

CAVEAT

INDONESIA'S BIMONTHLY HUMAN RIGHTS ANALYSIS

LBH Masyarakat presents you the September-October 2012 edition of CAVEAT, a bimonthly analysis of Indonesia's human rights situation.

EDITOR'S NOTE

The idea of reforming Indonesian criminal justice system by amending the current Criminal Procedure Code (KUHP) has been in suspended animation for much of the last decade. The draft revision has not been enacted and the progress to pass the draft revision practically halted. At this pace it may take another decade for the draft to be passed and one may even conclude that the government and the parliament seem to not want to pass it at all. This is at odds with their enthusiasm to hastily pass legislation of lesser importance as of late.

HUMAN RIGHTS, LAW, AND POLITICS

The Amendment of Indonesian Criminal Procedure Code: Quo Vadis?

On 17 November 2011, the Indonesian government, together with the other nine governments of South East Asian countries, declared political commitments to achieve zero new HIV infection, zero discrimination, and zero AIDS-related deaths. The fact that HIV epidemic in this region has affected more than 1.5 million people, and the concern that such epidemic may have negative consequences on the realization of an ASEAN Community, has led these ten countries to declare and renew their political commitment in achieving the 'Getting to Zero' goals.

HUMAN RIGHTS, HIV, AND DRUG POLICY

Harm Reduction and Young Injecting Drug Users in Indonesia

FROM OUR ARCHIVE

LBH Masyarakat v. BNN on the Right to Information: A Brief Note

In February 2012, the Community Legal Aid Institute (LBH Masyarakat) filed a right-to-information request to the National Narcotic Board (BNN) asking for copies of three of their regulations related with the investigation of drug offences. Those regulations are, Regulation of the Head of BNN number 3 of 2011 regarding the Technique of Controlled Delivery, Regulation of the Head of BNN number 4 of 2011 regarding the Technique of Undercover Purchase, and Regulation of the Head of BNN number 5 of 2011 regarding the Technique of Inquiry and Investigation of Drug Offences. However, in March 2012, BNN declined the request arguing that the regulations in question were exempted from the public information category. In April 2012, LBH Masyarakat filed an objection with regard to that decision.

A Letter From Jember

My name is Christina Sitorus. I am a law student at the University of Jember on my third semester now. Since few months ago, I joined the Community Legal Aid Institute (LBH Masyarakat), as a volunteer. One of my tasks is to provide legal counseling in Jember Correctional Institute, under the supervision of staff lawyers. Last August, I met a child prisoner.

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EDITOR'S

N O T E

LBH Masyarakat presents you the September-October 2012 edition of CAVEAT, a bimonthly analysis of Indonesia's human rights situation.

In Human Rights, Law, and Politics column, Alex Argo Hernowo, LBH Masyarakat's Justice Sector Reform Program Coordinator, writes about the progress, or lack thereof, of the Indonesian Criminal Procedure Code reform process, that has somehow stagnated at the bottom of the government's and parliament's list of priorities for much of the last decade. In his article entitled **The Amendment of the Indonesian Criminal Procedure Code: Quo Vadis**, Hernowo discusses one of the key arguments of why the present Criminal Procedure Code (KUHP) is deeply inadequate to provide the necessary human rights protections during criminal proceedings. He continues by elaborating two of the many fundamental issues in relation to Indonesian criminal procedure law, namely: the concept of criminal procedure and the rules on evidence. Hernowo argues that the lack of good political will from the government and the parliament has severely impaired the reform process of the Criminal Procedure Code. It is rather worrying that they are preoccupied with hastily passing bills that are less crucial to the development of Indonesian legal environment, whereas the deliberations regarding this strategic law have been practically in a limbo.

Ajeng Larasati, LBH Masyarakat's Human Rights, HIV, and Drug Policy Reform Program Coordinator writes about **Harm Reduction and Young Injecting Drug Users in Indonesia** in Human Rights, HIV, and Drug Policy column. Larasati examines laws and regulations regarding harm reduction services in Indonesia and how such services, namely, Methadone Maintenance Treatment (MMT) and Needle and Syringe Program (NSP), are available and accessible in the context of young injecting drugs users. Larasati argues that the laws are unclear and the implementation is poor. In light of the importance of harm reduction services for young injecting drug users in Indonesia, she offers some strategic proposals for further policy discussion. Given that the issue of harm reduction and young injecting drug users in Indonesia is rarely addressed, if not entirely overlooked, Larasati's article is an important attempt to launch a debate on this subject.

In From Our Archives we raise the issue of right to information in the context of drug policy reform. Muhammad Afif Qayim, a legal intern with LBH Masyarakat, and Ricky Gunawan, the Program Director of LBH Masyarakat, write about our recent and ongoing effort challenging the National Narcotic Board's (BNN) regulations regarding inquiry and investigation of drug offences. They present the chronology of the case of LBH Masyarakat against BNN before the Indonesian Information Commission and the legal debate involved in **LBH Masyarakat v. BNN on the Right to Information: A Brief Note**.

Finally, Christina Sitorus, an intern with LBH Masyarakat Jember Office, writes about her experience in a juvenile case she handled that raises questions that might have never been discussed in the legal community before. In a recent juvenile case, a child was sentenced to 25 days of imprisonment. At the time of the sentencing, the child had already been detained for 20 days, and he only needed to serve out five more days before release. However, three days before the release, the prosecutor filed an appeal. That child's detention then continued under a High Court's decision. While waiting for the appeal decision, the prosecutor eventually decided to drop his appeal. This meant that his conviction followed the lower court's decision, but he served more than 25 days of imprisonment. In such a case, who can be held responsible for the "extended detention" that the child had to suffer? This is the dilemma that Sitorus raised in her article "**Extended Detention: Whose Fault Is It?**"

As usual, we look forward to hear your comments or constructive criticism. We hope you find this edition of CAVEAT useful for your reference to understand the various Indonesian human rights issues. Thank you for your support.

~ The Editor ~

The Amendment of Indonesian Criminal Procedure Code: Quo Vadis?

By: Alex Argo Hernowo¹

Introduction

The idea of reforming Indonesian criminal justice system by amending the current Criminal Procedure Code (KUHAP) has been in suspended animation for much of the last decade. The draft revision has not been enacted and the progress to pass the draft revision practically halted. At this pace it may take another decade for the draft to be passed and one may even conclude that the government and the parliament seem to not want to pass it at all. This is at odds with their enthusiasm to hastily pass legislation of lesser importance as of late. This delay in passing the new law on criminal procedure is utterly frustrating and disappointing considering the fact that the current criminal justice system is murky, outdated and is in dire need for an overhaul. Against this backdrop, one really has to question the government and the parliament's seriousness to discuss and pass the revision of the criminal procedure law and whether they see this as important at all.

The Need to Amend the Criminal Procedure Code

Indonesian civil society coalition on criminal procedure reform² has identified why the current Criminal Procedure Code (KUHAP) must be amended. The coalition argues that the existing KUHAP no longer accommodates the human rights norms as enshrined in the international human rights laws pertaining to criminal procedure, in particular human rights standards recognized under the major human rights conventions, such as, the International Covenant on Civil and Political Rights (ICCPR), Convention against Torture (CAT), Convention on the Rights of the Child (CRC), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Indonesia has already ratified these conventions, therefore, as a State Party, Indonesia is obliged to harmonize its laws and regulations in accordance with the human rights standards enshrined in those conventions. In the area of criminal justice, KUHAP is the main source of law. Therefore, it is

¹ Alex Argo Hernowo is Justice Sector Reform Programm Coordinator of Lembaga Bantuan Hukum Masyarakat (LBH Masyarakat).

² KUHAP coalition consists of: LBH Jakarta, LBH Masyarakat, LBH Pers, LBH APIK Jakarta, LBH Semarang, HRWG, ILRC, Arus Pelangi, HuMA, MAPPI, Elsam, LeIP, Imparsial and PSHK.

essential for the government to ensure that KUHAP incorporates the international human rights standards according to the conventions it has ratified. It is also worth mentioning that KUHAP was enacted in 1981, or more than 30 years ago. The legal and political situations have changed and KUHAP must adjust its contents to reflect the current dynamics in the area of criminal justice.

It must be admitted that, to a certain degree, KUHAP has already recognized some human rights that are crucial in criminal proceedings, such as the right to legal aid, the right to be informed of the charges, and so forth. However, the stipulation of such provisions is not adequate. Other provisions that very likely infringe human rights of suspects during the criminal proceedings still persist. For example, KUHAP allows the police to detain a suspect up to 20 days and it can be extended up to 40 days. This long period of detention will put the suspect into a vulnerable situation where he may be subject to torture, difficulties to access legal aid, or extortion by the police or other law enforcement agents.

The draft revision of KUHAP has actually incorporated some principles which will provide more stringent safeguards to minimize human rights violations in criminal proceedings. As stated in the Academic Paper of the Draft, "the aim of the future Criminal Procedure Code is to pursue the objective truth, protect the rights and freedoms of individuals and citizens, preserve a balance between the rights of the parties, persons who are in similar situations and prosecuted for the same offences should be judged according to the same rules, the maintenance of constitutional system of the Republic of Indonesia against criminal encroachment, the maintenance of peace and security of mankind and the prevention of crimes."³

The Academic Paper of the Draft also emphasizes some of the points for revision, for example, harmonization of the roles and positions of police investigator and prosecutor, introduction of wiretapping or legal interception, revisions on detention, commissioner judge, plea bargaining, and crown witness. However, unfortunately, these principles have not been thoroughly debated during the discussion of the revision.

KUHAP: Issues on Criminal Procedure and Evidence

The Indonesian criminal procedure that is enshrined in KUHAP has often been interpreted as mere laws to regulate how law enforcement agents shall act to achieve the state's objective in relation to criminal law. This is why law enforcement agencies in exercising their authorities tend to perceive that punishment of criminals is the sole objective of their responsibilities. Where, in fact, placing many people in prisons is far from identical to achieving justice.

In its development, the objective of the criminal (procedure) law has shifted today to restoring the relationship between the perpetrators, victims and the society. Imprisonment should not be perceived as the foremost aim. Prof. Mardjono Reksodiputro argues that a criminal justice system can be summarily described as a system that aims to "prevent crimes". It is an attempt by the society to prevent crimes, and such attempts should be within acceptable limits of tolerance.⁴ With that concept in mind, a criminal justice system should contain the following elements: first,

³ Academic Paper of the Draft Revision of the Criminal Procedure Code, 2008, p. 8.

⁴ See Mardjono Reksodiputro, *Kriminologi dan Sistem Peradilan Pidana: Kumpulan Karangan Buku Kedua*, Jakarta: Pusat Pelayanan Keadilan dan Pengabdian Hukum, Universitas Indonesia, 1994, p. 140

to protect the society from crimes; second, to resolve the crimes taking place so that the society is satisfied to see that justice has been served and those who are guilty are punished; third, to ensure that those who have committed criminal acts will not repeat them again. These functions are embodied within the state organs in the area of criminal justice system: police, prosecutor, and correctional institute. Within this restorative perspective, a successful criminal justice system enables the perpetrator to fully reintegrate into the society and continue living as a law abiding citizen.

Putting the notion addressed by Prof. Reksodiputro into KUHAP's perspective, there are two problems with how the current criminal procedure law is carried out. Firstly, judges do not examine facts or evidence from direct sources (fresh evidence) or from the beginning. They examine the case based on the Minutes of Examination (BAP) prepared by the police investigator at the pre-trial phase. Judges, in this context, seem to just confirm the contents of BAP. This makes BAP a "burden" for the police investigator because it is through the BAP that an indictment can be formulated and this condition affects the subsequent processes, namely, police enforcement actions (arrest, detention, seizure, and so forth) and the relationship with the prosecutor. With such "burden" it is no wonder that during the process of preparing the BAP, violations of both the procedural and substantial laws often take place.

In resolving a criminal case, some enforcement actions by the police are inevitable. Police enforcement like arrest or detention can be classified as "deprivation of liberty". However, when conducted lawfully, it can be considered as "arrest"⁵ or "detention."⁶ In KUHAP, such police enforcement actions are rife with latent abuse of power, because the control mechanism relies mainly on internal mechanism of the police through their authority of "discretion". For example, there are no clear legal criteria to determine the necessity of extending detention apart from the investigators simply saying that they need more time to collect further information of the case. But, in fact, in most cases they finish their investigation within the initial part of detention and often the extension is used to either torture or extort the suspects. Discretion then seems to be the magic word for law enforcement apparatus to do their job arbitrarily. When questioned about the legal justification of their decisions during criminal proceedings, they can virtually argue on the basis of discretion.

The relationship between investigators and prosecutors in criminal procedure regulated in KUHAP also impacts the BAP. The functional concept of police and prosecutor are regulated in their own respective laws: Law on National Police and Law on Attorney General Office. Their separate relationship meets in one stage of the criminal process, namely: the so-called pre-prosecution. At this stage, research prosecutors will act like screening prosecutors to examine whether the BAP is already complete or sufficient for them to proceed to court or not. After examining the BAP, research prosecutors will recommend the investigators for completion, if needed. In practice, this relationship does not run well. Each can have different perspectives due to the separate relationship. Police investigators can say that their BAP is complete, but the prosecutors can argue

5 See Article 1 point 20 of KUHAP. Arrest is an act an investigator to temporarily restrict the freedom of suspect or accused if there are sufficient evidence for purposes of investigation or prosecution and/or adjudication matters and by means regulated in this law.

6 Article 1 number 21 of KUHAP: Detention is the placement of a suspect or accused in a certain place by an investigator or public prosecutor or a judge with ruling therefore, in matters and by means regulated in this law.

differently regardless. Even when the BAP is really completed, if the prosecutors do not wish to proceed with the case for whatever reasons, legitimate or otherwise, they can simply return the BAP back to the investigators, and this back-and-forth can drag on without end, and they will start lame each other.⁷ This will affect the case itself and puts the suspect in a disadvantaged situation as it delays the progress of the case.

Secondly, to decide whether a defendant is guilty or not, judges tend to base their decisions from the facts found, whether they have or have not fulfilled the elements of the crimes indicted formulated based on BAP. The process to examine in this way is called syllogism with the following premises. Step 1: an act has to fulfill all the elements of the crime. Step 2: facts (act) that are found or discovered have to be based on evidence.⁸ And, step 3: it follows that the judges will conclude that the defendant is guilty or not. If the defendant is found guilty, such decision will be followed with the qualification of the criminal act whether it is a premeditated crime, by intention, or by omission crime. Afterwards, it is followed by the sentencing of the defendant. In this process, evidence is crucial for both the defendant and the prosecutors. However, regulation on evidence in KUHAP only distinguishes between evidence as legal means of proof and evidence as hard or material evidence. KUHAP also provides limited scope of evidence as legal means of proof, that includes witness testimony, expert testimony, document, indication and defendant's statement.

With regard to evidence, there are two problems about this in KUHAP. First, on the qualification of sufficient preliminary evidence, according to KUHAP, an inquiry will start first with a police report or information regarding an event alleged to amount to a criminal act. Based on that report or information, investigators then start to seek and gather evidence to clarify whether a criminal offence has occurred and to identify the suspect.⁹ The arrest of a suspect should be based on "sufficient preliminary evidence". According to the explanation to Article 17 of KUHAP, "sufficient preliminary evidence" is preliminary evidence to presume there has been an offence.¹⁰ However, determining the legality and the force of "sufficient preliminary evidence" is not regulated in KUHAP. This provision on the legal criteria of "sufficient preliminary evidence" is important because it serves as the grounds to arrest a person that can lead to detention for the purpose of investigation. Further, the issue of "sufficient preliminary evidence" does not fall under the authorities of the pre-trial mechanism regulated in Chapter X, part one, of KUHAP. Where in fact, conceptually, the idea of pre-trial mechanism was intended to prevent the abuse of power of investigators or prosecutors, because the scope of pre-trial mechanism is to examine the legality of the arrest, detention, termination of investigation, or termination of prosecution.

Second, KUHAP does not regulate how investigators should obtain evidences. In reality, evidence is often obtained through practices like torture or other ill-treatment. The absence of provision on

7 Topo Santoso, *Polisi Dan Jaksa: Keterpaduan atau Pergulatan?*, Depok: Pusat Studi Peradilan Pidana Indonesia, 2000, p. 103

8 Under the Indonesian criminal procedure code, evidence refers to non-hard or non-material evidence. It is usually interpreted as "legal means of proof" to distinguish with common understanding of evidence. Evidence in this understanding are: witness testimony, expert testimony, document, indication, and defendant's statement.

9 Article 1 number 2 of KUHAP.

10 Explanation of Article 17 of KUHAP: "That which is meant by 'sufficient preliminary evidence' is preliminary evidence to presume that there has been an offense in accordance with the language of article 1 point 14. This article demonstrates that an arrest warrant cannot be carried out arbitrarily, but is aimed at those who have actually committed an offense."

how to obtain legitimate evidence makes it easy for the investigators to manipulate their evidence. This certainly will harm the suspects because it places them in a disadvantaged position. In a criminal proceeding, judges usually only examine evidence with regard to the relevance with the case, whether it helps to describe how the criminal act was committed, how it was used and how strong its force as a legal means of proof. Judges tend to ignore or rarely question the legality of the evidence in a hearing.

From Internal Constraint to Good Political Will

The above explanation covers only a few key issues about KUHAP which underscores the urgent need to pass the revision. The new KUHAP is crucial for the whole discussion on Indonesian criminal justice reform because it touches upon several strategic aspects of the reform such as police reform, and incorporation of the international human rights standards to the Indonesian criminal procedure law. However, substantive debate has rarely occurred throughout the decade of discussions between the government and the parliament. It seems that the government and the parliament pay no serious attention to this matter. The civil society coalition has often urged the government and the parliament to expedite the process and have on many occasions questioned their seriousness to pass the revision. The government repeatedly responds by saying that they will push the draft to the parliament to discuss it together, but such statement seems more like lip service bereft of any good faith to seriously discuss the draft revision.

The government also often argues that it has internal constraints to send the draft revision of KUHAP to the parliament, without ever specifying what such internal constraints are. Regardless of the reasons for why the government has not sent the draft KUHAP to the parliament, one thing is apparent, namely that the government lacks political good will, a deficiency that is equally shared by the parliament. Their lack of commitment to reform the Indonesian criminal justice system has not just resulted in the delay of the enactment of the new KUHAP per se, but more fundamentally, it has pushed back the legal reform agenda indefinitely.

Harm Reduction and Young Injecting Drug Users in Indonesia

By: Ajeng Larasati¹

Background

On 17 November 2011, the Indonesian government, together with the other nine governments of South East Asian countries, declared political commitments to achieve zero new HIV infection, zero discrimination, and zero AIDS-related deaths.² The fact that HIV epidemic in this region has affected more than 1.5 million people,³ and the concern that such epidemic may have negative consequences on the realization of an ASEAN Community, has led these ten countries to declare and renew their political commitment in achieving the 'Getting to Zero' goals. One of their commitments is to eliminate new HIV infections among children by 2015,⁴ which is in line with the United Nation's 'Getting to Zero' campaign launched on the 2011 World AIDS Day.⁵

In terms of HIV/AIDS, young people⁶ are perceived to be "at the heart of the problem" bearing in mind that in most parts of the world the majority of new infections are among young people between the ages of 15 and 24, or even younger.⁷ Their vulnerability to HIV infections may emerge at different stages of their lives. First, they become vulnerable if one, or both, of their parents are HIV positive. Second, adolescents are vulnerable to HIV because their first sexual encounter might be in an unsupported environment where there is no adequate information on sexual reproductive health and rights. Third, transition into adulthood is a crucial period when, as they

1 Ajeng Larasati is Human Rights, HIV, and Drug Policy Reform Program Coordinator of Lembaga Bantuan Hukum Masyarakat (LBH Masyarakat).

2 The ASEAN Declaration of Commitment: Getting to Zero New HIV Infection, Zero Discrimination, Zero AIDS-Related Death, 17 November 2011, available at: http://www.aseansec.org/documents/ASEAN_Declaration_of_Commitment.pdf

3 *Ibid.*, point 9.

4 *Ibid.*, point 16 D.

5 UN World AIDS Day 2011 Report, available at: http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/JC2216_WorldAIDSday_report_2011_en.pdf

6 The term "young people" here refers to people who are under 18 years old.

7 UN Committee on the Rights of the Child, *General Comment No. 3 on HIV and the Rights of the Child*, CRC/GC/2003/3, 17 March 2003, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/408/16/PDF/G0340816.pdf?OpenElement>

start to search for their identity, young people may begin experimenting with drugs.⁸ Given these circumstances, preventing HIV transmission among young people is a crucial issue.

According to the Indonesian Ministry of Health, January – June 2012 saw as much as 9,883 HIV cases and 2,224 AIDS cases in Indonesia.⁹ 13.3 % of new HIV infections occurred among people who inject drugs.¹⁰ 7.2% of these HIV cases occurred in population of people under nineteen years old – categorized in this article is as children.^{11,12} More than 700 HIV cases among young people in the first semester alone is alarming because this number may very likely increase in the following semester.

The National Narcotic Board (BNN) reported that in 2011, 9.6 to 12.9 million Indonesians have used drugs in their lifetime; with 3.7 to 4.7 million of them are still using drugs.¹³ 70,000 of the current users use injecting drugs, and 30% of the current injecting drug users are young people.¹⁴ In 2008, the National Child Protection Commission (KPAI) released their data on the situation of street children in Jakarta. It shows that, of 1,305 respondents, 7.63% of street children in Jakarta use drugs and 5.14% of street children sniff glue.¹⁵

This article will examine the harm reduction services for young people who inject drugs in Indonesia. It will briefly look at two harm reduction services available in Indonesia, namely Methadone Maintenance Therapy (MMT) and Needle and Syringe Program (NSP), on how these services are provided for young injecting drug users. Following the brief examination, this article will provide some arguments on the importance of harm reduction intervention for young injecting drug users (young IDUs) and offer some strategic recommendations in designing harm reduction services for them while keeping ‘the best interest of the child’ as its ground rules.

The Legal Framework for Harm Reduction Services with Emphasis on Young IDUs

Over the last decade, the global trend on drug policy has shifted away from perceiving people who use drugs as criminals to people who have health problems.¹⁶ To address this health issue, many countries adopted forced drug treatment approaches.¹⁷ It was carried out with the hope of

8 Jovana Arsenijevic and Andjelka Nikolic, ‘I’ve Been Waiting for This My Whole Life’’: Life Transitions and Heroin Use’, pp. 205-218, in Damon Barrett (ed.), *Children of The Drug War*, New York: the International Debate Education Association, 2011, available at: <http://www.childrenofthedrugwar.org/p/download.html>

9 Ministry of Health, *Laporan Situasi Perkembangan HIV/AIDS di Indonesia (sampai dengan 30 Juni 2012)*, 15 August 2012, Graphic 1, p. 2, available at: <http://www.aidsindonesia.or.id/laporan-kementerian-kesehatan-triwulan-ii-tahun-2012.html>

10 *Ibid.*, table 14.

11 Article 1 paragraph (1) of the Law number 23 of 2002 regarding Child Protection defines child as someone who is under 18 years old. Due to the age grouping used by the Ministry of Health, children’s HIV percentage is taken from the accumulation of ≤ 4 years old, 5-14 years old, and 15-19 years old group.

12 Ministry of Health, *Laporan Situasi Perkembangan HIV/AIDS di Indonesia (sampai dengan 30 Juni 2012)*, 15 August 2012.

13 National Narcotic Board, *Ringkasan Eksekutif: Survey Nasional Perkembangan Penyalahgunaan Narkoba di Indonesia di Tahun 2011*, p. 19, available at: <http://www.bnn.go.id/portal/uploads/post/2012/05/29/20120529145842-10263.pdf>

14 *Ibid.*, p. 23.

15 National Child Protection Commission, *2007–2008 Street Children in Jakarta Database*, available at: <http://rehsos.depsos.go.id/modules.php?name=News&file=article&sid=276>

16 See what is happening in Portugal, Switzerland, and Czech Republic to name but a few.

17 Vietnam, Cambodia, and China are some of the countries that impose compulsory drug treatment. See: <http://www.opensocietyfoundations.org/publications/human-rights-abuses-name-drug-treatment-reports-field?skin=printable>

reducing the demand for drugs, thus disrupting the market and ‘curing’ those who are addicted to drugs. However, forced drug treatment has proved to be at odds with international human rights standards, particularly the right to health, wherein one of the principles being violated is informed consent or voluntary treatment.¹⁸ Another reason why some states also put in place forced drug treatment is their unrealistic belief of having a drug free world. This is unrealistic given that there always will be people who are unwilling or just unable to stop their drug use. In such a situation there is a high risk that injecting drug user may contract HIV, and this gives rise to the need for a treatment that can reduce such health harm (and social harm) while still respecting those who are unwilling or unable to stop their drug use. This approach is known as harm reduction.

Harm Reduction International (HRI), a leading international non-governmental organization promoting practices and policies of harm reduction, provides a comprehensive definition of harm reduction. HRI defines harm reduction as a set of “policies, programs, and practices that aim to reduce the harm associated with the use of psychoactive drugs in people unable or unwilling to stop.”¹⁹ Their definition has been referred to by many other organizations, including the World Health Organization (WHO).²⁰

In Indonesia, harm reduction itself has been recognized by the government through a policy at the national level, although its harm reduction services are not as comprehensive as other countries that have implemented it earlier. In 2007, the Indonesian Coordinating Minister of Social Welfare, as the Chair of the Indonesian National AIDS Commission, issued a Ministerial Regulation number 2 regarding the National Policy on HIV and AIDS Prevention through Harm Reduction of Injecting Drug Use. In providing HIV prevention services for people who inject drugs, the NAC has set a range of programs, such as, Needle and Syringe Program (NSP), Opioid Substances Therapy (OST), Prevention from Mother to Children Treatment (PMTCT), and HIV prevention intervention in prison settings.²¹

With regard to harm reduction services for young people who use drugs, the Regulation of the Coordinating Minister of Social Welfare number 2 of 2007 also acknowledges that harm reduction shall be delivered with special attention for this population. By special attention, the regulation refers to a set of protections that enable young IDUs to obtain care, support, and treatment services. The Regulation explains that to provide harm reduction services for young IDUs the principles of the rights of the child shall be taken into account – principles already set out in Law number 23 of 2002 regarding Child Protection. These principles include non-discrimination, the best interests of the child, right to life and development, and respect for children’s opinion.²² The Regulation also recalls the special protection for young people who use drugs as set forth in the Child Protection Law. According to Article 59 of that Law, the government is obliged to provide special protection for a variety of children groups, including young people who use drugs.

18 UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Report to the UN General Assembly, A/64/272*, 10 August 2009.

19 International Harm Reduction Association Briefing, *What is harm reduction?*, London: International Harm Reduction Association (IHRA), 2010, available at: http://www.ihra.net/files/2010/08/10/Briefing_What_is_HR_English.pdf. Harm Reduction International was previously known as International Harm Reduction Association.

20 WHO uses HRI’s definition of harm reduction in its publication. See, for example, the Biregional Strategic for Harm Reduction 2005–2009 on HIV and Injecting Drug Use, available at: http://www.searo.who.int/catalogue/2005-2011/pdf/aids/biregional_strategic_for_harm_reduction2005-2009.pdf

21 See, for example, National AIDS Commission, *2010-2014 National Action Plan*.

22 Regulation of the Coordinating Minister of Social Welfare number 2 of 2007. See explanation of Articles 5.

However, the terminology used in the Child Protection Law is not young people who use drugs, but rather children as victims of drug “abuse”. Article 67 of the Child Protection Law states that special protection for children who are victims of drug “abuse” involves monitoring, prevention, treatment, and rehabilitation by the government and the society. Unfortunately, neither the Child Protection Law nor the Ministerial Regulation provides further provision on what amounts to that “special protection”.

One of the strategies under the NAC’s 2010-2014 National Action Plan also aims to address the HIV risks among young population age 15 to 24. Its strategy, however, emphasizes on educational aspect without any specific programs focusing on behavioral intervention.²³

Although the Regulation mentioned above and the NAC recognize harm reduction programs, and the Child Protection Law recognizes the need to provide drug treatment for young people who use drugs, the Indonesian Narcotic Law number 35 of 2009 does not recognize any of it. The term “harm reduction” or any other concepts that can be interpreted as harm reduction appears nowhere in the Narcotics Law, let alone particular references to drug treatment, HIV treatment, or harm reduction services for young people who use drugs. If the concept of harm reduction is recognized only at a Minister Regulation level, its power is not as strong as that under a Law. It appears that the only reference to drug treatment for young people who use drugs in an Indonesian Law is the Law number 23 of 2002 regarding Child Protection. What is ironic is that the Child Protection Law already had that wording since it was enacted in 2002 to emphasize the need to provide drug treatment for young people who use drugs. Yet, the recently enacted Narcotics Law does not even make any reference to the special attention and drug treatment for young people who use drugs. It seems that the implementation of harm reduction services for young people who use drugs, particularly, young IDUs, reflects the vague provisions under the Indonesian laws and policies.

Methadone Treatment for Children: Available but Not Accessible

One of the harm reduction services available in Indonesia is the Methadone Maintenance Therapy (MMT). In Indonesia, there are 88 places in total, including hospitals and Community Health Centers (*Puskesmas*), and prison settings, that provide MMT.²⁴ MMT was first introduced in Indonesia in 2006, when the Minister of Health issued Ministerial Decree number 494/MENKES/SK/VII/2006. The Decree designated four hospitals,²⁵ two Community Health Centers,²⁶ and one prison²⁷ to provide methadone treatment for injecting drug users.²⁸ However, methadone was not the first substitution therapy available in Indonesia. The first was Buphrenorphine.²⁹

There are, at least, three problems that might hinder young IDUs in accessing MMT. Firstly, the

23 National AIDS Commission, *2010-2014 National Action Plan*, Annex 2.

24 Ministry of Health, *Laporan Situasi Perkembangan HIV/AIDS di Indonesia (sampai dengan 30 Juni 2012)*, 15 August 2012.

25 Those are: Drug Dependency Hospital, Jakarta; Hasan Sadikin Public Hospital, Bandung; Dr. Soetomo Public Hospital, Surabaya, Sanglah Public Hospital, Denpasar.

26 Those are: Puskesmas Kec. Tanjung Priok, Jakarta; and Puskesmas Kuta, Bali.

27 Krobokan Prison, Bali.

28 Decision of the Minister of Health number 494/MENKES/SK/VII/2006 regarding the Establishment of Methadone Therapy Treatment Hospitals and Trial Satellite and Technical Guidance, 17 July 2006.

29 In 2002, the National Drug and Food Monitoring Agency (BPOM) issued a regulation about the distribution of buphrenorphine.

age restriction. To access MMT two requirements need to be fulfilled by prospective patients, namely the Inclusion and Exclusion Criteria. Under the Inclusion Criteria, MMT can be accessed by persons 18 years of age or older. Those under 18 years old wanting to access MMT have to obtain a second opinion from other medical professionals (child specialists).³⁰ The fact that children have to get a second opinion from other medical professionals will likely discourage them to access MMT.

Secondly, patients have to consume or take the methadone in front of the medical staff with doctor's supervision. This means that no one else except the patient can prescribe for take away methadone. Take away dosage can only be given for a maximum of three days and under special circumstances only.³¹ Thus, in a condition where a young person has been successfully registered as an MMT patient, if she is still a student, she has to face another barrier in accessing MMT, namely, time limitation. The school hours for high school and junior high school students, at least in some big cities in Indonesia, usually start at 7am and finishes at 2pm, and in some schools it can last even longer than that. Even though each MMT provider is expected to be able to open its services as long as possible in a day, most of them are open only for three hours a day, usually between 9am to 2pm. If a young IDU wants to take methadone during that time, it will probably create disciplinary issues – unless, the school is supportive for her treatment.

Thirdly, money. To register as an MMT patient, one has to pay some amount of money. An MMT patient has to also pay some amount of money to take their daily dosage of methadone. Interestingly, the costs for both items are different between one provider and another. In Gambir Community Health Center, for example, registration fee costs around IDR 7,000 (approx. USD 0.7), meanwhile daily dosage costs around IDR 5,000 (approx. USD 0.6) per day. Therefore, in the first week, an MMT patient has to spend IDR 42,000 (approx. USD 4), and IDR 35,000 in the following weeks (approx. USD 3.5). This amount does not include other harm reduction services that are available and may be needed by an MMT patient, such as, addiction counseling and blood test. Such amount of money might be small for some, but not for young people who live in the streets. In a condition where young IDUs live in a street, IDR 5,000 can make a difference for survival in one day. Adequate data on the exact or approximate number of street children who use drugs is lacking, if not unavailable. It is very likely that the actual numbers are very high. A quite worrying fact

Clean Needle: Uncertainty that Leads to Discouragement

Another harm reduction service available in Indonesia is the Needle and Syringe Program (NSP). NSP was first introduced in Denpasar, Bali.³² According to the Decree of the Minister of Health number 567 of 2006, NSP targets injecting drug use who still cannot stop injecting drugs.³³ There are five types of organizations that can provide NSP for IDUs: health organizations, civil society organizations, government bodies, non-government bodies, and civil society groups. At the beginning of its enactment, many of the civil society organizations provided NSP with outreach

³⁰ Decision of the Minister of Health number 494/MENKES/SK/VII/2006.

³¹ *Ibid.*

³² Decision of the Minister of Health number 576 of 2006 regarding the Technical Guideline for Narcotics Harm Reduction.

³³ *Ibid.*

systems. But, in the last two years, NSP can only be accessed in the Community Health Center. In terms of NSP for young IDUs, no information is available, unfortunately. However, testimonies from former outreach workers might help to understand the situation.

According to Kiki Effendi, a former outreach worker with Layak Foundation, there is no age restriction in accessing the NSP at the outreach site.³⁴ He never rejected any young people who want to obtain or exchange their needles with the clean one. However, he had to submit a monthly report to his employer and the Community Health Center where he conducted his outreach service. This is where the problem arises. The staff at the Community Health Center usually asked him to take the young people who access the NSP to the Center. If the young people cannot or do not want to come, Kiki was told to not give clean needles to them again in the future. Such treatment has never been applied to adults who access the NSP throughout Kiki's experience as an outreach worker.

The way that a Center's staff indirectly pushes young IDUs to come to the Center does not seem to respect the best interest for the child, although it might be good for the young IDUs. This treatment will discourage young IDUs to continue access the NSP. One may not be able to come due to limited resources, or one simply does not want any other services. When one decides not to come, it is probably better to keep letting one access the NSP (outside the Center through the outreach approach). This goes back to the discussion of harm reduction above. Someone may not want or be able to stop using certain drugs. In this case, someone may not want to stop using injecting drugs. If that is the case, the NSP helps to reduce the harm of injecting drugs by providing clean needles. If a young IDU is unwilling to stop injecting drugs and does not want to come to the Center (for whatever reasons) to meet the staff in order to continue accessing the NSP, and if by not coming to the Center means that her access to NSP is cut off, this risks her health condition as she will likely lead to using spent or shared needles. By providing the NSP to young IDUs, despite the fact that it has to be undertaken through outreach system, it will benefit the public and the government by reducing the HIV transmission risks among young IDUs.

Another former outreach worker, Ade Ilham, said that he never let young IDUs access clean needles from him when he conducted outreach services.³⁵ He was uncomfortable to give a needle to any young IDUs and let them use drugs. As a former injecting drug user, Ade knows exactly the effect of such drugs. However, if young IDUs come to his organization, he would provide the needles to them.

From these two experiences, it can be inferred that NSP for young IDUs depend on the outreach workers and the Center's staffs' discretion. The uncertainties of availability of NSP for young IDUs will discourage them to access it. This gets even worse now because NSP is no longer provided through the outreach system.

The Importance of Harm Reduction Services for Young IDUs

Injecting drug users usually inject drugs for the first time when they are young. Unlike older IDUs, young IDUs tend to share needles and other injecting equipment. Fortunately, they break their

³⁴ Interviewed on 18 October 2012.

³⁵ Interviewed on 19 October 2012.

habits more easily.³⁶ Therefore, an integrated harm reduction services addressing young IDUs play an important role to help them gradually reduce the harm and prevent HIV transmission.³⁷

Having looked at the above explanation, harm reduction services for young people who use drugs/IDUs in Indonesia are already in place, but only to a limited extent. Many of the services, however, do not meet the needs of young IDUs. For example, young IDUs may access MMT but only when there is a second opinion from other medical practitioners (child specialist).

A specific harm reduction program designed for young IDUs is needed because of the fact that they are unable and/or unwilling to stop their drug use at any given time. As with adult drug use behavior, some of them just cannot stop using drugs no matter how strong their efforts are. For street children in particular, the abstinence approach treatment does not guarantee that they will not relapse when they finally get back to the streets after undergoing treatment. It is not just about their age, but also the place where they live that makes them even more vulnerable. The lack of data on young IDUs in general and street children who inject drugs in particular do not necessarily mean that there are no young IDUs at all. Maybe, for all this time, we have never realized the importance of addressing the harm of injecting drugs among young people. Or, perhaps we simply do not want to accept the fact that they actually exist.

In regard to young IDUs who are not willing to stop their drug use at any given time and decide to keep using drugs and access harm reduction services, one might argue that young people do not have the autonomy and they are still under their parent's responsibilities. Such argument, however, is implausible. The government, and even the society at large, applies a double standard in regard to young people's autonomy. For drug use problem, the government and the society perceive that young people of all ages have no autonomy and are under the responsibility of the young people's parents. However, in the area of criminal justice, those older than 12 years old are considered as subjects of law, where they can be held responsible for their unlawful act because they are seen as persons who have autonomy in deciding to do something, like an adult.³⁸ The question now is what kind of harm reduction services are needed to address the issues that young IDUs face? This issue, no doubt, requires further research and it is beyond this article to provide a thorough answer. However, some of the following points offered below might be useful to start a debate about that.

One of the elements of harm reduction is education. The need for public education on the issue of drugs and addiction is no longer debatable. Therefore, public education that aims to prevent early age of initiation of using or injecting drugs by providing information on harmful effects of such usage is essential. Such education should also include information on harm reduction programs and how to access them. Along with that, the government must ensure that harm reduction services are not just available, but most importantly, accessible and suitable for young IDUs. Thus, ideally, specialized harm reduction services should be available for young IDUs. This means that

36 Eurasian Harm Reduction Network and Youth RISE, *Young People and Injecting Drug Use in Selected Countries of Central and Eastern Europe*, Lithuania, 2009, p. 11.

37 Opioid Substitution Therapy (OST) is recognized by the United Nation (UN) as the most successful form of drug dependency treatment. See Position Paper of WHO, UNODC, and UNAIDS on substitution maintenance therapy in the management of opioid dependence and HIV/AIDS prevention, available at: <http://www.unodc.org/documents/hiv-aids/Position%20Paper%20sub.%20maint.%20therapy.pdf>

38 Article 1 point 3 of the Law number 11 of 2012 regarding Juvenile Criminal Justice System.

counselors, outreach workers, and other professionals involved in the treatment should have an adequate knowledge on the subject. This requires training and development for all practitioners involved in the services. In terms of harm reduction sites, establishing a separate setting for young IDUs should also be considered, given that putting together young IDUs with adult IDUs might be counterproductive.³⁹ The government must also provide clear provisions in laws and policies about harm reduction services for young IDUs to clearly spell out what professionals involved in the services can and cannot do.

As for street children who use or inject drugs, different approaches on harm reduction must be available. First of all, services should be free because the street children may not even have money to eat. Secondly, harm reduction services should, literally, meet them where they are. Relying on them to visit the Community Health Center every day or every time they want to exchange needles, for example, might not be effective. A mobile harm reduction service that can reach street children might be a possible option to consider. Another aspect that should be considered when deploying mobile harm reduction services is an integrated service. Integrated services refer to a set of services for street children in general, for example, food, water, and clothes. The service provided to street children should also enable them to reintegrate into the society without any stigma and discrimination against them. When a street child cannot reintegrate into the society, it will likely lead them back to the street life again and the cycle of drug use may start again.

³⁹ UN Office on Drugs and Crime and World Health Organization, *Discussion Paper on the Principles of Drug Dependence Treatment*, March 2008, p. 12.

FROM OUR ARCHIVE

LBH Masyarakat v. BNN on the Right to Information: A Brief Note

By: Muhammad Afif Qayim and Ricky Gunawan¹

Introduction

In February 2012, the Community Legal Aid Institute (LBH Masyarakat) filed a right-to-information² request to the National Narcotic Board (BNN) asking for copies of three of their regulations related with the investigation of drug offences. Those regulations are, Regulation of the Head of BNN number 3 of 2011 regarding the Technique of Controlled Delivery, Regulation of the Head of BNN number 4 of 2011 regarding the Technique of Undercover Purchase, and Regulation of the Head of BNN number 5 of 2011 regarding the Technique of Inquiry and Investigation of Drug Offences. However, in March 2012, BNN declined the request arguing that the regulations in question were exempted from the public information category. In April 2012, LBH Masyarakat filed an objection with regard to that decision. BNN disregarded LBH Masyarakat's objection. In light of that rejection, in May 2012, LBH Masyarakat then filed a case to the Information Commission to settle a public information dispute.

According to Law number 35 of 2009 regarding Narcotics, BNN is a governmental non-ministry institution that answers to the President. BNN has the authorities to prevent and eradicate illicit drug trafficking.³ To carry out its investigative tasks, BNN has authorities to undertake the technique of undercover purchase and controlled delivery.⁴ However, neither the provisions under the Law nor other regulations have specified the definition and scope of those techniques.

LBH Masyarakat decided to file the right-to-information request was because in the last three years it has heard many reports from communities of people who use drugs and encountered

1 Muhammad Afif Qayim is a legal intern at LBH Masyarakat and Ricky Gunawan is the Program Director of LBH Masyarakat.

2 The right to information under the Indonesian law is guaranteed under the 1945 Constitution, Article 28F; Law number 39 of 1999 regarding Human Rights, Article 14; Law number 12 of 2005 regarding the Ratification of the International Covenant on Civil and Political Rights (ICCPR); and Law number 14 of 2008 regarding the Public Information Transparency.

3 Article 64 of the Law number 35 of 2009 regarding Narcotics.

4 Article 75 letter j of the Law number 35 of 2009 regarding Narcotics.

first hand cases in which suspects were 'entrapped'. There have been cases where suspects were induced by police officers to be involved in drug trafficking or where police officers have prepared the evidence beforehand and plant it in the crime scene to incriminate the suspects. Such examples can be classified as 'case fabrication'. However, it may not always be easy to distinguish entrapment from fabrication. The idea of entrapment is often associated with a negative connotation. It may, however, be a legitimate means under certain circumstances. As Perkins and Boyce pointed out, entrapment could be justified if the objective is to arrest suspects who already have real intention or have planned to commit criminal acts – this, of course, assumes that the entrapment operation itself is carried out according to procedure.⁵ It is illegal, however, if entrapment is undertaken against people who have no intention to violate the laws unless induced by the police. Under Indonesian law, the entrapment concept remains unclear.

In drug cases, entrapments – both legal and illegal – happen often. Legal entrapment may include techniques such as undercover purchase or controlled delivery. On the other hand, illegal entrapment may involve fabrication of cases and evidence. The Indonesian Supreme Court, in fact, in one of its decisions, has acknowledged that fabrication often takes place in drug offences with a common *modus operandi* such as police officers prepare drug evidence in advance.⁶ An undercover buy or a controlled delivery, however, can be also categorized as illegal entrapments if it is conducted without conforming to the laws.

In 2012, LBH Masyarakat handled three drug cases that could be categorized as undercover purchase. These cases involved children as the targets of such operations. However, it is difficult to ascertain whether the undercover purchase technique used in those cases had been legal or illegal. If fabrication took place, it would obviously be a violation of the right to a fair trial and could possibly amount to a violation of the right of freedom from torture. The three regulations mentioned earlier, should have served as safeguards from human rights violations. It can also be a good opportunity for the public to understand the legal criteria for undercover purchase or controlled delivery to clarify some of the grey areas of the Indonesian drug law enforcement. This was precisely the reason LBH Masyarakat filed the right-to-information request.

The Legal Battle

LBH Masyarakat argued this case on the grounds of the right to information and the right to fair trial. Under international law, the right to information is enshrined in, *inter alia*, the Universal Declaration of Human Rights (Article 19) and the International Covenant on Civil and Political Rights (Article 19). Indonesia recognizes the right to information through its Constitution and Law regarding Human Rights. The right to information was then elaborated in greater detail in Law number 14 of 2008 regarding the Public Information Transparency (PIT), operationalizing the general implementation of the right to information in Indonesia.

The importance of the right to information cannot be understated. According to Article 19 – the leading international human rights non-government organization working in the sphere

5 Rollin M. Perkins and Ronald N. Boyce, *Criminal Law* (3rd ed.), New York: Foundation Press, 1982, p. 1161. See also Ricky Gunawan, 'Putusan Ket San: Menelusuri Fenomena Penjebakan dalam Kasus Narkotika' (*Ket San's Decision: Tracing the Entrapment Phenomenon in Drug Cases*), in *Dictum*, Jakarta: LeIP, 2012, forthcoming, for a discussion on entrapment in drug cases in Indonesia.

6 See Supreme Court's decision number 1531 K/Pid.Sus/2010.

of freedom of expression and freedom of information – the right to information is essential to achieve other human rights, securing democracy as well as enabling democracy⁷ by promoting open government and providing open access for the people to seek information. These features will enrich the deliberation and sharpen the debates on key policies within the society. Article 19 also produced the Principles on Freedom of Information Legislation.⁸ These principles set the bar of the international standards on the right to freedom of information which can be used as a guideline for states to develop their national legislation on freedom of information. One of the key principles is maximum disclosure. Indonesian advocates of the right to information often interpret this maximum disclosure principle as maximum access limited exemption (MALE).

The PIT Law embraces this MALE principle in Article 2 paragraph (1) and (2). Article 2 paragraph (3) of the Law delineates the concept of limited exemption by stipulating that exempted information should be based on a two-tier test: consequential harm test and balancing the public interest test.⁹ The PIT Law does recognize the category of exempted information. Article 17 specifies the types of information under this category, as follows:

- a. Information the disclosure of which could obstruct the law enforcement process;
- b. Information that may undermine the protection of the right to intellectual property and the protection from unhealthy business competition;
- c. Information that may jeopardize the defense and security of the state;
- d. Information that could reveal the natural wealth of Indonesia;
- e. Information that may be harmful to the national economic security;
- f. Information that may be harmful to diplomatic relations;
- g. Information that may reveal the contents of an authentic personal deed and the last will or testament of an individual;
- h. Information that may reveal an individual privacy;
- i. Memorandum or letters between public agencies or among public agencies that are confidential in nature, unless decided otherwise by the Information Commission or the court; and
- j. Information that cannot be disclosed under the law.

However, Article 20 of the Law states that exempted information of letter a to f above cannot be permanent. BNN rejected LBH Masyarakat's right-to-information request on the grounds that the disclosure of the three regulations could obstruct the law enforcement process, in particular, drug law enforcement. LBH Masyarakat argues that the three requested regulations cannot be categorized under exempted information because it is assumed that such regulations should contain information on standard procedures of drug law enforcement specifically related with undercover purchase, controlled delivery and inquiry and investigation of drug offences; rather than rules on technicalities of the drug law enforcement.

Interestingly, in the hearing, BNN admitted that they had not done the exemption test. According to Article 19 of the PIT Law and Article 16 paragraph (1) of the Regulation of the Information Commission regarding the Standard of Public Information Services, exemption test is mandatory

7 See Article 19's website: <http://www.article19.org/pages/en/freedom-of-information-more.html>

8 Available at: <http://www.article19.org/data/files/medialibrary/1797/public-right-to-know.pdf>

9 See, for example, Dhoho A. Sastro, et.al., *Mengenal Undang-Undang Keterbukaan Informasi Publik* (Understanding the Law on Public Information Transparency), Jakarta: LBH Masyarakat, 2010.

before information is exempted from public access. The reason the test had not been undertaken was that BNN was yet to establish its Information and Documentation Management Unit, as required by the PIT Law. However, this is flawed reasoning. According to Article 42 of the Regulation of the Information Commission regarding the Standard of Public Information Services, if the Information and Documentation Management Unit is not yet established by the time the Regulation has taken effect, the function of such unit can be carried out in the interim by any unit within the institution with the authority in information services. Given that BNN has not carried out the exemption test, it can be inferred that the three regulations cannot be exempted from public information.

Further, BNN also argues that this information shall remain exempted permanently. This is another flawed argument, because as Article 20 of the PIT Law states, exempted information the disclosure of which could hinder law enforcement cannot be made permanently exempt.

In addition to the right to information argument, LBH Masyarakat also argues that the closed information regarding drug law enforcement creates a high risk human rights abuses.

Law enforcement agencies seem to receive higher incentive if they can investigate, prosecute, and convict a high number of people for drug offences. In a corrupted environment that lacks transparency and accountability mechanisms, it would not be so surprising, for example, to see police officers just arresting innocent people to reach informal quota of arrests for drug offences. LBH Masyarakat has often encountered cases where people are arbitrarily arrested through undercover purchase operations that appear to be an unlawful activity. For those whose rights are violated – in this context the right to fair trial – it is difficult if not nearly impossible to dispute the legality of the arrest because they cannot know the legal procedure of that operation. Indonesian legal system recognizes a pre-trial mechanism that functions to examine the legality or illegality of arrest or detention. The arrest and detention procedures are clearly spelled out in the Criminal Procedure Code, so it is possible to determine the legality of an arrest or a detention. This, unfortunately, is not possible in cases of undercover purchase and controlled delivery. The standard rules of such operations are not made public, and when they are not made public, how can one test the legality of arrests and detentions? To put it simply: if one cannot know the correct answer, one cannot say that something is wrong.

Furthermore, an undercover purchase operation involves the active participation of police officers or BNN agents. As such, if an undercover purchase operation is unlawful, it makes the officers involved in such operations a part of that illegal activity. They can only not be held accountable if what they do is legitimate and such legitimacy can only be obtained if it is conducted in accordance with the laws. The disclosure of the information on standard procedure of an undercover purchase and controlled delivery will provide a safeguard to ensure that law enforcement agencies do not abuse their powers, and to prevent any violations to suspect's rights during the criminal procedure.

The Information Commission's Decision

The Commission decided that the three regulations requested by LBHM are public information in accordance with Article 11 paragraph (1) letter b and Article 18 paragraph (1) letter b of the PIT

Law.¹⁰ The Commission also considered that the disclosed information is information regarding the administration of inquiry and investigation of drug offences, and it is disclosed to ensure the accountability of BNN in the exercise of such authorities as well as to ensure human rights protection. However, after a closed-examination of the regulations with BNN, the Commission found that certain information contained in the regulations can be classified as exempted information.

The Commission decided that:

1. For Regulation of the Head of BNN number 3 of 2011 regarding the Technique of Controlled Delivery:
 - a. Declassified information are: Article 1 paragraph (2) and (3); Article 2; Article 28 and Article 30.
 - b. Classified information are: Article 1 paragraph (1); Article 3 to Article 27.
2. For Regulation of the Head of BNN number 4 of 2011 regarding the Technique of Undercover Buy:
 - a. Declassified information are: Article 1 paragraph (2) and (3); Article 2; Article 6; and Article 12.
 - b. Classified information are: Article 1 paragraph (1); Article 3 to Article 11 (except Article 6); and the Annex.
3. For Regulation of the Head of BNN number 3 of 2011 regarding the Technique of Controlled Delivery:
 - a. Declassified information are: Article 1; and Article 31 to Article 63.
 - b. Classified information are: Article 2 to Article 30; Article 64; and the Annexes.

The reason that some information are classified is because such information can hinder the inquiry and investigation process of a criminal offence, as stated in Article 17 a (1) of the PIT Law. Unfortunately, no further reasoning is provided by the Commission as to what constitutes "information can hinder the inquiry and investigation process of a criminal offence."

The Saga Continues

BNN has provided the three regulations to LBH Masyarakat with articles determined to be closed information redacted from the text. Having read these regulations, LBH Masyarakat is still convinced that information contained in these regulations that should be made public, as those redacted articles should be just general provision. LBH Masyarakat has filed a lawsuit to the State Administrative Court as an "appeal" against the Information Commission's decision. As the legal battle continues, the final decision of this right to information dispute will appear in the coming months.

Regardless of the final result, LBH Masyarakat sees this case as not just a stand alone case but rather an opportunity to reform BNN and, beyond that, Indonesia's entire drug policy. Joanne Csete – a leading human rights and drug policy advocate – once said that the International

¹⁰ Article 11 paragraph (1) letter b: A Public Agency shall provide Public Information at any time, covering the decision made by the Public Agency and its reasoning.

Article 18 paragraph (1) letter b: Excluded from the category of exempted information are the following information: [...] an internally or externally binding as well as non-binding prevailing provision, decision, regulation, circular or any other form of policy as well as the consideration of a law enforcement agency.

Narcotics Control Board (INCB)¹¹ remains “perhaps the most closed and least transparent of any entity supported by the United Nations.”¹² It appears that BNN is heading towards INCB’s path to be a closed and least transparent institution. BNN’s stance that the three regulations related with inquiry and investigation of drug offences shall be kept permanently classified is not just a clear sign of violation of law but is also telling of arrogance and the intention to remain non-transparent. As the lead government institution in preventing and eradicating illicit drug trafficking, it is a matter of concern that the closed characteristics of BNN are reflected in Indonesia’s drug policy regime. This will perpetuate and worsen ongoing human rights violations as a result of failing Indonesia’s drug policy.¹³

In an open government era where the right to information is widely recognized as the key element contributing to an enhanced quality of public deliberation, BNN has no grounds to evade public scrutiny, and this includes scrutiny about their inquiry and investigation of drug offences. A closed investigation process creates a high risk of human rights violations. Preventing and eradicating illicit drug trafficking is no doubt important. However, it cannot be carried in a way that risks or forfeits the human rights of suspects. The paramountcy of human rights outweighs the objective of such drug regime. The importance of human rights is fundamental because it defines the kind of society we want to live in. If reform is needed to ensure that BNN’s powers do not result in human rights abuses, it is certainly a price worth paying.

11 INCB is the independent and quasi-judicial monitoring body for the implementation of the United Nations international drug control conventions. See: <http://incb.org/incb/en/about/mandate-functions.html> As Joanne Csete points out, the phrase “quasi-judicial” is a phrase that does not even appear in the drug Conventions.

12 Joanne Csete, ‘Overhauling Oversight: Human Rights at the INCB’, p. 67, in John Collins (ed.), *Governing the Global Drug Wars*, London: London School of Economics, 2012.

13 See, for example, Ajeng Larasati, ‘Indonesia’s Failed Drug Policy Undermines Drug Users’ Human Rights’, *CAVEAT*, July-August 2012, Jakarta: LBH Masyarakat, 2012.

A LETTER

F R O M

J E M B E R

Extended Detention: Whose Fault Is It?

Dear friends,

My name is Christina Sitorus. I am a law student at the University of Jember on my third semester now. Since few months ago, I joined the Community Legal Aid Institute (LBH Masyarakat), as a volunteer. One of my tasks is to provide legal counseling in Jember Correctional Institute, under the supervision of staff lawyers. Last August, I met a child prisoner. His name is Iwan (not his real name). Iwan was punished for 25 days of imprisonment. However he had been there for more than two months. How did it happen? Here is his story.

Juvenile Delinquency

Iwan was imprisoned in Jember Correctional Institute because he had a fight with Abdi (not his real name), his schoolmate. Both are in their first year of Madrasah Tsanawiyah (an Islamic school equivalent to a junior high school). It started when Abdi called Iwan a derogatory term. They did not fight right away, but had agreed to have a duel after school hours. The duel caused Abdi a serious injury to his hands. His arm bone was detached from his elbow.

A few days after, Abdi's parents reported this incident to the local police and demanded that Iwan be prosecuted. During the police investigation, Iwan was not detained, until the case was delivered to the Prosecutor. His trial proceeded quickly as well, no more than three weeks, and he was sentenced to 25 days of imprisonment. "I was detained for 20 days and then I got sentenced to 25 days in prison. If the Prosecutor did not appeal, I only had to serve five more days until my release. But then, the Prosecutor filed an appeal just two days before my release," Iwan told his disheartened stories to me. "Now, I don't know what to do or what I will face. It is all unclear. In the next few days, there will be Eid festivities. I was just wondering if I could celebrate it with my parents at home. I hope I can. But, who knows..." Iwan told me during Ramadhan.

A hyperbolic prosecutor

With Dhoho Sastro, our Director of LBH Masyarakat Jember Office, I went to see the Prosecutor who was in charge of this case to confirm the appeal. The Prosecutor told us, "That's correct. I had to appeal because the sentence was less than 2/3 of what we demanded. We demanded two

months of imprisonment, but judges only sentenced him to 25 days. And we have the right to appeal. So I exercised it.”

We argued that it would be better that Iwan’s detention be suspended. But then he responded, “No we can’t do that. It is the court who has the authority to detain him now. And I have filed an appeal to the high court, so let’s wait for the process then.”

I was very upset and infuriated by the Prosecutor’s response. I was fully aware that a prosecutor has the right to appeal and because of that Iwan was still detained at that time, and that it is now under the authority of the High Court not the Prosecutor Office anymore. However, I thought that such an appeal was just an exaggeration. The Prosecutor’s action is an aggrandizement. Iwan had been detained for 20 days and he only needed to serve out the remaining five days. He should have been released by now. I did not see any urgency for such an appeal. This was a simple case. I just cannot understand the way the Prosecutor thinks.

With the direction from Dhoho, I wrote a letter and sent it to the Head of Jember Prosecutor Office demanding that the appeal be withdrawn. In our opinion, withdrawing the appeal was the only way to resolve this issue. And because only the Prosecutor has the right to withdraw their appeal, we believe that they should act upon it and not inflict any more damage to Iwan’s young psyche.

Unresolved Business

Iwan has now been released. Unexpectedly, the Prosecutor withdrew his appeal. Iwan managed return home in mid-September. Although he had to spend the rest of Ramadhan and celebrated the Eid Festivities inside the Correctional Institute, he is now free. Iwan and his parents are really happy. They are not thinking about filing back any more complaints against anyone who may have caused this incident.

As a law student, I come to think that the only court’s decision that declared him guilty was the decision from Jember District Court that sentenced him to 25 days. However, in practice, he had to serve more than two months. The question now is whether Iwan’s extended detention can be qualified as unlawful detention. On the one hand, it may be considered lawful because there was a detention warrant from the High Court. On the other hand, however, prior to the High Court’s decision, the appeal had been withdrawn. If such detention was not lawful, who should be responsible for the extended detention: the Prosecutor who filed the appeal or the High Court that ordered the detention?

Although Iwan is now back home and happy with his parents, the questions remain unresolved and they remain to be my concern. I feel that I have to find the answers to those questions, because otherwise, it might put other children in the similar situation in the future. Exploring those questions can be an exciting academic journey for me. I really look forward for this.

Regards,

Christina Sitorus.

