

## **The International Conference On Legal Aid**

### **Legal Aid In Indonesia**

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#### **Introduction**

Indonesia is entering a new post-authoritarian country after the fall of the totalitarianism regime in 1998 where there were a lot of gross human rights violations. There are more than 200 million population in Indonesia where civil law system (the Dutch Legal System) is being used within the judiciary system. The President, the Governors and the Parliamentary Members (MPs) are elected directly by the people. There are 33 provinces which have an autonomy (quasi-federal system) in deciding their local budget, education, health, tax, capital investment etc. The Central Government in Jakarta is still to control external relation, security matters etc. Indonesia is member of international and regional organisations for example the Association of Southeast Asia Nations where there will be a regional human rights Charter and mechanism within next two years. Indonesia is also party to major International human rights covenants such as the International Covenant On Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ESCR).

According to the fourth amendment of the 1945 Constitution there are two judicial powers that are the Supreme Court and the Constitutional Court. The Constitutional Court has functions to determine the compatibility of the existing laws with the 1945 Constitution and its amendments (Judicial review), to settle the dispute of the result of presidential and parliamentary member elections and disputes among state institutions. The court consists of nine judges that have independent position to decide those disputes. The court has also held landmark jurisprudence for example the cases of freedom of expression, right to be elected, right to counsel etc.

The Supreme Court performs its function to decide the civil and criminal cases that has been held by the appeal courts and the district courts. The Court also decided the gross violation of human rights cases that have been decided by the Human Rights Courts. There are also the appeal courts that are located in the capital of each provinces in Indonesia as well as the district courts in every district areas. There is a Islamic court based on the Islamic bylaw in the Aceh Province, the Northern Province of Indonesia, that has a function to settle disputes on the civil cases and punish the defendants who find guilty in criminal cases. A few indigenous community laws are informally recognised to settle dispute on land etc within those indigenous communities.

According to the 2004-2005 Supreme Court annual report there were 390 civil, criminal and administrative cases submitted to the Court by January 2005. The Court is handling 20.099 cases that 605 cases already decided in 2004-2005.

The following is the judge composition according to the 2004-2005 Supreme Court annual report as follows:

**Table. 1 the Composition of The Judge**

a. the Supreme Court Judges	49
b. the Appeal Court Judges	617
c. the District Court Judges	5.176
d. the court officers	21.156
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	26998

The Judicial Commission (JC) is a newly established institution in order to supervise the judges' code of conduct preventing abuse and misuse of power and investigating violation of such code of conduct. The Anti-Corruption Commission (ACC) has mandates to prevent corruption and investigate corruption cases including those corruption cases involving judges. The 2007 Transparency International Indonesia (TII) survey showed that the judicial corruption is the highest degree corruption among other kind corruptions in Indonesia<sup>1</sup>. Such corruption is one of access to justice problems that is a systemic corruption involving judges, prosecutors, court officers and even lawyers.

**The Legal Aid Provisions**

Indonesia has no the integrated legal aid act that why the legal aid provisions are regulated within the Criminal Procedure Code No.8/1981, the Judicial Power Act No.14/2005, the Human Rights Act No. /1999, the Advocate Law No 18/2003, the Jurisprudence of the Constitutional Court.

The scope of legal aid is criminal and civil case according to Article (Art.) 37 the Judicial Powers Act No.4 /2007.

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<sup>1</sup> The TII is a Non-Governmental Organisation (NGO) which its activity is to monitor corruption cases in Indonesia by conducting a survey of the public perception on the corruption. See the [www.tii.org](http://www.tii.org)

Art. 54 of the Criminal Procedure Code recognises right to counsel for those who are charged with criminal offences, but art. 56 section 1 of the Criminal Procedure Act limits right to counsel that can be granted for defendants or suspects who are charged with the most serious crimes. The provision makes the absence of right to counsel for suspects or defendants who are charged with the criminal offence is the least crimes.

Art. 18 section 4 of the Human Rights Act No. 18/1999 recognises right to counsel in the criminal case only. The Act qualifies right to counsel as a derogable right that can be limited within a public emergency situation.

Art. 14 section 3 d of the ICCPR Ratification Act No. 12/2005 recognises right to counsel in criminal case if interests of justice required.

The 2004 Constitutional Court Judgement held right to counsel was constitutional right (the implied right), although, the 1945 Constitution itself does not mention explicitly right to counsel, but right to counsel can be derived from the rule of law principle that is part of the 1945 Constitutional.

### **The Legal Aid Providers**

There are legal aid providers that are provided by Non-Governmental NGO's, the Bar Association and University Legal Clinics.

NGOs provide a legal aid service for example the Indonesian Legal Aid Foundation (YLBHI), the Indonesian Legal Aid and Human Rights Association (PBHI), the Indonesian Women Association For Gender Justice (LBH APIK). They work to provide a legal aid service in particular for the victims of human rights violation both in civil, administrative and criminal cases. Most NGOs receive legal aid fund from the International Donor for example the Australian International Development Agency (the AusAid), the Netherlands International Development Agency (NoviB), The US International Development Agency (USAID), the Swedish International Development Agency (the SIDA), the Open Society Institute (OSI), the European Commission (the EC).

NGOs also provide an annual report as a public accountability of what they has been done within one year for example the Jakarta Legal Aid office, which is one of YLBHI's

branch office published the 2006 annual report. The Jakarta Legal Aid Office publishes the 2006 report based on human rights approach to categorize legal aid cases.

The following is the 2006 annual report of the Jakarta Legal Aid Office

**Table 2. The 2006 Jakarta Legal Aid Office Annual Report**

<b>Year</b>	<b>A Number Of Cases</b>	<b>A Number of Legal Aid Seekers</b>
2002	1.338	11.478
2003	1.026	21.409
2004	1.097	32.370
2005	1.134	21.409
2006	1.123	10.015

The Bar Association, (Peradi) which have eight members, should provide a legal aid for those who cannot afford the lawyer fee according to art. the Advocate Law No.18/2004. But the provision only recognises legal aid providers that are member of the Bar Association that why NGOs and University Legal Clinic are not recognised. The members of the Bar Association work in cooperation with the Supreme Court to provide a legal aid service. The Ministry of Justice and Human Rights distributes legal aid fund through district court where there are a legal aid office. The merit of cases is only criminal cases. The district court judges decide whether the case meet the legal aid requirement. The judge decides to appoint a lawyer, if the case meets legal aid requirement. The fund came from the state budget. There is, however, no public accountability the expenditure of legal aid that has been spent within one year. Ideally the Ministry of Human Rights and Justice should publish an annual report of the legal aid expenditure.

There are also both public and private universities which provide a legal aid service for those who cannot afford lawyer fee. The legal aid service is part of university's community service and clinical legal education where law students can intern to take part in handling a cases or observe the criminal and civil proceedings.

## **The Legal Aid Problems In Indonesia**

There are several legal aid problems that can be identified for example there is no legal aid act, right to counsel in a criminal case can only be granted for the most serious cases, right to counsel can be protection in a public emergency, limited resources of the government in providing of legal aid budget.

The legal aid act is being encouraged by a group of NGOs and UCLs, although, they do not have a concept of legal aid scheme which can be applied in Indonesia. But they offered and drafted the integrated legal aid system to the government and parliament that a legal aid board, using the South Africa legal aid model or the UK legal aid model in 1990-1999 where the Legal Aid Board (LAB) has a key role in keeping the quality of legal aid providers and delivering legal aid fund. There is a role of the Legal Aid Board to supervise legal aid providers in order to keep the quality of legal aid service, to distribute legal aid fund to the legal aid providers which meet the qualification of providers. They propose the role of state in putting the legal aid expenditure within the national and local state budget or at least there should be one percent for legal aid expenditure in the national and local state budget. There must also be a public accountability of legal aid expenditure.

Actually the Constitutional Court in 2004 held right to counsel is a constitutional right (the implied right) that is an answer the doubt of the question whether right to counsel is constitutional right.<sup>2</sup> Thus, right to counsel should granted for those are convicted with both a serious or the least criminal case in a normal or emergency situation. Indonesia is party to the International Covenant On Civil and Political Rights (ICCPR) that recognises right to counsel is part of fair trial rights that why the judges should be familiar with a leading international jurisprudence on the right to counsel for example leading jurisprudence of the European Court of Human Rights, the Human Rights Committee, Inter-American Court of Human Rights and the African Commission on Human Rights.

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<sup>2</sup> Case of the University Legal Clinic v Indonesia; the Constitutional Court held that the government cannot penalize legal aid providers which are not member of the Bar Association. They provide a legal aid service for public interests that is part of fair trial right and the rule of law principle. Those principles is recognised under the art. 1 section 3 of the First Amendment of the 1945 Constitution. The US Supreme Court (Escobedo v US, Miranda v US) held right to counsel is a constitutional right that should be granted in all proceedings including in the police interrogation.

There are several priorities in developing the future of legal aid in Indonesia, the first is to improve the quality of a legal aid service and legal aid providers, the second is to increase the role of state in providing a legal aid expenditure, the third is to establish an independent and accountable the LAB through a legal aid act.<sup>3</sup>

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<sup>3</sup> The draft of legal aid bill has been done by a group of high profile lecturers and human rights organisation. The Parliament members agree with the draft and will put the draft in the next year schedule.