Revealing The Practice of Violations of The Rights of The Accused During The Investigation Stage:

Case Study of The Accused Of Drug Offense in Jakarta

PERKUMPULAN
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High Time for the Police to Take a High Dose of Human Rights

Opening Remarks by Ricky Gunawan

In mid-2008 *Lembaga Bantuan Hukum Masyarakat (LBH Masyarakat)* become acquainted with drug user groups. The moment took place around the commemoration of the International Day to Support Victims of Torture and the International Day against Drug Abuse and Illicit Trafficking, both coinciding on 26 June. Just as a note, the event title, 'International Day Against Drug Abuse and Illicit Trafficking', was translated into Indonesian as *Hari Anti Narkotika Internasional* or International Anti Narcotics Day, or HANI for short. It could be that my English is deficient or maybe Indonesians have this knack for catchy acronyms, but this inexact translation, in my opinion, has perverted the intended meaning of the term. It is not the narcotics that is to be opposed, it is its abuse and illicit trafficking.

This introduction to the drug user community brought us together to do legal empowerment work and advocacy. We use the term "drug user" because according to our user friends, there is no such thing as a "former user" even though they may have stopped using. We do this by providing education on law and human rights for these communities regularly, building awareness about rights, encouraging our friends in the user community to take part in the fight for rights, including training some of its members as paralegals. We continue to do these activities together to this day. It also brought us further and introduced us to the dark side of law enforcement and human rights protection in Indonesia in narcotics cases.

As far as I can recall, each time we pay a visit to these communities we always hear the same horrible stories and experiences from our user friends. From being arrested and detained without due process, moneys and other properties, such as mobile phones, that have nothing to do with the case stolen, cases fixed, tortured in order to extract false confessions, tricked to pay certain sums of money to be freed, and intimidated from accessing lawyers saying that it will complicate the legal process and make the sentence more severe. It is not a stretch to conclude that here we are talking about the police as the main perpetrator of human rights violations.

Inspired by these stories, *LBH Masyarakat* initiated a program to document human rights abuses experienced by suspects in narcotics cases at the investigative level. The narcotics suspects we refer to

here are not the “big fish” in the drug trade. Rather, they are those who socially and politically cannot be categorized as having access to power, and economically they are usually from the poorer segments of society. Again, we are purposely targeting this group as respondents in our observation considering that we also intend to find out how the law is applied to them and to what extent the protection of their human rights has been fulfilled.

The book you are holding now compiles a report of *LBH Masyarakat* documentation conducted over one year in 2011. The results of this documentation affirms the stories we have heard before. Nearly all detainees in narcotics cases have experienced some sort of human rights violation during investigative phase, including arbitrary enforcement measures, torture and other mistreatment by the police. This book does not pretend to present a quantitative study. Instead, it provides a more qualitative analysis reflected from the findings.

The high incidence of human rights violations experienced by drug users and detainees in narcotic cases during the investigative phase is no surprise as we have been hearing this long before. This illustrates how inadequate police reform efforts have been thus far. One must recognize that there have been a number of positives achieved by the police, at least in recent years. However, the high rate of violence experienced by narcotic case detainees throughout 2011, particularly in Jakarta, indicates that institutional reforms within the police have not born fruit.

There are a number of factors that have led to police officers often resorting to violence and abusing their powers when performing their service. First, it is a weak internal accountability. This usually means that police officers who torture, extort and abuse their power do not receive a proper sanction. As such, there is no deterrent effect to discourage other potential perpetrators from committing violations. There is no reason for the supervisors to not be aware of abuse committed by their subordinates. So we can conclude that the superiors of the perpetrator of torture either know, or maybe even acquiesce, or have let this happen. Second, human rights values have not been internalized in the behavior and minds of the police corps. They may have received human rights education in their police curricula, and many internal regulations have also recognized these values. However, it is only manifested on paper and have not been fully absorbed by every police officer. It is therefore important that the police establishes a human rights culture institutionally and renounces the culture of violence and corruption. If reform efforts have not succeeded to produce a humanist image of the police, perhaps it is high time for the police to take a high dose of human rights.

The list of factors can be even longer, but it may not be the place for me to continue to elaborate it here. However, I would like to add one more factor about why the prevalence of human rights violations in

narcotics cases are so high. One reason in an array of distinctive features in narcotics cases is the poor formulation of a criminal narcotic act in the Narcotics Law Number 35 of 2009. None of the articles in the law – articles 111 to 126 that stipulate the usual predicates of narcotic crimes, including possession, ownership, sale, purchase, intermediary – specify the element of intent. The absence of this element makes narcotic cases vulnerable to manipulation. *LBH Masyarakat* has on many occasions encountered cases where suspects were unaware about narcotics but had to end up in prison. The police would visit them and plant narcotics near them. When questioned about it they would definitely deny any knowledge. This is when the police employs torture to force confessions that the narcotic belongs to them.

The book before you aims to recount what is taking place in the field and test it against a normative framework. This book presents the experience of observers and their documentation in the field. The first-hand experience presented here does not stop at numbers and graphics, it also includes stories with a personal touch from each of the observers.

This book would not have reached you without the tireless work of Ajeng Larasati and Antonius Badar, the persons in charge of this documentation project. Their determination and dedication deserves appreciation. The finalization of this report would not have been possible without the contribution of the observer team that includes of law students, community paralegals, as well as members of the drug user community who conducted their documentation throughout the year: Derry Patra Dewa, Prakoso Anto, M. Fathan Nautika, Femi Anggraini, Liza Fraihah, Radian Adi N, Robertus M.S, D.M Rendra Asmara, Ian Rumapea, Ageng Sumarna alias Apay, Bambang Sutrisno alias Beng-Beng, Rudy Fajar, Teguh Saputra, Andry, Riki Efendi, Fajar M. Faisal, Herru Pribadi, Ristyo Pradana, and Melisa Leksandri. My appreciation also goes to my colleagues at *LBH Masyarakat* who have conducted analyses on findings: Alex Argo Hernowo, Feri Sahputra, Grandy Nadeak, Magda Blegur, Pebri Rosmalina, and Vina A. Fardhofa. I would also like to extend my thanks to Ahmad Zaki and Fajriah Hidayati, who have provided invaluable help in all administrative and financial matters related to this program. And lastly, I would also like to thank the Open Society Foundation who has lent its support to *LBH Masyarakat* in undertaking this documentation program. This program goes beyond documenting human rights violations in narcotics cases, it also includes other legal empowerment activities for the drug user community.

Finally, we hope this book can be useful for you!

Colchester, 17 January 2012

Ricky Gunawan
***LBH Masyarakat* Program Director**

Enforcement Measures

Law enforcement measures inevitably involve a contradiction: on the one hand they aim to create order by imposing certain restrictions on freedoms and liberties, while on the other hand they must honor liberties and freedoms of every individual that they limit. Humans inherently are endowed with rights, and when these rights are derogated from their humanity is undermined as a result. A question then arises, in the event of a crime that poses a threat to public order what are we suppose to do with the perpetrator of the crime? Doing nothing will disrupt public order and will lead to chaos that in turn will deny the human rights of other individuals. Law enforcement essentially involves some restrictions to the human rights of the perpetrator, but at the same time, the perpetrator of the crime is also a human endowed with rights that must be protected. This is exactly the critical point of the tension between these two opposite situations.

To address this complication, a set of rules and regulations are needed as guidelines in the effort to ensure public order on the one hand, and human rights protection on the other.[1] Law enforcement can never be done by violating the laws. As such, when needs arise to limit and derogate from someone's human rights in enforcing the law, the limits and means of law enforcement must be clearly governed by law. If these guidelines are followed and implemented well, then law enforcement can still be carried out within the corridor of respect for one's human dignity.

In Indonesia the practical set of rules that serve as the basis for law enforcement is enshrined in Law Number 8 of 1981 regarding Criminal Codes of Procedure, to be hereon referred to by its Indonesian acronym, *KUHAP*. Certain types of crimes, such as narcotics-related crimes, have *lex specialis* laws regulating them.

The elaboration to *KUHAP* states that Indonesia is constitutionally a democratic state that upholds the rule of law and human rights and guarantees that all its citizens are equal before the law and the government, and are obligated to uphold the law and the government without exception. *KUHAP* further states that:

> *It is clear that the internalization, application and implementation of human rights as well as the rights and obligations of citizens to uphold justice is imperative upon all citizens, all state administrators, all state institutions and society institutions at the central as well as regional levels, which also need to be materialized within and along with the existence of this criminal procedural code.*

[1] Compare with Article 9 of the *International Covenant on Civil and Political Right* (ICCPR), "... No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

KUHAP further elaborates the above principle into ten points of reference about how human rights shall be implemented. They are:

1. Equal treatment of every individual before the law without discrimination.
2. Arrest, detention, search and confiscation shall only be carried out under written orders by officials endowed with such powers by the law and only for the purpose and with the means governed by the law.
3. Every person suspected, arrested, detained, prosecuted and/or brought before the court of law, is to be presumed innocent until they have proven guilty.
4. Persons arrested, detained, prosecuted or tried without due reason as prescribed by law and/or mistaken for other persons or as a result of mistakes in the application of the law, shall be given due compensation and rehabilitation beginning from the investigative level, and with respect to the law enforcement officers who intentionally or negligently have caused the violations to such legal principles, shall be prosecuted and held criminally and/or administratively liable.
5. The law shall be administered expediently, without undue complication and affordably, freely, honestly and fairly and consistently at all levels of justice.
6. Every person who is dealing with the law shall be given the opportunity to obtain legal assistance afforded solely to fulfil his right to self-defense.
7. A suspect, from the time of his arrest and/or detention, shall be informed of his charges and the legal basis for his indictment, as well as his rights, including the right to contact and request legal counsel.
8. The court shall hear the criminal case in the presence of the defendant.
9. Court proceedings shall be open to public, except in circumstances as prescribed by the law.
10. Oversight of the implementation of court decisions in criminal cases shall be established by the head of the district court in question.

The ten points above are in line with the universal principles of human rights in law enforcement[2], namely: (1) Due process, (2) Presumption of innocence, (3) The right to be informed, (4) The right to legal counsel, (5) The right to a fair trial, et cetera.

In the criminal justice administration, law enforcement powers are afforded to law enforcement officials to limit the liberty of a person. These measures include arrest, detention, confiscation, searches and document investigation. This paper will analyze how these measures are governed under Indonesian laws, specifically under KUHAP and Law 25 of 2009 regarding Narcotics, and will compare them against

[2] Osse, *Memahami Pemolisian: Buku Pegangan Bagi Para Pegiat Hak Asasi Manusia.* Amsterdam: Amnesty International Netherlands, 2007, pages 148 - 150

international standards. The reality of how these enforcement measures are applied in drug offenses will be presented in the next heading.

Arrest from the Indonesian Legal Perspective

Arrest is an act of temporary deprivation of personal liberty conducted by law enforcement officials for the purposes of administration of justice.[3] In Indonesia, the requirements and procedures for arrest are stipulated in Articles 16-19 of KUHAP. An arrest shall only be carried out on persons against whom there are solid grounds for suspicion of having committed a crime. This suspicion must be based on sufficient preliminary evidence.

Adequate preliminary evidence is defined by KUHAP as initial evidence to suspect a crime pursuant to article 1 point 14.[4] The explanation to the article also stipulates that an arrest warrant cannot be produced arbitrarily, but be carried out only for those for whom there are strong grounds to suspect them of having committed a crime. Further, the National Police under the Chief of Police Decree No. Pol. SKEEP/04/I/1982, elaborated some examples of sufficient preliminary evidence:

- Police Report
- Report of Crime Scene Investigation
- Investigation Report
- Witness/Expert Testimony, and
- Evidence

The Supreme Court, Ministry of Justice, Attorney General's Office and the National Police Workgroup Meeting on 21 March 1984 established that sufficient initial evidence shall comprise at a minimum a police report and one other item of evidence. An arrest must be made on valid and reasonable grounds that the person has or is planning to commit a violation of law.[5] The arrest must fulfil the basic principles of proportionality, subsidiarity, legality and necessity.[6]

[3] Compare with Article 1 point 20 of KUHAP, *"Arrest is a measure by the criminal investigator in the form of a temporary limitation to a suspect's or defendant's freedom when there is sufficient evidence for the purposes of criminal investigation or prosecution and or court proceedings in matters and by means as stipulated by this law."*

[4] This definition can be seen in the Article 17 of the Elaboration to KUHAP. Meanwhile, Article 1 point 14 of the KUHAP expounds the definitions of suspects, that is, a person which due to his actions and based on preliminary evidence can be suspected of being the perpetrator of the crime.

[5] In the Indonesian context, legal and reasonable grounds must fulfilled by at least 2 (two) items of sufficient preliminary evidence.

[6] Osse, *op.cit*., p. 157

An arrest must be conducted by the police based on an assignment letter, and when conducting the arrest, the police, in addition to showing a letter of assignment, must also give an arrest warrant. The police must then provide a copy of the warrant to the family of the person arrested as soon as the arrest is made. Unfortunately, the KUHAP is inconsistent about who has the authority to conduct an arrest. Article 1 point 20 of the KUHAP provides that: "An arrest is a measure by the *criminal investigator* by limiting the freedom … ". Whereas article 16 of the KUHAP provides that even investigators, under the order of the criminal investigator, has the authority to conduct an arrest. Additionally, Article 16 of the KUHAP provides that an arrest can be conducted not only for the purposes of criminal investigation, but also for the purposes of investigation.[7]

Irrespective of the difference in the definition of arrest, the above procedure may not be necessary if the arrest is not planned, but done when the perpetrator is caught in the act, or redhanded. Upon learning that a crime is about to occur, any person can conduct an arrest, with the condition that the arresting person must immediately turn over the perpetrator and any evidence to the nearest criminal investigator or assistant criminal investigator. In the event that the person is caught redhanded, the arrest warrant must be handed immediately after the arrest is made. The definition of caught redhanded is as follows;

> *"Caught redhanded is the arrest of a person at the time of the commission of the crime, or immediately after the crime has been committed, or immediately after being identified by the public as the person who has committed [the crime], or when immediately after certain items are found on the person implicating him in the commission of the crime or indicating that he is the perpetrator or accessory or has abetted in the commission of the crime."*[8]

Arrested: Planned or Redhanded?

One of the detainees we interviewed, Warto, related to us the process of arrest that he experienced. He was confused because there was no evidence, yet he was still arrested.

"I was just sitting around at the cigarette kiosk when suddenly three plainclothed men arrested me. Apparently they were the police. They said I was a drug dealer. And you know, there was no evidence. I mean, they should not have caught me, right, without evidence on me? When I asked about the evidence, one of them said 'Shut up you. Don't you know you've been reported?'. So that was it."

Warto's case is an example where the arrest warrant should have been produced at the time the arrest was made. This is because the police received information from another person, and if according to the police there is enough preliminary evidence, then an arrest warrant should have

[7] Prof. DR. Andi Hamzah, SH. *Hukum Acara Pidana Indonesia Ed. Revisi*., Jakarta: Sinar Grafika, 2001.
[8] Article 1 Point 19 KUHAP

been made before the police arrived at the scene and arrested Warto. Warto's arrest cannot be categorized as being caught redhanded.

The purpose of a deferred warrant in the event of someone getting caught redhanded is to enable the perpetrator of the crime to be arrested, despite the absence of a warrant at the time of arrest. In Warto's case, there was no urgency to arrest him without having prepared the warrant first.

Duration of the arrest: The Particularities in Narcotics Law

However the arrest is made, be it planned or redhanded, KUHAP provides that an arrest can only last for one day (article 19 paragraph 1). There is no extension. It really is only 1 x 24 hours. However, Law 35 of 2009 regarding Narcotics (the Narcotics Law) contains a special provision on the duration of the arrest, which can last up to 3 x 24 hours and is extendedable to another 3 x 24 hours. This means that according the Narcotics Law, an arrest can last up to 6 x 24 hours in total.

This arrest provision is found in Article 76 of the Narcotics Law. It reads as follows:

(1) *The exercise of the arrest authority as referred to in Article 75 letter g is to be conducted for up to 3 x 24 (three by twenty four) hours from the time the arrest warrant is received by the investigator.*
(2) *The arrest as referred to in article (1) can be extended up to 3 x 24 (three by twenty four) hours.*

Reading article 76 above, we can conclude that the particularity of this arrest is in the context of the exercise of arrest authority as referred to in article 75 letter g. Article 75 itself contains provisions about powers posessed by the National Narcotics Agency (BNN). BNN investigators are endowed with 19 powers (letters a – s), among which (as stated in letter g) is the power to arrest and detain persons involved in the misuse and trafficking of Narcotics and Narcotic Precursors. Even though this power belongs exclusively only to BNN, in practice, all narcotics cases are subject to a six-day arrest, despite the fact that not all are investigated by BNN. <u>If Narcotics Law is to be applied strictly and properly, the Police and Civil investigators only have the power to arrest for 1 x 24 hours only, not six days.</u>

Who is a Criminal Investigator?

The first thing provided in the KUHAP (article 1 letter a) is the definition of criminal investigator. The article expounds that the criminal investigator is a police official or certain civil servant official endowed with special authorities by law to conduct criminal investigation. In addition to the two groups of criminal investigators, KUHAP also recognizes an additional office, namely, assistant criminal investigator. In principle, an assistant criminal investigator has the same authorities as

the criminal investigator, except the power to detain, which an assistant criminal investigator can only do after receiving a delegation of such authorities from the criminal investigator.

A Criminal investigator, pursuant to Government Regulation No. 58 of 2010, in principle are police with the rank of Second Inspector with a minimum an undergraduate degree, and one who has underwent and passed the criminal investigation specialization. In the event that a person with such qualifications is not available, a Second Inspector without an undergraduate degree can be appointed as criminal investigator. When even such qualifications are not met, the Chief of the Police Precinct, due to the nature of his office, can become a criminal investigator.

As for assistant criminal investigator, in addition to attending and passing the criminal investigation specialization, he must be at a minimum a Second Brigadier. Whereas regular investigators, as provided by article 5 of KUHAP, can be any police official.

In addition to Police and Civil Investigators, the Narcotics Law also recognizes another group of criminal investigator, namely the BNN (National Narcotics Agency) Investigator. BNN Investigators in principle are tasked to conduct an investigation and criminal investigation on misuse and trafficking of narcotics and narcotic precursors, which is the authority of BNN. BNN Investigators are appointed by the head of BNN. The Head of BNN has many authorities as provided in article 75 and 80 of the Law on Narcotics.

Based on the two articles above, among the extra powers that a BNN Investigator has over regular criminal investigators include:

-- conduct interdiction on trafficking of narcotics and narcotic precursors in the entire national jurisdiction (article 75 letter h);
-- conduct interception pertaining to misuse and trafficking of narcotics and narcotic precursors after sufficient initial evidence (article 75 letter i);
-- conduct undercover purchase and controlled handover investigation technique (article 75 letter j);
-- blocking bank accounts and accounts in other financial institutions, and ask information regarding the finances of the suspect under investigation (article 80 letter b and letter c).
-- request information on wealth and taxes from the relevant institutions (article 80 letter f).
-- temporarily halt financial transactions, commercial transactions, and other agreements or temporarily revoke permits, licenses, as well as concessions conducted or owned by suspects who are suspected, based on sufficient preliminary evidence, of having connections to the misuse and trafficking of narcotics and narcotic precursors being examined (article 80 letter g).

For the so-called Civil Servant Criminal Investigator (PPNS), the Law on Narcotics specifies a number of their authorities in article 82 (2), whereas it does not specify the powers for Police Criminal Investigators. The question now, under such regulation, would BNN's investigative powers apply exclusively or can all investigators exercise powers that actually only BNN investigators possess?

Detention

Detention Procedures

Inevitably, questions arise as to the difference between an arrest and detention, and why must they be distinguished. Usually, one would say that the main difference is the duration. An arrest is carried out for a short time, whereas detention lasts longer. However, duration is not the only feature that distinguishes detention from arrest. In the Indonesian legal context, it would be useful to refer to their definitions according to law.

Arrest, according to article 1 letter 20 of KUHAP, is a measure by the investigator in the form of a temporary restriction of the suspect's or defendant's freedom when there is sufficient evidence for the purposes of criminal investigation or prosecution and or court proceedings in matters and by means as stipulated by this law.

Referring to this definition, what is the difference, then, between a temporary restriction of a suspect's or defendant's freedom from placing a suspect or a defendant in a certain confined space? Are they not substantively identical, since both restrict the freedom of a person where he is no longer free to move about as he wants and can only remain in one place?

Another substantial difference between arrest and detention is in the person/institution authorized to do it. There are several stages of law enforcement, from criminal investigation by police or other investigators, prosecution and court examination where guilt or innocence is determined. Both arrest and detention can be conducted since the criminal investigation phase.

Criminal investigation is actually not the first stage of law enforcement. Criminal investigation can be preceded by regular investigation. According to article 16 (1) of KUHAP, a regular investigator has the power to conduct an arrest. However, no article provides him the power to conduct detention. Therefore, when detention occurs, one can be sure that the legal process has entered the criminal investigation stage,

no longer just investigation. In regular investigation, a legal event cannot yet be qualified as a crime. When the act is qualified as a crime, the perpetrator of the act is established as a suspect.

Investigation or Criminal Investigation

Not many people can tell the difference between regular investigation and criminal investigation. In narcotics cases, the actual investigation can be utilized maximally. Before we can speak about the investigative process, we must understand what regular investigation and criminal investigation are respectively.

During the investigation stage, an act under investigation may not necessarily end up being a crime. In this stage no one is named a suspect yet. However, an investigator has powers, including to arrest, search, and confiscate under the orders of the criminal investigator. The investigator, however, does not have the power to detain.

In the event that a person is caught redhanded, any person, not just official investigators and criminal investigators, has the right to arrest a person committing a crime to be immediately handed over to a criminal investigator or assistant criminal investigator. After an event goes through investigation and determined to be a crime, it enters into a criminal investigative stage. During this stage, a criminal investigator will search and collect evidence to establish proof that the crime that took place can indeed be attributed to the suspect.

The distinction between investigation and criminal investigation is rather fine indeed, especially to the public at large who may not even know that there are even different investigative stages. Ideally, when during investigation an act is not established as a crime, the proceedings shall no longer continue.

In narcotics cases, based on the nature of the case alone the arrest time can be extended from 3 x 24 hours to another 3 x 24 hours, totalling 6 days in all. Compare this with general crime where an arrest lasts only 1 x 24 hours. With an extended arrest time, investigation can proceed for much longer, and with longer investigation, the police has the opportunity to develop the case with greater flexibility with the hope that a person more liable than the person arrested can be caught. With this, the person who was arrested first may not need to go through detention and proceed to criminal investigation.

If one is sure that the case will enter into criminal investigation and the suspect will undergo detention, the police should no longer have the urgency to apply the 6-day arrest period. If it is intended to develop the case, even during detention the investigator can proceed with building the case further. **Remember!** Enforcement measures are applied in order to facilitate administration of justice. Therefore, if there is no urgency to arrest a person for a long duration, why limit the freedom of the person for so long?

Basically, not all suspect have to undergo detention. Article 21 of KUHAP provides limitations to how detentions are to be conducted and they serve as requirements for detention They are:

1. A person to be detained is one who, based on sufficient preliminary evidence, is strongly suspected of having committed a crime:
    a. Punishable by at least a five-years of imprisonment; or
    b. A certain crime specified in Article 21 Paragraph (4) letter b of KUHAP
2. A person to be detained is someone who may escape, destroy or eliminate evidence, and/or repeat the crime.
3. A person to be detained must be served a detention warrant and its copies must be given to the family, informing:
    a. Personal identity
    b. Reason for detention
    c. Short explanation about the crime being charged
    d. Detention location

KUHAP also determines the duration limit for arrests. At a criminal investigation level, detention can only be carried out for 20 days and can be extended for up to another 40 days.[9] However, article 29 allows for additional detention should it become necessary, that is, for 30 days extendable to further 30 days. This additional detention can be applied only due to following unavoidable conditions, namely (a) the suspect or defendant suffers from serious physical or mental injury, and certified by a doctor, or (b) the case being examined is punishable by a nine years of imprisonment or more. Such additional detention at the investigative level can only be decided by the Head of the District Court.

Even though detention can also be applied during prosecutorial stage and court proceedings, because this documentation effort is focused only on the criminal investigation stage, detention by the prosecutor and judge will not be discussed in this paper.

[9] Article 24 of KUHAP explain that extension of detention at the criminal investigation stage must be approved by the General Prosecutor

Access to Health During Detention

Suspects in detention are yet to be found guilty of having committed a crime. Based on the principle of presumption of innocence, therefore, they must be afforded rights like those of an innocent person. There are certain rights guaranteed by KUHAP across several articles, including:

1. The right to contact a lawyer, and for foreign national detainees the right to contact their embassy (Article 57)
2. The right to personal physician visit for health purposes, both related to the case and otherwise (Article 58).
3. The right to be informed of the detention process and the right to contact and receive visits from family, cohabitants, or persons whose assistance is crucial for the suspect in order to get legal assistance or bail for the detention (Article 59 and 60). A suspect also has the right to receive visits from family for work or family purposes (Article 61).
4. The right to send and receive correspondence, and to be provided with stationery for that purpose.
5. The right to contact and receive visits from chaplains.

When a person is detained, they are entitled to the maintenance of their health. Their health status cannot deteriorate as a result of their detention. Health maintenance standards have been stipulated internationally under the *Standard Minimum Rules for the Treatment of Prisoners*.[10] The standard treatment for a detainee basically comprises more than just a fulfillment of the right to health only. More than that, this standard also governs a proper registration process, placement of detainees, fulfillment of accommodation, and so forth.

Another requirement that detention facilities must meet in order to fulfill the right to health includes:

- A minimum of 1 (one) qualified medical personnel, one with psychiatric expertise, as well as a dental care facility.
- For detention facilities holding women, prenatal and antenatal care must be available.

However, the definition of the fulfillment to the right to health includes more than mere curative treatment of sick detainees. The abovementioned health treatment standard also provides for personal healthcare, clothing, bed as well as food. The latter three also crucial to the health of detainees.

When a narcotics suspect is detained, there is a particular concern about his right to health, namely, the treatment for his drug addiction. Since addiction is an illness, drug addicts are people with an illness who

[10] The document can be downloaded from the following URL: http://ohchr.org/EN/Issues/Detention/Pages/standards.aspx

require treatment and medicine. Treatment or access to health is among the things stipulated under the minimum treatment standard in detention facilities.[11]

There are at least two problems regarding the right to health of detainees in narcotics cases. **First**, detainees in narcotics cases are likely to be drug addicts or abusers, and according to article 54 of the Law on Narcotics, they are obligated to undergo medical and social rehabilitation. The inevitable questions, then, is **how can this obligation be exercised when they are in detention?** Second**, how does one provide health facilities to address a detainee's narcotics dependency in narcotics cases?**

These are the two homeworks that must be addressed and resolved together. However, **as a matter of urgency, one thing that we must all advocate in the meantime is to ensure that the continued treatment of drug addicts is not disrupted.**

Arrest and Detention from the Human Rights Perspective and International Standards

Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR) stipulates that "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Therefore, in the event that the act depriving the liberty of a person violates the procedures as well as the grounds as stipulated by regulation, in this case the KUHAP, such deprivation of liberty would amount to an arbitrary act.

The international concept has stipulated the issues that must be taken into account in the event of an arrest, one of which is stipulated in the *Body of Principles for The Protection of All Person under Any Form of Detention or Imprisonment*[12], to be hereon referred to as the *Body of Principles*. This principle sets forth how arrests and detention of persons shall be conducted. The first principle states that persons arrested and detained shall be treated humanely.[13] In practice, this translates into treatment that respects their human rights.

Because the human rights of the person arrested or detained are limited, the second principle in the Body of Principles provides the following:

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[11] *Standard Minimum Rules for the Treatment of Prisoners*, Para. 22 – 26.

[12] *Body of Principles for The Protection of All Person under Any Form of Detention or Imprisonment* can be downloaded in the following link: http://www2.ohchr.org/english/law/bodyprinciples.htm

[13] *Ibid*., Principle 1

"Arrest, detention, or imprisonment shall only be carried out strictly in accordance with the provision of the law and by competent officials or person authorized for that purpose"

It can be concluded from the above principle that arrest, as well as detention or imprisonment can only be conducted in a limited fashion according to prevailing laws and by a person endowed with such authority. There cannot be limitations to the fulfillment of rights aside from those established by prevailing laws.

The purpose of limiting the powers of law enforcement in conducting detention is basically to ensure that the detention of a person is indeed necessary. The Body of Principles also provides that any form of detention must have a permit from a judicial body.[14] In Indonesia, the judicial body with the authority to issue detention permits lies with the District Courts, the High Courts and the Supreme Court. A detainee must also be given the opportunity to be heard before the said judicial bodies to present his defense regarding the detention to be imposed on him.[15]

There are certain obligations that must be fulfilled by the detaining party after receiving court permission to conduct detention. They are:

- "Anyone who is arrested shall be informed at the time that his arrest of the reason of his arrest and shall be promptly informed of any charges against him" (Article 9)
- "Any person shall, at the moment of arrest and at the commencement of the detention or imprisonment, or promptly thereafter be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights." (Article 13)

The *Body of Principles* also expounds the purpose of the arrest and detention. Principle 36 of the *Body of Principles* provides that: "The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden."

One way to institute control on arrests and detentions is by requiring an arrest and detention warrant. These letters administratively demonstrate that the arrest and detention of a person is conducted for certain charges. However, if we look into it deeper, the letter has a greater significance that merely an

[14] *Ibid.*, Principle 4
[15] *Ibid.*, Principle 11

administrative matter. This letter provides a measure of legal certainty for the person arrested and detained. Such legal certainty includes, at a minimum, the grounds for arrest and detention, as well as the party conducting arrest and detention. Furthermore, this legal certainty must also be afforded to the family of the arrested and detained person, by obligating the person making the arrest and detention to convey a copy of these warrants to the family. Aside from the issue of legal certainty, having arrest and detention warrants will also help to ensure the fulfillment of the rights of the suspect/defendant in preparing his/her defense.

Unfortunately, in practice, the conduct of detention is often distorted. The detention of a suspect does not always ease the administration of justice. To the contrary, detainees often run the risks of violence of torture. Despite the fact that the prohibition of torture and other ill treatment of suspects has been set forth, physical torture practices such as beating, electrocution, and psychological torture are still commonplace. Detainees are vulnerable to violence because the gains from using force and torture at the investigative level are very high. The detainees are under full control of the detaining party who often sees that violence and torture is the quickest and easiest way to obtain information about the case.[16]

The UN Human Rights Committee provides that detention must be governed by same rules, namely that the detention shall not be arbitrary; must be based on sufficient grounds and follow procedures as prescribed by law; the detainee must be informed of the grounds for detention; the detention must be court supervised; and, compensation provided in the event of violations.[17] Aside from the above requirements for arrests and detention, another important matter to note is that international standards have provided that under no circumstances can persons under arrest and detention be subjected to torture and other inhuman or degrading treatment.[18]

How Indonesian Laws stack up against International Standards

Normatively, Indonesian laws have met some international standards. The table below illustrates how the Indonesian Criminal Codes of Procedure (KUHAP) compares with the Body of Principles:

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment	Indonesian Criminal Code of Procedure (KUHAP)
Principle 2 *"Arrest, detention or imprisonment shall only be*	Normatively, KUHAP has provided

[16] *Pretrial Detention and Torture: Why Pretrial Detainees Are Most at Risk;* Open Society Justice Initiative, Ludwig Boltzmann Institute & University of Bristol Human Rights Implementation Centre, 2011.

[17] Osse, *op.cit*., page 155

[18] *Body of Principles*, *op.cit.*, Principle 9

carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose"	limitations to law enforcement measures. However, the implementation of these measures is only administrative. Substantively, there is nothing that prohibits the use of force in enforcement measures. As such, measures that are implemented with brutality are difficult to prove and categorized as illegal. See Articles 16-31 of KUHAP.
Principle 4 "*Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority."*	KUHAP provides that detention can only be carried out by judicial bodies, namely the criminal investigator, prosecutor and judge. However, there is no corrective mechanism from these bodies regarding the urgency to conduct detention.
Principle 6 *"No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment"*	KUHAP is not explicit in prohibiting the use of torture during arrest and detention. However, the Chief of Police Regulation No. 8 of 2009 regarding the Implementation of Human Rights Principles obligates the police to abide by human rights in the conduct of their duties. Torture has not yet become a crime in Indonesia.
Principle 8 *"Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons"*	KUHAP does not provide such regulation. Due to limited resources and infrastructure, in practice detainees and prisoners are often placed in the same detention facilities, merely differentiated by blocks or detention cells.
Principle 10 *"Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges*	KUHAP regulates this as part of the rights of suspects/defendants.

against him."	
Principle 11 *"1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.* *2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.* *3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention."*	In this regard, KUHAP has provided *pra-preadilan* (pe-trial lawsuit) mechanism that can determine whether detention of a person violates the law or not. However, there is a difference in the emphasis between the *Body of Principles* and the pre-trial system. In the *Body of Principles*, before one is detained, he has the right to argue for a stay of detention before a judicial body. It would be this body that will determine objectively whether the person needs to be detained or not. In KUHAP, a person who files for a pre-trial proceedings would already have been in detention by the authorized investigator. As such, it is not preventive in nature as stated in the *Body of Principles.*
Principle 17 *"1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.* *2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay"*	KUHAP has similar provisions regarding the right to legal counsel. However, in practice, the criminal investigator often provides false information regarding legal counsel and intimidates the suspect that if lawyers are used the punishment will be more harsh. This forces the suspect not to use a lawyer to defend him.
Principle 24 *"A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of*	KUHAP provides that free medical treatment should be the right of suspects/defendants. However, unlike the Body of Principles, KUHAP does not require that such treatment

detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge."	be offered, but merely given when requested.

It is evident from the table above that KUHAP does not fully comply with international standards. Efforts are still under way, as they have been for years, to amend the KUHAP to follow international standards that take into consideration human rights principles. One of the reasons why efforts to reform KUHAP have stalled is the rejection from the police for proposals to establish a judge-commissioner post. This judge-commissioner will play a supervisory role as well as a measure of control over enforcement efforts by the police.

Searches

Similar to arrests and detentions, searches are basically an interference, and could even be a violation of human rights, namely the right to the protection of his privacy . This right has been specified in Article 12 of the *Universal Declaration of Human Rights,* as follows:

> "*No one shall be subjected to arbitrary interference with his privacy, family, or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks*."

This protection of privacy is also provided under the Indonesian Constitution of 1945, Article 28 G. Even the arbitrary act of intruding into the property of others, in this regard a residence, is a punishable crime under article 167 of the Criminal Code. The protection of human rights is also binding on law enforcement officials. Their arbitrary acts that violate the right to privacy is also punishable under Article 429 of the Criminal Code.

In Indonesia two types of searches are recognized, namely: (1) **House search**, or acts by criminal investigators to enter into one's residence or other enclosed spaces to conduct a search or confiscation or arrests in matters and in a manner as provided by law.[19] (2) **Body search**, is an act by investigators to search the body or clothing of suspects to find items strongly suspected to be carried on the body of the suspect to be confiscated.[20]

[19] Article 1 point 18 of KUHAP
[20] Article 1 point 17 of KUHAP

Basically, as mentioned above, in every drug offense, the suspect's body is almost always searched to find evidence. As with arrests and detentions, in order to ensure the human rights of the suspect, the search must follow prescribed procedures.

The requirements to conduct a search are provided in articles 33 to 36 of KUHAP are as follows:

1. House searches are to be conducted after obtaining a letter of permission from the local district court and:
    a. If approved by the resident of the premises, witnessed by two witnesses,
    b. If the resident of the premises does not approve, to be witnessed by the local neighborhood official with two other witnesses.
2. Under urgent and pressing circumstances[21], the police may search certain places without a permit, such as:
    a. The yard of the house where the suspect lives, stays or is present, and whatever is on it,
    b. Other places where the suspect lives, stays or is present,
    c. The location where the crime has been committed or where trails are found,
    d. Places of stay and other public places.
3. Under all circumstances, with or without a warrant, the search dossier and its derivatives must be prepared and given to the owner of the premises.

Regarding body searches, KUHAP provides in article 37 the authority to conduct searches for two officials, the investigator and the criminal investigator. The investigator has the power to search the clothing and items carried by a person if there are strong grounds to suspect that the person is in possession of items that need to be confiscated.[22] Whereas, the criminal investigator has the authority to search not only the clothing but also the body of a suspect.[23] Narrowly speaking, a body search is not confined to searching the clothing but also includes a search of body cavities. For this type of search, female suspects are to be searched by female officers. The investigator can request assistance from health officials to conduct such body cavity searches.

The formulation provided in the KUHAP does not seem adequate in light of the reality. In practice there are several kinds of body searches involving varying degrees of intrusion, and as such, they require

[21] Based on Article 34 (1) KUHAP, a necessary and urgent situation is when the location to be searched is strongly suspected of holding suspects or defendants and that there are grounds to believe that they will escape or repeat the crime or destroy or move evidence.

[22] Article 37 para (1) KUHAP states: "At the time of the arrest, the investigator only has the authority to search the clothing, including items carried, if there are strong grounds to believe that the suspect is carrying items that are liable to be confiscated."

[23] Article 37 para (2) KUHAP states: "At the time of arrest the suspect, as referred to in paragraph (1) must be taken to the criminal investigator [and] the criminal investigator has the authority to search the clothing and the body of the suspect."

different levels of authority. The lowest degree of intrusion is to pat the entire clothed body. Another level is to scan the person. What is most intrusive is to require the arrested person to strip and be subjected to a naked search. The highest degree of intrusion is body cavity search, which is quite common in searches of drug offenders.[24]

With regard to body searches, there are further regulations on obligations and prohibitions for the police in conducting a search. These rules are specified in the Regulation of the Chief of National Police Number 12 of 2009 regarding Supervision and Control of Criminal Cases in Indonesia.[25] In the event that a body search becomes necessary, the police authorized to conduct the search has the obligation to:[26]

- inform of the purpose of the search clearly and politely;
- ask permission of the person to be searched and apologize for the invasion of privacy because the search is necessary;
- produce a letter of order and/or identity of the officer;
- conduct the examination to locate the target of the examination as necessary in a way that is detailed, polite, ethical and sympathetic;
- conduct the search according to the search techniques and tactics for the purposes that have been authorized;
- take into consideration and respect the rights of the person searched;
- to search female subjects by female officers;
- to conduct the search within the necessary time; and
- to thank the person for allowing the search.

On the other hand, police officers conducting the search are prohibited to:[27]

- conduct the search without informing the purpose of the search clearly;
- conduct the search in an excessive manner in a way that violates the right to privacy of the person searched.
- conduct the search impolitely and unethically;
- conduct the search outside of the prescribed search techniques and tactics, and/or acting beyond the limits of authority;
- harassing and/or not honoring the rights of the person searched;

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[24] Osse, *op.cit*., page 159

[25] The document can be read in the following link: http://forumduniahukumblogku.wordpress.com/2011/04/21/peraturan-kepala-kepolisian-ri-no-12-tahun-2009-tentang-pengawasan-dan-pengendalian-penanganan-perkara-pidana-di-lingkungan-polri/

[26] Article 111 para (1) of the Chief of Police Regulation No. 12 of 2009 regarding the Implementation of Human Rights Principles and Standards in the Exercise of the Duties of the National Police of the Republic of Indonesia.

[27] *Ibid*., Article 111 Para (2).

- pro tract the search in a way that harms the person subjected to the search; and
- to search females by male officers in a public space in violation of ethics.

Considering the above rules, one can conclude that both body and house searches are forcible in nature. It is evident from the fact that searches can still be conducted despite the objections of the resident of the house or the person in body searches. The person subjected to the search cannot refuse if the police is set on conducting the search.

Confiscation

KUHAP: Providing a Legal Loophole for Confiscation

Confiscation is an act of taking away or depriving a person of his property or other items suspected of being linked to crimes approved by law. Confiscation may only be carried out by criminal investigators. The purpose of the confiscation itself is to find evidence, because without it a case cannot proceed to court. As such, in order for the case to have evidence, the criminal investigator carries out confiscation as necessary for evidence in court, for the prosecutorial stage as well as for court examination.

The status of confiscated items is basically no different from the status of suspects. Before a binding court decision, the confiscated items are still considered the property of suspects or defendants. For that reason, confiscated goods must be protected from damage as well as unauthorized use.

Pursuant to Article 38 of KUHAP, confiscation must be conducted pursuant to an approval by a local district court. In an urgent or pressing situation, the criminal investigator may confiscate only movable objects and must immediately report it to the local district court for approval. Additionally, there are limitations to what items can be confiscated. They include:[28]

- Items or bills of the suspect/defendant that are entirely or partly suspected to be obtained from criminal acts or as a result of the criminal act;
- Items that have been used directly to commit or plan a crime;
- Items that have been used to obstruct investigation of a crime;
- Items specifically devised and used for the purpose of committing a crime;
- Other items directly connected to the crime.

In other parts KUHAP specifies a number of provisions about confiscation when someone is arrested in action. In such events the criminal investigator can confiscate:

[28] Article 39 of KUHAP

- Items or devices that are believed to have been used to commit a crime and other items that can be used as evidence (Article 40)
- Packages or letters or items transported or sent by post office, or courier or communication companies, as long as the package or the letter is intended for or originated from the suspect. In the event that a confiscation of these items is conducted, the investigator will produce a receipt for the suspect and for the official or the courier company. (Article 41)

The investigator does not always have to confiscate to obtain evidence. This can be conducted if under the orders of the criminal investigator, the person in control of such items surrenders the items for the purposes of investigation. When this takes place, the criminal investigator will provide a letter of receipt (Article 41 para 1). KUHAP does not specify how this order shall be conveyed. KUHAP also does not specify how the person in possession of these items can voluntarily surrender the items to the criminal investigator, or whether the suspect was under intimidation. What is clear is that this article allows the criminal investigator to obtain evidence without having to go through confiscation procedure, as if without compulsion. As such, a criminal investigator could take control of evidence without having to obtain a warrant from the head of the court if the evidence is surrendered by the suspect, However, any person thought to be in posession of evidence and having surrendered the evidence has the right to get a receipt.

A member of the drug user community related a story about how he lent a motorcycle, that was his property, but it was used as evidence and confiscated by the criminal investigator in a case involving his brother. Rules pertaining to lending of evidence are elaborated in detail in the Chief of Police Regulation No. 10 of 2010 regarding Evidence Management,[29] in article 23 para (1) and (2) as follows:

(1) Evidence that is confiscated and stored in a special place can only be lent and used by the owner or authorized parties.

(2) The procedure of lending and using as stipulated in para (1) of the article is as follows:
   a. the owner or the person entitled to request authorization to the criminal investigator's superintendent;
   b. the criminal investigator's superintendent shall conduct an assessment and consideration to reject or approve the request; and
   c. after the request is granted, the criminal investigator's superintendent prepares a recommendation to the Evidence Managing Officer.

[29] To download the document above, follow this link: http://acarapidana.bphn.go.id/peraturan/Peraturan%20Kepolisian/PERKAP%2010%20TAHUN%202010.pdf

Based on the above, the owner of the evidence basically can lend the evidence, certainly with clear reasons. However, the authority to grant permission still rests with the superintending criminal investigator. The considerations of the superintending criminal investigator are not clearly provided. This creates a loophole for the superintending criminal investigator to abuse his power and discretion.

Post Confiscation Responsibility in Narcotics Cases

There are specific provisions regulating confiscation in narcotics and narcotic precursors in articles 87 to 96 of Law Number 35 of 2009 regarding Narcotics. There are a number of steps that law enforcement agents must take before confiscating: first, to seal and prepare a report; second, to establish the status by the District Attorney; third, to destroy evidence; fourth, to utilize evidence.

Confiscation and report preparation are the responsibility of the criminal investigator, be it BNN, Police or Civil Narcotics investigator. All investigators **must** perform sealing and prepare confiscaion dossier **on the day of the confiscation**, that specifies, at a minimum: (a) name, type, nature and amount; (b) information about the location, hour, day, date, month, and year of confiscation; (c) information regarding the owner or those in possession of the narcotic and narcotic precursor, (d) signature and complete identity of the criminal investigator conducting the confiscation.[30]

All criminal investigators are required to furnish a report of the confiscation to the local District Attorney and submit the copies to the Head of the District Court, Minister of Health and the Head of Food and Drugs Supervisory Agency. The report must be furnished within 3 x 24 hours after the confiscation. Whereas for Civil Servant Criminal Investigators, as they prepare this report the confiscated evidence must be turned in to be kept by the BNN or Police Investigator. All investigators are responsible for the safekeeping and security of confiscated items under their control.

The second stage is determining the status, which is the responsibility of the local District Attorney. After receiving the report, within seven days the District Attorney must establish the narcotic and narcotic precursor status of the confiscated items, whether they will be used for purposes of evidence in court, for scientific research and development, for education and training, and/or to be destroyed. If the evidence is to be used for scientific research it must be turned over to the Minister of Health. If it is to be used for training and education purposes, it is to be turned over to the Head of BNN or the Chief of National Police, and in turn they must report to the Minister of Health about the use of narcotics for educational and training purposes. The handing over to the Minister of Health,Head of BNN and Chief of National Police must be conducted within five days after receiving the decision from the District Attorney.

[30] Article 87 (1) of the Law No. 35 of 2009 regarding Narcotics.

If it is decided to be destroyed, then within 7 x 24 hours since receiving the decision to destroy evidence, the criminal investigator is obligated to perform the destruction. In certain situations, the criminal investigator gets an additional 7 x 24 hours to prepare the destruction. The dossier of destruction must be prepared within 1 x 24 hours since the destruction is performed and submitted to BNN investigator or the local police criminal investigator with copies furnished to the District Attorney, Head of the District Court, Minister of Health, and Head of the Drug and Food Supervisory Agency.

For plant narcotics, there are more specific rules as stated in article 92 of the Law on Narcotics. The destruction of plant narcotics must be performed within 2 x 24 hours since the discovery after a small portion is set aside as for the purposes of criminal investigation, prosecution and court examination. For plant narcotics that due to their amount and location are difficult to access, the destruction can be carried out within a maximum of 14 (fourteen) days. For the destruction and preservation of the small amounts of such plant narcotics, a dossier must be prepared that at a minimum specifies: (a) the name, type, nature, and amount; (b) information regarding the location, hour, day, date, month, and year of the discovery and the destruction; (c) information regarding the owner or the party in possession of the plant narcotic, (d) the signature and complete identity of the executor and the officer or other parties witnessing the destruction.

The utilization of evidence, besides for the purposes of evidence in court, scientific research and development, education and training purposes, may also be sent abroad. This is done for the purpose of revealing the source of the narcotic or plant narcotic and its distribution network pursuant to international agreements and principle of mutual assistance.

All actions that must be done by the criminal investigator after confiscation are obligatory. The criminal investigation, prosecution, and examination in court does not delay or prevent the surrender of confiscated items pursuant to temporal limitations prescribed by law. Violation to this obligation is a crime with various sanctions as specified in the following table

Obligation		**Criminal Sanction**	
Action	**Legal Basis**	**Sanction**	**Legal Basis**
BNN and Police Criminal Investigators sealing and preparing dossier	Article 87 para (1)	A minimum imprisonment of 1 (one) year and a maximum of 10 (ten) years and a minimum fine of Rp. 100.000.000 (one hundred million) and a maximum of Rp.	Article 140
BNN and Police Criminal Investigators reporting to the	Article 87 para (2)		

District Attorney and furnishing copies to Minister of Health and the Head of Drug and Food Supervisory Agency		1.000.000.000 (one billion rupiah)	
Civil Servant Criminal Investigator turning over confiscated evidence to BNN Investigator and Police Criminal Investigator and furnishing copies to the District Attorney, Head of District Court, Minister of Health, and Head of Food and Drug Supervisory Agency.	Article 88 para (1)		
Criminal Investigator responsible for the safekeeping of confiscated items under his control.	Article 89 para (1)		
District Attorney establishes the status of evidence.	Article 91 para (1)	A minimum imprisonment of 1 (one) year and a maximum of 10 (ten) years and a minimum fine of Rp. 100.000.000 (one hundred million) and a maximum of Rp. 1.000.000.000 (one billion rupiah)	Article 141
Criminal Investigator conducts destruction of evidence	Article 91 para (2) – para (5)	A minimum imprisonment of 1 (one) year and a maximum of 10 (ten) years and a minimum fine of Rp. 100.000.000 (one hundred million) and a maximum of Rp. 1.000.000.000 (one billion rupiah)	Article 140
Criminal Investigator destroys plant narcotics within 2 x 24 hours after discovery.	Article 92		

Table 1 Obligation of the Criminal Investigator pertaining to Confiscation and Criminal Sanctions

Torture: The Limit to the Use of Force

Enforcement measure is an authority exclusively afforded to law enforcement agents. Neither civilians nor the military have the power to conduct arrest, detention, searches, as well as confiscation. In exercising this power, law enforcement agents must have proper documentation and a series of other requirements that they must fulfil. As the name implies, when an enforcement measure is carried out, the use of force may become necessary to overcome the resistance from suspects.

The goal of enforcement measures itself is to facilitate the administration of justice. During criminal investigation, the first stage of the administration of justice, the investigator (in this case usually the police) will try to obtain information about the case. They are tasked to uncover the crime and violations of law that occurred. In order to extract such information, the police often resorts to force and violent means. The use of violence to extract information amounts to torture.

Torture is a primitive interrogation method. It has been used even since Greek and Roman times[31], specifically on slaves, the weak and powerless. Torture, unfortunately, is still pervasive today, and examples are abound in how it is used to extract information, both by countries in the developed and developing worlds[32]. It is believed that the continued use of torture as an interrogation method may be due to the fact that it is seen as a cheap and easy, albeit dirty, way for the police and security personnel to obtain information to solve cases of crime.

What is torture?

Torture means: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or

[31] See, among others The Treatment of Prisoners Under International Law, Nigel Rodley dan Matt Polard, 3rd edition, Oxford: Oxford University Press, 2011; The History of Torture, Brian Innes, Leicester: Blitz Editions, 1998; Torture and the Law of Proof: Europe and England in the ancient regime, John H. Langbein, Chicago: University of Chicago Press, 1977, for general information about torture and its history.

[32] See Amnesty International and Human Rights Watch reports. These two international non-governmental organizations have documented many cases of torture experienced by terrorism prisoners and detainees.

acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[33]

Based on the above definition there are four elements to indicate whether an act of violence constitues torture. They are:

- "***... intentionally inflicted ...***" this part of the sentence intends to show that the violence taking place is indeed intentional and the perpetrator has the intention to do it. The perpetrator is fully aware of the act he is committing.
- "***...[to cause] severe pain or suffering, whether physical or mental...***" this part is what distinguishes torture with regular violence, where the pain caused is extraordinary.
- "... ***punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind...***" this demonstrates the purpose of the torture. The information extracted usually pertains to the crime committed.
- "***...when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity***." This part explains who is the perpetrator of torture, where it is committed and whether it is committed with knowledge of public officials. The police, in this regard, falls under the category of public official.

The above definition should suffice to explain the types of violence that amount to torture. The four elements also distinguish torture from regular violence. The definition of torture is adopted from article 1 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)* passed by the UN General Assembly on 10 December 1984. This convention is a progression of the previous Declaration.

On 9 December 1975, the UN General Assembly adopted a Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[34] In this declaration, torture is seen as a crime. However, being only a declaration, there is no legal obligation to implement this declaration. The UN Human Rights Commission then drafted the Convention against

[33] Article 1 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment that has been ratified by the government of Indonesia by Law Number 5 of 1998

[34] The birth of this declaration is inherent to the argument that torture and other cruel, inhuman and degrading treatment or punishment can corrupt the fabric that makes the society orderly and cultured. This principle is reflected in the Universal Declaration of Human Rights (UDHR). Article 5 of UDHR fully guarantees the right of every person to be free from all forms of torture and other cruel, inhuman or degrading treatment and punishment. Furthermore, ICCPR (article 7) provides that this right is a fundamental right that cannot be derogated from under any circumstances (*non-derogable right*).

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This Convention was then passed on 10 December 1984 and began to take effect on 26 June 1987[35].

In addition to CAT, the use of torture has been prohibited in absolute terms by various other international human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR)[36]; The European Convention for the Protection of Human Rights and Fundamental Freedoms[37]; and the American Convention on Human Rights[38]. Torture also has long been declared a violation of human rights based on international customary law[39]. In the *Filartiga v. Pena-Irala*[40] case, *Prosecutor v. Delalic and Delic*[41], and *the Restatement (3rd) FOREL, Part VII, Chapter 1, § 702, Comment (d),*

Torture is also seen as *jus cogens* or the highest norm in international law (commonly known as *peremptory norms*)[42]. The status of torture as *jus cogens* has been recognized in the case of *Siderman v. Argentina*[43] and the decision in the International Criminal Tribunal for former Yugoslavia (ICTY) in the *Furundzija* case[44]. This demonstrates that the prohibition of torture has been placed at the highest degree in international law, where every country is required to abide by it and the exclusion to this norm can only be done by other norms of similar degree of importance.

History of Torture Regulation in Indonesia

The Government of Indonesia has signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 23 October 1985. However, it took 13 years for Indonesia to ratify this convention. The *Reformasi* period of 1998 then became the trigger for the ratification of this convention. As *Reformasi* unfolded, the Indonesian Government prepared its National Human Rights

[35] GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc.A/39/51 (1984).
[36] GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc.A/6316 (1966).
[37] 213 U.N.T.S.222
[38] OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).
[39] International Court of Justice Statue Article 38 stating that customary law is translated as "*evidence of a general practice accepted as law*." See also *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p.14 for ICJ's interpretation on customary law.
[40] 630 F.2d 876, US Court of Appeals, 2nd Circuit, 1980. See also *Fortu v. Suarez-Mason*, 672 F.Supp. 1531, 1541 (N.D.Cal.1987), and *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C.Cir.1984).
[41] ICTY Case No. IT-96-21-T, 16 November 1998.
[42] The Vienna Convention on the Law of Treaties article 53 states that "*a peremptory norm of general international law is a norm accepted and recognised by the international community of States...as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*." See also *Demjanjuk v. Petrovsky*, 603 F.Supp. 1468; 776 F.2d 571 (1985) regarding the recognition of the status *peremptory norms*.
[43] 965 F.2d 699 (1992). See General Comment No.2 Convention Against Torture, CAT/C/GC/2, 24 January 2008 affirming the status of torture as *jus cogens.*
[44] *Prosecutor v. Furundzija*, Case No. IT-95-17/1 (Trial Chamber), 10 December 1998. See also *Prosecutor v. Kunarac, Kovac, and Vukovic*, Case No. IT-96-23 dan IT-96-23/11 (Trial Chamber), 22 February 2001; Report of the Special Rapporteur on Torture, E/CN.4/198615, paragraph 3, 19 February 1986.

Action Plan of 1998 – 2003 specifying priority actions for the promotion and protection of human rights. The priority for the first year of the Action Plan included the adoption of three international human rights instruments, including the Convention Against Torture.[45]

The passage of the Convention Against Torture was done based on Law Number 5 of 1998 under the initiative of the Parliament. In the elaboration to this law, five reasons were stated for why Indonesia became party to the convention. They include (1) Indonesian Nation rejects all forms of torture as stated in the Pancasila and the 1945 Constitution; (2) In the application of Pancasila and the 1945 Constitution, a set of regulations have been made, although not yet fully compliant to the convention. As such, these laws need to be improved; (3) The improvement is needed to further strengthen legal protections more effectively for the creation of an orderly, and civilized Indonesian society; (4) The prevention of torture contributes to the maintenance of peace, public order, and world prosperity and sustains the human civilization; (5) In order to show the seriousness in Indonesia's efforts to promote and protect human rights. The five reasons explained nothing about why it took Indonesia thirteen years to ratify the convention after signing it.

By ratifying this convention, Indonesia is actually bound to a number of obligations. The convention states, among others, that:

- Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. (Article 2 (1) of CAT)
- Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. (Article 4 (1) of CAT)
- Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature. (Article 4 (2) of CAT)

Unfortunately, to date, Indonesia's obligation to declare torture as crime has not been fully realized. There is as yet to be a specific regulation that puts torture as a crime along with its proper punishment.[46] Despite the fact, the adoption of the Convention Against Torture as law has rendered unjustifiable the act of torture by state agents. It is no longer tolerable to beat and kick a person who is arrested by state agents.

[45] The three international human rights instruments are (1) The International Covenant on Economic, Social and Cultural Rights; (2) The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment; (3) The International Convention for the Elimination of All Forms of Racial Discrimination. (Presidential Decree No. 129 of 1998 regarding National Human Rights Action Plan).

[46] Under international law, torture has a status of *jus cogens*, that is, the highest norm in international law. Other crimes with qualifying as *jus cogens* include slavery and genocide. Under *jus cogens*, torture (and other *jus cogens* crimes) is treated as enemy of humanity. The entire humanity places great concern about the crime and universal jurisdiction shall theoretically apply.

Violence cannot be justified during interrogation. Similarly, during detention, inhuman and degrading treatment is no longer be justified. This adoption provided a formal and normative recognition that torture is not something that can be tolerated.

Between Enforcement Measures and Torture

A state agent can no longer hide behind the pretense of "implementing the law" to use torture. A state agent (public official) has the power to conduct arrests, but in such arrests, must they indulge in battering suspects? Can state agents shoot at suspects trying to flee?

Generally speaking, the use of force is not prohibited in law enforcement. In order to determine the extent to which such force can be justified, the commonly used test to measure force under human rights is the necessity and proportionality tests. The Chief of Police Regulation Number 1 of 2009 regarding the Use of Force in Policing also provides that the principles of legality, necessity, proportionality, public obligation, prevention and reasonability must be honored[47]. Take the following example: XYZ, a drug addict, had just been using drugs. In his pocket there is an amount of unused heroin to be consumed the next day. On his way home he ran into a police checkpoint. He got nervous and as he approached he turned around and ran away. Seeing such suspicious behavior, the police ran after him, and when he was caught asked him why he needed to run away. Because he refused to answer, the police then beat XYZ. In this case, the police chase was a justifiable act. However, must they beat XYZ up? Is it not excessive? Would a search of XYZ not suffice for the purposes law enforcement?

[47] Article 3 of the Chief of the National Police Regulation No. 1 year 2009 regarding the Use of Force in Policing.

Covert Purchase or Case Manufacturing

Covert purchase or case manufacturing perhaps are not terminologies widely known to the public. However, to the drug user community, hearing these two terms would send a chill down the spine. Many of their friends have fell victim to covert purchases as well as case manufacturing.

In the spirit of eradicating narcotics, the Law on Narcotics provides a great authority to investigators. One such authority is to conduct covert purchase techniques and controlled handover.[48] Both these techniques can be used by investigators under written orders from the superiors.[49] Notwithstanding the debate presented in the previous chapter regarding the status of police investigators in regard to authorities stipulated in Article 75 of Narcotics Law, the authority to conduct covert purchases has become the bane of drug user community.

Prior to the nineteenth century, the covert purchase was not a part of the policing model. At that time, everything has to be conducted transparently. The police uses uniforms, and does not conduct policing covertly. Everything is done officially. However, this was seen as inadequate. In the middle of nineteenth century non-uniformed detectives were reintroduced in England. This was seen as increasingly inadequate when the intensity of crimes rose by the end of nineteenth century. More proactive policing measures were seen as necessary, and covert operation was one such measure.

Such covert operations became more widely used after the Federal Bureau of Investigation (FBI) was established in the United States of America. FBI often used this technique as a form of counter-espionage against spying by other countries in its jurisdiction. With respect to narcotic cases, such covert operations became more common in 1960s. Covert operations are also commonly used to reveal other crimes, such as property crimes, sex crimes involving underage children over the internet, as well as other general crimes.

Essentially, covert operations have shifted the old paradigm that tended to be reactive to crime, to become proactive. The police will not only move when crime has occurred and proceed to arrest the perpetrator, but more proactively, it will attempt to arrest the perpetrator before the crime takes place.[50]

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[48] Article 75 of the Narcotics Law

[49] Article 79 of the Narcotics Law

[50] Erwin W. Kruisbergen, et al., *Undercover Policing: Assumption and Empirical Evidence*. Brit J. Criminol, 2011, http://bjc.oxfordjournal.org

Due to its proactive nature, in its implementation covert operations have the potential to violate democratic principles of policing.[51] Democratic policing is consistent with the rule of law and all the values associated with it, such as accountability and transparency. In covert operations, the police would often conduct illegal activity and such police activity will not be punished. In addition to that, the issue of transparency and the urgency for such covert operations often become questionable.[52] As a result, in countries like the Netherlands, individuals who become targets of covert operations have the right to question the legality of such operations.

Covert purchases can be equated with entrapment 'approved' by the law. However, one need to keep in mind that in addition to the obligation to have orders from superiors, covert purchases must also target the drug traffickers. Certainly, the priority is the large-scale traffickers. As such, assuming that documentation of covert purchases can be used as evidence of transaction, suspects netted in such operations should be charged under article 114 of the Narcotics Law.

Unfortunately, although there have been many cases of entrapment by the police, rarely can these cases be proven as covert purchases. This is because such operations are not transparent. It is true that while the operation is ongoing, it should only be known to a few authorized individuals. However, then the target of covert operations are arrested, the fact that suspects were targets of covert operations need to be revealed to the public. Logically speaking, the buyer, in this case the undercover police, should also be arrested if the police is unable to show that the transaction was part of an undercover operation.

Meanwhile, one does not find the term 'case manufacturing' in the Narcotics Law. Case manufacturing is a term used by drug user community for cases that are suspected as being manufactured. Covert purchases are essentially something that is made up or manufactured. However, covert purchases are often equated with legal setups, whereas case manufacturing refers to something illegal.

Typically, case manufacturing often experienced by drug user community is highly variable, ranging from using women as objects to entrap someone to commit drug offense, to manufacturing of evidence. Such case manufacturing is so prevalent, there are now individuals whose profession is to entrap, commonly referred to as the *cepu*. Many such *cepu* are actually part of drug user communities.

The following stories are two examples in the range of illegal entrapment practices committed by the police.

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[51] Elizabet E. John, *Breaking The Law to Enforce It: Undercover Police Participation in Crime*. Stanford Law Review, 2011

[52] ibid.

Rafi, the Kid who was Entrapped

LBH Masyarakat advocacy team received a story about a case manufacturing and torture experienced by Rafi (not an actual name), 14 years old, who had the bitter experience with the police and went to court accused of being part of a drug trafficking ring operating in Central Jakarta. Although eventually he was acquitted by the Central Jakarta District Court of all charges, for a boy Rafi's age this experience left a mark, something that he will not forget his entire life.

Becoming a Victim of Entrapment

The night before Rafi was caught, he walked to an internet cafe to play games and some social networking. Along the way he passed a field and saw two of his friends, Mamat and Rohmat, who were chatting. As he passed he was called by the two of them and he approached without any suspicion. When he approached, Mamat immediately asked him to accompany Rohmat to get some money from someone waiting at the gas station in Cikini. Mamat then lent his motorcycle to Rafi to take Rohmat to the place, and Rafi acquiesced. As they arrived, Rafi parked the motorcycle near the sidewalk and waited on the motorcycle, while Rohmat approached a woman and a man and had a conversation that Rafi could not hear.

Some moments later, Rafi was asked to take the money to Mamat by Rohmat while he waited there. Rafi then took the money to Mamat and he intended to go to the internet cafe right away because he felt his task to take Rohmat was completed. As he gave the money to Mamat, apparently he was asked to return to the gas station to take a small package wrapped in black duct tape the contents of which he did not know. Rafi refused in the beginning because he wanted to play at the internet cafe as he intended in the beginning. But then Rafi was compelled to take the package with a rather forceful voice by Mamat. Rafi was scared because Mamat was much older than him. So he then took the package. Rafi then asked, "what is this?" Mamat merely replied, "just take the thing and don't ask questions!" Without thinking much, Rafi then took the package and gave it to Rohmat.

Rohmat who received the package from Rafi then approached the woman who gave him the money earlier. But as he approached, the man who was with the woman then came to him and held him with force. Not long after, a Kijang car approached and some men in plainclothes then pulled Rafi and Rohmat into the car. Rafi then realized that these men were the police in plainclothes who were entrapping him.

Succeeding at the Last Effort

It was fortunate that the court examining Rafi's case had a strong perspective about children's rights and assigned a special judge to examine this case. In court examination the legal facts presented at the beginning of the story were revealed. Rafi's story was supported by Rohmat who was arrested along with Rafi at the time. Unfortunately, when asked to testify in court, the police who arrested and prepared the dossier of investigation were reluctant to appear in court to solicit clarification about the discrepancies in the testimony.

After hearing the charges presented by the Prosecutor, the defense from lawyers, family's opinion, and advice from the Correctional House, the judge in the District Court examining the case ruled that Rafi was not proved guilty and acquitted him of all charges[53]. Facts were also revealed in the examination affirming that Rafi was indeed a victim of entrapment perpetrated by the Police. These facts include that the person arresting Rafi, the police, ordered the drugs from Mamat and Rohmat. It was also odd that the buyer who was at the scene was not touched by the police.

Based on these facts, in their considerations, *The Judges rule that Rafi was a victim of entrapment. Additionally, the lack of* mens *rea element in the crime committed by Rafi was seen as the grounds to state that Rafi did not fulfil the element of "without rights and against the law" in the article being charged.*[54]

Evidence out of the Blue

Danang was LBH Masyarakat client who also experienced entrapment by the police. He is 18 and is the eldest among five siblings. Danag's father works as a scavenger, and his mother has a tiny coconut grinding stall in front of the house. They live in a tiny hut along the railroad in Jakarta.

As the eldest son in the family, Danang would be helping his parents daily to eke out a living. With his old motorcycle, Danang spent time as a motor-taxi driver. That fateful day, Danang returned home from work at around 2 AM. He did not immediately come home, but he stopped by a hangout spot merely 50 meters from his house. There were some of his friends there, chatting. Some minutes after Danang joined the group, a young man also joined.

[53] Central Jakarta District Court decision No. 1726/Pid.B/2011/PN.JKT.PST dated 10 November 2011.

[54] *Press release* LBH Masyarakat dated 11 November 2011: "Tanpa Unsur Kesalahan, Terdakwa Kasus Narkotika Tidak Boleh Dinyatakan Memenuhi Unsur Pasal".

Danang and other friends were aware that this guy is a drug addict. Drug addiction is something they are used to seeing in their neighborhood. Danang also admitted that occasionally he and his friends would also use drugs. So when the guy invited them to use drugs together, they did not refuse. Especially it was paid for by the guy. He then produced a Rp 100,000 bill and asked "so who wants to buy the stuff. It's my treat, don't make me buy it myself too". As the youngest in the group, the task of purchasing the drug fell on Danang.

It so happened that the house of the crystal meth dealer that they knew was not far from where they hung out, in fact, right next to Danang's house. Danang then went to the dealer's house then knocked on the door. There was no answer. He knocked several more times and still there was no reply. So he went back to the hangout spot. Merely steps away, Danang was surrounded by plainclothed men who identified themselves as the police. Shocked, Danang asked them why he was captured. The commotion then drew Danang's father out of the house as well as other neighbors to see the source of the noise.

With rude words, one of those arresting Danang said that he was being arrested for purchasing drugs. Danang tried to deny this and explain that he was not buying drugs. Danang also said there was no evidence that he was buying drugs as he was not in possession of any. The police then pointed to a location just several meters from their position saying "there's the stuff". The police then ordered Danang to pick up the package with his mouth. Although Danang's father implored him not to pick up the package, but punches from the police broke his defenses.

Danang was very confused as to how the drugs were near where he was caught, while he still held the money that was to be used to buy the drug.

The above stories are indeed different. In Rafi's case, the entrapment target was not Rafi, but Rohmat and Mamat. The men and women who want to buy narcotics from Rohmat are the ones who entrapped them. In the case of Danang, irrespective of the fact that Danang initially intended to buy narcotics, the evidence found near him was evidence planted by the police.

Reading the stories above, the question then arises whether these two individuals were really entrapped. A common feature in such cases is that individuals who instigated the transaction are never arrested, and are even let go. From Rofi's story, none of the men and women were arrested by the police, while it is highly likely that they should be arrested as well.

The second common feature of entrapments is that the narcotic evidence seem to come out of the blue. This can qualified as planting evidence. Often times, the police would covertly place narcotics in spots under the control of the target. These can be bags carried by the target, pockets, vehicle seats, or like what happened to Danang, anywhere near the position of the target. Such evidence clearly do not belong to the targetted person.

In planting of narcotic evidence, the crime charged is often really perpetrated by the target, but the evidence used may not always be the evidence involved in the crime. It could also be possible that the crime has not or did not occur, but somehow the police would find the evidence under the control of the target.

Based on our findings, the prevalence of such abuse of power in the conduct of undercover operations can be related to the fact that there are quotas for narcotics-related arrests, promotion incentives, as well as the lack of control mechanism from third parties to ensure the transparency of such operations.

It has become common knowledge that every police precinct seem to have a quota for narcotics arrest that they must meet. The shortcut to meeting such quotas is by conducting entrapment, by way of covert purchases or case manufacturing. We certainly realize that it is not necessarily wrong to conduct covert operations to meet arrest quotas. What is wrong in such cases is when such purchases are directed at 'small fish' targets, especially when it is conducted without the approval or orders from the superiors. As a result, this becomes not an covert purchase. it amounts to case manufacturing.

The prevalence of such cases also seem to be facilitated by the Narcotics Law itself. It is very easy for the police to conduct case manufacturing and charge the target under articles of possession. It is enough that the police witnesses that the target 'is in possession' of the narcotics. The police does not need to prove anything anymore, such as whether or not there is the *mens rea* element. In court examinations that would follow, the prosecutors would very easily prove the narcotics possession. All they need to do is to present the police who arrested the defendant as the witness, and provide a laboratory document attesting that the items carried by the defendant is narcotics, then the requirement of a minimum of two items of evidence will be met for the judges to arrive at a conviction. When the judges arrive at such conviction, then the defendant can be found guilty. It is this need to act as witness in court also that encourages the police to manufacture cases and arrest the target involving a minimum of two police personnel.

Aside from the arrest quota, the number of narcotics arrests becomes an achievement for the police which in turn will affect his promotion. With such reward, and with the ease with which they can entrap

someone without control mechanisms to ensure the transparency of the entrapment process they conduct, the police find themselves in a race to entrap suspects.

Although such covert operations are conducted by the police, suspects, their family as well as lawyers are entitled to receive all documentation regarding the conduct of the covert purchase operation. In the event that the conduct of such operations deviate from rules, the suspect shall be released. Such a mechanism will be useful to reduce, prevent, and eradicate practices of case manufacturing by the police merely in order to meet their arrest quotas.

In 2011, the Head of BNN issued a number of directives regarding covert purchases: (1) Head of BNN Regulation Number 3 of 2011 regarding the Investigative Technique of Controlled Transactions. (2) Head of BNN Regulation Number 4 of 2011 regarding the Investigative Technique of Covert Purchase. (3) Head of BNN Regulation Number 5 of 2011 regarding Technical Guidelines for Investigation of Narcotics and Narcotics Precursor Crimes. Such regulation indeed does not take the form of a control mechanism for the implementation of covert purchases. But this regulation can serve as a reference about the rules of engagement in conducting covert purchases.

Realizing the importance of the three regulations above, and consistent with Law No. 14 of 2007 regarding Public Information Transparency, we requested the copies of these regulations from BNN. However, with the excuse that such public information fall under the confidential category under the Law on Public Information Transparency, it is difficult for us to access such information. We are currently striving to obtain access to these three regulations to make it publicly accessible, so that in the event that there are cases of suspected covert purchases or case manufacturing, drug user community and the public at large can compare them against the procedures stipulated by this regulation.

Research Findings

This observation was conducted from December 2010 to November 2011 involving 388 prisoners from Class 1 Cipinang Detention Center, East Jakarta, regarding breach of Act No. 35 year 2009 on Narcotics.

Characteristics of Respondents

This observation uses a method of interview on a weekly basis towards new prisoners in Cipinang Detention Center. There are several characteristics of respondents, namely:

- Most respondents are males aged over 18 years old. Cipinang Detention Center is a detention residence for adult males.
- The detention status of the respondents is prosecutor's detainee. Other Jakarta prisoners whose status is still as an investigator's detainee are placed in a state prison under each police offices.

Crime Scene and Its Proximity to Suspect's Address

Cipinang Detention Center heads three jurisdiction areas based on its crime scenes, including East Jakarta, North Jakarta and South Jakarta. Any suspect who is under jurisdiction from Central and West Jakarta District Court is placed in Salemba State Prison, hence they are not included as respondents in this observation. Looking at the crime scenes together with the data on suspect's address, it will be clear that not much distance spreads between the crime scenes and the suspect's address.

Suspect's Address	Crime Scene				
	North Jakarta	East Jakarta	South Jakarta	No Answer	**Total**
North Jakarta	**47**	8	19	4	**78**
East Jakarta	3	**70**	18	10	**101**
South Jakarta		9	**66**	13	**88**
Bodetabek	1	18	24	6	**49**
West Jakarta	5	2	11		**18**
Central Jakarta	2	10	9	2	**23**
West Java		5	2	2	**9**
Central Java		1			**1**
No Answer	4	6	7	4	**21**

Total	**62**	**129**	**156**	**41**	**388**

Table 2 Distribution of Crime Scenes and Suspect's Address

In the case of the high distance between suspect's address and their *locus delicti* shows high mobility of Jakarta residents. Arrest and detention process are always undertaken based on investigator's jurisdiction. If someone is detained in South Jakarta, it is almost given that the investigator is also based in South Jakarta, because the aim of detention is to expedite the investigation process. This policy is good to apply, however, to ensure the rights of a suspect are protected, some factors have to be considered. For instance, suspect's family members will need extra effort and sacrifice to visit their detained family member because of the relatively longer distance. Apart from that, the detainee could also attend a rehabilitation program in their residential area. To ensure that this process is going well, more effort and hard work by the family members will be needed compared to the detainee whose area of detention in closer proximity to their home address.

Age and marriage status

Respondents in this observation are all from 18 to 58 years old, with the distribution of the respondents' age shown as follows:

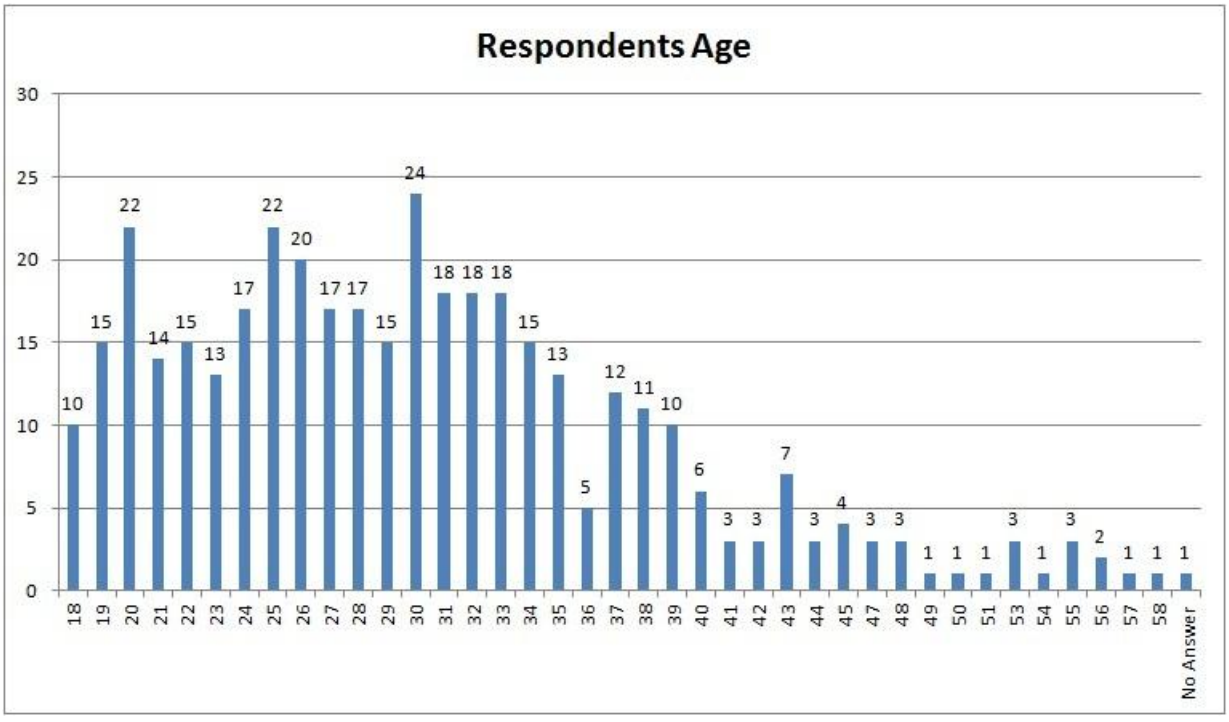

Diagram 1 The Distribution of Respondents Age

As we can see from the diagram above, the age range for narcotics detainee is mostly under the productive years, 20-40 years old. Within these productive years, respondents should have been on top of their careers. They would have started to have a job and a family by this age. They could also make some contributions to the country by using their income subject to tax. Unfortunately, being behind bars with possibility of getting a minimal of 4-year sentences actually hinders their wellness. On one hand, the respondents who experienced addiction cannot be cured from their addiction if there is no proper treatment (read: enrolled in rehabilitation clinics). On the other hand, the increasing number of detainees surely puts a weight on the government, as it is parallel to the size of expenses such as food and water.

In this observation, the qualification of suspect's personal details is divided into four categories. This observation looks at the possible tendencies based on age, income, criminal history, and also the Acts that are most often sanctioned in narcotics criminal act.

Types of Criminal Acts and its Distribution

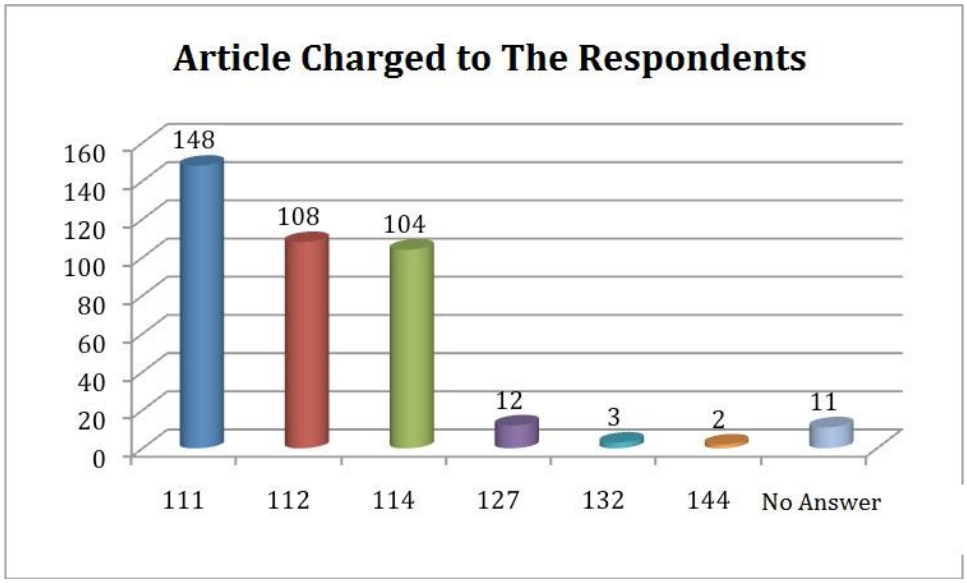

Diagram 2 Article Charged towards Respondents (Suspects)

The diagram above shows the articles charged towards the respondents. All the respondents are narcotic-related detainee, therefore all the articles are drawn from Act No. 35 year 2009. The diagram above shows the commonly articles charged to the respondents, which are article 111, 112, 114, 127, 132, and 144.

The most applied articles are articles 111 and 112 Act No. 35 year 2009 on narcotics. Both articles are related to narcotics provision. Judicially, the articles are aimed towards people with no rights or people who violate the law in planting, maintaining, possessing, storing, or providing narcotics class 1. Article 111

is aimed for narcotic plants (mainly marijuana), while article 112 is aimed for non-plants narcotics (mainly heroin or methamphetamine).

Article 113 and 114 principally are aimed towards people who are involved in the attempt of narcotics transactions. Article 113 is directed towards people who are involved in producing, importing, exporting or distributing narcotics category 1. While article 114 is directed towards people who are involved in activities such as offering for sales, buying, receiving or becoming the intermediary in any transactions, exchanging, or delivering narcotics category 1.

In principal, Act No. 35 year 2009 does not differentiate judicial crimes based on its subjects. Both ***newcomers*** or addicts**,** or even drug dealers have the possibilities to be alleged by the same articles. If the suspect is proven to be in provision of narcotics, they are subject to article 111 or 112. Conversely, if they are caught in the middle of transactions (be it selling, buying, or just distributing), they are subject to article 113 or 114. There is one article in Act No. 35 year 2009 that is directed specifically towards drug users or abusers, which is article 127. This article is directed only towards the narcotic abusers. They are subject to rehabilitation, not only prison sentences. However, in practice, is every narcotic abuser qualified to be subjected to this article? Follows is the result of this observation that will answer this question. The analysis on this article will be elaborated in its own part.

Article 132 is an experiment on criminal act that is regulated in article 111 – 129 Act No. 35 year 2009. It implies that the suspect has done a criminal act as regulated on article 111-120, but delayed due to external issues. For example, the suspect has not entirely done narcotic transactions but already caught by the authority. Meanwhile, article 144 is an article whereby any repeated cases of narcotics are executed within three years.

Relevant to the charged articles, this observation also provides data on the amount of narcotics as evidence. Related to this amount, the noted number is the weight that is given by the respondents based on their police investigation report. Does this data on narcotics amount fit the reality? The hypothetical case studies will give us more analysis.

Disregarding the hypothetical case studies, below is the composition of narcotics amount in cases under observation.

Amount	**Articles Charged**							**Total**
	111	**112**	**114**	**127**	**132**	**144**	**No**	

							Answer	
0-1 gram	24	77	32	4	-	-	2	**139**
1-3 gram	42	11	13	2	-	-	2	**70**
3-5 gram	20	5	10	3	-	-	1	**39**
>5 gram	35	4	28	-	-	1	1	**69**
No Answer	27	11	21	3	3	1	5	**71**
Total	**148**	**108**	**104**	**12**	**3**	**2**	**11**	**388**

Table 3 The distribution of Narcotics Amount and Articles Charged

As much as 139 (35.8%) respondents admitted that the amount of their narcotic possessions is less than 1 gram. From the analysis per article, 108 respondents that are subject to article 112, 77 (71,3%) respondents were in possession of narcotic amount less than 1 gram. The amount of narcotic possession that is less than 1 gram implies a greater meaning when we examine the rehabilitation sanction.

Experience in Prison

From all the respondents, there are two people with previous criminal history based on repeated narcotic offence that is regulated by the article. There are actually more than two people that admitted that this was not their first-time experience with the authority regarding narcotics. From the 388 respondents, there are 19 people (5%) that have previously penalized.

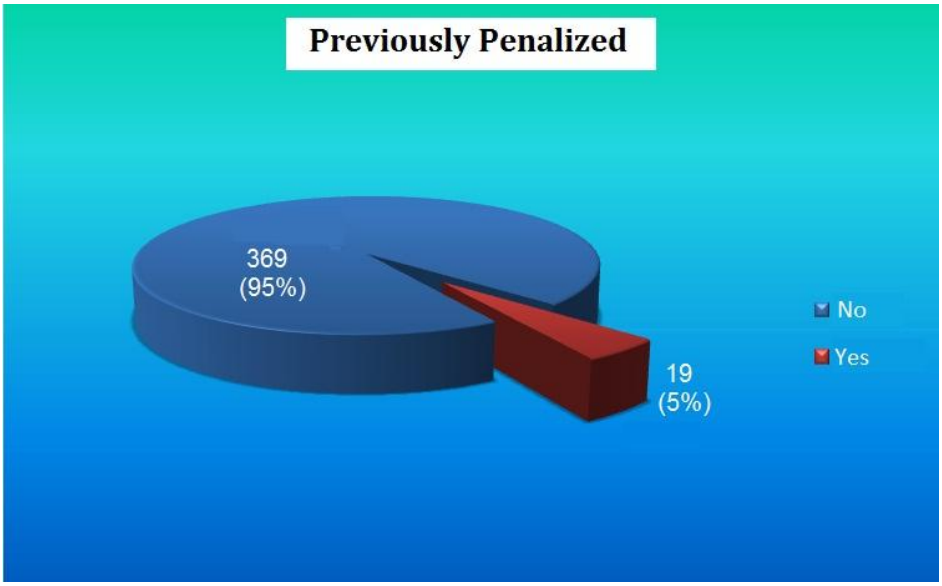

Diagram 3 Proportion of Respondents with Previous Criminal History

From 19 respondents that have been penalized before, the majority have some experience on narcotic/psychotropic case. There are only two people with no history of narcotics.

Detention Process: Dark Alleyway of Law Enforcement

Arrest is the first forceful attempt by the police when they want to start enforcing the law. Unfortunately, so far there is no guarantee that the legal process will stand according to the procedures. We too often discover a form of violence and authority abuse that are dehumanizing and forcing people to face bad experience. This detention process is like a dark alleyway to this traumatizing experience. At this starting point suspects are at their most vulnerable.

If the suspects can retaliate towards any form of detention that is out of procedure, they are indirectly capable to be refrained from the biggest risk, that is a form of abuse, torture or extortion, alongside with other violence. The biggest risk happens at the first stage of arrest, and continues to the next phase, detention process. This risk persists until investigation grinds to a halt, regardless of the location where the suspect is arrested[55]. When a suspect is able to avoid this illegitimate arrest, this becomes a success to avoid the next inhuman arrest.

There are two simple indicators that can be used to determine the legitimacy of one arrest. Firstly it is the administrative factor, secondly it is the substantive matter. This administrative issue is related to the provision of arrest warrant and the time of its grant alongside with a copy of arrest warrant to the suspect's family members[56]. Substantially, detention cannot involve violence. This observation is undertaken towards two indicators mentioned above.

[55] Osse, *op.cit.,* p. 156.

[56] Article 18 KUHAP regulates that detention process has to be attached with arrest warrant that is given to the suspect while doing the arrest. While the copy of the arrest warrant is given after the suspect arrives at the police station.

Only 47,9% of Arrest Process is Administratively Legitimate

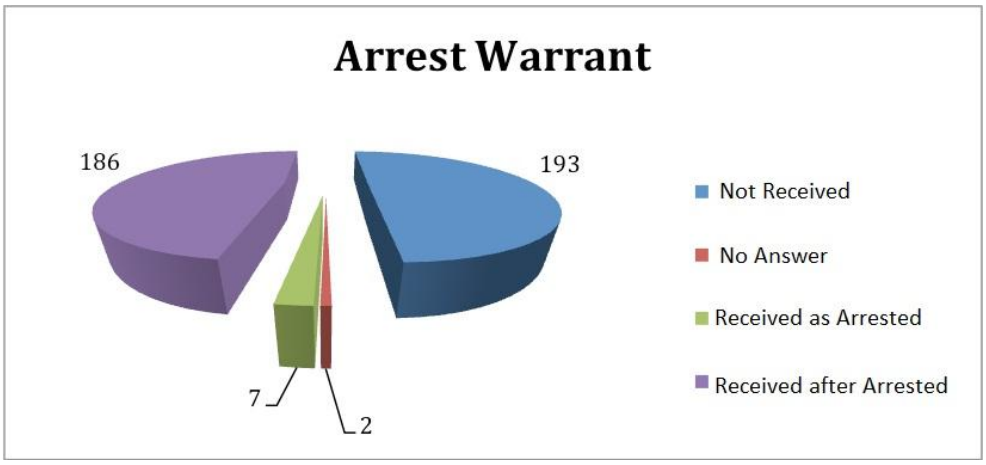

Diagram 4 Arrest Warrant and Time Received

Regarding the arrest warrant, it is recorded that 193 respondents (49,7%) said they did not receive the arrest warrant up until the observation was carried out. One hundred and ninety three respondents admitted that they did receive the arrest warrant, wherein 7 respondents (1,8%) were given arrest warrant during the arrest and 186 (47,9%) after the arrest. Meanwhile, 2 respondents (0,5%) did not answer the question.

From the 193 (47,9%) respondents who admitted of not receiving arrest warrant, we cannot immediately conclude that the administrative officer did not issue the arrest warrant. Usually, when the investigator submits the files to the general prosecutor, the prosecutor will check on the completeness of the documents. One of the required files on the document is the arrest warrant. Its absence will deem the document as incomplete.

The respondents in this observation are detainees who have gone through that hurdle. The prosecutors have stated the completeness of their documents, so the status is updated from investigator's detainee to prosecutor's detainee. Therefore they are no longer placed in the police station but are now located in Cipinang Detention Center as prosecutor's detainee.

From the explanation above, **can we say that the arrest of 193 respondents is a legitimate arrest, due to the existing arrest warrant?** The arrest of 193 respondents should still be qualified as an illegitimate arrest process. The Act regulates that arrest warrant is to be given to the suspect and its copy to their family. Related to the aforementioned 193 respondents, we can gather that the arrest warrants have never been given to the suspects. Arrest warrants were only made for the sake of administrative matter and not to grant the rights of the suspect during their arrest. With the absence of the arrest warrant, the legitimacy of the arrest is definitely questionable.

Regarding the copy of arrest warrant that is supposed to be given to the suspect's family, it is recorded only 187 of the total respondents (48,2%) that admitted knowing that the family received the copy of the warrant. Meanwhile, 194 respondents (50%) firmly stated that the family did not receive the arrest warrant and 7 respondents (1,8%) did not answer this question. Further details on issue regarding copy of arrest warrant are below:

Arrest Warrant	Copy of Arrest Warrant			Total
	Received	Did Not Receive	No Answer	
Received	186	7	-	**193**
Did Not Receive	1	187	5	**193**
No Answer	-	-	2	**2**
Total	**187**	**194**	**7**	**388**

Table 4 Distribution of Arrest Warrant and Copy of Arrest Warrant

From the distribution above, we can conclude that only 186 respondents (47,9%) were handled in an administratively legitimate manner. They received arrest warrant and a copy of arrest warrant was also sent to their family. This conclusion ignores the time factor in receiving the arrest warrant.

The copy of arrest warrant might not be deemed as worthy by the public. However, this copy actually has an important role in giving legal assistance or of other importance such as protecting the rights of the suspect in a quick and responsive manner. For example, when a suspect undertakes a *methadone* therapy, their family must need this copy as soon as possible after the suspect is arrested. This is very useful to ensure the succession of the *methadone* therapy mentioned above. Similarly with legal assistance, without the copy of arrest warrant, there is a possibility for the family to not know the arrest status of the suspect. When the family receives the copy of arrest warrant, they are entitled to seek legal assistance for the suspect, so the suspect will not suffer from any deficiency in their rights department.

From the previous data we know that the total respondents who received arrest warrant during the arrest process are only 7 people (1,8% from the total 388 respondents). There is a possible correlation between violence and the delay in giving the arrest warrant. If it was a red-handed arrest, the delay in arrest warrant is tolerable. Conversely, if the police have planned or deliberately goes on the arrest, the absence of the arrest warrant turns the process as a false arrest. However, this observation does not identify whether the respondents are caught red-handed or not.

Arrest without Violence, Only 20,9%

This observation also attempts on identifying whether violence happens during the process of arrest. There are three aspects of violence as main points of observation, namely (1) physical abuse, including barehanded hitting, hitting with blunt objects, kicking, and electrocution; (2) psychological abuse, including verbal abuse, gun intimidation, terror; (3) sexual abuse, including groping, stripping off, forcing sexual intercourse without consent, or masturbation.

The Venn diagram below shows the combination of abuse experienced by the respondents. There are three types of abuse, represented by each circle, namely physical, mental and sexual abuse. We can see each circle intersect with one another. This shows the number of suspect that experienced two or three types of abuse altogether. The number of respondents that did not experience any of the abuse is represented outside the circles.

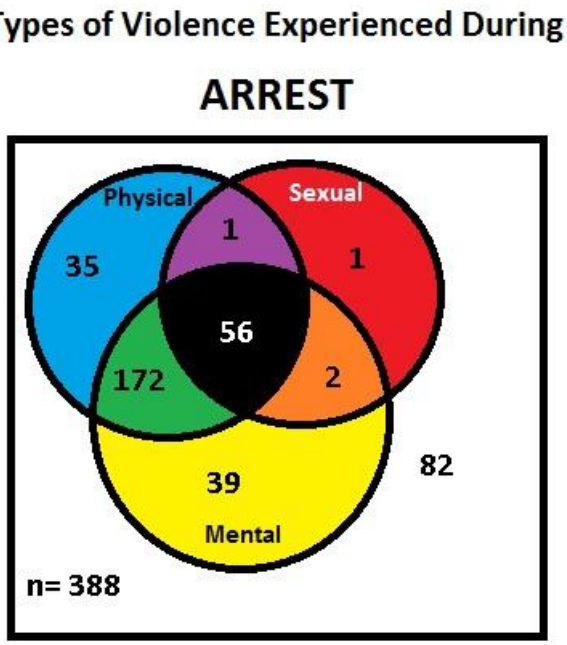

Diagram 5 The number of Respondents Experiencing Physical, Mental and Sexual Abuse during the Arrest

We can see that 264 respondents experienced physical abuse, 269 respondents experienced mental abuse, and 60 respondents experienced sexual abuse. From these numbers and also represented by the circle intersections, we can see that there are respondents who experienced multiple abuse (physical and sexual, physical and mental, and mental and sexual). Meanwhile, fifty-six respondents experienced all the three abuse. The majority of respondents, 228 people (27,4%), experienced physical and mental abuse while getting arrested by the investigator. Fifty-seven respondents experienced physical and sexual abuse, and

58 respondents experienced mental and sexual abuse. Only 82 respondents (21%) were free from any form of abuse during the arrest process.

Regarding to sexual abuse experienced by the respondents, there is one important point that ties into this observation – all the respondents are male – even though we can be sure that the police officers in charge of the arrest are also males. What sort of sexual abuse actually happened? This observation notes that from 60 respondents that experienced sexual abuse, 13 of them declared that their body was the object of groping by the police, and 47 respondents admitted a stripping-off by the police. The groping and stripping-off are often used as an excuse to undertake the arrest.

From the data above we can find that only 82 respondents (21%) that did not experience any abuse, which means only 21% that constitutes a substantially legitimate arrest process. If we compare this number to the data from administrative body regarding the requirement of arrest warrant and its copy sent to the family, how many of the arrest is administratively legitimate? Observation notes that among the 82 respondents who did not experience any abuse, there are 47 who received arrest warrant. From these 47 respondents, one respondent said no arrest warrant was received. From those 47 people, one respondent acknowledged of no copy of arrest warrant sent to the family. Hence, there are only 46 respondents (11,8%) who did not experience abuse during the arrest process that did receive their arrest warrant and also a copy of it sent to their family. This shows that from this observation, only 11,8% of the arrest process was free from judicial defect. Meanwhile, the rest has potential to be qualified as illegitimate arrest.

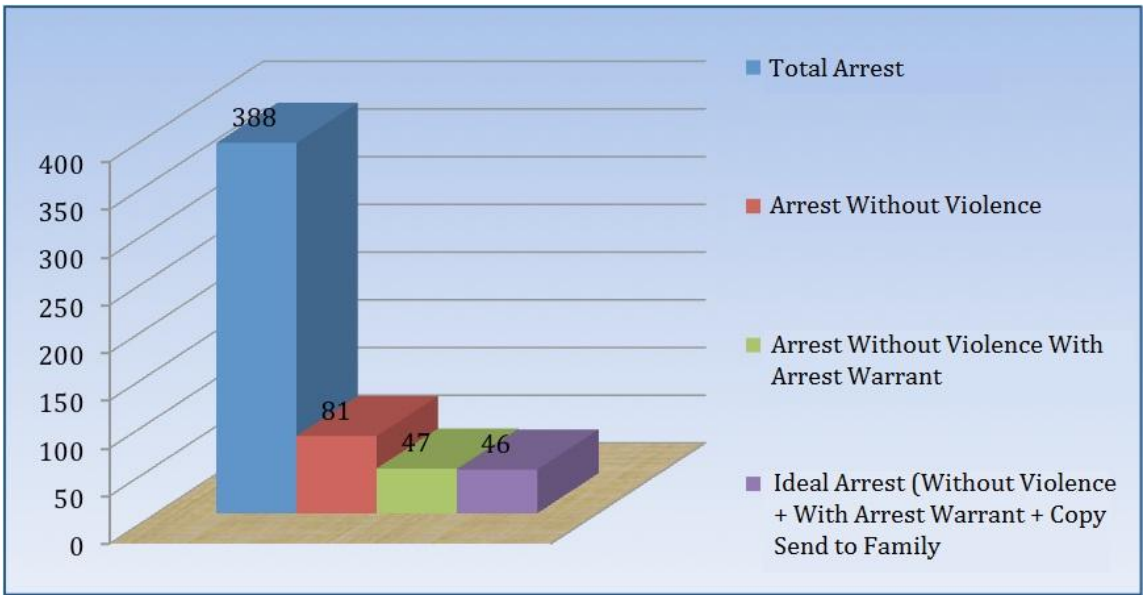

Diagram 6 Composition of Arrest Requirement Fulfilment

Detention

Just like an arrest, a detention process cannot be executed lawlessly. There are many requirements to fulfil. Detention, as one example of forceful attempts in legal pursuits, cannot be avoided by anyone. Alas it is not rare that the practice of detention contains many human rights violation. To ensure legitimate approach towards a detention is one of the many ways to avoid abuse during detention process.

This observation uses two indicators to control the legitimacy of detention. First is the administrative indicator, comprising requirements that arrest warrant is supposed to be given to the suspect and its copy to the family members. The second indicator involves the substance of detention that has to be free from any abusive practice. Failure to meet these two requirements qualifies the process as an illegal act. This should be a good starting ground to stop the detention process.

Detention Warrant and Its Copy

This observation notes the existence of detention warrant and its copy. From the 338 respondents participating in the observation, below is the finding:

Detention Warrant	Copy of Detention Warrant			Total
	Yes	No	No Answer	
>7 Days Detention	28	18	3	**49**
1-3 Days Detention	146	40	37	**223**
4-7 Days Detention	26	7	5	**38**
Did Not Receive	8	46	12	**66**
No Answer	1	3	8	**12**
Total	**209**	**114**	**65**	**388**

Table 5 The Composition of Respondents Who Received Detention Warrant and Its Copy

From the table above, we can see that 310 respondents (79.8%) received detention warrant within various time spans. As many as 49 respondents (12,6%) received detention warrant more than 7 days after their detention. While 223 respondents (57,5%) received detention warrant within three days after the detention. Moreover, 38 respondents received detention warrant within four to seven days after the detention.

In a glimpse, the time span of granting the detention warrant and its copy does not seem to be of a significant issue. Presumably it would not matter when the suspect receives the detention warrant. However, this delay in detention warrant shows the professionalism, or lack thereof, of the investigating officers. Investigator has ample time prior to the detention process of any suspect. In the case of drug offense, the arrest period is not only 1x24 hour but can go as long as six days. Within this period investigator has enough time to decide whether someone is worthy to be a suspect or not. Therefore, when a suspect is set to be in detention, investigator can issue the detention warrant and grant it straight to the suspect.

In relation to the administrative process, apart from detention warrant, there is another document that has to be submitted by the investigator to the suspect or their family, which is a copy of the arrest warrant. Not all the respondents who received detention warrant said that the family was sent a copy of the warrant. From 310 respondents who received detention warrant, only 200 respondents (51,5%) said the copy of the warrant was sent to their family. This data shows that as much as 65 respondents said that their family did not receive a copy of detention warrant, although the detention warrant itself was given to the suspect.

The procedure to give a copy of detention warrant to family members is one of the ways to ensure that the family has correct information on where their suspected family member is and for what period they will be in detention. This is to assure that the suspect's rights are protected and that they do not lose contact with the rest of the family members. This is the foundation that makes arrest process different from abduction.

Detention is not meant to be a grant of punishment. It only functions as an assistance to police investigator in their legal objectives and to impede suspects from avoiding the court. Oftentimes, detention process takes away the suspect's freedom, which is followed by other human rights violation. However, the biggest risk is the privacy rights, but other rights can also be in danger, such as the rights to be free from discrimination, rights to attain education, rights to be devout in one's religion, rights to express opinions, and rights to acquire information. The loss of these rights is often justified as a natural consequence of freedom robbery. However, this is not right and should not be tolerable. Detention should only be comprised of truly important actions that are significant towards avoiding the hindrance in investigating process or law enforcement, or towards maintaining the orderly manner of detention.[57]

[57] *Osse, op.cit., p. 160*

Abuse during Detention

As with the arrest stage, observation was done on abuse during the detention stage. There are three types of abuse assessed here, namely physical abuse, mental/psychological abuse, and sexual abuse. It should be noted that the detention period observed here is the detention period during police investigation.

The number of respondents who did not experience any abuse during detention stage is quite high, namely 261 respondents (67,3%). This number is much better compared to the one in arrest stage. In the arrest stage, only 81 respondents (20,9%) did not experience abuse. The distribution of each experienced abuse can be seen in the following Venn diagram.

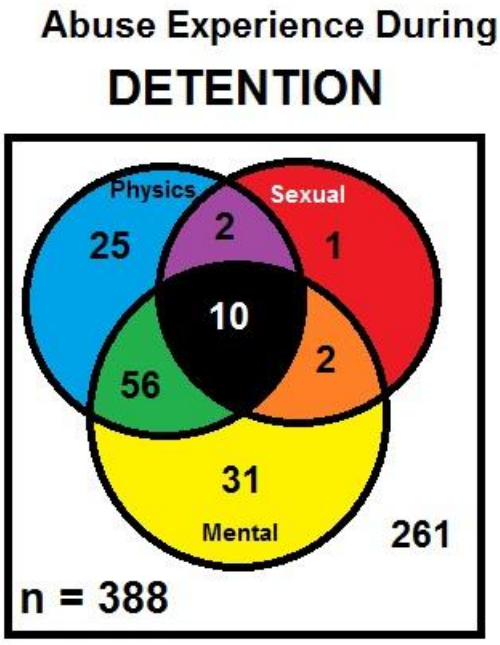

Diagram 2 Composition of Respondents Who Experienced Abuse during Detention

As with the arrest stage, a deeper analysis will be able to determine the actual percentage of detention deserving to be considered as ideal detention, which is detention that fulfills all administrative requirements and does not contain abuse. Detention fulfilling administrative requirements was experienced by 200 respondents (51,5%), meanwhile detention without abuse was experienced by 261 respondents (67,3%). If both data are combined, we will find that out of 261 respondents who did not experience abuse, only 210 respondents also received detention warrants.

Out of 210 respondents (54,1%), there are only 137 respondents (35,3%) whose families received copies of detention warrants. Thereby it can be concluded that only 35,3% of the detainees qualify as having

experienced ideal detention, fulfilling administrative procedures and done without abuse. This number is three times higher than the number of respondents who qualify as having experienced ideal arrests.

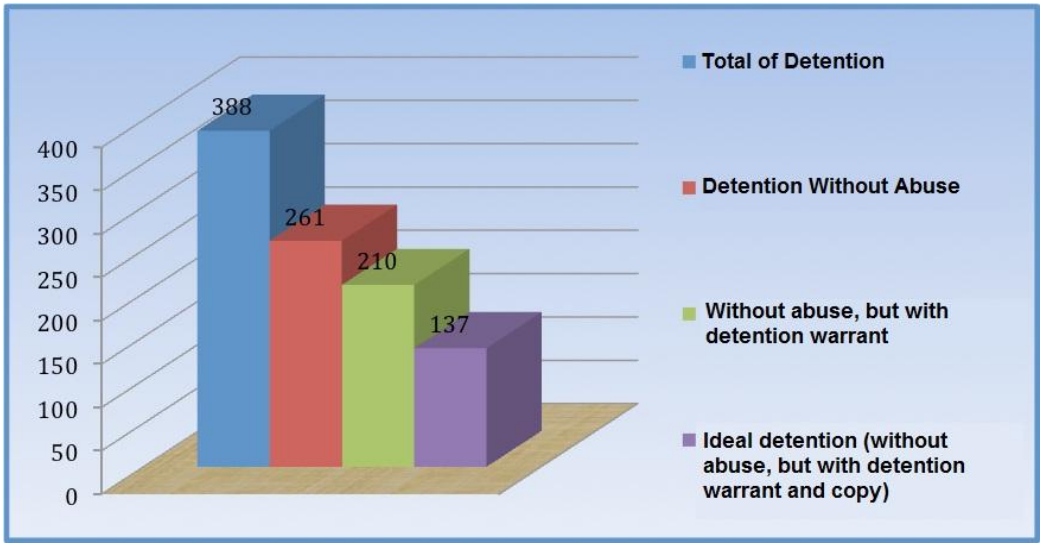

Diagram 3 Composition of Detention Requirement Fulfillment

Urgency of Detention

There are requirements that must be fulfilled in order to enable detention, therefore not every suspect can and must be detained. KUHAP regulates that to be detained, the main requirement is that criminal sanction is more than five years of imprisonment. However, in certain cases, KUHAP also states that detention can be done for several criminal acts with criminal sanctions that do not reach five years of imprisonment.

Principally, not all suspects must be detained. The norm is that detention is only done when investigators feel that the suspects will otherwise escape, destroy evidence, or repeat their actions. These are known as subjective requirements. There is another requirement that must be taken into consideration by investigators, which concerns the potential sentence that will be received by the suspect. Each detention process will reduce the term of sentence undergone by the convicted. If the detention period is longer than the term of sentence, it means there is a surplus of detention, and on that basis the convicted has the right to file for compensation.[58] Unfortunately, KUHAP does not state clearly, what if the criminal sentence faced by the suspect turns out not to be a prison sentence? The detention process already undergone by the suspect surely cannot be reduced. In this case, the detention process has caused damages to the suspect.

[58] Article 95 paragraph (1) KUHAP states "*Suspect, defendant or convicted has the right to demand compensation for being arrested, detained, prosecuted, and tried or subjected to other action, without lawful reason or because of errors concerning the person or law that has been applied.*" While in the explanation for Article 95 paragraph (1), it is stated that: *"What is meant by 'damages of being subjected to other actions' are damages caused by unlawful house entry, search, and confiscation. Included in unreasonable detention is detention that is longer than the term of criminal sentence."*

Rehabilitation Sentence

The problem of non-prison sentence is related to the possibility that the judge will sentence a drug addict with rehabilitation sentence. Surely a rehabilitation sentence cannot be considered equal with a prison sentence. It is unjust to subtract the rehabilitation period from the detention period. However, the rehabilitation sentence is unknown in the Indonesian Criminal Code (KUHP). Judges, consciously or not, handle this polemic by issuing multiple sentences. In addition to issuing a sentence to undergo rehabilitation, the judge also issues a prison sentence. The judge has the authority to issue multiple sentences, but this is not in line with the aim of giving the rehabilitation sentence. Rehabilitation is not aimed as a form of penalization. On the contrary, rehabilitation is based on the thought that an addict is someone who needs to be cured. The question lies on whether one must be detained if he/her will undergo a rehabilitation sentence, instead of a prison sentence.

There are two Circular Letters of the Supreme Court (SEMA) that must be referred to as guidelines in issuing a rehabilitation sentence, namely SEMA Number 4 of 2010 and SEMA Number 3 of 2011. As mentioned in SEMA Number 3 of 2011, since 1981, on the basis of Act Number 8 of 1981 on Criminal Procedural Law, a suspect with drug addiction in the detention process should be placed as soon as possible in a rehabilitation facility.

> *A suspect or defendant with drug addicition, when possible, should be detained in a place that also acts as a treatment facility.*[59]

SEMA Number 4 of 2010 regulates several criteria in order to issue a rehabilitation sentence to a drug addict. The criteria are as follows (a) suspect was caught in the act when arrested; (b) the amount of narcotics possessed during the arrest was for one-day consumption; (c) based on laboratory tests, the defendant has tested positive for drug use, (d) there is a statement from a state psychiatrist (e) proven as not involved in the narcotic trade network.

Concerning the amount of narcotics found during arrest, SEMA has regulated particular amounts for each type of narcotics, and as a general rule the amount for one-day use is not more than one gram of narcotics. This means that each suspect arrested with less than one gram has the right to receive a rehabilitation sentence. Even for certain types of narcotics, the amount reaches 5 grams. This observation notes that out of 388 respondents, there are 139 respondents (36%) who qualify as suspects who have rights to receive rehabilitation. The proportion of narcotic posession based on amount can be viewed in the following diagram.

[59] Explanation of Article 21 paragraph 4 KUHAP. Article 21 KUHAP regulates requirements of the application of detention to a suspect.

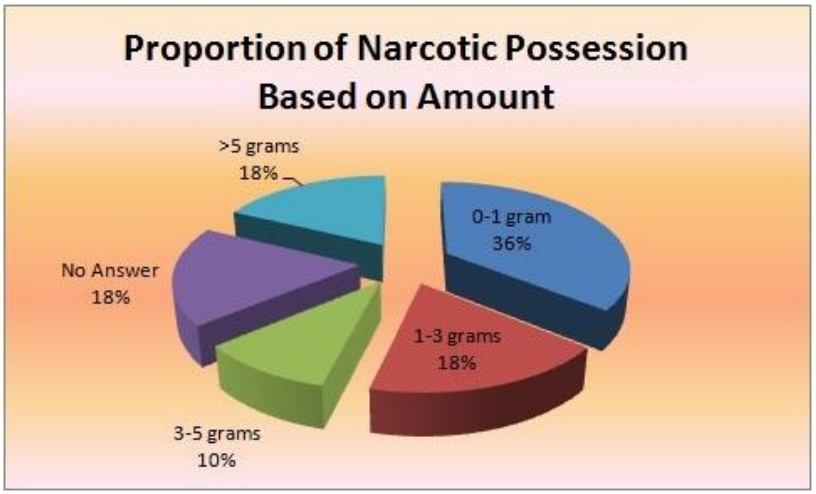

Diagram 4 Proportion of Narcotic Possession Based on Amount

From the exposition above, the question is whether detention must always be applied to every drug addict or not. As apparent from observation results, we have found that not a few respondents can potentially receive rehabilitation sentences.

Related to the potential sentence faced by a suspect, article 128 paragraph (3) UU No. 35 tahun 2009, states that

> *A drug addict who is of age, as intended in Article 55 paragraph (2), who is undergoing medical rehabilitation of 2 (two) treatment periods in a hospital and/or medical rehabilitation institution appointed by the government is not to face criminal prosecution.*

This article regulates that there will be no criminal sentences, including prison sentences, for those undergoing medical rehabilitation of 2 (two) treatment periods. In this observation, although not recorded systematically, respondents undergoing medical rehabilitation through the methadone substitution program done in various community health centers in Jakarta are often found.[60] These respondents, when later undergoing court trial and taking responsibility for their actions, should not be subject to criminal prosecution. The judge may issue a sentence to the related party, however, it should not be a criminal sentence but a sentence to undergo rehabilitation instead

Methadone as Medical Rehabilitation

One of the types of narcotics commonly used is heroin. Heroin contains a substance known as opium. In a position letter jointly written by the World Health Organization (WHO), United Nation

[60] Methadone therapy is part of the HIV Prevention Program proclaimed by the government. The legal basis of methadone therapy is the Regulation of the Coordinating Minister for People's Welfare Number 2 of 2007.

Offices on Drugs and Crime (UNODC), and Joint United Nations Programme on HIV/AIDS (UNAIDS) in 2004, it is stated that dependence on opioid substances requires a long time to treat.[61] Therefore, those using narcotics containing opioid substances will require a long time for healing and treatment processes. Replacement therapy is the most effective type of therapy for people who experience opioid substance addiction. One of the types of opioid replacement substances is methadone. The use of methadone for dependence programs as an opioid replacement substance has been acknowledged by WHO by adding the substance into the WHO Model List of Essential Medicines.[62]

The use of methadone as one of forms of treatments and medications for narcotic dependency is also practiced in Indonesia. Based on the Regulation of the Coordinating Minister for People's Welfare Number 2 of 2007, methadone therapy treatment can be accessed in public service units, even including Detention Centers (Rutan) and Correctional Institutions (LP). A doctor from the National Narcotics Board (BNN), dr. Joseph Jodi, in his expert statement in a narcotics case on behalf of HA (not real name), said that methadone therapy is one of the forms of medical rehabilitation available in Indonesia.[63]

Related to the urgency of detention, this observation has found a phenomenon that should be brought into attention. Out of 388 respondents, there are 12 respondents (3,1%) subject to article 127 of Act Number 35 of 2009. The article goes as follows:

(1) Every abuser of:

(a) Narcotics Category I for personal use is punishable by a *maximum sentence of 4 (four) years of* imprisonment;

(b) Narcotics Category II for personal use is punishable by a *maximum sentence of* 2 (two) *years of* imprisonment;

(c) Narcotics Category III for personal use is punishable by a *maximum sentence of* 1 (one) year *of* imprisonment.

(2) In sentencing a case as intended in paragraph (1), the judge must observe the terms as intended in Article 54, Article 55, and Article 103.[64]

[61] See WHO/UNODC/UNADIS Position Letter: Substitution Maintenance Therapy in the Management of Opioid Dependence and HIV/AIDS Prevention. Link: http://www.who.int/substance_abuse/publications/en/PositionPaper_English.pdf

[62] Can be downloaded from this link: http://whqlibdoc.who.int/hq/2005/a87017_eng.pdf

[63] As written in Defense and Sentencing Notes on behalf of defendant HA in the District Court of Central Jakarta, Case Number 757/Pid.B/2011/PN.Jak.Sel.

[64] The three articles, Article 54, 55, and 103 of the Narcotic Law, concern the authority of the judge to issue a rehabilitation sentence.

(3) If the abuser as intended in paragraph (1) can be proven or is proven as a substance abuse victim the abuser must undergo medical and social rehabilitation.

By being subject to article 127, the highest criminal sanction they can receive is four years of imprisonment. Therefore, detention of suspects violating article 127 of Act Number 35 of 2009 cannot be done, because the criminal sanction does not reach five years of imprisonment. In actuality, these 12 people were undergoing detention in Cipinang Detention Center during the course of this observation. This indicates a weakness in Indonesia's criminal justice system. The objective requirements which have roles in deciding whether a suspect should be detained or not are 'defeated' by subjective requirements, which depend solely on investigators.

Search and Confiscation

The Lack of Ideal Search

From observations done of 388 respondents, it is found that only 20 respondents (5,15%) did not experience searching. The rest experienced searching, either body searches, house searches, or both. The composition of searches experienced by respondents can be viewed in the following diagram.

From the diagram, it is revealed that 238 respondents (61,3%) experienced only body searches, 23 respondents (5,9%) experienced house searches, and 107 respondents (27,6%) experiences both searches. In practice, a body search is a type of search that is often, even almost certainly done by police.

As with other forceful attempts, a search must administratively equipped with a search warrant. A search cannot be performed arbitrarily. Out of 368 searches that happened, this observation notes that there are only 9 respondents (2,3%) who admitted to receiving search warrants, and out of that number only 4 respondents (1%) received search warrants during the searches. The low number of respondents who received search warrants is an indication that the search process often disregards administrative requirements and is done arbitrarily.

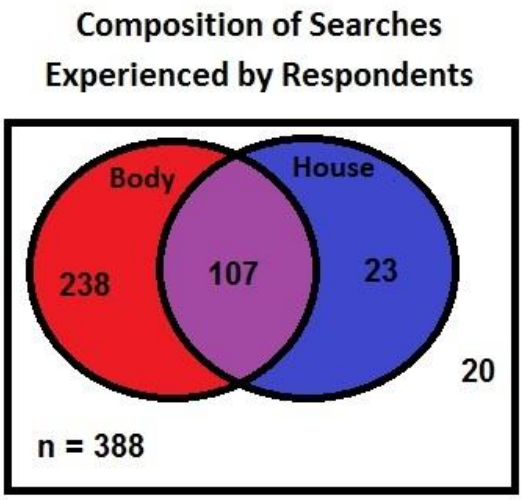

Diagram 5 Composition of Searches Experienced by Respondents

Related to the abuse experienced by respondents during searches, this observation notes the composition of experienced abuse as follows:

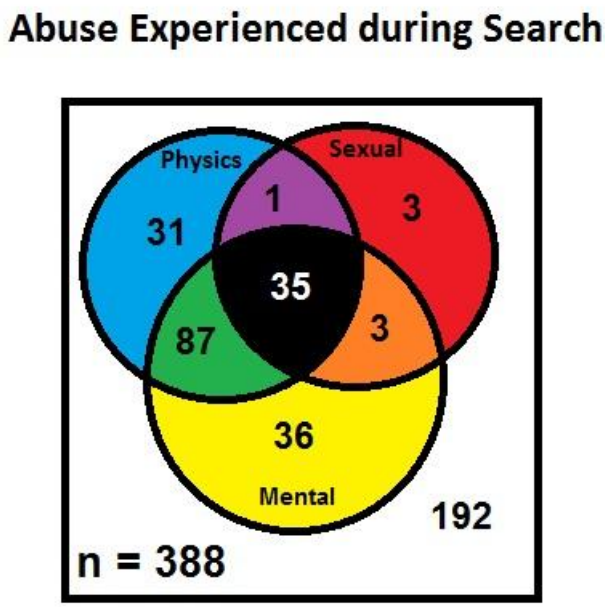

Diagram 6 Diagram of Violence Experienced during Search

From the composition above, it can be seen that 192 respondents (49,5%) did not experience abuse during searches. On the other hand, out of the 9 respondents who received search warrants, only 5 respondents (1,3%) did not experience abuse. Therefore, only 1,3% of searches qualify as ideal searches (not using violence and fulfilling administrative requirements).

The low number of ideal searches cannot be separated from various distortions of searching. Searching is often used to trap suspects so that evidence can be found. It is not uncommon to find reductions of evidence, e.g. eight grams to six grams of heroin. This phenomenon is noted in the observation, although not recorded systematically in the questionnaires used. Results of record-taking by the observers can be viewed in a separate part of this book.

Confiscation

All respondents admit to having experienced confiscation. Various types of items were confiscated from them. The table and diagram below explain the items confiscated from 388 respondents in this observation.

Confiscated Items	Amount
ATM cards/Wallets/Money	458
Narcotics	316
Mobile phones	300
Motorcycles	114
Clothing/Watches/Footwear/Jackets/Bags	52
ID Cards/Driver's Licenses	28
Others	8
Jewelry	7
Cars	7
Syringes/Bongs/Rolling Papers	6
Digital Equipment (Laptop, Flash Disk)	5
Total	**1301**

Table 3 Confiscated Items

Regarding confiscation letters or confiscation reports which essentially name confiscated items, the majority of respondents claimed they did not receive confiscation letters. Only 39 respondents (10%) said they received confiscation letters. The rest claimed they did not receive any confiscation letters. Regarding they received the letters, 6 respondents said they received the letters during confiscation, while 28 respondents claimed they received confiscation letters several moments later. As much as 5 respondents did not answer this question.

As with other forceful attempts, this observation also monitored abuse in the implementation of forceful confiscation attempts. From the observation, it is known that 282 respondents (72,7%) did not experience

abuse during confiscation. Meanwhile, the rest experienced torture with various dimensions, as seen in the following diagram.

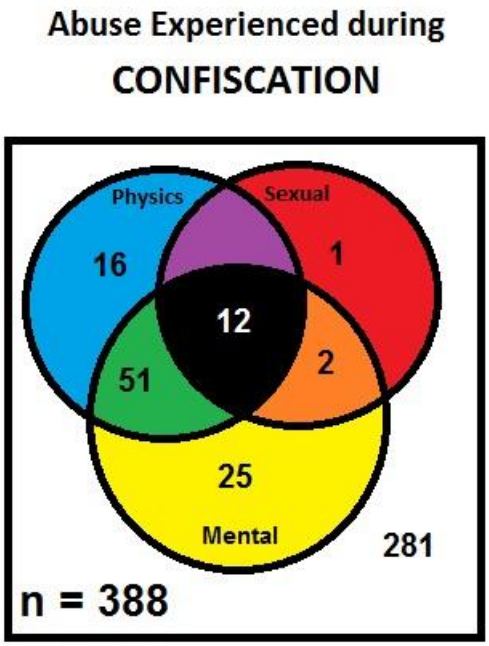

Diagram 12 Composition of Abuse Experienced during Confiscation

Torture And Other Mistreatment During Interrogation

This observation also records torture and other mistreatment during interrogation. Record-taking is done by asking respondents to narrate their experiences during the interrogation process by investigators. Their responses where recorded by observers, and from their accounts the observers concluded whether the respondents experienced torture or other mistreatment. Respondents claiming they were targets of abuse during interrogation, having been beaten, stung with burning cigarettes, scolded, qualify as having received torturous treatment. Those forced to not sleep during interrogation, as well as those who were harrassed during interrogation are qualified as having received other mistreatment. Qualitatively, this observation only notes how many respondents experienced torture and how many respondents experienced mistreatment, and the forms of treatments are presented qualitatively.

From the observation results, it is found that not all respondents experienced torture and other mistreatment. There are still respondents who, as suspects, experienced good conditions as they faced authorities. They were not tortured, did not experience physical abuse, also did not experience mistreatment. They received good treatments. The number of respondents receiving good treatments is 52 respondents (13,4%). There rest are divided into three groups, namely those who only experienced torture, only experienced mistreatment, or experienced both. The proportions of respondents who experienced torture, mistreatment, or none at all, can be seen in the following diagram.

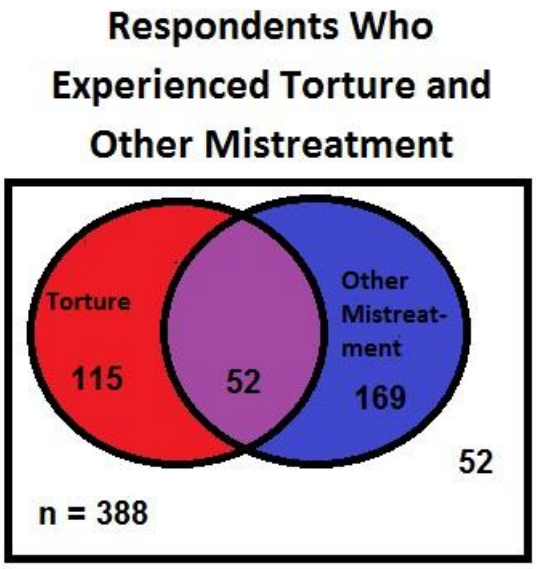

Diagram 13 Diagram of Respondents Who Experienced Torture dan Other Mistreatment

The existence of respondents who experienced ideal treatment (without torture and without mistreatment) is an anomaly. We presumed that torture or mistreatment practices almost certainly happens in every case. Therefore, after finding the phenomenon of no torture or other mistreatment toward several suspects, the observers made several notes indicating factors which caused the lack of torture and mistreatment. One of the factors is concerns the arrest period.

> *"Before, there were rumors that in doing arrests, law enforcers do not always use violence to vent their anger or to interrogate the arrested perpetrator, but in Ramadan these actions are not done and are replaced with extorting arrested perpetrators because it is sinful to use violence or angry outrages during Ramadan. Quite strange, a bit unreasonable. Yet, this was proven during my observation.[65]"*

What was noted by this observer was not fully confirmed by the resulting data. As seen from the data, the month of arrest did not have a significant effect toward the number of torture or other mistreatment. The proportions of these treatments are more or less the same in each month. The following digram shows this phenomenon.

[65] Notes of Mohamad Fathan, an observer from LBH Masyarakat.

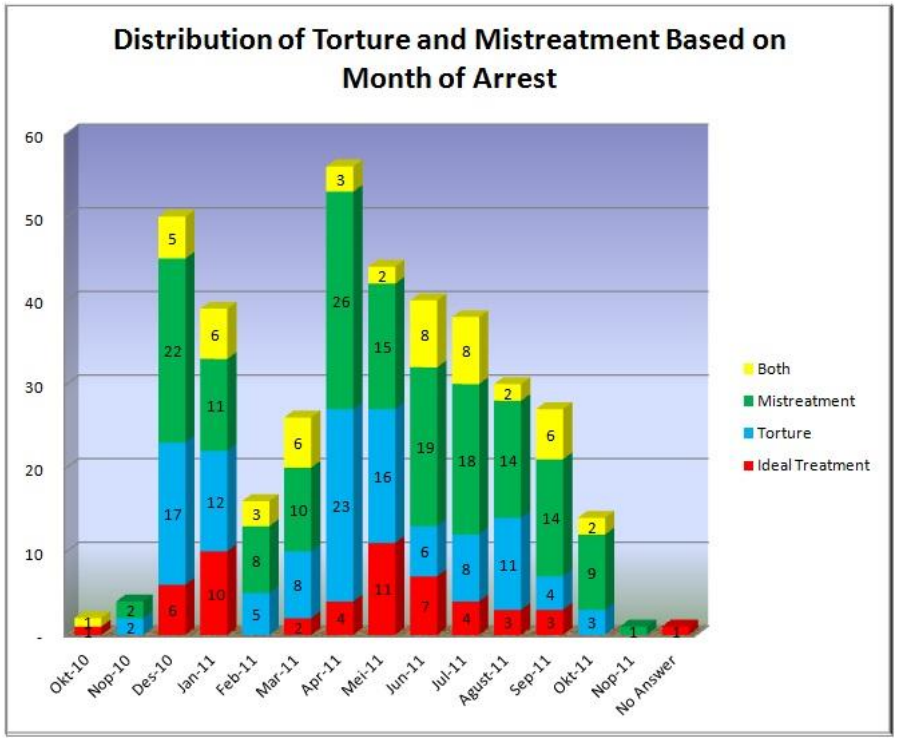

Diagram 7 Distribution of Torture and Mistreatment Based on Month of Arrest

From the data above, it is concluded that there are no specific patterns that show a correlation between the number of torture and other mistreatment and the month of arrest. The presumption that torture and mistreatment do not happen during Idul Fitri is also unproven.

A condition that may influence torture or mistreatment is the amount possessed by the suspect. Related to the amount, this observation records the data distribution as follows:

Amount	Both	Torture	Mistreatment	Ideal Treatment	Total
			Based on Real Amounts		
0-1 gram	16	41	63	19	**139**
1-3 grams	9	17	33	11	**70**
3-5 grams	11	11	14	3	**39**
>5 grams	11	15	36	7	**69**
EMPTY	5	31	23	12	**71**
Total	52	115	169	52	**388**

Table 7 Distribution of Torture and Mistreatment Based on Amount

By comparing the average distribution percentage, narcotic possession with the amount of three to five grams appears as an anomaly. In the amount of three to five grams, there is a decrease in ideal treatment.

The ideal treatment in average is experienced by 13% respondents from all amounts, yet in the amount of three to five grams it decreased to 8%. On the contrary, respondents who experienced both torture and mistreatment increased to 28%, while in average it is only experienced by 13% respondents.

Our analysis shows that the cause of the phenomenon is because the amount of three to five grams is a risky amount in Act Number 35 of 2009, in which the amount of five grams is the limit for the increase of penalty. The amount above five grams be subject to a different article with a different criminal sanction. The regulation of this increase of penalty in the amount above five grams is what is presumed to be the cause of intense torturous treatment and other mistreatment.

Case Manipulation

As with torture and other mistreatment, case manipulations are also recorded in this observation. Case manipulations in this case are not analogous with undercover purchase as stated in the law. Case manipulation in its most simple form is when an investigator offers to the suspect to change the amount of evidence and ask for a certain amount of money as compensation. Case manipulation is also done by offering to the suspect the chance to be processed using the rehabilitation article in exchange for a certain amount of money or goods.

Apart from the forms above, in practice, case manipulations are often used as a form of entrapment. A person who had no intention of committing drug-related actions is conditioned in such a manner as to become willing to commit drug-related activities. The most commonly model to be use is when someone is asked by a person he/she just met to buy or find narcotics. If this person didn't exist, the suspect would not have purchased narcotics. People who buy narcotics after being persuaded by someone else are often taken advantage of by the police. These informants are commonly known as *cepu*. There are many cases in which the *cepu* is someone the suspect already knows personally. After the narcotics are bought, the *cepu* disappears and the evidence are already in the hands of the suspect. Police claims that because there is evidence, then the suspect is considered caught in the act. There are several accounts by respondents about *cepu* that were not arrested despite being in the crime scene during the arrest.

From this observation, it is known that 83 respondents (21,4%) claim to be case manipulation victims. The table below shows the distribution of case manipulations based on articles charged and amount.

Amount	**Occurence Case Manipulation**			
	No	No Answer	Yes	**Total**
0-1 gram	78	34	27	**139**

1-3 grams	45	7	18	**70**
3-5 grams	26	4	9	**39**
>5 grams	37	17	15	**69**
No Answer	27	30	14	**71**
Total	**213**	**92**	**83**	**388**

Tabel 8 Distribution of Case Manipulation Occurence Based on Amount

Stories Behind Numbers

As aforementioned, this documentation was conducted by interviews directly with the drug-offense detainees. During that interviews processes, our observers obtained some interesting stories which we believed would be very useful for readers. We asked our observers to write down their first-hand experiences in conducting the interviews as well as the stories that they had heard from the detainees. This chapter is a chapter where our observers share their personal experiences and the reality behind their interviews. This compilation of interesting stories is put together in one chapter which we call “Stories Behind Numbers”.

A Phenomenon that Happened during the Drug Arrest Process[66]

By: Mohamad Fathan

During my four-month observation from June to September of drug convicts, I encountered a unique phenomenon. How could I not? A long term observation of different informants enabled me to find unique phenomena from month to month. Apart from these factors, the changing cultural factors during the observation period helped cause this unique phenomenon. What is this unique phenomenon?

The observation was initially done to find out how many, what kinds of, and why abuse happens to drug users or dealers arrested by the police. In various stories I heard during my observation, I often found physical abuse such as being striked with blunt objects or beaten. Mental abuse such as being threatened, held at gunpoint, or being scolded happens even more often and has turned into daily occurrences before a suspect becomes a prosecutor's detainee to start the court process. Extortion also often happens alongside entrapment (known among the drug user environment as *cepu*[67]) to arrest drug dealers or users.

However, apparently the police do not always abuse arrested perpetrators. Before, there were rumors that in doing arrests, law enforcers do not always use violence to vent their anger or to interrogate the arrested perpetrator, but in Ramadan these actions are not done and are replaced with extorting arrested perpetrators because it is sinful to use violence or angry outrages during Ramadan. Quite strange, a bit unreasonable. Yet, this was proven during my observation

Yes, replacing abuse with material extortion during Ramadan is a very unique phenomenon which really happens in police circles during arrests of drug users or dealers. This is a phenomenon that I found and concluded from my observation.

When I first did my observation, the detainees I interviewed were arrested around three weeks to two months before, which means they were arrested around March to the end of April. Observation results show that almost all the people I interviewed said they received unpleasant treatments, abuse, and threats during arrests, while making Police Investigation Reports, or during interrogation in the police attempt to acquire other evidence or arrest other dealers or users. The abuse stories are not mere words. One the informants who received abuse showed his bruises. In another case, a detainee who claimed his feet nails were smashed by table legs really had smashed nails. I don't know how exactly the police commit abuse.

[66] To be published by Lembaga Bantuan Hukum Masyarakat as Observation Results, made on January 6th, 2012.

[67] Read also "Entrapments in Drug Cases", 21 November 2011 to be published in Lembaga Bantuan Hukum Masyarakat *Newsletter*.

What is clear is that the police have mistreated perpetrators who have rights to not experience abuse. For the next several weeks of observation, I still found the same phenomena.

After Ramadan, I came back to do my observation. This time, the informants were arrested around three to one month before the interview. I was a bit surprised and appreciated the police because the informant I interviewed said there was no mistreatment at all. No hitting, he was only forced to get in the police car. I asked repeatedly, I kept digging deeper, observing whether there are inconsistencies or whether the informant was lying about the lack of abuse, but it was useless. The detainee really did not experience mistreatment or abuse. No hitting, not even scolding.

My suspicions were answered when I got to the next question. A detainee said that the motorcycle he rode during a raid, where he was caught having methamphetamine in his wallet, was taken, and if he wanted it back he had to pay around 1-2 million after his detention. It turned out that extortion happened in place of the regular abuse.

In another interview, a detainee was asked to show the detainee's house because the police were suspected there was more evidence. However, even when no other evidence was found, electronic appliances such as television, radio, and mobile phones were confiscated as evidence. What is this if not extortion?

The appreciation I felt because of the disappearance of abusive practices was gone in a second. That culture has changed into extortion as a temporary practice when the enforcers arrest perpetrators during Ramadan. My conclusion came through after I found out that the informant I interviewed was arrested during Ramadan. It was proven that during Ramadan, abuse is not done and replaced with extortion.

The phenomenon of the change of police arrest practices because of society's cultural changes is unique and shows that there are enforcers who still abuse and those who extort instead during Ramadan. According to their stories, informants chose to be abused instead of extorted. I think neither should be done. These practices have to be stopped. The police who arrest drug users are meant to save users from the dangers of drugs, the police who arrest drug dealers are meant to reduce drug distribution, and the police who arrest drug traffickers are meant to stop the distribution of drugs forever. It should be realized that the police force is an important element and forefront in the eradication of. They should not turn their roles around into an arena for venting their anger or filling out their pockets.

“On the Prowl”

By: Ian P. Rumapea

I was surprised when a detainee told me about an entrapment case done by the police to arrest him and his friend. I had this experience some time ago when I was talking with a detainee named Boim (not his real name). Boim was relaxing in his rented room when he received a visit from an old friend named Rudi and Andi (Rudi’s friend that he just met). After talking and getting to know each other, the three of them who admitted to be drug users started talking about using drugs there.

After agreeing on that, Andi, who didn’t talk much, gave Boim Rp 600.000 to buy methampethamine. Without suspicion, Boim bought methampethamine from his regular dealer. After getting the goods, Boim went back to his rented room to use the methampethamine with his two friends. However, when he just started to sit and put the methampethamine on the floor, he was surprised by four policemen who suddenly smashed in the door and immediately arrested Boim. Andi, who was there with him, suddenly took a gun from inside his clothing and pointed it at Rudi.

The surprised Boim and Rudi were defenseless and didn’t expect that they were trapped by a police officer passing off as a friend and then arresting them. Both were asked to take the methampethamine from the floor and confess that the drugs are theirs. Andi who was thought to be a fellow drug user, turned out to be a policeman “on the prowl”. Upset, irritated, and angry, emotions were mixed up when he shared the bitter experience that brought them to that place.

Alleged Case Manipulation by Law Enforcers

By: Robertus . M.S.

That afternoon, my colleagues and I visited Cipinang Detention Center to research the fulfillment of suspect rights in the procedure of forceful acts. We had the opportunity to interview several drug case detainees there. I interviewed a man who seemed quite old. I immediately started the interview by greeting the old man (from this point called "Old Man") and asking his identity. Then I started asking about formal matters concerning his case, *"Sir, how did you get here?",* I asked casually. He then said; "*I'm here for a drug possesion case"*. I then asked further about the chronology of events he experienced, yet he himself seemed confused and helpless about his experience. *"What was the evidence? How much?"* I asked further. *"Marijuana, but I don't know for sure how much it was! Because it wasn't mine, Sir."* He answered hesitantly. His last statement made me more interested to hear the rest of his story.

According to his story, "Old Man" was initially asked by his friend Anto (not his real name) to accompany him to a terminal. At the terminal, Anto met his friend Beni who brought two bags which "Old Man" were asked to carry. After that, Anto and Beni left him for a while. Around 10 minutes later, Anto came back and asked "Old Man" to help him bring the bags, one person each, but when they were just about to the the terminal, they were suddenly arrested by the police.

They did not experience abuse by the police during the arrest. However, when the bags where checked, it turned out there was marijuana of which "Old Man" didn't know the amount of. Eventually they were both brought to the nearest district police station.

In the police station, they were put in separate rooms. When the investigation process was about to start and the Police Investigation Report was about to be written, "Old Man" only gave statements of what he experienced and also said he didn't know where the evidence came from. He became upset because the police forced him to admit the evidence as his. After that, "Old Man" was moved to a detention cell. While in the cell, he did not see his friend Anto at all.

Around 10 days in his detention period, his family came to visit him and told him that Anto had been working and going home as usual. "Old Man" was surprised and felt he received injustice, "*Why is it that I, who didn't know anything about the goods, am still in detention, meanwhile Anto, who clearly received the goods from Beni was released by the police?"* He said with a slightly angry tone.

From the “Old Man” case, several presumptions formed in my mind: the **first** is that Anto is a police accomplice used to arrest others or commonly known as “cepu” , because Anto was released by the police without “Old Man” knowing anything and during the investigation process the police forced “Old Man” to confess the evidence as his. The **second** presumption is that there were ‘peaceful attempts’ between the police and the ‘suspect-to-be’ (in this case, Anto) by giving money to the police or usually known as the 86 phenomenon, so that Anto could be freed of charges and the police then forced “Old Man” to confess the evidence as his.

After “Old Man” told the long story of his case, I started to refocus on the questions I had to ask to get observation data. “Old Man” also asked about several things he didn’t understand concerning his legal matters. From his statements, it can be concluded that several of his rights as a suspect and the procedure of forceful acts by the police were quite appropriate. He also did not experience severe abuse during the forceful act process, yet it is regrettable how someone who has no idea of one thing can be a victim of injustice done by the police.

Obedience is Gold

By: Derry Patra Dewa

Stories about drug offenders who are resigned in facing the police are not new. Some of them were even willing to confess evidence which weren't theirs so they wouldn't receive beating, kicks, or slaps from the authorities. However, this story is different because torture was avoided by simply nodding.

It was a Friday in Ramadan of 2011. As an observer, I had the chance to interview a drug detainee who, from his looks, appeared to be my age, perhaps in his early 20s. His tall figure, dark skin like a surfer's, and bald head (like most detainees) made me guess his profession. "*Your name, Sir?*" I started to ask. "*Slamet*" (not real name) he answered softly. While taking notes, I asked him, "*Your address, Sir?*" He became silent for a moment then answered with an area in the north shore of Java. I was surprised and tried to explore how Mr. Slamet ended up in Cipinang. "*Why are you here, Sir?*" I asked. "*I was fishing in Jakarta, Sir*" he answered. His answer confirmed my hypothesis that he was a fisherman.

After several more questions and answers, I concluded that Mr. Slamet was a fisherman from the north shore of Java who was resting in Muara Angke after having fished and sold his fish. During his rest, Mr. Slamet and his friends played cards and smoke marijuana. The nearby residents who knew about their activities reported them to the authorities. The police came quickly and found the group of fishermen playing cards. "*The goods were no longer there*" said Mr. Slamet with his thick Javanese accent after I asked whetherhe was caught in the act. According to his story, the evidence was gone when the police came, and the remains were cleaned up.

The police immediately arrested Mr. Slamet and his friends. His friends who felt there was no evidence started to struggle and tried to defend their selves. The police, irritated because they had no evidence, started hitting and kicking Slamet's friends. However, our friend Slamet got off the hook, because when the police came he did not fight back or defend himself. When he was ordered to squat, he squatted. When he had to answer, he nodded. I was confused and asked him, "*You didn't fight back at all, Sir?*". "*I just followed orders, so I wouldn't get beaten up*" said Mr. Slamet with his thick accent. Mr. Slamet then told me that he didn't want to be hit or kicked like his friends, so he chose to obey the police. He also chose to remain silent when he was not asked to speak. He feared he would end up like his friends who defended their selves and tried to question the authorities. He repeated this behavior in the investigation process, and as a result he did not receive abuse, yet he also did not receive an arrest warrant or a copy for his family. His family in his village was informed by the police only by phone. Going through detention in the police station without experiencing torture was enough to make him feel grateful, he thought.

The Unfortunate Mr. Asep

By Liza Farihah

Around June-August 2011, I participated in a survey on drug offenders in Cipinang Detention Center held by LBH Masyarakat. The survey aims to document violations of human rights, especially torture, that often happens to drug offenders. Torture often happens to suspects both during arrest or detention. One day I met a man who was in his 30s. His name was Mr. Asep (not his real name). According to his story, he was arrested by the police when using marijuana. The remaining marijuana was used as evidence that incriminated him as a suspect of drug possession.

During the arrest, Mr. Asep didn't expect that he would be abused by the police who arrested him. Mr. Asep, who was arrested for the first time, was forced to confess by being beaten. Although he had already confessed, he was confused because the police officer kept hitting him. Apart from physical abuse, Mr. Asep also experienced psychological abuse by being scolded and verbally abused by the police officer, which made him terrified. While in custody, Mr. Asep, who was in pain, was not given any medication. When I talked to him, I could still see the blue bruises of his face that was punched. Mr. Asep claimed he received no medication for his pain and bruises.

From the story above, a thought came in my mind that the medical access of drug offenders is not fulfilled because of several things. **First**, law enforcers do not care about the drug offenders. They consider medication as unneeded for suspects who are in pain as a result of forceful acts by the police. Forceful acts are done because the police want to acquire statements and/or confessions from the suspects that the drugs found on them are theirs. **Second**, limited medical staff and budget. Usually, medical checkups for suspects only exist in District Police and Provincial Police levels. In the Subdistrict Police level, there are no health clinics or sufficient medical staff. Also, the budgets of District Police, Subdistrict Police, or Detention Centers are very limited so they cannot provide sufficient medical access, especially to hospitals. The families of drug offenders also sometimes decline to pay for treatment because they have no money.

Assistance Legal Advisor for Drug Case Suspects

By Prakoso Anto

Based on several months of mid-year observation at Cipinang Detention Center, there are several findings related to the fulfillment of rights of drug offenders concerning the assistance of legal advisors.

In my observation, very few of the drug offenders were assisted by legal advisors. Almost all of those assisted by legal advisors were financially able. Those who didn't have enough money were not assisted by legal advisors. Those who were not assisted by legal advisors had various reasons, among them are:

- **They did not receive information on legal advisor assistance**

  Many of the drug offenders admit to not knowing that when they face a legal case, they can be assisted by legal advisors as a means to help their case through legal suggestions and inputs. They admit not being informed by the police as investigators and law enforcers who first handled their cases. Many suspects felt they are guilty and do not deserve to have their rights defended, so they go through any process given by investigators, legal or not, with resignation. The illegal processes include beatings or other processes in the investigation that use violence or torture. Their guilt and resignation enabled the police to not inform that suspects can be assisted by legal advisors.

- **They cannot afford to pay legal advisors**

  Some of the suspects were assisted by legal advisors, but most of them were not. Most of the suspects who were not assisted by legal advisors admit to not having enough money to pay legal advisots. They assumed that legal advisors always require high prices. One of the suspects said the legal advisors have to be like O.C. Kaligis, Hotman Paris, or Ruhut Sitompul who are paid exorbitantly. With those kinds of thoughts, most of them are hesitant in using legal advice services. They seemingly did not receive information that for suspects faced with more than five years of imprisonment, they have the rights to be assisted by legal advisors and have the expenses paid by the government. Most of them were unaware of the existence of legal aid instituions that offer free legal aid. Some of them were told by investigators not to use legal advice because it will cost a lot of money. They were told they should give money to the investigators to 'help the case' instead of spending money for legal advisors using the proper legal processes.

- **They assumed that by being assisted by legal advisors, their case will become more complicated.**

  "*It's complicated to use lawyers, Sir.*" Those are the words that came out of several drug case suspects who chose to not use legal aid services from legal advisors. They admitted that they have seen on television or their friends' experiences, or even their own experiences in other cases, that using legal aid services from legal advisors will only complicate their cases. They admit that legal advisors are not a solution to help their legal cases or lighten legal processes. They think that legal advisors will only extend the existing process because they will expect recurring payments. Based on these thoughts and experiences, they thought legal advisors would only complicate their cases and make them last longer.

A Job Application that Ended in Jail

By: Bambang Sutrisno

Komeng (not his real name) intended to apply for a job in a bonafide company in the Sudirman area as an *office boy* (OB). When Komeng arrived at the company office, he met a security officer named Ali. Komeng then asked the security officer about the office where he would be applying. The security officer then gave him directions, and Komeng went straight to the office. After applying, Komeng went back, but before going home he met again with the same security officer. There Komeng thanked him for his help. They started to converse, and Komeng shared about his difficulties in looking for a job in Jakarta. Ali then offered to help Komeng make a fake diploma so it would be easier for him to get a better job positions.

Interested after hearing Ali's offer, Komeng asked how much he had to pay Ali for the documents. He knew nothing is free in Jakarta. Ali lightly answered that Komeng didn't need to pay anything. He only needed to bring him a pack of marijuana. Komeng agreed because he knew a drug dealer where he lived. Ali then made an appointment wih Komeng to meet in Jatinegara to deal with the documents Ali promised to Komeng.

That day, having brought a pack of marijauana, Koment went to the meeting spot in Jatinegara. After arriving at where Ali said he would meet him, suddenly Komeng was approached by two sturdy men who turned out to be undercover police officers. Komeng was immediately searched and caught bringing a pack of marijuana. Komeng immediately thought that Ali had set him up, and it turned out to be true that Ali was a police accomplice who was fulfilling his 'quota' of arrests. I heard this story while interviewing a detainee at Cipinang Detention Center a while ago with LBH Masyarakat.

False Promises

By: Ageng Sumarna

This story began when I interviewed three drug case detainees in Cipinang Detention Center. One afternoon before getting arrested, three young men named Iyan, Jimmy, and Sonny (not their real names) were relaxing and enjoying marijuana in their usual hangout place. They lighted and smoked roll by roll carefully. Suddenly, five sturdy men approached the three of them. "*One of them kicked me*", said Jimmy. That person also said "*Stay where you are or I'll shoot your ankle. I'm a police officer*!" Iyan and Sonny were then searched roughly. In Iyan's hand, a roll of marijuana was found, in Sonny's hand there were two rolls, and in Jimmy's hand there was a half-used one.

After the search, the three of them were asked to ride around using a black Kijang car guarded by patrol cars. In the car, they were surprised because the three of them were asked to cooperate and show where they bought the marijuana. "*If you show us where you bought the marijauana, you will be released. If you don't, you'll have to pay one million for each person to be released,"* said a police officer in the car. Because they had no money, they agreed to show where they bought the marijuana, but it turned out the promise was only a false one, and they still were arrested in the end.

“My Best Friend’s Friend is a Cepu”

By: Andri

I heard this story when I was interviewing a detainee who turned out to be a close friend who lives near my house.

My close friend and his friend where planning to buy ‘putaw’ (heroin) by chipping in together. They then went to the usual place. After they arrived, theymet the dealer and bought the goods, then without hesitation my close friend immediately used the heroin. He split the heroin in half with his friend. His friend took his part with him because he said wanted to use it at home.

After using, they went home by taking a bajaj because my close friend’s motorcycle was left at his friend’s house. He thought it was better to use public transport because it is safer and has less risk, but he still took his helmet because his friend said it might be stolen otherwise. Without suspicion, my friend obeyed him. After they used the drugs, they went back to the house of my close friend’s friend to get my friend’s motorcycle. After a short while, my close friend’s friend told the driver to stop because he wanted to buy cigarettes from a roadside stall. He then got off the bajaj and left his helmet to be held by my close friend. Not long after, an undercover police came inside the bajaj, and sharply demanded to search the helmet held by my close friend.

The police officer searched helm and found heroin slipped in by my close friend’s friend. My close friend protested that the heroin was not his and said that they were his friend’s. He said his friend was buying cigarettes nearby. However, the police officer did not see his friend because he had already disappeared somewhere. After the incident, my close friend was taken to the police station. Sadness and disappointment were apparent on his face when he talked privately about his experience.

Catching the 'Brown-shirted Man's Accomplice'

By: Riki Effendi

While interviewing a detainee some time ago at the Cipinang Detention Center, I met with a suspect named Fakri (not his real name). Our conversation revealed that he has been a drug addict for around four years. He does it almost every day, injecting illegal substance to his body through needles and all. The scars on both his arms are so visible as he was wearing a worn-out short-sleeved top in the interview.

The incident happened several months before getting caught by the police. Fakri was hanging around in one of the malls in Jakarta. While strolling around, he felt a strong drug withdrawal and an urge to inject more narcotics to his body. These withdrawals come out pretty often but with such erratic intervals that he has some drugs and needles to come in handy, to be used anywhere including in one of the mall's toilets.

While on a high, Fakri faintly realized that he had sparked a janitor's suspicion that a security officer was called in to check up on the toilet area. "*Hey… What are you up to??*" shouts the security guy from outside the cubicle. He then barged in the door and saw Fakri on his high state. The security then dragged Fakri to a security post in the basement. A couple of policemen came along shortly after and brought Fakri to Cempaka Putih Subdistrict Police Station.

Fakri admits that he had been released by the police at that time because he helped them catch some drug dealers. But then another group of police caught him while he was helping the former group of police who needed his favor.

Ever since Fakri was caught by the Cempaka Putih Subdistrict Police, he often got asked for help to catch any drug dealers he might know. From this, he got a commission of around Rp 500.000 to Rp 700.000. One time he and the police had an eye on one particular dealer in North Jakarta. Fakri was given an incentive of Rp 500.000 to buy drugs off the target as a trap. Alas he got caught by another group of North Jakarta policemen as he was suspected to be a genuinely interested buyer. Although he tried to explain that he was on a mission with the police, he was undeservedly ignored and had to go on a legal suit together with the drug dealers.

Everything Depends on the "Casing"

By: Herru Pribadi

As usual on Friday, my colleagues of observers from LBH Masyarakat and I went to Cipinang Detention Center to go on doing observations. This observation aims to document the fulfilment of human rights and rights as a suspect and defendant for drug cases. As one of the members in the community, I have also experienced an arrest by the police, even went on to serve in jail. I really understand what these drug offenders are going through. That's why when LBH Masyarakat asked me to be an observer, I was very happy.

There weren't too many drug offenders that we're interviewing this time. It's strange because usually there are at least 20 people around here every week. But now, each observer was only interviewing one suspect. I felt a bit weird, how come it's so few. But I didn't think too much about it, I just went on doing what I had to do: to interview.

I then start the interview process.

This detainee that I'm interviewing seems like a well-off person. He was wearing a pretty nice shirt with a collar on. He wasn't bald, and he didn't reek of bad odour like most other interviewees. Sometimes I have to smoke cigarettes just to get rid of the smell. From my experience, considering the limited water supply in the detention center, often times the suspects only shower once every three days, or even once a week. No wonder they smell so bad. But this interviewee is different.

As the interview went on, I realized that this criminal suspect that I'm talking to is a businessman. "It's what I do. I don't earn that much yet, but enough to get by and have some fun," said Raka (not his real name). He is actually quite a well-off guy compared to others in this detention center. From some data I have on him, he earns around three million rupiah per month. His arrest process was done correctly and complies with the procedures. I was quite surprised at first. Have the police changed its system for the better? If so, I'm really happy. But I also doubt it, because as I was interviewing Raka I saw another detainee showing wounds on his body to my other colleague.

Raka admits that he received the arrest warrant, the detention warrant, and a copy of both. He also said that he had never been an object of violence by the police. Based on his observation, Raka can say that: "*The police aren't so violent anymore these days. They look at the 'appearance' first. If it looks convincing, they won't hit you. But if you look shady, you'll be more likely to get hit. I think the police are reluctant to hit*

the better-looking ones, although a good appearance doesn't always mean that you earn much, right?" What Raka just said might be true. Raka also said that the police are so friendly with his family when they come to visit him at the police office. "*They are also warm to my family.*" He said.

During the interview, Raka often asks about his legal concerns, including what he's supposed to do in the court. He said he was briefed by the police, to which his family has to pay a certain amount for. Also other than to pay for a lawyer, Raka said that when the police was about to give him the copy of arrest and detention warrants, they asked for some money to his family. The police gave with many excuses. And then when the police finally gave him the copy of warrants, the police said that if Raka wants to get a lower sentence, Raka is better to be charged with article 127 on Narcotics Act. Of course, Raka's family has to bribe some more to get access to special doctors who can issue a recommendation letter stating that Raka is indeed a drug addict. Same thing when the police came to give him copies of the warrants, they also demanded some money to protect Raka from other detainees in the police center. Collectively, it is not a small amount of money. Plus, the prosecutor that handles Raka's case threatened him through his lawyer that if his family isn't willing to bribe, he can't grant Raka the article 127 on Narcotics Act.

Raka said to me that he actually doesn't approve of his parents being financially extorted like that. He's willing to retaliate. That's why Raka asked me to help him, by telling what he has to do if he still wants to put himself up without letting his parents pay for bribes. Raka is aware that this kind of extortion will go on until the court. I give him advice as much as I can. I also seek help to LBH Masyarakat, who was with us to discuss with Raka.

I was really surprised when Raka told me that he even had to bribe to get copies of the warrants. The police are so sneaky nowadays. They see suspects like Raka as an easy target. Since then, I often ask the suspects that I interview about this possibility. Some of them said the same thing like Raka. It gets me thinking, is this how corrupt Indonesian police is?

The Neglected

By: Herru Pribadi

The experience to be an observer in documenting the violence of human rights and suspect/defendants rights done by LBH Masyarakat is valuable to me. I get to see how the rights are fulfilled. In my college years, I could only study the application, but never got the chance to go on a face-to-face contact with the suspects.

I came across a lot of intriguing stories from the many interviews that I've done with the suspects. Stories range from how the police treat them, to how the arrest process goes, to how they cope with addiction while in detention. There is one thing that saddens me about the *orang terlantar* (the neglected, or OT) phenomena. From what I can gather, OT refers to people who live under extreme poverty**.** Most of them do not have any family left, or choose to live away by themselves, like the people who live in the streets.

I often hear the term OT from the detainees. "*I'm only an OT, Sir*" said one of the detainees called Ali (not his real name). Ali lives aimlessly in Jakarta. He doesn't have any family left. Since he was arrested until now he's in detention, Ali has experienced repeated violence by the police. Once when the police were hitting him in the office, they said, "*What did I tell you? Get your family here to save you!*" But after the police heard that Ali is an OT, they weren't as abusive as what they used to. Now the intensity has waned, less than before they knew Ali is an OT. This story gets me thinking if claiming oneself as an OT brings advantage to these detainees.

My question answered itself during the next interviews. One teenager called Dani reversed my thinking. The same with Ali, Dani is an OT living alone in Jakarta. He is a busker, stick thin and filthy. When Dani admits to the police that he is an OT, the police did not stop abusing him. In contrary, the police went out of control. "*Well, who cares about us OTs? No one cares when we die. Would the police care?*" said Dani. It's quite a different outcome from the police.

What surprised me even more is that, those who still have family often misuse the OT status. This is Asep's experience. "*My family is very poor, Sir. I can't let them come in here and pay for the warden. Plus my friends said that the police often extort the families. They ask for money*" said Asep. I was surprised. Does it take that much to be a detainee nowadays? From my interview, there is no limit to how much families can bribe if they want to visit a detainee. The bribe acts like a thank-you note to the police. Although it is a subtle gesture, it has become a habit of the police to accept bribe in order to "protect" the detainees.

The consequence of admitting oneself as an OT ranges depending on the police. When the police realize that the OTs cannot be ripped off anymore, they will choose to stop abusing them, like what they did to Ali. But those who think that the OT doesn't have any family left, or even a carer, will most probably pay no attention to the detainee, like what Dani experienced. Whatever risk it entails to be an OT, I found a good few who pretend to be an OT to protect their family. They don't want their family to be ripped off. They choose to struggle through the process by themselves so their family does not feel burdened.

Seeing these pretend OTs make their decision makes me realize that these drug addicts still have a heart and feelings. They have a protective nature as an OT. They are also courageous and responsible, shown by their choice to go through this agonising time alone without their family. Although I regret the implication that pretending to be an OT actually breaches more rights, I take my hat off to their bravery.

Addressing the Rights of Suspects in Drug Cases

"Everyone is entitled in full equality to a fair and public hearing
by and independent and impartial tribunal,
in the determination of his rights and obligations
and of any criminal charge against" [68]

A suspect, according to Article 1 point 14 of the Criminal Codes of Procedure (hereon referred to as KUHAP), is a person who as a result of his deeds of circumstances, based on preliminary evidence could be suspected of having committed a crime. In such a situation, until the person can be convicted beyond a reasonable doubt in a court of justice, the suspect shall be presumed innocent in line with the principle of presumption of innocence. Consequently, the person cannot be subjected to any form of punishment. Even in the event that the person must be detained prior to trial, the time spent in detention must be subtracted from the final sentence. In the event that the person is found not guilty, he shall be entitled to a compensation.

In this regard, *LBH Masyarakat*, who focuses on advocacy for the fulfillment of human rights, conducted an observation on the fulfillment of suspects' rights in the criminal justice process, especially at investigation and criminal investigation levels in narcotics criminal cases. Irrespective of the controversy about drug offenses, we must treat every person, including those who have committed drug offenses, as bearers of human rights as stipulated in Article 10 of the Universal Declaration of Human Rights which provides that *"Everyone is entitled in full equality to a fair and public hearing by and independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against*".

The principle of universality is not only found in the Universal Declaration of Human Rights. The Indonesian constitution also provides for rights that apply to all without discrimination. The constitution shall still apply even to those who are drug addicts. Article 27 (1) of the Indonesian constitution reads, "*all citizens are equal before the law and the government and shall uphold the law and the government without exception*." Whereas Article 28 D reads: "*All persons shall be entitled to a just recognition, guarantee, protection, and certainty under the law as well as equal treatment before the law*". The two articles clearly mandate that all citizens are entitled to the right to a fair trial and the right to access to justice.

[68] Article 10 of the Universal Declaration of Human Rights (UDHR)

The Rights of Suspects as Part of Criminal Justice System

In any legal system elements must be present to support the system and make it operable, as elaborated by Lawrence Meir Friedman in his book, *The Legal System: A Social Science Perspective*, "*A legal system in actual operation is a complex organism in which structure, substance and culture interact"*[69] .

Structure is the institution that administers the legal system. Substance is the principles or norms as instrumental elements that serve as the basis for the authority of the institution within the legal system in order to be able to execute its authorities. Whereas culture is interactions among actors – such as the police, prosecutors, judges, suspects, legal aid lawyers, and others – within the legal system. The legal process as part if the Indonesian legal system is a way for the society to seek justice, and these elements aim to ensure that justice is achieved.

Unfortunately, as part of the system, especially as a criminal justice system, law enforcement agents often become perpetrators of such violations themselves. The resolution of criminal cases, starting from investigation and criminal investigation, often involve repressive practices, including torture and other ill-treatment. The criminal justice system that aims to punish those who are guilty often operates disproportionately, resulting in the excessive punishment of a person. It is excessive because in addition to the criminal punishment imposed through a sentence from a court of law, suspect also expereince "other punishments" throughout the criminal justice process.

In the Indonesian criminal justice system, investigation is fully placed under the authority of the criminal investigator, and the police is the institution with the full discretion over the investigative process. With such authorities, questions arise about what protections suspects have during the investigative process. This writing highlights three rights of suspects that we see as most important and fundamental, namely (1) the right to be informed of the crimes charged, (2) the right to a legal counsel/legal assistance, and (3) the right to health.

The Right to be Informed of Charges

In the process of preparing the investigation and preparation of the dossier, a suspect should be clearly informed in a language he can understand about the charges and indictments he is subjected to during investigation. KUHAP in article 51 has clearly stated the purpose for affording this right. The full text of the article is as follows:

> *For the purposes of preparing the defense :*

[69] Lawrence Meir Friedman, *The Legal System: A Social Science Perspective,* New York, 1975, page 16.

(a) the suspect is entitled to be informed unequivocally in a language comprehensible to him about the charges brought against him at the start of the investigation;

(b) the defendant is entitled to be informed unequivocally in a language comprehensible to him about the indictments brought against him.

As stated above, the purpose for which this right is afforded is to provide the opportunity for suspects/defendants to prepare their defense. The explanation to article 51 letter a, it is stated that by learning about and understanding what is being charged, a suspect should know of the severity of the charges he is facing so he shall be able to make an informed decision about the legal assistance needed for his defense.

Although the purpose of this article is to provide the opportunity and guarantee that a suspect can prepare his defense, in practice this often only goes so far as informing about the articles under which suspects are charged and providing translation for foreign nationals who cannot speak Indonesian. The investigator and law enforcement officers would disregard whether suspects really understood the charges/indictments subjected to them. Law enforcement officers also do not consider whether a suspect is ready to provide his defense or not, whereas this is exactly the purpose for which this right is guaranteed under KUHAP.

This observation notes that from 388 respondents, 101 (26%) say they have not been afforded this right. Nine respondents (2%) did not answer. In other words, only 278 respondents (72%) felt that their right to be informed of the charges has been fulfilled. This response is actually inconsistent with other questions. When asked about the articles charged, almost all respondents can provide the information. Only eight (2%) failed to answer[70].

[70] From the 8 respondents who did not answer the question about the article charged, apparently only 2 said their right to proper information was not fulfilled and 1 person did not answer the question about the fulfillment of this right. Five persons said their right to obtain information has been fulfilled.

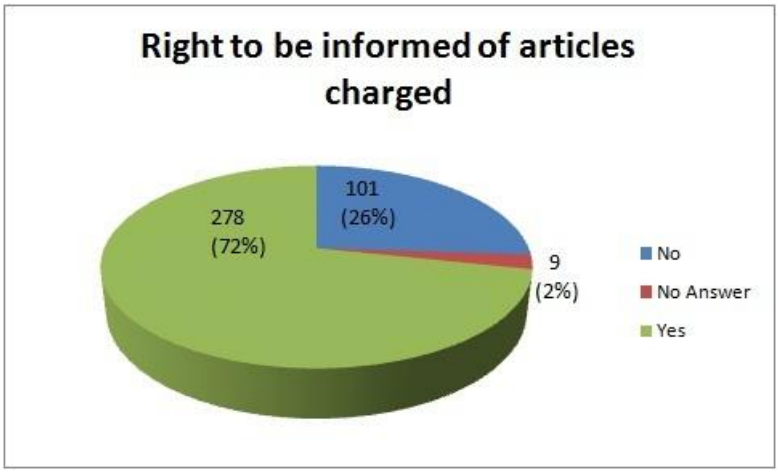

Diagram 14 Right to be informed of articles charged

Only 72% of respondents said that they received proper information, while 98% were able to convey the charges against them. This shows that in providing information to suspects, it is not limited to merely charges against them, which would not be sufficient. Suspects may not completely understand them, and in the end suspects do not have sufficient preparation to defend themselves.

It Is Not Mine, I Am Not Guilty

Wawan was his name. He's quite ideally built, relatively tall, although not quite athletic. Although bald, his appearance is unlike other detainees. His clothes are not unkempt and he is clean. His eyes are sharp, unlike the others who seem distraught and hopeless. Throughout the workshop he followed attentively what was presented. He seems to be eductaed. "*I used to be in college*" he said while citing the name of the private college he attended.

Now Wawan is sitting in front of me, about to tell his case. After each workshop sessions on criminal procedure conducted at Cipinang Detention Center, LBH Masyarakat always provides the opportunity for participants to consult their cases. "*Cases should not be told in front of many people. That's not good. Tell it during consultations, not before the public*" I told them.

"*My case is narcotics, 112*" The number 112 refers to the article he was charged with, namely, the possession of non-plant narcotics, which is usually for crack. "*I am not guilty. The evidence was not mine. It was my friend's. We did intend to use it together*" added he with a distraught face.

"*So if you weren't caught, you would have used the crack?*" I asked. "*Yes I would.*" "*How long have you been using crack?*" I asked to open the conversation. I purposely did not want to discuss the case at the outset, but I asked him about his life and what he experienced while under investigation.

"*While I was with the police, they told me the article. I got 112 for possessing crack. There was evidence, but it wasn't mine. The police just didn't care. I was told instead to be thankful for not being charged with the dealer article. I didn't want that, so I just relented with that article. But that's the thing. The evidence wasn't mine. Why must I be punished?*"

"*Do you know what 112 says*?" I asked. "*No*, *Sir*" He answered. "*If you read the Article 112*, *it's not just those who own the narcotic, it also talks about those in possession of the narcotic. So that article punishes not just owners. It doesn't matter who pays, who owns, if one is found in possession, he'll get Article 112*" I told him.

Wawan seemed dismayed. Perhaps he is surprised about the information I just told him. I continued "*If you want to defend yourself you don't say that the thing is not your, or that you didn't buy it. That's not the defense because you were still in possession. Ownership and possession are charged with the same article, and the same punishment. If you want a lighter sentence you must defend yourself differently*". He asked "*How, Sir*?" Now he looked a bit more lively, as if there is new hope, a lighter sentence.

"*You know that you are wrong, right? That your actions are punishable. You realize that, don't you?*" "*I do, Sir*" he said. "*If you realize then you tell the Judge in court that you are aware that you're wrong. You were in possession of the heroin because you did intend to use it, right? And you've been using for three years now*" I said repeating what he told me earlier. "*Yes Sir*, *but rarely. Just for fun, not every day. Just when I want to and when I have a friend to do it with,*" he said in his defense.

"*Don't be afraid of admitting that you've been using it for long. Honesty is better, rather than hiding things, or you'll be nervous in court. Honest, as it is. If you're an addict, just say so. That way the judge can consider and sentence you to rehabilitation, so you won't have to be locked up in jail for a long time and can be treated,*" I explained.

Wawan seemed a bit more relaxed hearing my explanation. But he is not yet satisfied, as if there's something else in his mind. "*How can I get that sentence, Sir? Who should I contact*?" he asked. Contacting usually implies trying to negotiate the sentence, usually along with some payments. "*Through the prosecutor or directly to the judge?*"

"*Don't ever pay. It's never useful. There is no guarantee that the punishment will be lighter. Even if you don't pay, the sentence could be the same. So it's useless. So just go through it. The judge will determine your sentence. The judge will sentence you lightly if he's convinced that you deserve so. You've heard it earlier in the session. You will be examined as a defendant. Tell the judge honestly that you're an addict and that you've been using it in your privacy. This time you got caught. You tell the Judge that you're prepared for however long the sentence, and leave it up to the judge's discretion. Then suggest that you could be better sent to rehab so you can return to society and become a good citizen*."

"*If I were your lawyer, this is what I would say. I think you can say these things yourself, even without a lawyer. Why must you pay for the lawyer, right?*" I said. "*But there's a legal aid like yours, right? It's free*," Wawan said. "*True. But why must I be present in court if you can do what I can do. I can defende others instead. Legal aid organization has limited resources, and it's impossible to handle all cases. That is why I'm teaching others to act as lawyers for themselves. Without legal aid lawyers you can present your own defense just like a lawyer. I've told you how. There's just one key*," I said. "*Honesty. Nothing but the truth. If you're honest and you relate things as they are, people will believe you. Judges are also humans and they can measure what you deserve. If you're not honest, if you make things up, judges can tell that too and will lose respect for you. It is not beneficial. The easiest way to gain the judge's sympathy is when we say things honestly.*"

"*So you understand now, a good defense is not to say that the things isn't yours, but just be honest and admit that you are a user,*" I said while patting him on the back to end the conversation. "*Yes Sir. Thank you,*" said Wawan while shaking my hands.

Legal Aid: A of Justice in the Investigative Process

In truth, problems about the fulfillement of suspect's rights can be addressed since the beginning of the investigation process with the presence of a lawyer. A lawyer defending the interests of the suspect acts as both balance to and control of the investigators powers over the suspect. Unfortunately not all suspects/defendants get the luxury of a lawyer present with them. Aside from cost issues, the access and availability of a lawyer and the level of understanding about the criminal justice process posessed by suspects/defendants are also a consideration.

In the Indonesian criminal justice politics, especially in its Criminal Codes of Procedures (KUHAP), the right to legal assistance, as provided under articles 54 and 56 of KUHAP. However, the findings reveal that the number of suspects not getting the benefit of a legal counsel is very high.

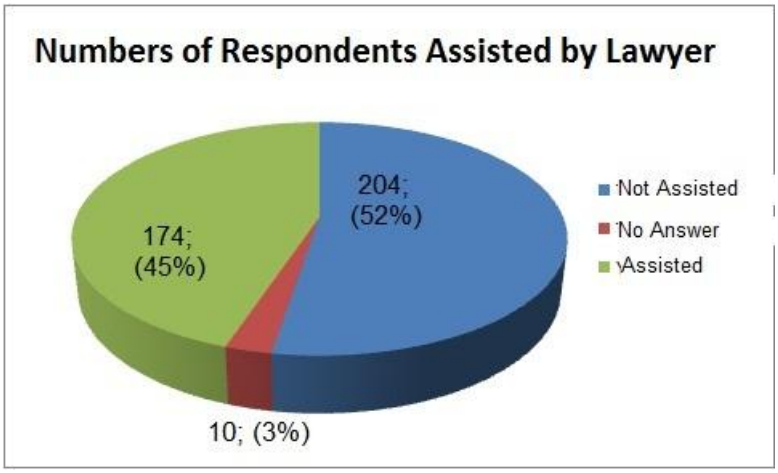

Diagram 15 The Numbers of Respondent Assisted by Lawyer

The fact that there are respondents who did not get any access to legal assistance indicates that the potential for violations is even higher. Most narcotics cases are punishable by five years of imprisonment or higher. This means that for suspects in narcotics cases who cannot afford legal defense and risk a minimum of five year in prison, KUHAP has mandated that they shall be provided with a lawyer. As for suspects charged with 15 years of imprisonment, the state is obligated to provide a lawyer. With respect to this observation, we can see the distribution of respondents who did not get access to legal assistance in the following table:

Article	Assited by Lawyer	Not Assisted	No Answer	Total
111	63	84	1	**148**
112	48	59	4	**111**
114	53	**47**	4	**104**
127	6	6		**12**
132		3		**3**
144	1	**1**		**2**
Tidak Diisi	3	4	1	**8**
Total	**174**	**204**	**10**	**388**

Table 9 Distribution of Respondents Having Lawyers based on Articles Charged

Respondents charged under article 111 (1) and 112 (1) risk 12 years of imprisonment. Whereas respondents under article 111 (2) and 112 (2) risk 15 years of imprisonment. This observation does not distinguish between the two provisions. Respondents who are sure to risk above 15 years of imprisonment are charged under article 114 and 144. Considering the provision, at least 48 respondents (12.4%) have experienced rights violations. In regard to them (47 charged under article 114 and 1 under 144) the presence of a lawyer is obligatory because the punishment is more than 15 years. This number still does not take into account respondents charged under article 111 (2) and 112 (2).

Considering such findings, legal assistance is like a "treasure" for suspects. This is because the right to obtain legal assistance is something the lay public is unaware of, giving the false impression that it is something hidden. Generally, investigators would ask of the willingness to proceed without lawyers, instead of offering the services of a lawyer. Suspects who are ignorant of the law would certainly not object to be examined without a lawyer, because they would not know anyways where to obtain lawyers or they could feel like they could not afford lawyers. Whereas for certain conditions, lawyers shall be provided by the state for free. The suspect's approval would not have any effect on the legal process. This is due to the lack of strict sanctions for investigators or authorized officials who fail to appoint lawyers for suspects at every level of the proceedings. This despite the many provisions requiring it, as well as a number of precedents of defendants acquitted due to lack of lawyers.

Legal Aid: Theory versus Findings in the Field

There have been many regulations about legal aid. In addition to KUHAP, Article 37 of Law Number 4 of 2004 regarding the Judiciary specifies that: "Any person involved in legal proceedings shall obtain legal assistance." A question inevitably arises then, who shall volunteer as lawyer to provide the said legal assistance. Article 22 (1) of the Law on Legal Counsel provides that: "A legal counsel shall provide pro bono legal assistance to justice seekers who cannot afford it."[71]

In addition to laws providing the normative framework, there have been a number of decisions that can be used as precedent to require the fulfillment of the right to legal assistance. Several such decisions are as follows:

- Judge's consideration in the **Supreme Court Decision No 1565 K/Pid/1991 dated 16 September 1993** which essentially states, "*in the event that the requirements requested are not*

[71] The government has issued government regulation No. 83 of 2008 regarding Requirements and Procedures for Providing Free Legal Assistance. This Government Regulation is an implementing regulation for Article 22 of Law No 18 of 2003.

met, for example when the investigator failed to appoint legal counsel for the Suspect since the outset of investigation, then the prosecutor's charges are rendered unacceptable."

- Judge's considerations in the **Supreme Court Decision No 367 K/Pid/1998 dated 29 May 1998** which essentially states, *"in the event that no legal counsel has been appointed at the investigation level it would contradict Article 56 of KUHAP, the investigation and prosecution dossier shall be rendered null and void by law and as such the charges of the prosecutor shall be deemed unacceptable, although during court examination the suspect was assisted with legal counsel."*

- Judge's considerations in the **Supreme Court Decision No 545 K/Pid.Sus/2011** which essentially states, *"that during the investigation the Defendant was not provided with Legal Counsel, whereas the Dossier of Search and Statement dated 15 December 2009 was apparently made by Official who did not do the action and actually replaced by another officer; Thereby, the Dossier of Investigation of the Defendant, the Dossier of Search are not valid and legally defunct, as such, the Prosecutor's Indictment made on the basis of the Dossier in question is rendered invalid and legally defunct as well."*

- Judge's consideration in the **Decision of the Central Jakarta District Court No 728/PID.B/2011/PN.JKT.PST** dated 11 May 2011 and Judge's consideration in the **Decision of the Central Jakarta District Court No 1606/PID.B/2011** dated 3 October 2011 which essentially stated that "*based on provision of law as stated above, in particular the provisions of Article 51 Law Number 3 of Year 1997 regarding Juvenile Court, it is clear that as it pertains to the rights of children in conflict with the law, especially children as Defendants, it is mandated by the Law that [the children] shall have legal counsel*"

Seeing the multitude of regulations and legal precedents above, it is evident that the right to legal assistance is an important prerequisite to ensure that the examination of suspects does not contradict the law. If law enforcement officers at every level of examination, particularly the investigator, disregards the law regarding the fulfillment of the right to legal assistance, it could lead to the indictment being annuled or declared void. It would mean that investigations under such circumstances will proceed outside the law. Unfortunately findings in the field show that to this day many suspects still do not get proper legal counsel. **The high prevalence of such cases imply that the law has been 'disregarded'**.

In conducting this observation, LBH Masyarakat was present not just as an observer, but also played a role to bring legal aid access to suspects. Before interviews are conducted LBH Masyarakat would provide some guidance and an opportunity to conduct consultation with the detainees who need it. From some of

the cases consulted, only a few proceeded to actual defending in court. The majority stopped with consultation at Detention Facilities. This might be because many detainees receive misleading information from investigators who would scare suspects away from lawyers saying that they risk compounding their sentence. It is at this point that the power relation between investigators and suspects/defendants is established and they are forced to submit to investigators' whims. Although technically lawyers often function to provide knowledge regarding defense to suspects, the also function as public control mechanism over the power of the police and prosecutors. The practice of torture by the police will never be conducted in an open space known to the public. All of it is done in close quarters accessible only to law enforcement agents. The presence of lawyers is often useful to observe and monitor that no police treatment fall outside of their authorities. Investigators are fully aware of this situation and they eliminate it by means of the authorities and power relations that they have.

Seeing these conditions it can be understood that legal assistance substantially is not limited to merely providing defendants with legal counsel physically. Instead, it is how to ensure that defendants are aware about their options and what to do about their defense. Thereby, fulfilling the right to legal access does not have to mean merely providing lawyers in court, but also to provide as much legal information in a way that is accessible to suspects from the onset of investigation all the way through court proceedings. Access to legal information means increasing the capacity and ability of suspects to undergo the legal process. This capacity building will make them capable and empowered to undergo court proceedings even without lawyers. This is essentially the approach of community legal empowerment that has guided *LBH Masyarakat* so far. People are not made dependent on lawyers. To the contrary, they are made capable and empowered to defend themselves.

The Right to Health Access

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that state parties are obliged to recognize the right to health of all persons, both physical as well as mental health[72]. Under this right to health there are four important elements that the state must fulfill, namely the availability, accessibility, acceptability, and quality[73]. Under the element of availability, the state has the obligation to guarantee adequate health facilities, goods and services[74]. In regard to accessibility, the state is obligated to ensure that the health facilities, goods and services in question are also accessible, both physically and economically[75]. Accessibility also means that the state must ensure that the distribution

[72] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Para 12 (1), 999 UNTS 3.

[73] General Comment No. 14 regarding the Right to Health, *Committee on Economic, Social and Cultural Rights*, Session 22, para 12, E/C.12/2000/4.

[74] *Ibid*., para 12 (a).

[75] *Ibid*, para 12 (b).

and services are provided without discrimination and that the state ensures that there is public access to relevant health information.[76] Acceptability means that in regard to the right to health, the state is obligated to ensure that the health services are provided in a manner that honors the medical codes of ethics and are culturally acceptable.[77] The element of quality places the burden on the state to ensure that the health facilities, as well as goods and services, meet the prescribed standard.[78]

Although generally speaking the state has the obligation to fulfill the right to health of every individual under its jurisdiction, the fulfillment of the right to health of certain groups should become of special concern to the government. In the ICESCR General Commentary Number 14 regarding the Right to Health, the Committee on Economic, Social and Cultural Rights (CESCR) cited that the groups under this category include women, children and young adults, the elderly, the disabled, as well as indigenous communities[79]. In addition to the groups specified by CESCR, detainees and prisoners have also been classified as a group whose fulfillment to the right to health requires special attention. The fact that those held in detention or prisons are under the exclusive control and auspices of the state gives rise to the state's responsibility to ensure their physical integrity and welfare. This is consistent with what has been stated by the UN Human Rights Committee[80], the European Court of Human Rights[81] and the African Commission on Human and Peoples' Rights[82].

Various international human rights instruments in the form of soft laws have also emphasized the importance of the rights of detainees and prisoners to health access. The Basic Principles for the Treatment of Prisoners, for example, cited the ninth principle, in that 'Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation'.[83] In the same vein, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment also specified that: "A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge"[84]

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[76] *Ibid*.
[77] *Ibid*., para 12 (c).
[78] *Ibid*., para 12 (d).
[79] *Ibid*., see para 21-27.
[80] See, for example, *Pinto v Trinidad and Tobago*, UN Human Rights Committee, para 12.7, UN Doc. A/45/40.
[81] *McGlinchey and others v the United Kingdom*, App. No. 50390/99, European Human Rights Court, para 57.
[82] See *Malawi African Association and others v Mauritania*, African Human and People's Rights Commission, para 122. See also *International PEN and others v Nigeria*, African Human and People's Rights Commission, para 112.
[83] Basic Principles on the Treatment of Prisoners, Principle Nine.
[84] *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 24.

Under the national legal framework, the right of suspects to health access is stipulated under Article 58 of the Criminal Codes of Procedures (KUHAP)[85] and the right of prisoners to adequate health services is also stipulated under Article 14 point (d) of Law number 12 of 1995 regarding Correctional Facilities[86]. However, the provisions in these two laws are not fully consistent with international human rights laws. The law on Correctional Facilities only provides that prisoners have the right to obtain proper health services without specifying in greater detail about how such right shall be fulfilled. Meanwhile, the problem with Article 58 of KUHAP is that it only provides that suspects have the right to contact or receive visits from personal physicians and does not put the burden to provide the health services for detainees or prisoners on the state. This certainly is inconsistent with international human rights standards that provide that the state shall bear the obligation to provide free health services to detainees and prisoners.

However, the provisions of KUHAP are then complemented with Government Regulation Number 27 of 1983 regarding the Implementation of KUHAP which was later amended as Government Regulation Number 58 of 2010.[87] Article 19 (9) of the Regulation provides that 'a doctor shall be assigned to the detention facility appointed by the minister to maintain and provide health care to detainees.'[88] It is further stated in article 21 (4) that 'the responsibility for the health care of the detainees shall be borne by the doctor appointed by the Minister.'[89]

It is certainly important that detainees and prisoners have access to independent medical care, such as personal physicians or health institution not part of the institution of the police, detention or correction facilities. This, in fact, is another mechanism to prevent and minimize torture in detention or prisons. However, the option to have independent medical care that is financially afforded by the detainees or prisoners themselves is not sufficient to ensure their right to health access.

Sick detainees or prisoners certainly must obtain special medical care compared to those who are healthy. In the event that detainees or prisoners fall ill or require special medical treatment, they must be transferred to a special institution without delay. If such facility is available within the detention or prison premises, then such transfers may not be necessary as long as all the necessary equipment and medication is available along with competent and trained personnel.[90]

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[85] Article 58 of KUHAP

[86] Article 14 point (d) of the Law No. 12 of 1995 regarding Correctional Systems

[87] Amendments in Government Regulation No. 58 of 2010, nonetheless, only focus on investigation and did not change any provision regarding the rights of suspects.

[88] Article 19 para (9) of the Government Regulation No. 27 of 1983 regarding Implementation of the Criminal Codes of Procedure (KUHAP).

[89] *Ibid*., Article 21 para (4).

[90] Standard Minimum Rules for the Treatment of Prisoners, Rule 22.

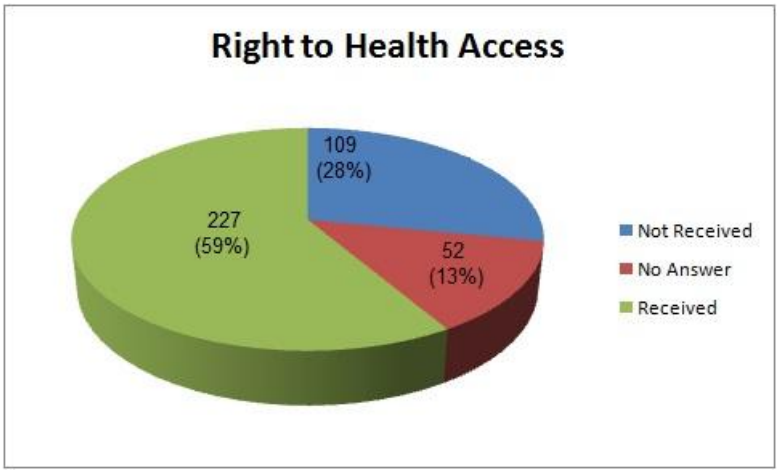
Drug users in detention or prison can be classified as a group requiring special treatment. The mere fact that they have addiction indicates that they have health problems. This is compounded with the fact that they also endure withdrawal symptoms. As such, for drug users who are detained or imprisoned, the availability of treatments to address their dependency on drugs becomes crucial[91]. The failure of the state to provide special care for drug users in detention or prison is a violation of the right not to be treated or punished inhumanely or degradingly.[92] The UN Special Rapporteur on Torture has also stated that if drug users experiencing withdrawal symptoms are intentionally not given treatment with the intention as prescribed in the definition of torture according to the Convention Against Torture (CAT), then it too can be classified as a violation to the right not to be tortured.[93]

The elaboration to article 21 letter b of KUHAP also specifies that 'suspects or the accused who are drug addicts to the greatest extent possible shall be detained in a special facility that shall also serve as treatment facility.'[94] However, this provision alone does not automatically render the fulfillment of the right to special health treatment for drug addicts in detention free from problems. Detention facilities that provide methadone treatment are mostly found in bigger cities. Methadone treatment itself is only a substitute to heroin, so non-heroin addicts will still run into problems. Besides, methadone therapy is often integrated with the police, whereas these withdrawal symptoms usually occur one to three days after arrest.

Indonesia has already ratified the ICCPR as well as CAT that ensures the right not to be treated and punished unhumanely or degradingly as well as the right to be free from torture.[95] The Indonesian government, accordingly, has the international obligation to ensure that every individual in detention or prison under its jurisdiction has the proper access to health. Unfortunately, this obligation along with those stipulated in the Government Regulation regarding the Implementation of KUHAP and the Law on Correctional Facilities are yet to be fully fulfilled by the Indonesian government.

As the graph below indicates, from the 388 respondents interviewed by *LBH Masyarakat,* only about 60% or 227 respondents stated that they have received access to health while in detention and/or prison. 109 respondents stated that they did not get health access, while the remaining 52 did not respond.

[91] Human Rights Watch, *Barred from Treatment: Punishment of Drug Users in New York State Prisons*, hal. 16-17.
[92] *McGlinchey and others v United Kingdom*, *op.cit*.
[93] Report of the UN Special Rapporteur on Torture, Manfred Nowak, para 57, Session 7, A/HRC/10/44.
[94] Explanation to Article 21 letter b of KUHAP.
[95] Law No. 12 of 2005 regarding Ratification of the International Covenant on Civil and Political Rights and Law No. 5 of 1998 regarding Ratification of the Convention Against Torture.



Tabel 10 Distribution of Respondent Having Access to Health During Detention

Why Defend Drug Users?

A Closing Reflection by Dhoho A. Sastro

Drug users are often considered the 'scum of society' as it is often considered that drug use is a common enemy. People are taught to stay away from drugs and its dangers are socialized to the masses. The derivative of such calls to stay away from drugs is, inevitably, to stay away from its users. Drug users are no longer seen as friends but as scums that must be avoided. When drug users run into the law, instead of being defended, many hope they are punished severely. Mindful of such a phenomenon, why do I and *LBH Masyarakat* still want to defend drug users?

In the beginning, we were like most. To us, drug users were public enemy. Drug users were like satans who will rob people of their future. Drug users will destroy this nation because they destroy the young generation. In short, in the beginning we did not find any basis to compel us to defend drug users. However, our perception that was borne out of prejudice and discrimination then changed. Slowly we found reasons to defend drug users.

Freeing Ourselves from Prejudice

Our perception change when we saw the reality about law enforcement on drug users. It is true that the police and other law enforcement agents have the right to do enforcement measures. They have the power to conduct arrest and detention. They have the power to confiscate. They have the power to question and put people in prison and enforce the law so that offenders get sentenced and punished. But do they have the right to torture? Can these drug users, as suspects, be subject to violence and other ill treatment? Drug users are beaten, subject to extortion, and often must be deprived of their dignity when they are subject to inhuman treatment. They do not deserve such treatment.

The law and recognition of human rights do not exempt drug users from getting protection. The law is intended to all without exception.[96] Then why must there be discriminatory treatment? Why is it that when torture is subjected to others we are willing to advocate but when it comes to drug users we are reluctant to help? Why must we discriminate? It was at this point that we realized the importance of

[96] Compare with the provisions of article 28 G para 2 of the 1945 Constitution, which reads: *"Every person has the right to be free from torture or other degrading treatment and have the right to seek political asylum from other countries."* Compare also to the provisions of article 28 D para 1 of the 1945 Constitution, which reads: "*Every person has the right to a just legal recognition, guarantee, protection, and certainty as well as equal treatment before the law.*"

human rights, the significance of universality. Every person is entitled to equal treatment, and that includes drug users.

This new realization compelled us to try and get to know the drug users and provide them with legal assistance. As we got in deeper in the cases we handled, we were surprised by the phenomenon we hardly understood: case manipulation. The law does allows for law enforcement personnel to make the so-called covert purchases. Law enforcement agents can pretend to act as buyers or sellers of narcotics, and when a transaction occurs they can arrest those involved in the transaction. However, in reality, such covert purchases are taking place far outside the intended ideal perspective.

Many suspects involved in drug offences are in detention because they were framed. Formally, they appear to have fulfilled all elements stipulated in the articles. They are proven to posses narcotics. Clearly, they had drugs in their hands. They also have been proven to have conducted the transaction, because the narcotics in their hands resulted from such purchase. However, to our surprise, the possession is often not based on the suspect's intent. The suspects buy, then possess the drugs because they were told to after being persuaded by others. This happened to some *LBH Masyarakat* clients, like Rony, in the case No.1018/Pid.B/2009/PN.JKT.PST. After he completed the act for which he was persuaded, suddenly the police came and arrested him. What is more strange, the person who persuaded suddenly disappeared. As a result, it was impossible to prove that the suspect was only told to commit the act. This is not fighting drug abuse. This is framing people to be accused and punished under the Narcotics Law.

Such stories are not unique. Often these stories also involve violence. "*I was forced to confess that the drugs were mine. I cannot say that they were not mine. If I say that I was told [to buy], the police would say that I'm lying. I was framed.*" The prevalence of such stories convinced us that this is phenomenon is not just imagined. Many suspects are caught then prosecuted not on the bases of intent to possess (*mens rea*)[97]. As we know, intent to commit a crime is a crucial justification for punishment, not merely proving that a person has committed an act prohibited by law. There is a process of criminalization taking place that has deviated from the intention of the criminal justice system.

In addition to abuse of power, the practice of framing and case manipulation, the third thing that shocked me about the drugs law enforcement practice is about access to healthcare. Similar to other detainees, drug users are often neglected while in detention. There is no health care to ensure that they are in good

[97] I Dewa Made Suartha, stated "the Mens Rea doctrine is founded on the maxim of "*Actus non facit reum nisi mens sit rea",* which means that an act does not lead to someone being guilty, unless if the person has the evil intent. (I Dewa Made Suartha, *Pekembangan Sistem Pertanggungjawaban Pidana dan Relevansianya dalam Pembaharuan Hukum Pidana Indonesia*, *Jurnal Kertha Wicaksana, Vol 16, No. 1).* Can be accessed through http://isjd.pdii.lipi.go.id/admin/jurnal/161106572.pdf

health. Suspect do have the protection to their right to health, however, in reality this is often far from true.

When faced with drug cases, users often have special needs regarding their health. Often they experience withdrawal symptoms[98], are they could be detained while undergoing medical rehabilitation. Methadone therapy, for instance, requires that users take methadone on a daily basis. The dosage is usually determined by health clinics they go to. When in detention, many users experience disruption in their therapy.

Health problems are also closely associated with the fact that users are a group vulnerable to HIV/AIDS. The absence of health checks before detention, as well as the lack of proper treatment will further deteriorate the detainee's condition. There is also the risk that prisons could become a place for spreading HIV/AIDS. There needs to be affirmation for drug offenders, especially regarding their health. They have to be treated with special care, unlike other detainees. Blanket treatment of drug users like other detainees will lead to an even more dangerous situation.

The facts that we found have not been well documented before. Such facts often circulate as word-of-mouth stories among us and they have never been systematically documented and publicized. What was presented in earlier in this book showed that these facts actually took place. Some of the victims of the abuse of power have also been described. How case manipulation takes place was presented not only in numbers but also in qualitative stories. We are similarly concerned about health issues. This is what convinced us that we must take on the task of defending drug users.

Defending without Supporting Drug Abuse

"*Drug abusers are caught, and then they try to free them. Arrests are said to be illegal*", "*When law enforcement try to instill a deterrent effect, then they're advocated to get proper treatment*"

This is what we frequently hear when we try to defend drug users. As a result, the public often wrongly judge us and see us as supporters of drug abuse. But are we? Certainly not. Then why do we often find ourselves at odds with law enforcement agents, even the public?

In the effort to eradicate narcotics, for years we have only seen conventional eradication methods, that is, hunting and getting rid of drug traffickers. The War on Drugs, is what this has been commonly called. The

[98] The term commonly used by addicts is *sakau*, a sickness caused by the disruption of using narcotics.

basic idea is how to stop drug from getting into the market. Narcotics are to be eradicated and this is achieved by catching drug traffickers and try to get up the chain and get the big dealers. Distribution networks must be uncovered, and every trafficker must be punished. The assumption is that if there are no more traffickers, then narcotics will not be sold. This has been the prevailing pattern for years.

Has it succeeded? There have been a number of small victories in the war on drugs.[99] Many networks have been exposed by law enforcement. Numerous dealers and traffickers have been caught and prosecuted. But has drug trafficking subsided? Has the number of drug users receded? Not really. The war on drugs is still a long way from victory.

The conventional approach to stop illicit drug trafficking centers its effort on the supply side. One of the reasons why this method has not been effective is because there has been no intervention on the demand side to suppress the demand for narcotics in the black market[100]. Demand will always be there, especially when addicts are not treated and there is no effort to prevent new users from taking up the habit. There have been rehabilitation programs directed at drug addicts. These programs have been the spearhead to address demand for narcotics. Rehabilitation is not limited to inpatient treatment, it also includes substitution programs. With rehabilitation, the number of addicts will drop and that translates into a drop of demand in the market. Unfortunately, in practice, rehabilitation requires willingness and participation of the addict.

This is where the problem is. Currently, users feel that their position as fugitives is a direct effect of the war on drugs. As a result, addicts often hide and conceal their addiction status, discouraging them from accessing available treatment. Users often feel threatened. Addicts cannot trust rehabilitation centers to be a safe place. On the other hand, they fear being arrested by the police and being prosecuted under a legal system that is far below human rights standards. Addicts will be no longer afraid if they can be sure that they will not be arrested, detained and imprisoned.

Is this at all possible in Indonesia today? First, the enactment of Law Number 25 of 2009 added a new goal of Narcotics Law, namely, to provide for rehabilitation and recovery[101]. Second, Law Number 35 of 2009,

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[99] To learn about some of the victories in the war against narcotics, namely, the uncovering of some narcotics trafficking networks, see the 2011 End-of-Year Press Release of the National Narcotics Agency, accessible through: http://www.bnn.go.id/portal/_uploads/post/2011/12/30/20111230095820-10084.pdf

[100] Citing some articles discussing the changing of paradigms in narcotics eradication. Martin Jelsma, *The Development of International Drug Control: Lesson Learned and Strategic Challenges for The Future*. Working Paper Prepared for the First Meeting of the Global Commission on Drug. Accessible through: http://www.globalcommissionondrugs.org/Arquivos/Global_Com_Martin_Jelsma.pdf

[101] Article 4 of Law number 35 of 2009 states that teh Law on Narcotics aims to: (d) to guarantee the administration of medical and social rehabilitation for drug abusers and addicts.

complemented with a Supreme Court Circular[102], affirmed the judge's authority in sentencing the drug users being tried to rehabilitation. Third, since 1981 Indonesian laws have required that drug users are not detained together with general detainees, but put in a place that enabled treatment[103]. Fourth, Law 35 of 2009 provides that individuals under rehab shall not be criminally prosecuted[104].

This is where the urgency lies to provide legal assistance to those who are drug addicts, namely, to ensure that every addict undergoing a legal process are given their right to be rehabilitated, advocated that they do not undergo convential detention, and also to remind law enforcement officials that not all addicts can be prosecuted, for instance, those undergoing medical rehabilitation. In other words, the legal advocacy to addicts shall ensure that the legal process does not subject them to violence and extortion. On the other hand, this shall also serve as means to ensure that drug addicts undergo rehabilitation process. The process that makes drug addicts deter and stop using drugs cannot come out of conditions that worsen the addiction, but is achieved through rehabilitation.

The urgency of providing legal assistance to narcotics addicts include:

- ensuring that every addict undergoes the legal process and obtain their right to undergo rehabilitation.
- ensuring that they do not undergo conventional detention.
- to remind that not all addicts can be prosecuted. Those undergoing medical rehabilitation cannot be prosecuted.

In other words, the legal assistance to addicts shall ensure that the legal proceedings do not turn addicts as objects of violence and extortion. To the contrary, it shall serve as means that ensures addicts undergo rehabilitation process. To make addicts contrite, or have them stop using narcotics altogether, cannot be achieved by the process that worsens the addicts' condition, but by way of rehabilitation.

[102] Supreme Court Circulars (SEMA) regarding handling of narcotics cases include SEMA No. 4 of 2010 and SEMA No. 3 of 2011.

[103] Explanation to Article 21 para 4 of KUHAP states that "Suspects or defendants who are narcotics addicts to the greatest extent possible shall be detained in places that at once serve as treatment facilities"

[104] Article 128 para (2) UU No. 35 of 2009 states "Narcotics addicts that are of age as referred to in Article 55 para (2) undergoing medical doctor-supervised rehabilitation of 2 (two) periods in hospitals and/or other medical rehabiilitation facilities appointed by the government shall not be criminally prosecuted."

Whereas article 55 para (2) of Law No 35 of 2009 states: "Narcotics addicts that are of age are obligated to report or be reported by their family to community health clinics, hospitals, and/or medical and social rehabilitation institutions appointed by the Government to obtain medication and/or treatment through medical rehabilitation and social rehabilitation.

Wrongs in Narcotics Law Enforcement

It does not seem that the courts and other law enforcement bodies make rehabilitation the main goal of their terms of reference. This is indicated by the detention of almost all drug offenders in police detention facilities – installations where all other detainees are held. They also disregard whether or not there is an urgency for the detention. Officers also never consider whether rehabilitation should be prescribed from the onset. It is as though officers want to show that they have performed well by sending as many people to prison, and not prioritize giving rehabilitation. This is the first wrong, and there are several more.

The second wrong pertains to the time limit of arrest. The Law provides that arrests as stipulated under article 75 letter g shall only be as long as 3 x 24 hours and can be extended for another 3 x 24 hours.[105] So in total an arrest can extend to six days. In practice, almost all Police investigators apply this rule on arrest. They are not using the provision under Criminal Codes of Procedure that only extends for 1 x 24 hours. Whereas as stipulated under article 75 letter g clearly provides that it is the six-day arrest authority is only given to BNN (the National Narcotics Agency). This begs the question, how can a Police investigator have the same authority as BNN investigator?

We did not find anything on such authority in the study that we conducted. Perhaps we have missed it, but regardless of whether or not there are such powers, the question that begs to be asked is what is the urgency for the added arrest time? Can the investigator not immediately proceed to detain after conducting an arrest. This will provide adequate time for the investigators to build the case while the suspect is already in detention. Why must there be an added time to conduct the arrest?

The logical explanation is that with added time for arrest, the investigator has the room to conduct more things before formal detention. This means that there is hope that a person arrested by the police may not have to serve time in detention. Perhaps an investigator requires a person under the arrest status to build the case so a real suspect can be found and the person in question may not need to be detained. But in practice, arrests are always used to the maximum. Almost all detainees have experienced maximum time, that is, six days, before the arrest is made, and even then afterwards they would still be detained. If they are going to be detained anyways, why not immediately change the status of the suspect from arrest to detention? Is not the principle of expediency crucial for justice?[106] This is the second wrong.

The third wrong relates to the responsibility after confiscation. The law clearly stipulates regarding what the investigator must do after confiscation, and to show its seriousness there is even a criminal sanction

[105] Article 76 of the Narcotic Law

[106] Article 4 para 2 of the Law No. 4 of 2004 regarding Judicial Powers states that: “Courts proceedings shall be conducted simply, expediently and affordably”

regarding that responsibility. This pertains to the management of evidence,[107] considering that evidence under the auspices of investigators from confiscation, namely, narcotics, have high economic value in the black market. It is this confiscated narcotics that should be made as the people's enemy. Therefore, we have ot make sure that the confiscated items in the hands of the law enforcement does not get into the market. However, there does not seem to be meaningful oversight by the courts over confiscated evidence.

Why Does The Investigation Has To Stopped?[108]

This case involves a young woman from Kyrgyzstan who was arrested by customs officials at Hussein Sastranegara Airport in Bandung. She entered Indonesian territory with a suitcase that apparently contained heroin. She said that she was asked by someone to bring this suitcase and hand it over to another person in Jakarta. She was not aware of what the suitcase contained. She was shocked to find out that the bag contained sizeable amounts of heroin wrapped in several packages in the lining of the suitcase. She was then handed over to investigators at the West Java Regional Police. The investigators did not treat her with force. She did not experience beatings or torture.

Using information given by ZS, the Kyrgyz girl, investigators proceeded to develop the case. She was asked to do all the activities as instructed by the person who sent her to Indonesia and pretend that nothing had happened, that is, that she has not been arrested and that she was not with the police. The police provided her with a mobile phone number to make contact with the intended recipient of the package. Shortly, the contact was made.

The intended recipient directed ZS to Jakarta. In Jakarta ZS was still with the investigators from West Java Regional Police. Due to the different jurisdiction, the team requested assistance from the Jakarta Metropolitan Police. Communication was maintained. ZS was even conditioned to ask her sender to make a money transfer because she ran out of money. The money was successfully transferred to the account of the investigators who pretended to be the hotel receptionist where ZS stayed in Jakarta.

The contact was quite intense, and with a little bit more patience the investigators would have discovered the intended recepient of the heroin package. This person must be a major narcotics dealer in Indonesia, likely part of an international syndicate. It is this person that the police should

[107] A more detailed explanation regarding evidence management is written in a different part of this book. See pages 23 – 29.

[108] Excerpted from the case of narcotics trafficking examined in Bandung District Court under register number PDM-1558/BDUNG/12/2010.

have arrested to be prosecuted. It is this person that is the enemy of society. He is the one destroying the nation's generation.

However, that did not happen. After days of contact, even after money transfers, the investigator took ZS back to Bandung and stopped the case development. The investigator considered there was insufficient operational funds, so the case was focused on ZS as the perpetrator. ZS was made to be criminally liable for trafficking heroin into Indonesia. She was liable alone. The intended recipient of the package who had made contact with ZS while she was with investigators never appeared.

Nobody knows whether investigators continued to communicate with the intended package recipient. In court, investigators testified that there was no contact despite the fact that they still had the telephone number they used to communicate with the dealer under their control. Nobody knows whether the investigator traced down the account number used to transfer the money for ZS in Indonesia. According to investigators, this is not relevant to the case of possession by ZS.

What about the evidence? In court, the prosecutors produced a record of evidence destruction. Officially, the evidence has been destroyed, except for the two grams set aside for court examination. Everyone in court was convinced of that. No one can suspect that investigators continued to communicate with the package recipient, or that they may have actually relayed the package to the syndicate and intentionally held ZS criminally liable for it. There was no evidence to prove it. No questions asked.

ZS was later sentenced to 10 years in prison by Bandung District Court and the West Java Appeals Court raised it to 12 years.

The fourth wrong has to do with the fact that not all people can be criminalized. Article 128, as cited many times, clearly states that drug addicts who are undergoing medical rehabilitation cannot be criminally prosecuted. In order for them to undergo this rehabilitation, addicts must perform their obligation to report as stipulated under article 55. The problem then arises with addicts who have enrolled under the methadone program. If we recognize that this is a medical therapy performed only in health facilities, such as hospitals and community clinics[109], then no methadone treatment participant shall be criminaly prosecuted. In reality, the police never considered that addicts are participating in methadone therapy, and this makes them liable to criminal prosecution.

[109] A more detailed explanation regarding methadone therapy as medical therapy is written in another part of this book. See pages 54 on this book.

Public Legal Empowerment: Hope amidst Despair

Considering the situation about narcotics law enforcement, one cannot say that the performance of this law enforcement has been satisfactory. A lot of abuse is taking place, but efforts to address those often run into dead end. This is a desperate law enforcement situation, and complaining to those who shall be responsible, namely, the state, to make improvements is almost hopeless. The state takes in too many complaints already, as such, they lose track of what needs to be focused on.

Is there no hope to this despair? Before we reach this sceptical conclusion, we must remember the victims who cannot avoid this desperate situation. When they cannot hope for any help from outside, they are left with no choice but to face it. But is it true that there is no power within them to overcome their plight? And if they choose to do something about it, is there no help for them? This is what encouraged the development of public legal empowerment.

Like victims of natural disasters, suspects are not just seen as victims, but survivors. In a natural disaster, those who live on are seen as survivors so they are able to live and pursue their future. It is this strength that us used as a foothold to pursue their future and dreams. This is the empowerment approach that treats them as survivors.

Compare this with the approach that treats them as victims who must be helped immediately because they have lost many things. Their needs must be fulfilled and they are made dependent on outside help. In the end, although there might be some strength within them, it could disappear because it is no longer needed. As a result, when such outside help stops, it would be very difficult to make the victims independent individuals.

Such is the case with suspects. Meeting suspects who are still able to speak about the violations to their rights shows us that we are talking to a survivor who has managed to pass through the dark stages of investigation. The ability to survive show us that they have strength. All that is left is how to turn this strength to build the future and face the trial and the case. It is about making the suspect realize that there will no be change when he chooses to remain silent. He has that strength, and it must be used, not merely for himself, but as a pioneer to share this spirit with other suspects. We begin from within, not from outside strength and resources.

If they remain silent, we can be sure that he will get a criminal sentence, in line with the prevailing perception of law enforcement agents. However, if he uses his rights to defend himself, there is hope for him to build a positive impression about himself before the judge who will sentence him. There is hope

that he could get sentenced to rehabilitation. By remaining silent in the face of violations to his rights, there will be no change and violations will continue. But if he does something, there could be changes that may not be enjoyed by him alone, but by suspects in the future.

There is strength, and there is hope that something can be done to make changes. The victim's meager strength can be easily supplemented with proper legal help, and this help can multiply and be more meaningful when done in collaboration with the suspect. The help is not intended to replace and represent the suspect, but actually to empower the victim. Legal aid is done to empower, and not take over the role of the victim. Legal aid providers direction and ideas about where to move, but it is the suspect who becomes the victim who will go through the struggle.

Legal aid providers are not present as angels who will overcome the suspect's problems. They will not take over the responsibility to address the despair. The legal aid providers will try to explore along with the suspects the most effective avenues in order to be effective. It is the suspect who will do this. They may not have all the capabilities, but they have legal aid by their side that will give the suspects access to all the capabilities of this legal aid to help them in their struggle.

How does this translate in practice? Take, for example, a suspect who is a drug addict, and was caught in possession or having consumed drugs. When he must do is to inform the court honestly that he is a drug user. Explain to the judge the background that has lead him to using narcotics and tell about his plans for the future. He should be prepared to take responsibility for his deeds and able to trust the judge to hand him the proper sentence, and not wail asking for a lower sentence. He must also have the courage to remind the judge about rehabilitation sentence. With this sentence he has the opportunity to cure himself and have a better future. This admission can be stated as is, even without lawyers.

It is the same when there are violations to rights. Suspects who are subject to violations of his rights are encouraged to testify about the violations they experienced, without which it would be difficult to conduct advocacy. At present, most suspects choose to remain silent and surrender themselves to fate rather than do something.

From the presentation above, there is hope amidst the desperation when empowerment and capacity building is conducted. This is what we need to make changes in narcotics law enforcement, including to conduct advocacy to stop violence in **the enforcement measure**; to reveal case manipulations and give precedent about using the *mens rea* test in narcotics cases; to fulfil the rights of suspects; as well as to make investigators accountable for evidence management. This is the time for us to increase hope to overcome this desperation.