

# Legal and Human Rights Review of Fullfilment of Access to Justice: Considering the Elements of Legal Capability

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## ABSTRACT

As a country based on the law (*rechtstaat*) and acknowledging the existence of human rights, makes Indonesia have an obligation to take any relevant steps to make sure the human rights protection are running as it should. One of them is create and participating in a target called Sustainable Development Goals (SDG). In order to participate in achieving SDG's goals point 16.3, Indonesian government has been trying to formulating framework and tools to measure access to justice through National Strategy of Access to Justice (SNAK) which issued in 2009. In its period, SNAK 2009 together with government and House of People Representative (DPR), have carried out legal and regulatory reforms. There are Law No. 16/2011 about Legal Aid, Law No. 11/2012 about Child Criminal Justice System in order to protect children who encounter legal problems, and also Presidential Regulation No. 75/2015 which become the legal basis for National Action Plan for Human Rights (RANHAM). For renewal, in 2016, Indonesian government issued National Strategy of Access to Justice (SNAK) for 2016-2019. One example of the right to equality before the law is rights of access to justice. So in other world the government has obligation to respect, protect and fulfill the mechanism of justice, access to the mechanism, a system to solve the problem, access to the people's capability.

**Keywords:** *human rights, right to equality before justice, access to justice, legal capability, Sustainable Development Goals*

## 1. INTRODUCTION

The fourth amendment of Indonesian Constitution defined that Indonesia is a country with a government based on Law. This provision has been regulated in article 1 paragraph 3 of the 1945 Constitution of the Republic of Indonesia (UUD 45). The Indonesian constitution acknowledged the concept of human rights as something that given by the God directly to human as basic rights. Therefore, there is no power in the world that can remove it. The human rights are fundamental for human life. So that makes it human rights must be owned by ever human whatever the situation and whoever the human is.

Indonesia through its Constitution also guarantees that every person has same opportunities and rights on equality before the law, wherein article 28D of paragraph 1 explained that every person has right of recognition, guarantees, protection, and certainty of fair law and also equal treatment before the law. Not only that, rights of equal treatment before the law also explained by the Law No. 12 of 2005 on Ratification International Covenant on Civil and Political Rights. Law No. 12 of 2005 regulates and assign that every person has right to legal protection,

right to self-determination, has fair trial rights, and so on. [1].

Indonesia's law about human rights as an extension from the international covenant that already ratified by the government such as Law Number 39 Year 1999 states Human Rights is an instrument of right adhered to human as God's creature and His Blessing which must be respected, upheld and protected by State, Law, Government and every people for respect as well as the protection of human rights.

From that regulation, Human Rights are divided into two kinds, the one that cannot reduced and diminished under any circumstances called non derogable rights such as rights to life, rights to belief, and right to equality before the law . The other one is human rights that can be reduced in some situation which must be carefully regulated, that situation called derogable rights such as right to have family, right to get sensitive information, and right to go to other country. Human rights also divided into other to kinds, first is civil political rights such as right to participate in political activities, right to life, right to equality before justice, and right not to be tortured. Then the other one is economic social culture rights such as right to get education, right to get health care, and rights to have an occupation.

As a country which its governance based on the law and a country that acknowledge the existence of human rights, makes Indonesia obliged to respect, provide, and protect the rights of every person especially on rights to equality before the law. In relation to fulfilling the rights of equality before the law itself, specifically the Government produced a strategic policy called “Rencana Pembangunan Jangka Menengah Nasional (RPJMN) 2015 – 2019” and “Strategi Nasional Akses Terhadap Keadilan 2016 – 2019”. Based on these two policies, the government seeks to set out their objectives to emphasizing a strategic approach to ensure access to justice in Indonesia works properly.

This strategic approach is then in line with the Sustainable Development Goals (SDGs), especially in Goal 16, namely to promote a peaceful and inclusive society for sustainable development by providing access to justice for all and building effective accountable and inclusive institution at all levels.

SDG Goal 16 then has branch Goals, which in line with the goal 16.3 that explain the specific purpose to promoting the law supremacy at national and international level also to guaranteeing equal access to justice for all. [2] The goal 16.3 itself then points to something relevant with other components in Sustainable Development Goals, like in goals 16.2 which the purpose is to eliminate the violence, exploitation, human trafficking, and all forms of discrimination and torture against children. With the presence measurement of SDG’s goal 16.3 will strengthen the data relating to vulnerable groups that lead to the integration of problem solving outside the formal justice. Broadly speaking SDG’s commitment are stated in their goals in efforts to achieve inclusiveness is to make sure that no one shall left behind to have their rights of equality before the law. As in the implementation, SDG’s should give a convenience benefits to all people without exception, including vulnerable groups.

In order to participate in achieving SDG’s goals point 16.3, Indonesian government has been trying to formulating framework and tools to measure access to justice through National Strategy of Access to Justice (SNAK) which issued in 2009. In its period, SNAK 2009 together with government and House of People Representative (DPR), have carried out legal and regulatory reforms. There are Law No. 16/2011 about Legal Aid, Law No. 11/2012 about Child Criminal Justice System in order to protect children who encounter legal problems, and also Presidential Regulation No. 75/2015 which become the legal basis for National Action Plan for Human Rights (RANHAM). For renewal, in 2016, Indonesian government issued National Strategy of Access to Justice (SNAK) for 2016-2019 which explained access to justice as: [3]

*“...conditions and processes in which state guarantees the fulfillment of basic rights based on the 1945 Constitution and the universal principles of human rights, and also guarantees the access for every citizen to have the ability to know, understand, aware and use these basic rights through formal and non-formal institution”*

However, Indonesian government needs to promote the issue by developing framework and measurement tools to perceive the achievement of access to justice in Indonesia. With the existence of these frameworks and tools, it will be easier to ensure an effective legal framework and policy of access to justice in Indonesia.

This article discusses the elements of legal capability as one of important of element of access to justice. The method used in this study is normative using primary legal material and some literature which contain the expert view about elements capability on access to justice. Access to justice is not only perceives the availability and quality of formal and informal mechanism that are in accordance with human right standards. However, it must be able to look at the capability of the people to access those mechanisms. Capability can be measured through the status of ownership in various resources exist in society. Also, it can be defined from knowledge and understanding of individual which can be seen from how the individual knows the following things: do they understand that they are currently experiencing injustice? Do they know who is responsible for their problem? Do they understand to whom they should ask for help to begin the process of obtaining justice? How they bear the long process of their legal problem?

From the definition about access to justice, SNAK defined access to justice not only about the mechanism or infrastructure but also the capability in every person to achieve the justice. Whenever the government has already acknowledged the element of legal capability which can be seen on the some public policy, it still needs a lot work to do in the future. But, from the side of many academic forums, on the implementation, element of legal capability still needs more action to be developed. That condition makes it very interesting is because the element of capability is one of most important element about access to justice. The Author think the Capability as a component of access to justice is very often under looked.

### ***1.1. Our Contribution***

This paper presents some point of view based on some other research that already written by academic, researcher, government and civil society organization. The paper will discussed about human rights specifically on rights to access to justice which considering the element of legal capability in every individuals who face the legal problem. This paper expects to explore further about the element of capability as the important element of rights to access to justice. The explore will based on the implementation condition, government’s policy condition, and some academic research.

This paper also has a purpose to promote to bigger forum the element of legal capability in order to fulfilment of rights to access to justice.

## 1.2. Paper Structure

The rest of the paper is organized as follows. Section 1 will explain about the introduction about the general human rights on civil and political rights specifically rights to access to justice. Also in section 1 fill with the purpose of the paper. The section 2 presents the main topic of paper, which will explore on the problem of implementation condition about elements of legal capability. The section 4 will present government's policy conditions which already create by the government. Section 5 will presents some related academic research from the government, academics and other civil organization. Section 6 will concludes the paper and presents the point of view about suggestion in the future.

## 2. THE IMPORTANCE OF ELEMENTS OF CAPABILITY AS TOOLS OF ACCESS TO JUSTICE

World Justice Project (WJP) research 2018 explained about how to access to justice depart from there is a legal problem experienced by the individuals. According to WJP; access to justice reached when the individuals able to solve their problem related to occupation, housing, education, health, daily family problem. [4] In line with the WJP research, Pascoe specifically on Legal Needs Surveys and Access to Justice explained that the legal needs appears when the individuals need assistance/support from legal service to solving their legal problem. So it can be said that there is also a needs for a mechanism or something as a container for the individuals to receive legal assistance from their legal problem. [5]

The concept of access to justice is thus closely linked to the elemental concept of legal need. In broad terms, legal need arises whenever a deficit of legal capability necessitates legal support to enable a justiciable issue to be appropriately dealt with. A legal need is unmet if a justiciable issue is inappropriately dealt with as a consequence of effective legal support not having been available when necessary to make good a deficit of legal capability. And if a legal need is unmet, there is no access to justice. [6]

Adrian Bedneer's point of view about access to justice is very interesting. He defined access to justice as: [7]

*"...the process of seeking justice starts with the awareness of having suffered an injustice, and involves acquiring the necessary courage, knowledge, contacts, money (etc.) to address this injustice"*

Adrian Bedneer's view about capability is very interesting. First, his view explain us that individual capability became very important to make access to justice work. Second, the individual's experience facing legal problem triggers the individuals to have some legal capability like legal knowledge, courage, and legal capability.

From some experts view about the elements capability, we can see that how the capability is an important component access to justice. In other words, individual's capability became very important especially for understanding the

legal problem which they faced. Capability to understand their legal problem helps them to know how to enter the justice mechanism to solve their problem.

Based on the some expert's view on the element capability as importance element of access to justice, here some further explanation about elements of capability on access to justice from some literacy:

1. Global Insights on Access to Justice: Findings World Justice Project General Population Poll in 45 Countries [8]

In this research, WJP explains that law able to provide a framework about rights, responsibility, protection which has implications on every aspect of life. This framework forms something that individuals bring and determine their problem related to aspect of occupation, housing, education, health, family between their other problems. As an added dimension, the daily problems can affect an individual's health, social stability, and capability to participate in the economy. For this reason, it is becomes very important to see the needs and individual's legal problem in their effort to access the justice system.

That condition can be seen when someone experienced a legal problem, then ideally they will tend to find a way out or trying to access the justice system. That condition happened because of that legal problem can interfere with their economic stability which can triggers poverty.

From this literature, it can be seen how the tendency of individual's decision when dealing with a legal problem, despite there is no explanation about how the individual takes these decisions and considerations. Based on WJP research there is a conclusion note that the injustice indeed affecting individual's decision to accessing the justice, but it also needs to be understood what are the reasons behind those decisions to receive comprehensive result and deep and representative.

2. Strategi Nasional Akses Pada Keadilan (SNAK), Bappenas, 2016

As a renewal of SNAK in 2009, Bappenas launched the SNAK periods of 2016 – 2019 as a framework for measuring access to justice in Indonesia. SNAK 2016 – 2017 doesn't intend to replace or duplicate other strategies that already exist in the field of poverty, health, education, justice, environmental protection, and social services. SNAK 2016 – 2019 tries to sharpen the direction of the roles of legal protection and justice to guaranteeing society's access to the human rights and the environmental sustainability.

SNAK has four strategies, that is

- (1) Strengthen access to justice on service and fulfillment of basic rights,
- (2) Strengthen access to justice on judiciary and dispute resolution,
- (3) Strengthen access to justice on legal aid,
- (4) Strengthen authorization,
- (5) Natural resource management. Those strategies including participation from the society.

3. Access to Just Justice Assessment Tool: A Guide to Analyzing Access to Justice for Civil Society Organizations, ABA RoLI, 2012 [9]  
As a renewal of SNAK in 2009, Bappenas launched the SNAK periods of 2016 – 2019 as American Bar Association of Rule of Law Initiatives on the year 2012 released guidelines about the steps for Civil Society Organizations (CSOs) to measure access to justice. Not much different from other studies, the access to justice concept depart from the existence of legal problem that occur to individuals. Little different, this literature emphasizing the availability of formal and informal institution as a main requirement is able achieve an access to justice by individual.  
Furthermore ABA RoLI defines that there are five dimension when measure access to justice, which legal framework, legal knowledge, advice & representation, access to justice institution, fair production and enforceable solution.
4. Adriaan Bedner, Sebuah Kerangka Analisis Untuk Penelitian Empiris dalam Bidang Akses Terhadap Keadilan, , *Kajian Sosio-Legal*, 2012 [10]  
Bedneer explains in his writing that access to justice can be said to be fulfilled when talking about individuals or group, especially marginalized people, people experiencing injustice, has ability, to make their complaints heard, and received a proper treatment against their complaints, by the state and non-state institution, which produce restoration from the injustice that happened to them, based on principle or state regulation, religious law or customary law, and in accordance with the rule of law. These pillars of access to justice are then used by Bedneer in formulating measures of access to justice which inspired by Felstiner, Abel, and Sarat (1981), named ROLAX frame analysis.  
Basically, access to justice departs from “marginalized people” perspective and analyzing the choices which they took “through tools of law” for the sake of receiving justice as they wanted.  
The first characteristic from this framework is some serious attention that has given when defining the injustice (naming), including the awareness, categorizing and defining grievances.

### 3. CONCLUSION

To respecting, protecting, fulfilling, and promoting justice and human rights, it became very important to provide proper access to justice. That obligation can be reflected in form of the availability of mechanism of justice, access to the mechanism, a system to solve the problem, access to the people’s capability.

The element of capability is one of the most important components of access to justice. Since the element of capability is a tool to accessing the mechanism of justice, knowledge to solve the problem, will and courage to face any legal problem that happened to them. So its safe to say

that the element of legal capability become very important to uphold the justice system.

### ACKNOWLEDGMENT

This work was supported by Faculty of Law University of Indonesia.

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