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RIGHT OF EARLY ACCESS TO CRIMINAL LEGAL AID IN INDONESIA: CLEAR RULE, CLEARER VIOLATIONS

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Abstract

This article will examine the right of early access to criminal legal aid in Indonesia, both in theory and in practice. In theory, the right of early access to criminal legal aid (the Right) is clear and firmly established in Indonesian law and international law, which applies to Indonesia. Individuals under arrest or in detention are entitled to receive legal aid at all stages of the criminal justice process. Therefore, law enforcement may not deny or delay a suspect's access to a lawyer during the initial procedural stages of arrest, investigation, and detention. This article will argue that the Right meets certain criteria of a clear legal rule, as distinguished from a vague legal standard. Thus, we would expect a high degree of compliance with the Right. However, in practice, we find frequent violations of the Right in Indonesia. After reviewing evidence of the violations, the article will conclude by briefly addressing several explanations while maintaining that the Right is a clear legal rule.

Keywords: *legal aid, human rights, criminal procedure, rules, standards*

Abstrak

Artikel ini akan memeriksa tentang hak untuk segera mendapatkan bantuan hukum pidana di Indonesia, baik secara teoretis maupun praktis. Secara teori, hak tersebut jelas dan tegas dinyatakan dalam hukum Indonesia dan hukum internasional, yang berlaku terhadap Indonesia. Individu yang ditangkap atau berada dalam penahanan berhak untuk memperoleh bantuan hukum dalam seluruh tahapan proses perkara pidana. Sehingga, aparat penegak hukum tidak dapat menolak atau menunda hak tersangka untuk mendapatkan pengacara selama tahapan awal acara pidana seperti penangkapan, penyidikan, dan penahanan. Tulisan ini akan mengargumentasikan bahwa hak tersebut telah memeroleh kriteria sebagai peraturan hukum yang jelas yang terpisah dari standar hukum yang samar. Dengan demikian, penulis berharap tingkat kepatuhan yang tinggi oleh aparat penegak hukum atas pemenuhan hak tersebut.Tetapi, dalam praktik, kami menemukan pelanggaran yang cukup sering terhadap pemenuhan hak tersebut di Indonesia. Setelah meninjau bukti dari pelanggaran tersebut, tulisan ini akan disimpulkan dengan memberikan penjelasan secara singkat dengan tetap mengargumentasikan bahwa hak tersebut adalah aturan hukum yang sudah jelas.

Kata kunci: *bantuan hukum, hak asasi manusia, hukum acara pidana, aturan, standar*

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I. INTRODUCTION

Over many years and numerous criminal cases, law enforcement builds up institutional knowledge and extensive capacity to investigate, arrest, detain, prosecute, and imprison criminals. Police investigators and government prosecutors are law enforcement professionals who are paid by the state and possess an inherent advantage in an adversarial criminal justice system. A single suspect on their own cannot be expected to know all the relevant aspects of criminal procedure and mount a strong defense.[1] Nearly every suspect entangled within the criminal justice system does not have the repeated interactions with criminal procedure necessary to acquire institutional knowledge and capacity equal to that of law enforcement. Access to a lawyer is a necessary condition for balancing disparities in knowledge and capacity and for protecting human rights.[2]

But when should an individual have access to a lawyer? A criminal procedure can be long and complex. Involving a lawyer for a suspect can interfere with police investigations into heinous crimes. However, in the interest of equity and fairness, a suspect has the option to retain legal aid at the first instance their basic rights are implicated in any stage of a criminal procedure.

The first stages of a criminal procedure are crucial for ensuring a just outcome. Without a lawyer during the initial investigation, arrest, and/or detention, a suspect can suffer numerous harms. In countries around the world, suspects denied access to counsel at the early stages of a criminal procedure frequently experience mistreatment, abuse, and torture. The absence of a lawyer also hampers the ability of a suspect to gather exculpatory evidence and develop a sound defense strategy.[3]

The importance of access to legal aid at the beginning of a criminal procedure has been documented and debated in numerous texts, and an in-depth discussion of this matter is beyond the scope of this article. This article will instead focus on how the right of early access to criminal legal aid (the Right) is enshrined in legal texts and then put into practice in Indonesia.

Part II of this article will begin with a background on the differences between legal rules and legal standards. It will identify three salient criteria of rules that can be applied to any law. This part will conclude by arguing that rules generate more frequent compliance than standards, meaning if we can classify a particular law as a rule, then we would expect relatively few violations.

Part III will examine the provisions of Indonesian and relevant international law containing the right of early access to criminal legal aid. It will argue that the different legal texts are consistent in their formulations of the Right and then derive a single textual formulation that captures the meaning of all the relevant provisions. This part will conclude by testing the single textual formulation of the Right against the three criteria identified in Part II and argue that the Right is a legal rule that should generate

[1] United Nations Office on Drugs and Crime, *Early Access to Legal Aid in Criminal Justice Processes: a Handbook for Policymakers and Practitioners* (Vienna: United Nations, 2014), p. 1, http://www.unodc.org/documents/justice-and-prison-reform/eBook-early_access_to_legal_aid.pdf, accessed 25 August 2016.

[2] Ed Cape, *Improving Pretrial Justice: The Roles of Lawyers and Paralegals* (New York: Open Society Foundations, 2012), sect. 4.1-4.7, https://www.opensocietyfoundations.org/reports/improving-pretrial-justice-roles-lawyers-and-paralegals, accessed 25 August 2016.

[3] Open Society Foundations and United Nations Development Programme, *The Socioeconomic Impact of Pretrial Detention* (New York: Open Society Foundations, 2011), https://www.opensocietyfoundations.org/reports/socioeconomic-impact-pretrial-detention, accessed 29 August 2016.

a high level of compliance. Part IV will review numerous studies of criminal justice in Indonesia and demonstrate that the expectation of strong compliance with the Right is not fulfilled in practice. Part V will conclude the article by maintaining that the Right is a legal rule and briefly discuss alternative explanations for the frequent violations documented in Part IV.

II. CLEAR RULES AND VAGUE STANDARDS

One way to understand laws is through classifying them into rules and standards. Both rules and standards attempt to achieve a particular political or moral objective. However, on the one hand, rules are thought of as clear manifestations of laws that are enforced based on the literal meaning of their terms and language rather than the objective behind them. On the other hand, standards directly reference the underlying objective and use vague and flexible terminology in the process.[4]

Rules contain objective and descriptive language about a given situation, as well as the action that must be taken in that situation. For example, "sounds above 70 decibels in the neighborhood after 10 PM shall be punished with a ten-dollar fine" is a clear rule. It attempts to achieve the underlying policy objective of a tranquil and peaceful neighborhood by using objective and measurable language about a certain situation. Standards are considered vague and contain subjective and indeterminate language that is difficult to measure with scientific precision. Terms such as "fairness," "negligence," "good faith," and "reasonable" are hallmarks of legal standards.[5] "Excessive loudness disturbing neighborhood peace and tranquility shall be enjoinable upon a showing of irreparable harm" is an example of a standard.[6] It attempts to achieve the same objective of a peaceful and tranquil neighborhood by employing terminology that directly references that objective but escapes precise measurement.

Clear rules also provide stronger guidance for action and greater predictability in the regulation of human behavior than flexible standards. Judges applying a rule in a given case are left with little room for interpretation, and their actions will be more predictable and uniform across all similar cases.[7] Standards such as "excessive loudness disturbing neighborhood peace and tranquility shall be enjoinable upon a showing of irreparable harm" leave room for reasonable people to disagree and many possible outcomes. While a teenager may consider anything below 90 decibels acceptable, a great-grandparent might feel anything above 60 decibels is excessive.

Standards can sometimes be such weak guidelines for action that judges will attempt to invalidate them on their face. For instance, American constitutional jurisprudence contains the vagueness doctrine. This concept holds that laws that are so unclear that they provide no notice of what is legal (and therefore enable arbitrary prosecutions) must be invalidated.[8] No opposing doctrine invalidates laws for too much specificity. A rule may be so specific that it applies to a situation that will never occur, but a specific rule will not be invalidated on its face in the same way as an

[4] Scott Dodson, "The Complexity of Jurisdictional Clarity," *Virginia Law Review* 97, no.1 (March 2011): 15-16.

[5] Ofer Raban, "The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism," *Boston University Public Interest Law Journal* 19, no. 2 (Spring 2010): 175.

[6] Pierre J. Schlag, "Rules and Standards," *UCLA Law Review* 33 (December, 1985): 380.

[7] Dodson, "The Complexity," pp. 15-16.

[8] Cornell University Law School, Legal Information Institute, "Vagueness Doctrine," https://www.law.cornell.edu/wex/vagueness_doctrine, accessed 29 August 2016.

exceedingly vague standard.[9]

Therefore, if a law, including the right of early access to criminal legal aid, is a rule rather than a standard, it must exhibit certain characteristics: (1) a rule must contain descriptive and objectively measurable language; (2) a rule must not directly reference the underlying political or moral goal in its terminology; and (3) a rule must provide a strong and unambiguous mandate for a specific action in a specific situation. Other parameters of rules and standards exist and have been debated for many years by legal scholars. However, these three criteria should help determine if the Right is a rule or a standard.

But why does it matter if the Right is a rule or a standard? While standards have their place, the prevailing consensus is that rules are preferable to standards in enforcing a right and regulating behavior.[10] In the instance of human rights law and other international laws, clearer rules will impose higher reputational costs on states that violate those rules.[11] States do not want to be seen by other states, corporations, international organizations, and numerous actors as violators of human rights for various moral, political, and economic reasons. If a particular human right is the underlying policy objective for a clearly drafted rule, then perceiving a state as a violator will be easier for other actors. Thus, if the right of early access to criminal legal aid is a rule and not a standard, then we would expect to see criminal suspects receive legal representation in a way that both complies with the literal meaning of the terms and language in the text of the rule and fulfills its underlying political and moral objectives.

II. SPECIFYING THE RIGHT OF EARLY ACCESS TO CRIMINAL LEGAL AID IN INDONESIAN AND INTERNATIONAL LAW

We must now turn to the text of Indonesian and applicable international law to determine if the right of early access to criminal legal aid is a rule that inspires compliance or a standard engendering potentially conflicting action. Unfortunately, no single article of law discusses the Right in Indonesian domestic law and could therefore serve as the controlling interpretation in all cases. The Right is reiterated across various applicable laws and within different articles of the Indonesian Criminal Procedure Code (*Kitab Undang-Undang Hukum Acara Pidana/KUHAP*). However, in examining the relevant legal texts, a pattern emerges: synonymous, specific, and objective terminology is used repeatedly across diverse legal texts that embody the Right. Terms such as "all stages of examination," "every stage of the legal process," and "at any time" appear repeatedly. Given the compatible nature of the various legal texts, we can propose a single formulation that embodies the various synonymous statements across Indonesian and international laws. The three criteria of rules identified in Part II can then be applied to this single textual formulation of the Right. Once this process is complete, we will find that the Right is a rule and not a standard.

A. Indonesian Law

The KUHAP is the proper starting point for an examination of the right of early

[9] Joseph Raz, "Legal Principles and the Limits of Law," *Yale Law Journal* 81, no. 5 (April 1972).

[10] Raban, " The Fallacy of Legal Certainty," p. 175.

[11] Andrew T. Guzman, "A Compliance-Based Theory of International Law," *California Law Review Vol. 90 Issue 6* (December 2002): 1863.

access to criminal legal aid in Indonesian law. Chapters VI and VII of the KUHAP specify when the Right attaches to a suspect and other basic parameters of the Right. Article 56(1) requires the state to provide a lawyer when a criminal suspect faces

> *the death penalty or imprisonment of fifteen years or more or for those who are destitute who are liable to imprisonment of five years or more who do not have their own legal counsel, the official concerned at all stages of examination in the criminal justice process, shall be obligated to assign legal counsel for them.*[12]

Article 69 specifies that a lawyer "shall have the right to contact a suspect *from the moment of his arrest or detention*."[13] This definition might seem to suggest that a suspect has the right to contact a lawyer only when they are officially and formally placed under arrest or detention. However, Article 70(1) continues,

> *legal counsel as intended by Article 69 shall have the right to contact and speak with the suspect at any stage of examination and at any time for the purposes of the defense of his case.*[14]

The right of early access to criminal legal aid is enshrined in several Indonesian laws in addition to the KUHAP. The Indonesian National Juvenile Courts Act (*Undang-Undang Negara Republik Indonesia Tentang Pengadilan Anak*) states that every child who is arrested or detained has the right to legal aid at "*every step*" of the juvenile criminal procedure.[15] Likewise, the Indonesian National Law on Child Protection (*Undang-Undang Negara Republik Indonesia Tentang Perlingdungan Anak*) requires that every child "receive legal aid or other effective assistance at *every stage of the legal process*."[16]

At this point, the status of witnesses in relation to the Right must be clarified as well. The concepts of arrest and detention are not always clear. Police could engage in behavior they would describe purely as the questioning of a witness. However, in a situation where questioning is performed with an aggressive demeanor over a long period of time in a tightly confined space, one could reasonably feel that their liberty was restricted and they were *de facto* arrested and/or detained.[17] The articles in the Indonesian laws described above indicate that the moment at which the right to legal counsel must attach in the criminal procedure is the very first stage of the criminal process, regardless of its formal name in the criminal code. Therefore, the right of early access to criminal legal aid must also attach to witnesses in many situations, and not just suspects because, in many cases, the line between witness and suspect is very fine or nonexistent, as witnesses can quickly become suspects. A situation that has been observed in Indonesia and other countries is that law enforcement will call a suspect in for questioning as a witness, possibly thinking that this approach is a less confrontational and more efficient way to bring the suspect into custody.[18] A witness

[12] Indonesia, *Kitab Undang-Undang Hukum Acara Pidana (Indonesian Criminal Procedure Code),* UU. No. 8 Tahun 1981 (Law Number 8 Year 1981), art. 56(1). (emphasis added)

[13] *Ibid.,* art. 69. (emphasis added)

[14] *Ibid.,* art. 70(1). (emphasis added)

[15] Indonesia, *Undang-Undang Negara Republik Indonesia Tentang Pengadilan Anak* (*Indonesian National Juvenile Courts Act*), UU. No. 3 Tahun 1997 (Law Number 3 Year 1997), art. 51. (emphasis added)

[16] Indonesia, *Undang-Undang Negara Republik Indonesia Tentang Perlingdungan Anak* (*Indonesian National Law on Child Protection*), UU. No. 23 Tahun 2002 (Law Number 23 Year 2002), art. 17. (emphasis added)

[17] UNODC, *Early Access to Legal Aid,* p. 49.

[18] Institute for Criminal Justice Reform, *Judicial Killing: Dibunuh demi Keadilan, Fair Trial dan Hukuman*

can be deprived of liberty during a criminal investigation or easily become a criminal suspect; thus, the Right must be robust and flexible enough to apply to witnesses as well. Fortunately, Articles 69 and 70 of the KUHAP and other Indonesian laws are written broadly enough to permit the Right's application to witnesses in situations where they are treated similarly to suspects.

B. International Law

The international laws and norms to which Indonesia subscribes also use a variation of the key "all stages" terminology and support the establishment of the right to criminal legal aid at the earliest possible moment for protection of the suspect's rights. Indonesia ratified the International Covenant on Civil and Political Rights (ICCPR) on February 23, 2006.[19] Article 14, paragraph 3(d) of the ICCPR specifically addresses the right to legal aid:

> *In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.*[20]

The text of the ICCPR itself does not specify the moment when the right to legal assistance is engaged. However, interpretations of this article by the Human Rights Committee (HRC) clarify that legal assistance must be provided at the first relevant stage of a criminal procedure.[21]

In adjudicating potential violations of the ICCPR, the HRC employs the same terminology as Indonesian law and demonstrates that a criminal suspect is entitled to legal aid from the first relevant step in the criminal process. In *Chikunova v. Uzbekistan*, the defense counsel was permitted to represent their client's interest only after preliminary investigation had ended. In finding a violation of Article 14, paragraphs 3(b) and (d) of the ICCPR, the HRC stated, "It is axiomatic that the accused is effectively assisted by a lawyer at *all stages of the proceedings*."[22] In *Levy v. Jamaica*, the HRC also held that a suspect must receive assistance at *"all stages of the proceedings"* and found a violation of Article 14, paragraph 3(d). In this case, the defendant was not provided with legal assistance during the preliminary hearings.

Mati di Indonesia [Judicial Killing: Killed for Justice, Fair Trial and the Death Penalty in Indonesia], (Jakarta: Institute for Criminal Justice Reform, 2015), pp. 132-133; Human Rights Watch, "US: Misuse of the Material Witness Statute" (28 January 2011), https://www.hrw.org/news/2011/01/28/us-misuse-material-witness-statute, accessed 13 November 2016.

[19] United Nations, Office of the High Commissioner for Human Rights, "Ratification Status for Indonesia," http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN, accessed 29 August 2016.

[20] *International Covenant on Civil and Political Rights*, New York, 16 December 1966, *United Nations Treaty Series*, Vol. 999, No. 14668, art. 14.

[21] Indonesia has not ratified the First Optional Protocol of the ICCPR. Therefore, an Indonesian national cannot bring a complaint before the HRC for Indonesia's violation of the ICCPR. However, decisions of the HRC in other cases can still give specificity and context to the provisions of the ICCRP.

[22] United Nations, Human Rights Committee, *Mrs. Tamara Chikunova v. Uzbekistan*, Communication No. 1043/2002, U.N. Doc. CCPR/C/89/D/1043/2002 (3 April 2007), para. 7.4. (emphasis added)

The HRC noted that this deprived the defendant of a crucial opportunity to consult with counsel, share information, and devise a legal strategy.[23]

The familiar "all stages" terminology is found in other international laws and norms that apply to Indonesia. The UN Basic Principles on the Role of Lawyers was unanimously adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990. While these principles are non-binding, Indonesia was one of the 74 states that participated in the Congress, signifying the country's belief in its contents.[24] Principle 1 of the Basic Principles states

> *"all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings."*[25]

The same language is employed by the Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. Adopted by the UN General Assembly in December 2012, the Principles are the first international instrument to focus exclusively on legal aid. Principle 3 of this document reads

> *"states should ensure that anyone who is detained, arrested, suspected of, or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process."*[26]

The Principles and Guidelines also pay special attention to the right of witnesses to be provided legal assistance. Principle 5 of this document states that

> *"without prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to witnesses of crime."* [27]

The need to provide witnesses with legal aid is likewise reflected in the UN Basic Principles on the Role of Lawyers, quoted above, which states "all persons," and not only the formally detained and accused, must be afforded counsel. These UN standards are in accordance with the Indonesian laws outlined earlier in this section, reiterating that when a witness is treated similarly to a suspect, they must also benefit from the right of early access to criminal legal aid.

C. Single Formulation of the Right of Early Access to Criminal Legal Aid

The exact words used in describing the right of early access to criminal legal aid vary slightly from one document to another. Furthermore, the KUHAP referenced for this article has been translated to English from the original Bahasa Indonesia, making comparison between the texts less precise. To discern if the Right meets the criteria of

[23] United Nations, Human Rights Committee, *Mr. Conroy Levy v. Jamaica*, Communication No. 719/1996, U.N. Doc. CCPR/C/64/D/719/1996 (3 November 1998), para 3.2. (emphasis added)

[24] United Nations, Office on Drugs and Crime, *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, United Nations Publication, Sales No. E.91.IV.2, chap. 1, sect. B.3, annex, (27 August-7 September 1990).

[25] *Ibid*., para. 1. (emphasis added)

[26] United Nations, Office on Drugs and Crime, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, (New York: United Nations, 2013), p. 9, https://www.unodc.org/documents/justice-and-prison- reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf, accessed 29 August 2016. (emphasis added)

[27] *Ibid.,* p. 9.

a legal rule, a helpful step would be to derive a single textual formulation of the Right that encapsulates the synonymous language across the various sources of law listed above. For this exercise, the formulation of the Right shall be:

> *"Individual criminal suspects are entitled to receive legal aid at all stages of their engagement in criminal justice process."*

The language in this formulation is an attempt to adhere to the specific wording of the KUHAP while also embodying the full meaning of the Right under international standards.

An important potential counterargument must be addressed here. One could argue that deriving a single formulation of the Right from different laws will miss some essential meaning. Different drafters used different words for a reason, and each word, although synonymous, has a unique etymology, context, and application. If different formulations of the Right are truly the same, then the drafters of later formulations would have copied the same text word for word. Therefore, any attempt at a single textual embodiment of the Right will not faithfully adhere to all the legal texts it claims to represent.

An ideal situation would be for every legal code that spoke of the right of early access to criminal legal aid to have the exact same words. Drafters of new laws will use words that are better suited to their contemporary era and fit the current legal and political landscape. However, different terminology may possibly reference the same underlying principles. In the case at hand, the different formulations of this specific right are so similar that each one could undergo the analysis in the following section and the results would be the same. All the different formulations in the laws listed in the previous section could be considered clear rules about the right of early access to criminal legal aid. For the sake of efficiency and brevity, a single formulation derived from the different provisions will be scrutinized to see if it meets the criteria of a legal rule.

D. Descriptive and Objective Language

The formulation of the Right derived above uses sufficiently clear and objective language to meet the first criteria of a legal rule. Words that require contextual interpretation such as "reasonable" or "fairness" do not appear in the formulation given above. While no numeric measurements are contained in this rule statement, the terms can provide an objective interpretation of when the rule applies.

Some words in the textual formulation above merit a closer examination. One definition of "all" is "every member or part of."[28] Therefore, "all stages of their engagement in the criminal justice process" necessarily entails the first stage, as the first stage is an equal member and part of the process. One must simply look at the stages of law enforcement as described in the KUHAP and determine the first stage that involves a criminal suspect.

Merriam-Webster's legal definition of "entitled" is "to give an enforceable right to claim something."[29] This definition may seem unclear and in need of further interpretation, but in the context of criminal legal aid, it is more straightforward

[28] Merriam-Webster, "Simple Definition of All," http://www.merriam-webster.com/dictionary/all, accessed 29 August 2016.

[29] Merriam-Webster, "Legal Definition of Entitle," http://www.merriam-webster.com/dictionary/entitle#legalDictionary, accessed 29 August 2016.

than it first appears. The UNODC Handbook on Early Access to Criminal Legal Aid in Criminal Justice Processes provides a helpful definition of "legal aid," stating, in part, "the service provided—legal advice, assistance and representation" by a lawyer for a criminal suspect.[30] When an individual is implicated in the criminal judicial process, at any point, they must be allowed to claim a service from a lawyer. Therefore, the police must not deny or delay the provision of a legal service from the lawyer to the suspect. If a suspect is in an interrogation room and has asked for a private family lawyer but the police fail to contact this lawyer, then that is an example of a clear contradiction of the textual formulation of the Right provided above.

One may always argue for more specific definitions. Words like "service," "claim," and "advice" could also be looked up in legal dictionaries, and their definitions could be found as well. However, in this context, the textual formulation provided above does not contain any terms similar to "reasonable" or "fair," thereby inviting an incredibly wide array of interpretations. The language used to describe the Right permits objective application and therefore meets this first criterion of legal rules.

III. WIDESPREAD VIOLATIONS OF THE RIGHT OF EARLY ACCESS TO CRIMINAL LEGAL AID

Stories of criminal suspects being denied legal assistance are far too common in Indonesia. Numerous intuitions have documented the pervasiveness of the problem. This research demonstrates that the denial of early access to criminal legal aid is a widespread problem that affects marginalized people across the country.

In 2008, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment conducted a visit to several prisons and detention centers across Indonesia. In the report following the visit, the Special Rapporteur reiterated that the Right attaches from the "moment of arrest/detention at all stages of examination" and is an essential safeguard against torture. However, this right was not protected by the Indonesian government as "few detainees had legal assistance" among the dozens observed by the Special Rapporteur.[31] Unfortunately, according to the report, the lack of legal assistance was one of many factors contributing to a situation in which torture was a "routine practice" in many areas of Indonesia.[32]

Also in 2008, the Committee Against Torture issued its Concluding Observations on Indonesia. Within this document, the Committee highlighted Indonesia's failure to protect the right of early access to criminal legal aid. Drawing upon the work of the Special Rapporteur, the Committee stated

> *"there are insufficient legal safeguards for detainees, including…restricted access to lawyers and independent doctors and failure to notify detainees of their rights at the time of detention, including their rights to contact family members."*[33]

In a widely publicized 2015 report entitled "Flawed Justice: Unfair Trials and

[30] UNODC, *Early Access to Legal Aid,* p. ix.

[31] United Nations, Human Rights Council, *Promotion and Protection of All Human Rights, Civil Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak Addendum, Mission to Indonesia*, A/HRC/7/3/Add.7 (10 March 2008), p. 20.

[32] *Ibid*., p. 2.

[33] United Nations, Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Concluding Observations of the Committee Against Torture, Indonesia*, CAT/C/IDN/CO/2 (2 July 2008), p. 3.

the Death Penalty in Indonesia," Amnesty International documented violations of the Right in cases of capital punishment. Under Article 56(1) of the KUHAP, the government must provide suspects facing the death penalty with a lawyer at all stages of the criminal process. The report studied 12 cases in which the Government of Indonesia sought the death penalty against a suspect. Amnesty International found that

> *"in the 12 cases documented in this report, that the defendants did not have access to legal counsel from the time of arrest and at different stages of their trial and appeals; and that they were subjected to ill-treatment while in police custody to make them 'confess' to their alleged crimes or sign police investigation reports. All 12 prisoners were brought before a judge for the first time when their trials began, months after their arrest."*[34]

Furthermore, the 12 cases scrutinized by the report took place in eight different provinces, indicating that problems with access to counsel are not restricted to only a few geographic areas.[35] The report also studied cases of both Indonesian and foreign nationals who had been denied proper access to lawyers. In the case of Zulfiqar Ali, a Pakistani national arrested on suspicion of possessing 300 grams of heroin in 2004, the opportunity to consult with a lawyer was severely delayed. Ali was only able to speak with a lawyer one month after his arrest. He alleges that he was severely beaten and tortured while he was in detention, and his ability to construct a legal defense to the charges against him was seriously undermined.[36]

In a study similar to the Amnesty International report, the Institute for Criminal Justice Reform (ICJR) analyzed the failings of justice in Indonesia's death penalty cases. The ICJR report, entitled "Judicial Killing: Killed for Justice, Fair Trial and the Death Penalty in Indonesia" (*Judicial Killing: Dibunuh demi Keadilan, Fair Trial dan Hukuman Mati di Indonesia*) extensively analyzed 42 death penalty court decisions between 1998 and 2013.[37] Researchers for ICJR cataloged nearly every detail of the judicial process of the 42 cases. Among the 42 cases, ICJR found that 11 either did not have access to a lawyer or access could not be verified for the initial stages of investigation and detention.[38] If more than a quarter of these death penalty cases, when the stakes could not be higher, exhibit a failing of the right of early access to criminal legal aid, then it is not hard to imagine that the Right is routinely violated in other criminal cases when the suspect's life is not on the line.

IV. CONCLUSION

This paper has established several standards for what makes a legal rule, argued that the right of early access to criminal legal aid is a legal rule, and demonstrated that the rule is routinely violated despite the existence of a rule that should generate compliance. The natural next question is, why? If the rule is clear and promulgated in numerous Indonesian and international legal texts, then another reason must

[34] Amnesty International, *Flawed Justice: Unfair Trials and the Death Penalty in Indonesia* (London: Amnesty International, 2015), p. 8.

[35] *Ibid.*, pp. 7, 33, 35, 48.

[36] Evitarossi S. Budiawan, "After Idul Fitri, Executions to Go Ahead as Usual," *Jakarta Post* (21 July 2016), http://cbe.thejakartapost.com/news/2016/07/21/after-idul-fitri-executions-go-ahead-usual.html, accessed 29 August 2016.

[37] ICJR, *Judicial Killing* pp. 54-56.

[38] *Ibid.*, p. 35.

exist for why the failure to provide early access to criminal legal aid is so frequently undermined. Numerous possible explanations can be given. While these explanations merit their own in-depth analysis outside the scope of this paper, two issues deserve to be mentioned here.

First, enforcement of the Right is lacking. One reason for the lack of enforcement is the low number of legal aid lawyers in Indonesia. According to a 2011 study by the bar association PERADI, Indonesia has only 22,000 lawyers, despite being a country of more than 250 million people, and most of these lawyers are commercial lawyers.[39] Only 409 government-accredited legal aid organizations can receive public funding. Most of these organizations are located in urban areas, and eight provinces have fewer than five accredited organizations.[40]

These 409 organizations do not represent the totality of legal aid in Indonesia. Private lawyers can give pro bono services, and unaccredited legal aid organizations are currently operating in the country. The 2011 Law on Legal Aid, which created the system for accrediting legal aid organizations, was a major accomplishment of the Indonesian government and represented a shift of legal aid resources toward grassroots and community-level organizations.[41] The fact that only 409 organizations are currently accredited by the government with unequal geographic distribution indicates the low level of legal aid infrastructure in the country.

Also undermining enforcement of the Right are the high levels of perceived corruption among police and other law enforcement bodies. According to Transparency International's 2013 "Global Corruption Barometer," 91% of Indonesian respondents felt that the police were corrupt or extremely corrupt, making it the Indonesian institution with the highest level of perceived corruption. In third place was the judiciary, with an 86% level of perceived corruption or extreme corruption.[42] Another assessment by the World Justice Project (WJP) corroborates the high degree of perceived corruption in law enforcement. WJP's "2015 Rule of Law Index" gathered data from average citizens and legal experts. The Index measured both whether a country's criminal justice system is free from corruption and if it protects the rights of the accused.[43] With regard to criminal justice overall, Indonesia is in the bottom one-third of the 99 countries that were studied.[44] When asked whether the police acts according to the law, only 47% of Indonesian respondents answered in the affirmative.[45] When law enforcement is seen as corrupt and does not adhere to the letter of the law, enforcing legal rules such as the right of early access to criminal legal aid will be difficult for them.

A second potential reason for the frequent violations of the Right is that Indonesian citizens are not sufficiently aware of it. This is not to say the Right is not clear and

[39] Tony Budidjaja, "The Future of Indonesia's Legal Profession: A Lawyer's Perspective," *Jakarta Post,* (11 April 2013), http://www.thejakartapost.com/news/2013/04/11/the-future-indonesia-s-legal-profession-a-lawyer-s-perspective.html, accessed 29 August 2016.

[40] Badan Pembinaan Hukum Nasional, "Akses Penyuluhan dan Bantuan Hukum [Socialization Access and Legal Aid]," http://adil.bphn.go.id/, accessed 29 August 2016.

[41] Ancilla Irwan and Simon Hearn, *Formalising Legal Aid in Indonesia: A Case Study as Part of an Evaluation of the Australia Indonesia Partnership for Justice*, (London: Overseas Development Institute, 2016).

[42] Transparency International, "Global Corruption Barometer 2013: Indonesia," http://www.transparency.org/gcb2013/country/?country=indonesia, accessed 30 August 2016.

[43] World Justice Project, *Rule of Law Index 2015* (Washington: World Justice Project, 2015), p. 13, http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf, accessed 30 August 2016.

[44] *Ibid.,* p. 23.

[45] *Ibid.*, p. 49.

does not constitute a legal rule. It is only an assertion that knowledge of the Right is not yet widely socialized into Indonesian culture and civil society, and Indonesian suspects are therefore unlikely to claim the Right when entangled within the criminal justice process. A study by the Hague Institute for the Internationalisation of Law (HiiL) entitled "Justice Needs in Indonesia 2014: Problems, Processes and Fairness" examined Indonesians' attitudes and understandings regarding the law and rights. Only 16% of respondents to this study reported experiencing a legal problem in the past four years. This situation was contrasted with 46% of Dutch citizens, who reported experiencing a legal problem over the same period.[46] HiiL hypothesized that the reason for this relatively low percentage is an overall lack of legal awareness among Indonesians.[47]

Another indication of low legal awareness in Indonesia is the existence of numerous international development projects in recent years that have sought to raise this awareness. The UNDP projects Strengthening Access to Justice in Indonesia[48], Legal Empowerment and Assistance for the Disadvantaged Project[49], the USAID/ Asia Foundation project eMpowering Access to Justice[50], and the AusAid project Australia-Indonesian Partnership for Justice[51] all aim to raise legal awareness. These projects have received major investments of millions of dollars. A significant amount of background research is conducted before objectives are set and money is spent. The fact that these projects, which are led by different agencies, have all felt that legal awareness needs to be raised in Indonesia supports the argument that awareness is currently unacceptably low.

These explanations for the frequent violations of the Right are systemic and deeply rooted in Indonesian society. Thus, they will not be easy to rectify. However, the clarity of the legal rule found in Indonesian and international law can be an instrument in the fight for justice and the protection of criminal suspects. Advocates can highlight the clarity of the Right and use it as a tool to raise legal awareness, combat corruption, and demand compliance with its provisions. This ability may finally give criminal suspects real access to legal aid and end the frequent human rights violations we see today.

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[46] The Hague Institute for the Internationalisation of Law, *Justice Needs in Indonesia 2014: Problems, Processes and Fairness* (The Hague: The Hague Institute for International Law, 2014), p. 25, http://www.hiil.org/data/sitemanagement/media/JNST%20Indonesia%20Final.pdf, accessed 30 August 2016.

[47] *Ibid*., p. 89.

[48] United Nations Development Programme, "UNDP Results: Strengthening Access to Justice in Indonesia Project," http://www.undp.org/content/dam/indonesia/docs/gover/2013%2008%2013%20SAJI%20Result%20Sheet.pdf, accessed 30 August 2016.

[49] United Nations Development Programme, "The Legal Empowerment and Assistance for the Disadvantaged (LEAD): What We Do," http://www.id.undp.org/content/indonesia/en/home/operations/projects/democratic_governance/the-legal-empowerment-and-assistance-for-the-disadvantaged.html, accessed 30 August 2016.

[50] United States Agency for International Development, Notice of Funding Opportunity: USAID-INDONESIA Request for Application (RFA)-497-16-000001, 9 October 2015, pp. 8, 11.

[51] Australia Indonesia Partnership for Justice, "Legal Aid Delivers Justice in Indonesia," http://www.aipj.or.id/en/civil_society_strengthening/detail/legal-aid-delivers-justice-in-indonesia, accessed 30 August 2016; Australia Indonesia Partnership for Justice, "Indonesia's First Nationally Funded Legal Aid System," http://www.aipj.or.id/en/legal_aid, accessed 30 August 2016.

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