accessible and can equally gives benefit to all social layers. Taking this perspective into account, this paper will analyze the research question: To what extent is the access to justice development in Indonesia aligned with capability approach?

1.1 Paper Structure

This paper will start with a discussion of capabilities approach concept and how it can be a framework of access to justice development. Next section will describe access to justice definition and the obstacles for achieving justice in society. In subsequent section an overview of access to justice development and progress in Indonesia will be presented to analyze is it align with capability approach. Finally, the last section will conclude by answering the given research question.

2. CAPABILITIES APPROACH AS A FRAMEWORK OF DEVELOPMENT

The capability approach is an alternative life-quality assessment approach introduced by Indian philosopher and economist Amartya Sen which tries to measure broad normative framework of well-being and social arrangements¹⁶. In this approach, concept underlining the development assesment should go far beyond the aggregate of wealth and the growth of gross national product and other income-related variables.¹⁷ Sen's capabilities approach suggest that poverty must be seen as a deprivation of basic capabilities instead of narrow measurements of GNP growth or Industrialization¹⁸. This approach can be said as a groundbreaking paradigm in term of poverty of social justice because he tries to measure the development not only as an end result but as a process¹⁹. Therefore the bottom line goal of development in this approach is to ameliorate people's freedoms and their capabilities²⁰. This approach also advocates the development model that focusing freedom as part of process²¹.

Sen views development as process of expanding freedoms that people enjoy. He stated that the expansion of freedom can be seen as the 'primary end' and 'principal means' of development. Therefore it can be viewed that the capability approach does not see the development measurement merely as an outset to cultivate.²² He divided this freedom expansion into two which are "Constitutive role" of freedom and 'Instrumental role" of freedom in development. "Constitutive role" including elementary capability (being able to avoid deprivation or starvation, and escapable morbidity) and being literate, and enjoying freedom of speech.²³ While "Instrumental role" of freedom comprised of kind of rights and entitlement

which can contribute to expanding freedom in general and promotes development and complement one to another. 'Instrumental freedoms' constituted of: Political freedoms, Economic facilities, Social opportunities, Transparency guarantees, and Protective Security²⁴

The capability approach subsequently applied by several international institutions such as UNDP which adopted it to The Human Development Index which recognizing multidimensional factors constitute human development. In the report of countries, UNDP requires policies that ensure the growth pattern benefits the poor and resources generated are invested in building human capabilities because merely growth is not enough.²⁵ This is in line with Sen's suggestion that public policy foundational to one's ability to exercise agency.²⁶

Although there is still critical view regarding the difficulties to apply the capability approach as a framework assessment of development particularly in access to justice reform, the capability model actually can be operationalized to measure access to justice movement trough examine how effective is the law and justice reform, both as means and end to gain the capacity of the poor to access justice.²⁷ Thus any legal reform assessed by capability approach should address procedural and substantive issue in relation with capability improvement of all people.

3. ACCESS TO JUSTICE CONCEPT AND ITS OBSTACLES

As mentioned earlier, Access to justice is a crucial part to expand the people capability. The following will discuss the concept of access to justice and what hurdles impede achievement of equal access to justice.

Access to justice is one of the approaches of legal development co-operation that focus on supporting poor and marginalized people in their effort to obtain justice as a strategy of legal empowerment²⁸. Nevertheless Legal development co-operation is frequently narrowly viewed as to promote "the rule of law" trough legal reform and institutional strengthening which mainly focus on formal judiciary system (Top to down) while access to justice is only part of the program²⁹.

To understand the full concept of access to justice, then it should be known what are things hinder achievement to equal access to justice. Generally, There are two major obstacles for the poor and marginalized when seeking justice or to exhaust formal justice system. the obstacles namely: *Supply Side obstacles* (this problem related to justice institutions and/or duty bearer) and *Demand Side obstacles* (this problem related to justice seekers).³⁰ In *Supply side*, the obstacle mainly stemmed from legislation and norm problem, court and adjudicative enforcement institution, and justice providers in multi-level authorities such as village and regional authorities. While in *demand side*, the obstacle can be grouped into three categories which are: Lack of knowledge of justice system, Dependency and lack of

financial capacity, and Negative stigma of formal justice institution.³¹

Therefore, adopting the right law and the written legal instrument development is only a part of achieving equal access to justice, because the injustice which frequently happens in the society is not only stemmed from behavior of individual or impaired legal documents but mainly caused by unbalanced pattern of social relationship.³²

4. ANALYSIS OF ACCESS TO JUSTICE DEVELOPMENT IN INDONESIA THROUGH CAPABILITY APPROACH

4.1 Background Access to Justice Development in Indonesia

To address access to justice development in Indonesia then it should be presented the whole image of Indonesian justice system that makes Indonesian access to justice as a lifetime struggle. The following will describe the brief summary about the background of Indonesian legal system by describes three phases development of legal and justice system in Indonesia: *first*: by tracing back from historical perspective; *second* by overviewing the development of justice system after proclamation of Indonesian Independence, and *third* by viewing the development of access to justice post *new order regime* until the modern era.

The long period of Dutch occupation in Indonesia had given important consequence of Indonesian nature legal system. The colonial government had introduced pluralistic law and legal institution that made segregation based on ethnic category (divided between Natives, European, Foreign Oriental). Therefore, The Natives Indonesian were governed by their own customary laws system³³. However, in some area of laws, colonial government adapted laws that applied to the entire of population (e.g Criminal code of 1918) but without any attempt to unification as in the procedural criminal law, the Natives were tried in different courts with the Europeans (or those who were equated with Europeans) thus this offered less protection of justice system for natives. Meanwhile, the natives law officials (which comprised of local aristocracies) could not be relied upon by the natives, as these official were backed up by the colonial state. To summarize, the natives have no control of their justice system which had been designed by colonial government (as the courts of appeal were European courts and the higher judges were all Europeans).³⁴

After Independence in 1945, the remnants of Dutch colonial legal system was almost entirely adopted by Republic Indonesia (Some of the laws are still applied until today, e.g: Criminal code of 1918 and some of Civil Code's Provisions). But this adoption was with an abolishment of nearly all traditional courts thus made cases in state's courts overloaded. This situation worsened with the fact that in the *Old Order Regime* (the regime after independence) President Soekarno

was pessimistic about the possibility of positive social change can be brought about by law and justice system.³⁵ As a result, judiciary system were mastered by bureaucratic skills, personal contacts and money.³⁶

The subsequent regime, *The new order regime*, began with one of the most terrible events from justice perspective, with thousand of Indonesian alleged communist massacre and imprisonment without any trial, this new government regime become even worse in legal system as law just become a product of democratic and political lobbying and judges was subservient of government order.³⁷

The end of New order regime in 1998 gave a new hope to bring a legal system back on track as a tool of social mobilization by means of various reformations agendas that aims to redress Indonesia's democracy. It started with a decentralization program which delegated formerly centralistic power to the district level to make it exercised more accountable³⁸. At that time, Indonesia was aided by international donors such as World Bank and IMF to make a reformation in the formal justice sector and strengthening the law institutions (court, public prosecutors, and legislative organ). These efforts aim to bring about 'rule of law' therefore a lot of funding were given for training judges, improving transparency at the courts and law-making capacity, and handling corruption problem.³⁹

The reforms happened in Indonesia at that times was type of 'reform menus' which described in Carother's 'The Rule of Law'⁴⁰ that was comprised of three types of reform namely:

1. *Type one* reform focusing on the laws themselves (primarily written law in civil law country systems) such as revising or making new codes.⁴¹
2. *Type two* reform is rebuilding formal justice institutions and law-related systems which target to: *first*: reformulates salaries and gives training for judges and court staff, and improve circulation of judicial decision; *second*: focus on reforming to formal state apparatus such as police, prosecutors, and public defenders. *Third*: strengthening legislatures, and local governments.⁴²
3. *Type three* reform focus on generating judicial independence without government's intervention to accelerate accountability thus make public service more meritocracy.⁴³

Ten years after those initiatives both internationally and in Indonesia, many consider the results is disappointing. This failure is indicated by the high level of corruption and scandals involving judges, and prosecutors.⁴⁴ The disappointing result showing that top-down initiative is not quite success because at the end of the day the 'formal' legal system is only can be a tool to protect the interest of those with 'access' (which mostly comprised of money, legal skills, and contacts) to formal justice system. It can be said that those reforms can not bring about the trust of society to the formal justice system in Indonesia.⁴⁵

4.2 Access to Justice Development in Indonesia Toward Capability Approach

In term of capability perspective, the rule of law reformations which happened after the end of Soeharto's new order period had not yet fully fulfilled the development criteria of capability approach because the building of formal justice system with top-down approach did not address the issue of how the developments effective to enhance the capacity of disenfranchised people to access justice system.⁴⁶ The initiatives in the reformation period merely an improvement of access to justice obstacles in *demand side* or the duty barrier by developing formal justice and legal instruments without considering whether the legal and justice system reformation enhance poor people capability. Given the background of access to justice development and society condition of Indonesia which is not having a firm trust to a formal legal system, that development is not yet fulfill the criteria of 'primary end' and 'principal means' of capability approach.

Nevertheless, in recent years there is a positive movement considering there is firm relation between poverty, marginalization, and access to justice, since poverty can also be interpreted as being deprived of opportunities, voice in decision making, and limited access to legal institution that put the poor people in a state of "lawlessness" although there is a set of comprehensive formal legal instrument. Therefore, UNDP, Worldbank, and Government of Indonesia have been implementing research projects on access to justice in Indonesia through these four initiatives⁴⁷:

1. Access to Justice Assessment in 5 Provinces
2. Aceh Justice Project (AJP)
3. Legal Empowerment and Assistance for the Disadvantaged (LEAD) Project
4. Strengthening Access to Justice in Indonesia (SAJI)

Even though, this comprehensive national access to justice strategy that aims to support the development through a combination of analytical and operational activities⁴⁸ still not showing maximum potential on its implementation, this can indicate a positive movement toward the development which in conformity with capability approach model as this movement align with *principal means* of development which advocated by Sen.⁴⁹ However, as the *Primary ends* of the development, there should be a lot works to do because the merit of those initiatives would only be a rhetoric if not well implemented in practical ground.

5. CONCLUSION

In conclusion, Access to justice development in Indonesia is aligned with capability approach in certain extent: *First* it is aligned in term of principal means of development because from time to time there are efforts to enlarge all people functioning through the accessibility of justice system by update set of justice development strategy which suit and more compatible with the background and condition of Indonesian society. *Second*: there is an awareness that developing legal system by using 'rule of law' approach that focuss on formal justice instrument to achieving equal access to justice is like trying to draw

green line with a red ink because in case of Indonesia it only bound to benefit those who have the capacity to use the instrument. However, In term of Capability as *primary ends*, it can not yet be considered that the recent positive initiatives align with the purpose of capability approach as there is not significant implementation result showing the improvement of this initiatives.

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