

## REFORMULATION OF THE FORMULATION OF OFFENSES IN LAW 35 OF 2009 CONCERNING NARCOTICS

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### Abstract

This study aims to analyze the reformulation of the formulation of offenses in Law Number 35 of 2009 concerning Narcotics. The research method used is juridical normative. The results showed that the formulation of offenses in Law Number 35/2009 caused problems in determining sanctions. Therefore, it is necessary to reformulate the policy as follows: *First*, the formulation of criminal provisions in article 127 does not distinguish between beginners, addicts, victims of abuse and abusers involved in networking. *Second*, Do not attach importance to the element of intentionality in narcotics crimes. The use of the word "Everyone without rights and against the law" in several articles of Law Number 35 of 2009 regardless of the element of intentionality. *Third*, drug addicts who are old enough, who have undergone medical rehabilitation more than 2 (two) times the period of doctor treatment in hospitals and / or medical rehabilitation institutions appointed by the government, become open or have the potential to be criminally prosecuted if they do not report themselves. *Fourth*, the criminalization of parents and the community, who do not report their children who become addicts, this also causes problems, because with the punishment of parents who do not report their children to the institution of Mandatory Report Recipients (IPWL). *Fifth*, the equality of punishment for probation and criminal offense is completed, the punishment between non-probationary offenders and non-criminal offenders should be distinguished.

**Keywords:** Reformulation, Offenses, Delic, Law, Narcotics.

### A. INTRODUCTION

Criminal law policy is divided into three stages, namely the formulation policy stage, the application policy stage (judicial), and the execution policy stage. Policy formulation is the stage of policy formulation as part of the legislative process of a law and regulation, so that criminal law formulation policy is interpreted as an effort to make and formulate a good criminal law.

This formulation stage is also called the law enforcement stage in abstracto by law-making bodies, also called the legislative policy stage. This stage is the legislative/formulative power that is authorized in terms of determining or formulating what actions can be punished which are oriented to the main problems in criminal law including unlawful acts, criminal guilt or responsibility and what sanctions can be imposed by lawmakers. This stage is the most strategic stage of efforts to reduce crime through criminal law, because if there are errors / weaknesses in legislative policies, then crime reduction efforts at the application and execution stage will be hampered.<sup>1</sup>

The formulation of offenses or criminal acts and the formulation of sanctions in criminal law laws and regulations are issues that really need attention in forming criminal law. The formulation of offenses and sanctions is a follow-up to the activity of weighing and determining

unwanted acts that need to be prohibited in the written criminal law.<sup>2</sup> Barda Nawawi Arief emphasized that the existence of criminal sanctions is determined by the presence and absence of unwanted actions (prohibited). An act that is not desired (forbidden) by society can be realized in the form of regulations. Unwanted actions are negative actions. That is, unwanted actions are expressly prohibited in written laws and regulations.

The content of the laws and regulations is in the form of actions that are prohibited or may not be done. So in principle, all these actions can be done except those that are prohibited. While the prohibited acts are regulated in various forms of written or unwritten regulations or norms.<sup>3</sup> Thus, two central issues in criminal policy using penal means (criminal law) are the question of determination: 1) what acts should be made a criminal offense; and 2) what sanctions should be used or imposed on the violator.<sup>4</sup>

The birth of legal products, namely Law Number 35/2009 relating to the determination of the formulation of offenses and the formulation of sanctions, still causes problems at the implementation stage, including the determination of offenses whose qualifications are not clear, causing problems in determining sanctions. In addition, articles 111 to 126 of the Narcotics Law stipulate that a criminal fine must be paid by a convicted person against the State in the amount of at least Rp. 400,000,000.00 (Four hundred million Rupiah) and a maximum of Rp. 8000,000,000.00 (Eight Billion Rupiah). Meanwhile, Article 148 regulates the provision of substitutes for convicts who are unable to pay fines with a maximum imprisonment of 2 (two) years. With the existence of subsidiary criminal provisions in article 148 of the Narcotics Law. Then the convict will have more imprisonment than having to pay a fine of Rp.8000,000,000.00 (Eight Billion rupiah). These subsidiary provisions are not effective in overcoming the overcapacity that occurs in community institutions.

The criminalization of parents who do not report their children who become addicts, this also causes problems, because with the conviction of parents who do not report their children to the Mandatory Report Recipient institution (IPWL) to undergo rehabilitation can be criminalized, which results in parents not being able to participate in efforts to restore the health of addicts, because parental involvement is part of an important element in the implementation of rehabilitation for addicts.

Thus, the study of penal policy that focuses on the problem of delict formulation by looking at how its implementation at this time as *Ius Constitutum* leads to the reformulation of the formulation of offense to the problem of drug abuse is important to be studied. Due to the breadth of penal policy problems in regulating narcotics crimes, this study is limited to the context of policy formulation of offenses against the problem of drug abuse.

## **B. DISCUSSION**

### **1. The Formulation of Delik in Law Number 35 of 2009 concerning Narcotics**

The term criminal act in Law is a translation from the Dutch language *Straffbaarfeit* which is the official term in *Wetboek Van Strafrecht* which has been translated into Indonesian with the Criminal Code (KUHP), which is still valid in Indonesia today.<sup>5</sup> In addition to the term

criminal act, several other terms are also known, namely criminal acts, criminal events or delicacies. However, these differences do not have a fundamental meaning, according to the author's understanding in essence what happens is a difference in the use of words, while the purpose and purpose of the meaning are the same. Therefore, it is also necessary to put forward the definition of each of these terms.

According to Wiryono Prodjodikoro, a criminal<sup>6</sup> act is an act whose perpetrators can be subject to criminal law. While Moelyatno used the term criminal act, which is an act that the rules of criminal law prohibit and threatened with a crime, whoever violates the prohibition.<sup>7</sup>

Unlike the case with Tresna, it uses the term criminal event, which is a human act that is contrary to the Law or other laws and regulations, against which actions are punished.<sup>8</sup> While CST Kansil, uses the term Delik, which is an act that violates the law committed deliberately by a person who can be accounted for.<sup>9</sup> From some of these meanings, the author is more likely to use the term criminal act, which can be interpreted as an act committed by an act that is able to account for his actions because he has violated the criminal law and therefore can be sentenced to criminal sanctions.

In the formulation of criminal acts, there are elements of criminal acts including the following:

- 1) In every offense can be found its constituent elements, the most important element is human action which includes doing and not doing, in other words neglecting his duty. While what is outside the scope of the elements forming the offense is not a concern in criminal law. The inner attitude in a person, even though he is considered reprehensible by society, is not an important thing in criminal law. *Dalial Cogitationis poenam nemo petitur* states that no one can be convicted because of his thoughts, in other words the thoughts and feelings of attack are beyond the scope of criminal law.<sup>10</sup>
- 2) A number of offenses also refer to the act of causing or giving rise to a cause or so-called constitutive effect. Any action or deed that ultimately results and gives rise to an effect in the outside world. However, this element of effect in the law is not absolute to determine the formation of understanding.<sup>11</sup>
- 3) Many formulations of offense (Criminal Provisions) are in their elements psychic, for example "with intent" (*oogmerk*), "Willful" (*opzet*), "Negligence or Culpa" (*onachtaamheid*). On the formulation of criminal offenses.<sup>12</sup>
- 4) Many criminal provisions in which these elements are realized need to be added to the conditions of certain objects and situations. Like sedition, blasphemy, drunkenness can only be punished when done in public. While there are also many other delicts that include subjective factors.<sup>13</sup>
- 5) Additional conditions relating to the nature of punishability are a circumstance that arises (immediately) after the behavior or act formulated in the offense occurs, including its constitutive consequences. It is such circumstances that first establish the punishable nature of the behavior.<sup>14</sup>

- 6) Other elements of the formulation of offenses that can be categorized as special groups are e.g. *wederrechtelijk*, *onrechtmatig*, (against the law), *zonder daaroegerrechtig te zijn* (without authority to it), *zonder verlof* (without permission), *met overschrijding van de bevoegdheid* (by exceeding authority bats / *ultra vires*).<sup>15</sup>

The categories of space and time are generally not listed as elements in a delict formulation. However, place (*locus*) and time (*tempus*) must in principle be taken into account as inseparable facts.<sup>16</sup>

Narcotics crime as stated in Law Number 35/2009 concerning Narcotics is a crime. This can be seen in the classification of crimes based on the characteristics of perpetrators of crime as organized crime. Organized Crime according to Article 1 number 20 of Law Number 35/2009 concerning Narcotics is a crime committed by a structured group consisting of 3 (three) or more people who have existed for a certain time and act together with the aim of committing a Narcotics crime. The scope of Law No. 35/2009 is regulated in Article 5 which states that "Narcotics Regulation in this Law includes all forms of activities and/or acts related to Narcotics and Narcotic Precursors". Matters related to activities related to narcotics and narcotic precursors have criminal consequences if violated, because in essence narcotics can only be used for the benefit of health services and / or the development of science and technology. Matters related to criminalization and the scope of acts that constitute the criminal act of narcotics abuse in Law No. 35/2009 are as follows:

1. Narcotics are classified into 3 (three) groups based on their use and potential dependence. With this classification, criminal acts and the severity of sanctions are adjusted to each group;
2. The majority of drug crimes are formulated with the concept of formal offenses. No constitutive consequences were found which are prohibited in Law No. 35/2009. Only Article 116, Article 121 and Article 126 are formulated with the formulation of offenses with qualified consequences. These articles regulate the prohibition of giving Class I Narcotics, Class II Narcotics, and Class III Narcotics without rights or against the law to others for use. In these articles there are prohibited consequences that result in the death of others or permanent disability. If such prohibited consequences occur, it will be subject to objection;
3. There is no qualification for a criminal offence in this law whether it constitutes a crime or an offence;
4. The enactment of Indonesian criminal law according to place was expanded by Article 145 of Law No. 35/2009. The article stipulates that the criminal provisions in this law apply to any person who commits narcotics crimes and/or Narcotic Precursor crimes as referred to in Article 111, Article 112, Article 113, Article 114, Article 115, Article 116, Article 117, Article 118, Article 119, Article 120, Article 121, Article 122, Article 123, Article 124, Article 125, Article 126, Article 127 Paragraph (1), Article 128 Paragraph (1), and Article 129 outside the territory of the Republic of Indonesia;

Law No. 35 of 2009 concerning Narcotics, there are four categorizations of unlawful acts prohibited by law and can be threatened with criminal sanctions, namely:<sup>17</sup>

1. The first category, namely acts in the form of possessing, storing, controlling or providing narcotics and narcotic precursors (Articles 111 and 112 for class I narcotics, Article 117 for class II narcotics and Article 122 for class III narcotics and Article 129 letter (a));
2. The second category, namely acts in the form of producing, importing, exporting, or distributing narcotics and narcotic precursors (Article 113 for class I narcotics, Article 118 for class II narcotics, and Article 123 for class III narcotics and Article 129 letter (b));
3. The third category, namely acts in the form of offering for sale, selling, buying, receiving, being an intermediary in buying and selling, exchanging, or delivering narcotics and narcotic precursors (Article 114 and Article 116 for class I narcotics, Article 119 and Article 121 for class II narcotics, Article 124 and Article 126 for class III narcotics and Article 129 letter (c));
4. The fourth category is acts in the form of carrying, sending, transporting or transiting narcotics and narcotic precursors (Article 115 for class I narcotics, Article 120 for class II narcotics and Article 125 for class III narcotics and Article 129 letter (d)).

Law No. 35 of 2009 concerning Narcotics has regulated criminal acts that can be said to be criminal acts of narcotics abuse, including:<sup>18</sup>

1. Criminal offences for abusers or as victims of drug abuse, the abuser must undergo medical rehabilitation and social rehabilitation.
2. Criminal Acts of Parents / Guardians of Narcotics Addicts who are Not Old Enough (Article 128) are punished with a maximum imprisonment of 6 (six) months or a maximum fine of Rp. 1,000,000.00 (one million rupiah).
3. Criminal Acts Committed by Corporations (Article 130) Sentenced to imprisonment and fines with aggravation 3 (three) times. Corporations can be sentenced to additional penalties in the form of: a. revocation of business licenses and/or b. revocation of legal entity status.
4. Criminal Offences for Persons Who Do Not Report Narcotics Crimes (Article 131). Sentenced to a maximum imprisonment of 1 (one) year or a maximum fine of Rp50,000,000.00 (fifty million rupiah).
5. Criminal Acts against Malicious Attempts and Conspiracies to Commit Narcotics and Precursors (Article 132) Paragraph (1), shall be punished with the same imprisonment in accordance with the provisions referred to in these Articles. Paragraph (2), punishable by imprisonment and the maximum fine plus 1/3 (one-third).
6. Criminal Acts for Ordering, Giving, Persuading, Coercing, Force, Deceit, Coercing, Coaxing Children (Article 133) paragraph (1), punishable with the death penalty or life imprisonment, or imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years and a fine of at least Rp2,000,000,000.00 (two billion rupiah) and a

- maximum of Rp20,000,000,000.00 (twenty billion rupiah). paragraph (2), shall be punished with a maximum imprisonment of 5 (five) years and a maximum of 15 (fifteen) years and a fine of at least Rp1,000,000,000.00 (one billion rupiah) and a maximum of Rp10,000,000,000.00 (ten billion rupiah).
7. Crime for Narcotics Addicts Who Do Not Report Themselves (Article 134) paragraph (1), punishable with a maximum imprisonment of 6 (six) months or a maximum fine of Rp2,000,000.00 (two million rupiah). paragraph (2), punishable with a maximum imprisonment of 3 (three) months or a maximum fine of Rp1,000,000.00 (one million rupiah).
  8. Criminal Acts for Pharmaceutical Industry Administrators Who Do Not Carry Out Obligations (Article 135). Sentenced to imprisonment for a minimum of 1 (one) year and a maximum of 7 (seven) years and a fine of at least Rp40,000,000.00 (forty million rupiah) and a maximum of Rp400,000,000.00 (four hundred million rupiah).
  9. Article 136 of Law No. 35 of 2009, Narcotics and Narcotic Precursors and the proceeds obtained from Narcotics crimes and / or Narcotics Precursor crimes, whether in the form of assets in the form of movable or immovable objects, tangible or intangible and goods or equipment used to commit Narcotics crimes and Narcotic Precursor crimes are seized for the state.
  10. Criminal Acts against the Proceeds of Narcotics and/or Narcotic Precursors (Article 137) letter (a), shall be punished with a maximum imprisonment of 5 (five) years and a maximum of 15 (fifteen) years and a fine of at least Rp1,000,000,000.00 (one billion rupiah) and a maximum of Rp10,000,000,000.00 (ten billion rupiah). Letter (b), punishable with a maximum imprisonment of 3 (three) years and a maximum of 10 (ten) years and a fine of at least Rp500,000,000.00 (five hundred million rupiah) and a maximum of Rp5,000,000,000.00 (five billion rupiah).
  11. Criminal Acts against Persons Obstructing or Complicating the Investigation, Prosecution and Examination of Cases (Article 138) Shall be punished with a maximum imprisonment of 7 (seven) years and a maximum fine of Rp500,000,000.00 (five hundred million rupiah).
  12. Criminal Acts for Captains or Flight Captains who Do Not Implement the Provisions of Article 27 and Article 28 (Article 139) shall be punished with imprisonment for a minimum of 1 (one) year and a maximum of 10 (ten) years and a fine of at least Rp100,000,000.00 (one hundred million rupiah) and a maximum of Rp1,000,000,000.00 (one billion rupiah).
  13. Criminal Acts for PPNS, Police Investigators, BNN Investigators who Do Not Implement the Provisions on Evidence (Article 140) shall be punished with a prison sentence of not less than 1 (one) year and a maximum of 10 (ten) years and a fine of at least Rp100,000,000.00 (one hundred million rupiah) and a maximum of Rp1,000,000,000.00 (one billion rupiah).



14. Criminal Acts for Chief District Attorneys who Do Not Implement the Provisions of Article 91 Paragraph (1) (Article 141) shall be punished with imprisonment for a minimum of 1 (one) year and a maximum of 10 (ten) years and a fine of at least Rp100,000,000.00 (one hundred million rupiah) and a maximum of Rp1,000,000,000.00 (one billion rupiah).
15. Criminal Acts for Laboratory Officers who falsify test results (Article 142) shall be punished with a maximum imprisonment of 7 (seven) years and a maximum fine of Rp500,000,000.00 (five hundred million rupiah).
16. Criminal Acts for Witnesses Who Give False Information (Article 143) are punished with imprisonment for a minimum of 1 (one) year and a maximum of 10 (ten) years and a fine of at least IDR 60,000,000.00 (sixty million rupiah) and a maximum of IDR 600,000,000.00 (six hundred million rupiah).
17. Criminal Offences for Any Person Who Commits a Repeat Crime (Article 144) shall be punished with a maximum penalty plus 1/3 (one-third).
18. Article 146 also provides sanctions for foreign nationals who have committed narcotics crimes or undergo narcotics crimes, namely expulsion of the territory of the Republic of Indonesia and are prohibited from re-entering the territory of the Republic of Indonesia. Meanwhile, in Article 148, if the fine stipulated in this law is not paid by the perpetrator of a drug crime, the perpetrator is sentenced to imprisonment for a maximum of two years in lieu of a non-payable fine.<sup>19</sup>
19. Criminal acts committed by Hospital Leaders, Leaders of Science Institutions, Leaders of the Pharmaceutical Industry, and Leaders of Pharmaceutical Traders (Article 147) are punished with imprisonment for a minimum of 1 (one) year and a maximum of 10 (ten) years and a fine of at least Rp100,000,000.00 (one hundred million rupiah) and a maximum of Rp1,000,000,000.00 (one billion rupiah)

For the purposes of treatment and based on medical indications, doctors can provide Class II or group III narcotics in limited quantities and certain preparations to patients in accordance with the provisions of laws and regulations. The patient may possess, store, and/or carry narcotics for himself. The patient must have valid evidence that the narcotics possessed, stored, and/or brought for use were obtained legally in accordance with the provisions of laws and regulations.<sup>20</sup>

Meanwhile, in Law Number 35/2009 concerning Narcotics, Chapter XI relating to penal provisions, it is stated broadly that the perpetrator of a criminal act is any person without rights or against the law. Law Number 35/2009 concerning Narcotics does not explain what is meant by each person. However, everyone can be interpreted as a legal subject in the form of an individual or legal entity who without rights and against the law commits acts that according to Law Number 35/2009 concerning Narcotics are Narcotics Crimes and the individual or corporation is able to account for his actions.

Apart from the word "Everyone" there are several legal subjects specifically mentioned in Law Number 35/2009 concerning Narcotics which include the following:

**a. Abusers (Article 127)**

According to Law Number 35/2009 concerning Narcotics, Abusers are people who use narcotics without rights or against the law.<sup>21</sup>

**b. Parents or Guardians of Inadequate Addicts**

Parents or Guardians of Invalid Addicts may be designated as criminal offenders in the event of intentionally failing to report the addict to a government-designated institution for treatment and/or treatment through medical rehabilitation and social rehabilitation.

**c. Drug Addicts**

According to Law Number 35/2009 concerning Narcotics, Narcotics Addicts are people who use or abuse narcotics and are in a state of dependence on Narcotics, both physically and psychologically.<sup>22</sup>

**d. Pharmaceutical Industry Management**

The Management of the Pharmaceutical Industry is considered to have committed a criminal offense if it does not carry out its obligations as mentioned in article 45, namely the obligation to include labels on narcotic packaging, both in the form of finished drugs and raw materials for narcotics where the labels on the packaging of narcotics are in the form of writing, pictures, a combination of writing and images, or other forms included on the packaging or are part of the container, and/or its packaging. The information included in the label on the narcotics packaging must be complete and not misleading.

**e. Ship Captain or Flight Captain (Article 139)**

The captain of the ship or the captain of the Airman is considered to have committed a criminal offense if he commits an act that is contrary to the law by not carrying out the provisions of the Transportation of Narcotics and Air Transport (Narcotics) by the Flight Captain. Then it will be sentenced to imprisonment for a minimum of 1 (one) year and a maximum of 10 (ten) years and a fine of at least Rp. 100,000,000.00 and a maximum of Rp. 1000,000,000.00.

**f. Civil Servant Investigator**

Civil Servant Investigators can be determined as Perpetrators of Narcotics Crimes if they do not implement the provisions as referred to in Article 88 and Article 89. Obligations PPNS investigators referred to in Article 88 and Article 89 who confiscate narcotics and narcotics precursors must make minutes of confiscation and delivery of confiscated goods along with minutes to BNN investigators or Police Investigators, with copies to the local Chief District Attorney, the Chairman of the local District Court, the Minister, and the Head of the Food and Drug Control Agency.<sup>23</sup>

**g. Indonesian National Police Investigators and BNN Investigators**

Police Investigators or BNN Investigators who confiscate narcotics and narcotics precursors are required to seal and make minutes of seizure, and must notify the Chief District Attorney within a maximum of 3 x 24 hours from the seizure and then the copy is submitted to the



Chairman of the local District Court, the Minister, and the Head of the Food and Drug Supervisory Agency, and the National Police Investigator or BNN Investigator is responsible for the storage and security of confiscated goods under their control.<sup>24</sup>

#### **h. Chief District Attorney**

The Chief District Attorney is said to have committed a narcotics crime if found to have committed an unlawful act if he does not issue a determination on the status of narcotic confiscated goods and narcotic precursors after receiving notification of the seizure of narcotic goods and narcotic precursors from a National Police investigator or BNN investigator, or issue a determination beyond a period of seven days after receiving the notification, in addition to the content of the determination made must also be in accordance with in fact.<sup>25</sup>

#### **i. Laboratory Officer**

Laboratory officers can be determined as perpetrators of criminal acts if proven to have falsified test results or legally not carried out their obligations as laboratory officers, namely reporting the test results to investigators or public prosecutors.

#### **j. Witness**

A witness in a criminal case can be determined as a criminal offender if in the examination conducted on the witness, the witness gives incorrect information in the examination of the drug crime case and narcotic precursors before the court hearing.

#### **k. Foreign Nationals**

Foreign nationals who commit narcotics crimes in Indonesia will be subject to punishment in accordance with applicable provisions in Indonesia. <sup>26</sup>According to Law Number 35/2009 Article 146, foreign nationals who have committed Narcotics and/or Narcotics Precursor crimes and then have served their sentences as stipulated in Law Number 35/2009, will be expelled out of the territory of the Republic of Indonesia and prohibited from re-entering the territory of the Republic of Indonesia. In addition, foreign countries that already have a black record related to Narcotics crimes and / or Narcotics Precursor crimes outside the territory of the Republic of Indonesia will be prohibited from entering the territory of the Republic of Indonesia.

#### **l. State Officials**

- 1) Hospital Leaders, Community Health Centers, Medical Centers, Storage Facilities for government-owned pharmaceutical preparations and pharmacies
- 2) Leaders of Science Institutes
- 3) Pharmaceutical Industry Leaders
- 4) Chief Pharmaceutical Wholesaler

In addition to Individuals, the word "any person" also includes Corporations. Based on the general provisions in Law Number 35/2009 concerning Narcotics, a Corporation is an organized collection of persons and/or wealth, whether it is a legal entity or a non-legal entity.<sup>27</sup>

A corporation is said to have committed a criminal offence if it commits acts as described in Article 111, Article 112, Article 113, Article 114, Article 115, Article 116, Article 117, Article 118, Article 119, Article 120, Article 121, Article 122, Article 123, Article 124, Article 125, Article 126, and Article 129. If the corporation is proven to have committed acts that have been regulated in these articles, the sanctions that will be given in the form of imprisonment and fines against its management and against the corporation will be subject to fines with three times the weight of the criminal fine as stipulated in the articles mentioned above. Also, the Corporation can also be sentenced to additional penalties in the form of revocation of business licenses and / or revocation of status as a legal entity.

The elements of narcotics crime in Law Number 35/2009 concerning Narcotics, consist of:

### **1. Elements of each person.**

The existence of legal subjects, who can be made legal subjects only persons (*Person*) and legal entities (*Recht Person*).

### **2. Elements without rights or against the law.**

The existence of prohibited acts, actions carried out in accordance with the delicacy formula. It is against the law, namely; a. Formal unlawful means if the act committed has previously been regulated in law. b. Against material law means that if the action committed violates the rules or values that live in society, there must be a mistake, the mistake in question is a reproach from the community if it does so that there is an inner relationship between the perpetrator and the event that will later cause an effect. The error itself can be divided into 2, namely intentionality / *dolus* and negligence.

### **3. Elements own, store, master, or provide**

In accordance with the provisions of Article 112 paragraph (1) of Law Number 35/2009 concerning Narcotics states that; "Any person who without rights or against the law possesses, stores, controls or provides class I narcotics is not a plant

### **4. Group I narcotic elements are in the form of plants, group I is not plants, group II and group III**

Provisions for criminal acts in the field of psychics are regulated in Chapter XV Articles 111 to Article 148 of Law Number 35 of 2009. Acts that are punishable by criminal penalties are regulated in articles 111 to 148, and are all criminal offenses. The Penal Code places crimes in the second Book and offenses in the Third Book, but there is no explanation of what constitutes crimes and offenses. Everything is left to science to provide the basis. In the distinction that crime is a *rechtdelict* or *legal offense* and an *offense* is a *westdelict* or legal offense. Legal offenses are laws that are perceived to violate the sense of justice. While the offense of the law violates what is prescribed by law. Here there is no concern at all about justice.

## **2. Reformulation of the Delik Formulation in Law Number 35 of 2009 concerning Narcotics**

In Indonesia, despite the existence of Law No. 35 of 2009 concerning Narcotics, in certain cases law enforcement officials still find it difficult to determine a user who is caught from the beginning of the examination whether as an addict, user or abuser, then the user is processed or not. The definition of addicts, users or abusers has confusion because there has been no firm distinction by lawmakers. There are addicts/users who are not against the law, but there are also addicts/users who are against the law. Lawmakers have not expressly placed addicts as victims. To mediate this categorization problem, the regulation of grammar should be a solution. But unfortunately the new law on narcotics does not regulate it.

The positive impact in distinguishing/determining the status of addicts or users or abusers from an early age is the reduction of addicts who must be placed or sentenced to prison. With Article 103 of Law No. 35 of 2009 which authorizes the Judge to decide or determine a drug crime defendant must undergo rehabilitation whether proven guilty or not, if there is a drug crime case at a glance, it is interpreted that law enforcement officials must take it to court. But on the other hand, it turns out that in the law there is an article that regulates the abolition of criminal prosecution if the addict from the beginning reports himself to the authorized institution. The problem is that the law still places an addict including a criminal subject / perpetrator of crime, not a perspective as a victim. If the law has positioned expressly and impartially that an addict is a victim, then the obligation to report for the addict and the existence of criminal provisions against him if he does not report will feel unnecessary to be regulated in the law. Because there is no distinction between addicts who report themselves or not, both are equally addicts. Even if the authorities find it difficult to distinguish which addicts are not abusers, to mediate it is to regulate the grammar for addicts caught at that time.

Therefore, it is necessary to improve criminal provisions, especially in Articles 111 to Article 127, these articles contain criminal provisions for everyone who without rights and against the law commits drug crimes. In these articles, one of the elements that he norms is the quantity / amount of narcotics. Improvements as referred to in the Bill amending Law No. 35 of 2009 concerning Narcotics, the word "Tree" in Article 111, Article 113, Article 114 and Article 115 which connotes quantity / quantity is omitted, because the definition of trees is very broad, so it is very subjective in its proof. In order to provide different legal treatment between abusers, victims of abuse, addicts and drug dealers and dealers, different approaches are needed in constructing criminal articles.

The Law on Narcotics does not provide a clear line between the criminal offenses in Article 127 of the Narcotics Law and other criminal offenses contained in the Narcotics Law, where drug users who obtain narcotics unlawfully must meet the elements of "possessing", "possessing", "storing", and/or "buying" narcotics which is also regulated as a separate crime in the Narcotics Law. In practice, law enforcement officials also link the criminal offenses of drug users with the criminal offenses of possession, possession, storage or purchase of narcotics without rights and against the law where the criminal threat becomes much higher and uses a special minimum sanction of at least 4 years in prison and a fine of at least IDR 800,000,000

(eight hundred thousand rupiah). Furthermore, assessing the criminal provisions stipulated in Law Number 35 of 2009 as follows:

**a. Does not attach importance to the element of intentionality in narcotics crimes**

The use of the word "Everyone without rights and against the law" in several articles of Law Number 35 of 2009 regardless of the element of intentionality, can ensnare people who actually have no intention of committing drug crimes, either because of coercion, urging, or ignorance.

This has the potential to entangle people to be made suspects in accidental narcotics crimes, either because they are "framed" by others or for lack of knowledge of the types of narcotics that exist and other possible conditions such as: receiving entrustment of goods from others to be delivered to a place and without their knowledge in the goods there are narcotics tucked, receiving packages from the post and other conditions.

**b. Use of the criminal system is minimal**

The use of the minimum criminal system in Law Number 35 of 2009 strengthens the assumption that the Law was indeed enacted to criminalize people related to narcotics. The use of the minimum criminal will also close the judge from passing a verdict although in practice, judges can impose sentences less than the minimum sentence and this is allowed by the Chief Justice of the Supreme Court.

**c. Criminalization for parents and society**

Law Number 35 of 2009 provides a threat of criminal punishment (6 months of confinement) for parents who deliberately do not report their children who use drugs to get rehabilitation. Although the element of 'intentional non-reporting' must be proven first, it does not exclude parents who do not know that the substance consumed by their child is narcotic.

Law Number 35 of 2009 also demands that everyone report drug crimes. This law provides a maximum criminal threat of 1 year for people who do not report drug crimes. The application of this article will be very difficult to apply because usually this article is used for parties arrested when gathering with drug users. The person can also be used as a crown witness to incriminate a drug offence. This article also threatens those who accompany the drug addict community.

In the provisions of community participation in Chapter XIII, the community is not required to report if they know of drug abuse or illicit drug trafficking. This provision shows the inconsistency between formal offenses and material offenses.

**d. Equality of punishment for probation and felony completed**

Law Number 35 of 2009 equates criminal penalties for non-convicted offenders with non-probationary offenders. Narcotics crime is a crime because it has a bad effect. Probation offense requires that a crime occur, so that the consequences of the crime are not completed, so that the punishment between non-probationary offenders and non-convict offenders must be distinguished.

### C. CONCLUSION

The formulation of offenses or criminal acts and the formulation of sanctions in criminal law laws and regulations are issues that really need attention in forming criminal law. The birth of a legal product, namely Law Number 35/2009 relating to the determination of the formulation of offenses, still causes problems at the implementation stage, including the determination of offenses whose qualifications are not clear, causing problems in determining sanctions. Therefore, it is necessary to reformulate policies as follows:

*First*, the formulation of criminal provisions in article 127 does not distinguish between beginners, addicts, victims of abuse and abusers involved in networking. The formulation of the Criminal Provisions in article 127 of the Narcotics Law in the future should be added and distinguished between beginners, addicts, victims of abuse and abusers involved in networking.

*Second*, Do not attach importance to the element of intentionality in narcotics crimes. The use of the word "Everyone without rights and against the law" in several articles of Law Number 35 of 2009 regardless of the element of intentionality, can ensnare people who actually have no intention of committing drug crimes, either because of coercion, urging, or ignorance.

*Third*, in article 128 (3) Narcotics addicts who are of legal age as referred to in Article 55 paragraph (2) who are undergoing medical rehabilitation 2 (two) times the period of doctor treatment in hospitals and / or medical rehabilitation institutions appointed by the government are not criminally prosecuted. As a result, drug addicts who are old enough, who have undergone medical rehabilitation more than 2 (two) times the period of doctor treatment in hospitals and / or medical rehabilitation institutions appointed by the government, become open or have the potential to be criminally prosecuted if they do not report themselves. The mechanism should be equipped with a supervisory mechanism.

*Fourth*, the criminalization of parents and the community, who do not report their children who become addicts, this also causes problems, because with the conviction of parents who do not report their children to the Mandatory Report Recipient institution (IPWL) to undergo rehabilitation can be criminalized, which results in parents not being able to participate in efforts to restore the health of addicts, because parental involvement is part of an important element in the implementation rehabilitation for addicts.

*Fifth*, Equality of punishment for probation and felony is completed. Law Number 35 of 2009 equates criminal penalties for non-convicted offenders with non-probationary offenders. Narcotics crime is a crime because it has a bad effect. Probationary offense requires that a crime occur, so that the consequences of the crime are not completed, so that the punishment between non-probationary offenders and non-convict offenders should be distinguished

**Footnote**

- 1) Vivi Ariyanti, Dissertation Summary." Legal Policy..op cit., p.9
- 2) Mudzakkir, Development of Victimology and Criminal Law", paper delivered on "Training on Indonesian Criminal Law and Criminology (MAHUPIKI), at University Club UGM Yogyakarta 23-27 February 2014, p. 7
- 3) Mudzakkir, Ibid p., pp. 2-3.
- 4) Barda Nawawi Arief, Policy Potpourri, Op.Cit., p. 35.
- 5) Mardani, Drug Abuse ... Op. cit., p. 59.
- 6) The same meaning is also conveyed by Jet Simongkir and Woeryono sastropranoto and Van Apeldorn using the term criminal act, see JCT. Simongkir and Woeryono sastropranoto. Criminal Law Lessons, (Jakarta: Gunung Agung, 1959), p. 238. Compare also Van Apeldorn, Introduction to Law, (Jakarta: Pradnya Paramita, 1982), p. 336.
- 7) Moelyatno, Criminal Acts and Accountability in Criminal Law, (Yogyakarta: UGM, 1955), p. 9.
- 8) Tresna, Principles of Criminal Law, (Jakarta: Tiara Limited, 1959), p27.
- 9) CST Kansil, Introduction to Indonesian Law and Legal Procedure, (Jakarta: Balai Pustaka, 1986), p. 269.
- 10) J. Rummelink, Introduction to Material Criminal Law 1 (Inleiding Tot De Studie Van Het Nederlandse Strafrecht), (Yogyakarta: Maharsa, 2014), p. 105.
- 11) Ibid., p. 106.
- 12) Ibid., p. 107.
- 13) Ibid., p. 108.
- 14) Siswanto Sunarso, Legal Politics in Narcotics Law, Jakarta: Rineka Cipta, 2012, p. 256.
- 15) Anton Sudanto, Application of Narcotics Criminal Law in Indonesia Just: Journal of Law Vol. 7 No.1, p. 151
- 16) In this article, it has the potential to cause problems in the implementation of the narcotics law, because it provides opportunities for perpetrators of drug abuse crimes to replace fines with imprisonment under the pretext of being incapacitated.
- 17) Ibid., p. 257.
- 18) Article 1 number 15 of Law Number 35 of 2009 concerning Narcotics
- 19) Article 1 number 13 of Law Number 35 of 2009 concerning Narcotics
- 20) Siswanto, Politics ... Op. cit., p. 273.
- 21) Siswanto, Politics ... Op. cit., p. 275.
- 22) A.R Sujono and Bony Daniel, Comments ... Op. cit., p. 340.
- 23) According to Article 2 of the Criminal Code, criminal provisions in Indonesian legislation apply to everyone who commits a criminal act in Indonesia.
- 24) Law Number 35 of 2009 concerning Narcotics.



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- 3) Arief, Barda Nawawi. 1998. *Criminal Theories and Policy*. Bandung: Alumnus.
- 4) Arief, Barda Nawawi. 2010. *Potpourri of Criminal Law Policy*. Jakarta: Prenada Madia Group.
- 5) CST Kansil. 1986. *Introduction to Indonesian Law and Legal Procedure*. Jakarta: Balai Pustaka.
- 6) JCT. Simongkir and Woeryono sastropranoto. 1959. *Lessons in Criminal Law*. Jakarta: Mount Agung.
- 7) Lj. Van Apeldorn. 1985. *Introduction to Legal Science*. Jakarta: Pradnya Pharamita
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- 9) Moelyatno. 1955. *Criminal Acts and Liability in Criminal Law*. Yogyakarta: UGM.
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- 14) Tresna. 1959. *Principles of Criminal Law*. Jakarta: Tiara Limited.
- 15) Vivi Ariyanti. 2018. "Criminal Law Policy Towards Victims of Drug Abuse in Indonesia". Dissertation Summary. Yogyakarta: Gajah Mada University