

RENEWAL OF CRIMINAL LAW POLICY ON NARCOTIC USER BASED ON JUSTICE VALUES

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ABSTRACT

The purpose of this study is to conduct criminal law reforms on drug users based on justice. The method of approach in research was empirical juridical. Data used were primary data and secondary data. Data was analyzed analytically. The findings of this research are action sanctions in the form of rehabilitation for narcotics abusers according to the purpose of criminal punishment theory that believes that punishment is worthy to be directed to the perpetrator of the crime, not on his actions. The punishment referred to by this stream is to provide treatment and rehabilitation to the offender in lieu of punishment. This flow is based on the reason that the perpetrator of the crime is a sick person requiring treatment and rehabilitation. Renewal of criminal law policy toward narcotics-based justice user against Law Number 35 Year 2009, namely in Article 127 paragraph (1) Every Addict, Abuse and Victim of Abuse must be rehabilitated.

A. INTRODUCTION

Narcotic¹ is a global problem faced by almost every country in the world, including Indonesia², although in different contexts and complexities³. In an International perspective⁴, narcotics crime is categorized as a serious crime⁵. The same category also applies in the Indonesian context as judged by the impacts and makes the crime of narcotics aligned with other serious crimes such as terrorism and corruption.

Law enforcement is the task of the state⁶ which is one of its manifestations by establishing a judicial institution that is expected to reflect the value of justice. The authority of the state to impose criminal sanctions is then delegated to law enforcers working

¹Narcotics are substances or drugs derived from plants or non-plants, both synthetic and semisynthetic, which can cause a decrease or change in consciousness, loss of taste, reduce to eliminate pain, and can cause dependence (Pasal 1 Undang-Undang Nomor 35 Tahun 2009 tentang Narkotika).

²Since Indonesian independence, even long before that, regulations or policies on drugs have been updated several times. This is done because drug crimes develop along with the development of science. Government of countries everywhere, including the Indonesian government, agree that the war on the dangers of drugs should be increased by various efforts and strategies, since drugs have penetrated into the pulse of Indonesian society.

³In Indonesia alone the estimated number of Drug Abusers in the period 2013 to 2014 about 3.1 million to 3.6 million people or equivalent to 1.9% of the population aged 10-59. The projected outcomes of prevalence of drug abusers increased by 2.6% in 2013. BNN, *Laporan Akhir Survei Nasional Perkembangan Penyalahgunaan Narkotika Tahun Anggaran 2014*, Jakarta, 2014, page 8.

⁴The social and economic impacts of trade and drug abuse are very worrying about the world, including in Indonesia. Socialization loss due to drug abuse tends to increase from year to year, from Rp. 23.6 trillion in 2004 to Rp. 48 trillion (2008). Although the number of Users is likely to be stable, but the number of drug cases revealed increases in 2012 to 2013. These reported figures are just the tip of the iceberg of a much larger drug problem. Ibid, page viii.

⁵Various efforts were made to overcome the problem of narcotics. One of them is to reform and strengthen the regulatory sector. This can be seen from the ratification of the United Nations Convention on the Eradication of Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) by Indonesia through Law No. 7 of 1997. At the level of national legislation, is supported by the enactment of Law No. 22 of 1997 on Narcotics and Law No. 5 of 1997 on Psychotropic. In its development, Law Number 22 Year 1997 on Narcotics is considered not able to answer the many aspects of the problem of narcotics. One of them is about the negative impacts on public health that are in the position of being the perpetrator, the user, and at the same time becoming the victim of narcotics abuse. To respond, the government then established Law Number 35 Year 2009 on Narcotics.

⁶Here the state, including the state of Indonesia, as the ruler and in the exercise of law enforcement shall have the right to impose criminal sanctions and is the only legal subject having the right to punish (*ius puniendi*). The reason the state has the right to

in a criminal justice system⁷. MardjonoReksodiputro argues that the criminal justice system is a system of society to tackle the problem of crime⁸. The objectives of the criminal justice system according to MardjonoReksodiputro are formulated as follows⁹: Preventing people from becoming victims of crime, Resolving cases of crimes committed so that the public is satisfied that the justice has been established and the guilty of the criminals; and seeking those who have committed evil do not commit any more evil.

The criminal justice process aims to generate the material truth that is the complete truth of a criminal case by applying the law provisions in an honest and proper manner or due process of law¹⁰, that is, apart from the formal application of law or legislation, must provide guarantee protection and the legal certainty of citizens to obtain a fair and impartial judiciary based on human rights.¹¹

The formation of Law Number 35 Year 2009 is in fact willing to realize the value of justice. Government together with the People's Legislative Assembly to form Law Number 35 Year 2009 aims to find out balance between public health approach and the implementation of criminal instruments in overcoming narcotics crime¹², followed up with and then with Government Regulation No. 25 of 2011 about Necessary Report Narcotics Addict

The use of addictive narcotics requires special treatment, which is getting care and protection. In addition to the user side, this view is also in tune with the effort to overcome the abuse of narcotics. In coping with narcotics abuse strategy is needed integrally from upstream to downstream. Decriminalization of Misuse and Narcotics addicts is a model of suppressing demand reduction that can reduce the supply of illegal narcotics. This concept also has an economic effect on the handling of narcotics problems.¹³

In some cases, law enforcement of narcotics has its own dilemma. The act which includes a narcotic crime constitutes a series of interconnected acts. To be able to distribute, sell, export narcotics must have no act of possessing or at least mastering narcotics. Similarly, for narcotics users, of course proceeded also by the act of control or possession, because a person is not possible to use something that is not in control or ownership. Both crimes are threatened with a much different penalty. Even if categorized as an addict, then a person is not categorized as a perpetrator of crime, but as a victim, which would require different treatment as well as by the criminal justice system.¹⁴

By looking at this condition, it will lead to the non-completion of narcotics problem, because this is synonymous with moving the addict into the prison wall without any effort to be healed, even to plunge into the illicit trafficking of narcotics. Basically narcotic addicts have addiction properties, so cannot recover by themselves. There must be a new paradigm in the handling of

impose criminal sanctions is the duty of the state to protect the legal goods (rechsgoederen) using appropriate tools (gepaste middelen), and the corresponding tools are deliberately threatening or suffering, and the suffering is hard enough to force concerned acts appropriately and prevents the concerned from committing unlawful acts. seeE. Utrecht, *Rangkaian Sari Kuliah Hukum Pidana I*, Pustaka Tintamas, Surabaya, 1987, halaman78.

⁷The law enforcement structures in Indonesia have their respective roles in the exercise of legal functions, such as the Police who are authorized to provide protection, protection and service to their citizens as well as law enforcement aimed at the creation of public order and security, prosecutors who are authorized to prosecute against a person or legal entity alleged to be against the law, which aims to create a formal law, and a judge authorized by the state to adjudicate a case that is unlawful and disconnects in accordance with human rights, and has the purpose of the decision. The three apparatuses are supplemented by correctional and legal advocates (complementary) sub-system of criminal justice in 5 (five) institutions or called panca of law enforcer. Lilik Mulyadi states that the criminal justice system in Indonesia recognizes 5 (five) sub-system of criminal justice system as Panca Wangsa law enforcement, namely Police Institution (Law Number 2 Year 2002), Attorney Office (Law Number 16 Year 2004), Judicature (Law Number 49 Year 2009), Penal Institution (Law Number 12 of 1995) and Advocate (Law Number 18 Year 2003). See: Lilik Mulyadi, *Bunga Rampai Hukum Pidana; Perspektif, Teoretis dan Praktik*, Citra Aditya Bakti, Bandung, 2007, page 7.

⁸Mardjono Reksodiputro, *Human Rights in the Criminal Justice System*, Institute of Criminology University of Indonesia, Jakarta, 2007, page 84. Law enforcement within the criminal justice system aims to overcome every crime. It is intended that any actions that violate the rules of law and legislation as well as make the life of the community becomes disturbed can be overcome, so that people's lives become safe, secure and controlled and still within the limits of community tolerance

⁹*Ibid*, page 85.

¹⁰According to Mardjono Reksodiputro, dueprocess of law means that a fair judicial process is the opposite of an arbitrary process or an arbitrary process (based on the power of law enforcement officials). A fair process of law in the right sense refers to the protection of citizen freedom as a major milestone in the criminal justice system within the law. *Ibid*, page 28.

¹¹*Ibid*.

¹²Approach to the solution to reduce the number of drug abusers so far can be seen from 2 (two) different viewpoints, first of which prioritize law enforcement efforts with the imposition of criminal sanctions to Narcotics Abusers to get a deterrent effect, while on the other using rehabilitation efforts to reduce the assumed black market may have an effect on the decline in demand for narcotics.

¹³AnangIskandar, *DekriminalisasiPenyalahGunaNarkotikadalamKonstruksiHukumPositif di Indonesia*, <http://dedihumas.bnn.go.id/read/section/artikel/2013/11/19/813>.

¹⁴In examining the trial of narcotics cases, it is sometimes difficult to categorize whether a defendant is a user, an owner, a dealer, or even a narcotics dealer. For that reason not infrequently also the formulation of the prosecutor's indictment letter in reality different from the fact of the trial, so that someone who should be more suitable classified as the user, he was indicted as the owner or the person who mastered grouped with the person who provides. *Ibid*.

drug addicts. In dealing with drug addicts, law enforcement officials should be oriented to sanctions in the form of rehabilitation in order to save their future. This must be based on the understanding and mutual agreement that drug abuse is a serious problem of the nation and the enemy of the nation. Government and law enforcement officers must unite to unite vision and mission to overcome the abuse of narcotics in order to realize the noble ideals of the nation to make a healthy generation of the nation. Based on the above description of the above description is very urgent to conduct research on the **RENEWAL OF CRIMINAL LAW POLICY ON NARCOTIC USER BASED ON JUSTICE VALUES.**

B. RESEARCH METHODS

The method of approach in this research is empirical juridical. According to Soemitro and Ronny Hanitijo, normative law research or doctrinal research is legal research using secondary data, while empirical law research is legal research using primary data.¹⁵ On the other hand, according to Soedjono Soekanto and Sri Mamudji who classify legal research into 2 (two) classes / types, namely normative and empirical legal research.¹⁶

Data collection technique was done by library research, which collected data by conducting a review of library materials or secondary data covering primary legal materials, secondary legal materials, and tertiary legal materials that have to do with the problems studied.¹⁷ The primary legal material was in the form of legislation related to the discussion on the problems in this research. While the secondary legal materials obtained from literature studies in the form of books, journals and opinions of scholars. Tertiary legal material is a supporting material of secondary law, in the form of dictionary, and *eksiklopedia*.

Data analysis is the process of organizing and sorting data in patterns, categories, and basic descriptions, so that it can be found the theme and can be formulated working hypothesis as suggested by the data.¹⁸ Technique of data analysis is a description about the way of analysis, that is with activity of collecting data and then held editing first, for subsequently used as material of analysis which qualitative. Analyzing data is the most important stage in legal research. Data processing is essentially an activity of systematizing written legal materials.¹⁹

Systematic disclosure was done on symptoms and data obtained in this study. Data analysis technique used is qualitative technique based on assumption about reality or complex phenomenon. Where there is regularity on a particular pattern with great diversity²⁰. Data analysis was done to primary, secondary and tertiary data.

C. RESEARCH RESULT AND DISCUSSION

1. Values of Justice and Progressive Law

As a law state, rule of law should be commander in running the wheel of life of nation and state. In addition to legal certainty and justice also serves for the welfare of human life or provide benefits to the community. So it can be said that punishment is as the field of human struggle in the context of seeking the happiness of life.²¹

Satjipto Rahardjo said; the role of human beings, as well as society, is shown to the fore, so the law is more emerging as a field of struggle and human struggle. The law and work of the law should be seen in the context of the law itself. The law does not exist for oneself and necessities, but for humans, especially human happiness.²²

However, in the reality of people's lives, the law experiences a crucial problem or it can be said to be suffering from chronic-resistant disease, thus obscuring the meaning of the law. Law is only used as a tool to protect certain interests and the law is used as a tool to legalize actions that defame the value of justice in the community.

The law is only used as a tool and not a goal, or law enforcers may only see the law as written law, while there is an unwritten law in which they agree that lawyers and law enforcers should view the law with the concept of holistic or synthesis between written and unwritten law, or at the level of the Qur'an synergizes *kauliyah* verses (written) with *kauniyah* verses (which exist in the universe and in man) so that both are to be a truth, so that man says the true God with all His words.

Likewise, law and justice are essentially two inseparable sides of the coin, the law aims to bring about justice and lawless justice like a toothless tiger. But to get justice then the seeker of justice must go through unfair procedures. So the law becomes a frightening specter for the people, the law is no longer to make people happy but instead miserable the community. Law fails to provide justice in society. The supremacy of law has been echoed only as a sign without meaning. The legal texts are only language games that tend to be deceptive and disappointing.

¹⁵Ronny Hanitijo Soemitro, *Metodologi Penelitian Hukum dan Jurimetri*, Ghalia Indonesia, Jakarta, 1998, page 10.

¹⁶Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif, Suatu Tinjauan Singkat*, Rajawali, Jakarta, 1986, p 15.

¹⁷Bambang Waluyo, *Penelitian Hukum dalam Praktek*, Grafika, Jakarta, 1996, p 14.

¹⁸Lexy J Moleong, *Metodologi Penelitian Kualitatif*, Remaja Rosdakarya, Bandung, 2000, p 183.

¹⁹Soerjono Soekanto, *Pengantar Penelitian Hukum, Op, Cit*, page 251.

²⁰Burhan Bungin, *Analisis Data Penelitian Kualitatif, Pemahaman Filosofis dan Metodologis Kearah Penguasaan Aplikasi*, Raja Grafindo Persada, Jakarta, 2003, page 53.

²¹Sabian Usman, *Dasar-Dasar Sosiologi Hukum*, Pustaka Belajar, Yogyakarta, 2009, page 1.

²²Satjipto Rahardjo, *Biarkan Hukum Mengalir (Catatan Kritis Tentang Pergulatan Manusia dan Hukum)*, Penerbit Buku Kompas, Jakarta, 2007, page 7.

One of the causes of stagnancy that occurs in the world of law is because it is still falling into a single paradigm of positivism that is no longer functional as an analysis and control that aligns with the live table of real human characteristics in a dynamic context and multi interest both on the process and the legal event.²³ So that law is only understood in a very narrow sense that is only interpreted as a law, while values outside the law are not interpreted as a law.

In the history of the state of the Republic of Indonesia there have been alternating political changes (based on the period of the political system) between democratic political configuration and authoritarian political configuration. In line with the change in political configuration, the character of legal products is also changing. At a time when the political configuration appears democratically, the legal product it produces is responsive, on the contrary when the political configuration is authoritarian, the laws it produces are orthodox.²⁴

Law is a part of human creativity that is used to uphold human dignity. Human beings do not indulge in the alphabets and semicolons contained in the law as the fruit of the manifestation of reason, but the law that harbors the human interest to uphold the value of humanity. The law is not only product ratio, but part of intuition. Relevance with the basic value of nationality is to realize the concept of civilized justice, such as the second principle of Pancasila.²⁵

Progressive legal thinking broke the deadlock. It demanded the courage of law enforcement to interpret the chapter to civilize the nation. If the process is correct, the ideality built in law enforcement in Indonesia is parallel to the efforts of the nation to achieve a common goal at the level of reality. That idealism will take away from the unbridled practice of legal inequality. So that Indonesia in the future there is no more legal discrimination, for the poor because the law does not only serve the rich. If equality before the law cannot be realized, partisanship is absolute. Man creates the law not only for certainty, but also for happiness.

Progressive law enforcement is to live the law not merely black-and-white words of the rule (according to the letter), but according to the spirit and meaning deeper (to very meaning) of the law or law. Law enforcement is not only intellectual intelligence, but with spiritual intelligence. In other words, law enforcement is done with full determination, empathy, dedication, commitment to the suffering of the nation and accompanied by courage to find a way other than the usual.²⁶

The agenda of reform which is the demand of the society is how to fulfill the sense of justice in society. But in reality, the size of the sense of community justice is not clear. According to Supreme Court Justice Abdul Rachman Saleh, the sense of community justice demanded to be able to be fulfilled by the judges is not easy. This is because the size of the sense of community justice is not clear.²⁷

Basically human life cannot be separated from the law. Throughout the history of human civilization, the central role of law in an effort to create an atmosphere that allows humans to feel protected, peaceful coexistence and maintain its existence in the world has been recognized.²⁸

Justice is the core or the nature of the law. Justice can not only be formulated mathematically that the so-called fair if someone gets the same part with others. Similarly, justice is not enough to be interpreted as a symbol of numbers as written in the Penal Code sanctions such as the number 15 years, 5 years, 7 years and so on. Since justice is actually behind something that appears in that number (metaphysically), it is formulated philosophically by law/judge officers.²⁹

In the legal system anywhere in the world, justice is always the object of hunting, especially through its judicial institutions. Justice is fundamental to the working of a legal system. The legal system is actually a structure or completeness to achieve the concept of justice that has been mutually agreed upon.³⁰

Formulating the concept of justice in progressive legal thinking is how to create substantive justice rather than procedural justice. As a result of modern law which gives great attention to the procedural aspect, the law in Indonesia is faced with two great choices between courts that emphasize procedure or substance. Progressive justice is not justice that suppresses procedure but substantive justice. The heavily *proceduralized* procedural process runs well above all, even above the accuracy of substance. Such a system provokes the trials without truth.³¹

²³Sabian Usman, *Op Cit*, page 219.

²⁴Mahfud M D, *Politik Hukum di Indonesia*, Rajawali Pers, Jakarta, 2009, page 373.

²⁵Saifur Rohman, *Menembus Batas Hukum*, Opini Kompas, 22 Januari 2010.

²⁶Satjipto Rahardjo, *Penegakan Hukum Suatu Tinjauan Sosiologis*, *Op, Cit*, page xiii.

²⁷Furthermore Arman argued that in determining the judge's decision it must put forward a sense of justice. But the sense of community justice as some claim to be fulfilled by judges is not easy. Not because the judge is not willing, but because the size of the sense of community justice is not clear. Satya Arinanto, *Human Rights In Political Transition*, Center for Study of Constitutional Law Faculty of Law Univesitas Indonesia, Jakarta, 2008, page 340.

²⁸Johnny Ibrahim, *Op, Cit*, page 1.

²⁹Andi Ayyub Saleh, *Tamasya Perenungan Hukum dalam Law in Book and Law in Action Menuju Penemuan Hukum (Rechtsvinding)*, Yarsif Watampone, Jakarta, 2006, page 70.

³⁰Satjipto Rahardjo, *Membedah Hukum Progresif*, *Op, Cit*, page 270.

³¹*Ibid*, page 272.

Thus, justice according to progressive legal thought is substantive justice. Justice based on the equilibrium value of equality of rights and obligations. The value of justice is derived directly from the community and not the value of textual justice and black and white which has a limited meaning. Not justice procedures obtained through various procedures that sometimes obscure the value of justice itself.

2. Renewal of Criminal Law Policy to Narcotics Users Based on Justice Values

In principle, narcotics abusers are guaranteed medical rehabilitation as well as social rehabilitation as stipulated in Article 4 point (d), and also Article 54 stating that narcotic addicts and drug abuser victims must undergo medical rehabilitation and social rehabilitation, but in criminal provisions have also been regulated criminal sanctions for people who use narcotics as regulated in Article 127 which reads:

- (1) Any abuser:
 - a. Narcotics class I for self-narcotics abusers shall be punished with imprisonment for a maximum of 4 (four) years;
 - b. Narcotics Group II for self-narcotics abusers shall be punished with imprisonment for a maximum of 2 (two) years; and
 - c. Narcotics Group III for self-narcotics abusers is punishable by imprisonment maximum 1 (one) year.

However, the Indonesian criminal justice system adheres to the legality principle, in practice in general, all narcotics cases including self-narcotic narcotics users are also always processed legally in accordance with the legal norm as stipulated in Law Number 35 Year 2009, the threat of criminal sanctions imprisonment. So the self-narcotics abusers who are not distributors who initially as victims who should be rehabilitated become subject to imprisonment as provided for in Article 127. Not only that the narcotics users who are not dealers when faced in front of the trial will be charged with another overlapping article. The logic of users who obtain narcotics unlawfully, then of course there are also at the same time some actions done by the user as formulated in Article 111 and or Article 112 or even Article 114 which has elements of buying, controlling, storing, or having ultimately used own.

Law Number 35 Year 2009 does not provide a clear distinction between criminal offenses in Article 127 of Law Number 35 Year 2009 with other criminal offenses contained in Law Number 35 Year 2009, where narcotic users who get narcotics in against the law must fulfill the element of mastering, possessing, storing, and or buying narcotics where it is also regulated as a separate crime in Law Number 35 Year 2009.

In practice, law enforcement officers linked (included/juncto) between criminal offenses of narcotics users with criminal offenses of illegal possession, storage or purchase of narcotics where the threat of criminal is much higher and using a minimum special sanction of at least 4 years imprisonment and a fine of at least Rp. 800.000.000, - (eight hundred thousand rupiah).

The number of narcotics abuse cases, especially the self-narcotics abusers and the criminal policy that responds in a repressive manner as regulated in Article 127 juncto Article 111 and or Article 112 or even Article 114 of Law Number 35 Year 2009 which puts forward justice retributive of course this will bring a logical consequence for the number of residents in prisons in addition to users who are not dealers become double victimization.

The terminology of the narcotics abusers to the self is not explicitly mentioned in Law No. 35 of 2009, but only explains some terms that have essences that are almost identical to self-abusers, among others: drug addicts, abusers, abuse victims, a former narcotics addict, a patient.

One of the problems caused by the number of terms to the narcotics users is the confusion of the arrangement in which Article 4 Sub-Article d of Law Number 35 Year 2009 states that the purpose of narcotics law is to guarantee the regulation of medical and social rehabilitation efforts for drug abusers and addicts, but in Article 54 Narcotics Act states: Narcotics addicts and victims of narcotics abusers are required to undergo medical rehabilitation and social rehabilitation so that the right of abusers to get rehabilitation as regulated in Article 54 is not recognized by the threat of criminal sanctions for narcotics users as regulated in Article 127.

self-narcotics abusers are a crime without victim where self-narcotics abusers who are not accompanied by other non-criminal qualifications such as distributors, manufactures, imports, exports and other qualifications in Law No. 35 of the Year 2009, other than as a perpetrator of crime but also as a victim of his own crime.

In terms of victimology, the self-narcotics abusers is included in the victimizing victim (victimizing victims), the victim of his own crime. therefore, what is most appropriate to him is a sanction of action and not a prison sentence because the self-narcotics abusers is essentially a victim of a crime that needs treatment and/or treatment, and because he / she is a party to loss of a crime that is a crime of narcotics abuse.

The losses experienced by narcotics users not only feel material losses, but also social, psychological, physical, and health losses. Social losses experienced by a narcotics user in the form of stigma or bad cap imposed by the community, such as the name of a narcotic user is public waste and other bad names. Psychic losses experienced by narcotics users are clearly unstable psychiatric conditions due to dependence on narcotic substances, especially if narcotics users, especially injecting drug users infected with HIV virus that causes the user eventually suffered from AIDS. This is the loss of physical and health as a result of the effects of multiple injection drug use, not only get a bad stamp due to narcotic dependence but also stigma because of HIV infection³². In

³²Explanation of Expert Inang Winarso in the decision of the Constitutional Court of the Republic of Indonesia Number 48/PUU-

terms of the health of self-narcotics abusers, especially those who have experienced dependency have been examined by health experts and categorized as brain diseases or damage to brain cells that work in the human body, where the body controlled by the brain that has been disrupted due to the use of substances in narcotics cause the body wants the substance to be consumed continuously. As a result, punishment will not necessarily make the person dependent on the substances heal and will not use the substance again, but this dependency can only be overcome with medical and social processes.³³

When narcotics enter the body all will work in the brain, so that will affect the behavior and mindset of the person. The change is through a process called neuro adaptation. The longer a person uses narcotics changes will occur on the nerve endings in the function of receiving and giving the effects of narcotics into a person's body, so the user must increase the dose to get the same effect as before. The neuro adaptation is the number of narcotic substances used more and more the higher and when lowered or stopped completely will cause the symptoms of breaking substances, which makes a person a narcotic users feel uncomfortable both physically and psychologically. Narcotics work in the brain in an area that is the center of pleasure, because of the pleasant effect due to the positive effects of narcotics cause the brain difficult to remove the memory that has been recorded. If a user sees or feels something uncomfortable then the thing to remember is to use the narcotics back to get that pleasure. This condition will cause a person who has been addicted to narcotics into a chronic and recurrent disease because of the difficulty of releasing receptor cells that have binded the addictive substance/narcotics.³⁴

The qualifications of self-narcotics abusers differ from other types of qualifications categorized as narcotics offenses such as dealers, importers, exporters, carriers, sellers, producers and other types of deeds, where the qualification of such acts constitutes a very dangerous crime and has an adverse effect on both on the victims and the interests of the nation and the country in the future and future generations. As for the victims of self-narcotics abusers is in general the youth who should be a generation of the nation. So in addition to the qualifications of self-narcotics abusers then any qualification of narcotic crime should have sanctioned criminal sanctions firmly and weighing in order to save the future and the generation of the Indonesian nation.

This phenomenon is undeniable especially when the perpetrators of criminal acts of narcotics is a network of international crimes that do not rule out the possibility of having a political interest that is by using narcotics as a tool subversion (destroy opponents secretly through efforts to opponent experiencing destruction from within) from a particular party or country that is by distributing narcotics in Indonesia and damaging the future of the young generation of Indonesia then one day can master and colonize the Unitary State of the Republic of Indonesia.

Therefore, it is reasonable if the perpetrators of criminal acts of narcotics other than self-narcotics abusers must be dealt with firmly because their actions are very detrimental to society and also the state. This can be seen from the target of their victims who are generally the young men who should be the successor and the generation of the nation. But if the perpetrator is a self-narcotics abusers, he/she must be saved because by rescuing the victim, the self-narcotics abusers is the same as saving the generation and future of this country.

In principle, self-narcotics abusers are getting rehabilitation guarantees, but in Article 127 of Law Number 35 Year 2009 narcotics abuse is also subject to punishment and may lose its right of rehabilitation, unless it can be proven or proven as a narcotics victim. In practice the application of the law in the field of application of the norm of the article is becoming ambiguous while the self-narcotics abusers as well as the victim of his actions but he remains subject to criminal sanctions as formulated in Article 127 which usually in the indictment also linked (including/include/juncto) Article 111 or Article 112 because it also meets the elements in the norm of that article.

If it views from the provisions of the norm, in principle the self-narcotics abusers is subject to criminal sanctions as provided for in Article 127 and in the provisions of the norms of Article 103 provides that a judge may decide to place such user to undergo rehabilitation in which the rehabilitation period is also counted as punishment where such a system in criminal law is known as a double track system.

In addition to the threat of criminal sanction as stipulated in Article 127, a self-narcotics abusers is also prosecuted with the formulation of Article 111 and or Article 112 because when a person meets the element of Article 127 is certainly the same as fulfilling the elements in Article 111 and or Article 112 ie an alternative element that is possessing, storing, controlling where this element does not have to be fulfilled in whole but one of the elements fulfilled is included in the category of norms because the elements in this article are of an alternative nature.

If it is traced further, before a self-narcotics abusers and also fulfills the element of possessing, storing, controlling there is also an act of origin which he did to be able to abuse narcotics is in the form of buying actions that meet the qualifications of narcotics crime such as Article 114 (1) with a lifetime criminal penalty or imprisonment of a maximum of 5 (five) years and a maximum of 20 (twenty) years and also accompanied by a fine of at least Rp. 1.000.000.000, - (one billion rupiah) and at most Rp. 10.000.000.000, - (ten billion rupiah).

Therefore, when a person misuses narcotics for his own and is not given clear restrictions with other articles then the act can also fulfill other narcotic article as long as fulfill the element of possessing, storing, controlling and or buying narcotics in a way

IX/2011, page 67.

³³Explanation of expert AsminFransiska, *Ibid*, page 65.

³⁴Explanation of expert dr. DiahSetiaUtamiSp.KJ, *MARS, Ibid*, page 70.

without rights or against the law where the threat of punishment much heavier namely imprisonment and fines with a special minimum accumulation so that there is no other option for judges to cut off rehabilitation without imprisonment and high fines because of the high penalty limits also in the article.³⁵ This is in accordance with the theory of criminal responsibility, especially the dualistic flow which essentially states that all criminal acts must be criminal as long as they meet the elements of the criminal code norm.

Logically, we can simply know that when a self-narcotics abusers, of course, there has been an act related to the source of the goods he obtained. In general this is usually the case begins when the influence of internal conflicts and external circumstances of the perpetrator so he accepted the offer of illicit goods in order to calm yourself for a moment or even just to try, so that at a certain time when the user was in an addicted position consequences of these substances then the user will usually also find themselves or buy the substance to be consumed.

Based on the description of events in general, usually before the act of self-narcotics abusers actually has happened an act that begins that is fulfilling the element of owning, storing, controlling, and or buying as referred to in Article 111 and or Article 112 or Article 114 -Indonesia Number 35 Year 2009.

Such circumstances can be encountered in cases of self-narcotics abusers in general. Where in general one initially commits a narcotics abuser to oneself because of the conflicting / conflictive norm of the article and even the existence of certain obscure article norms so that the self-narcotics abusers always ends up with imprisonment and also accompanied by other qualifications of crime.

For narcotics abusers is actually a victim against the body / health itself for the actions he did and also suffering in the form of deprivation of rights in terms of imprisonment. It is also exacerbated by the current condition of prisons that have not performed its function maximally as there is still a merger of narcotics users with other criminal actors, the presence of people who use narcotics and even as controlling the circulation of narcotics in prisons so it is possible when a prisoner of narcotics users has already completed his term of imprisonment also performs the same deed (recidivist) and even in a much more cunning manner as a result of the merger of all criminals in prisons.

self-narcotics abusers should be positioned as sick people who need treatment and recovery resulting from the negative effects of substance abuse they use (victims whose rights should be protected as victims).³⁶ So the sanctions that should be applied specifically to the self-narcotics abusers that are not accompanied by the qualification of other major criminal acts is a type of sanction that can restore originally state in the form of an action sanction.

Based on the objective of punishment, especially the relative (deterrence) view that the criminal is addressed to the day of the day to come, that is with the intention of educating people who have done evil to be good again³⁷ and the sick in this case people who have dependence on narcotics to be healed or free from addiction (addiction). On the other hand if the self-narcotics abusers uses the narcotic substance, where he is a sick person (drug dependence) then it is not appropriate to account for him with imprisonment but must be an action that can cure him so that it is free from dependence on the substance and can recover into the original state.

Based on the description and various arguments presented above, action sanction is a sanction which should be considered also must provide expediency to the self-narcotics abusers without any other qualification of narcotics crime.

In Law Number 35 Year 2009 has classified an act which is categorized as a criminal act of narcotics along with criminal sanction in accordance with the type of qualification of deeds done. The qualifications of self-narcotics abusers as regulated in Article 127 in principle follow a double-track system, in which a judge who examines narcotics abusers is given the freedom to decide to place jail or order rehabilitation.

Besides, based on Article 103 of Law Number 35 Year 2009, the Supreme Court has made a breakthrough by issuing Supreme Court Circular No. 04 of 2010 on Stipulation of Abuse, Abuse Victim and Narcotics Addict into Medical Rehabilitation Institution and Social Rehabilitation as a substitute from the Circular Letter of the Supreme Court Number 07 Year 2009. However, the application of the SEMA is hampered because it decides cases of narcotics users judges can not intervene other law enforcement officers (investigators and prosecutors).

In addition to SEMA Number 04 of 2010, there are also other provisions such as Joint Regulation of the Supreme Court Chief Justice, Minister of Justice and Human Rights, Minister of Health, Social Minister, Attorney General, Chief of Police, Head of National Narcotics Agency of Republic of Indonesia concerning Narcotics Addicting and Narcotics Abuse Victims into the Rehabilitation Institution established in Jakarta on March 11, 2014. In addition, the National Narcotics Board issued a Notice Number MAK / 01 / III / 2014 / BNN on the Rescue of Drug Users made in Jakarta on March 27, 2014 essentially suggesting that recovery in the form of rehabilitation is the best way to apply to self-narcotics abusers (victims of abusers).

However, it is unfortunate that in practice, there are many law enforcers from Investigators, Prosecutors, until the judges are still bound by legalistic concepts, demanding and deciding the act as a criminal act and having to face imprisonment because such

³⁵Sudarto, *Hukum Pidana I*, Yayasan Sudarto – Fakultas Hukum Universitas Diponegoro, Semarang, 1990, page 41.

³⁶Arif Gosita, *Masalah Perlindungan Anak*, Akademika Pressindo, Jakarta, 1989, page 52.

³⁷Samidjo, *Pengantar Hukum Indonesia*, Armico, Bandung, 1985, page 153.

acts also fulfill the elements of Article 111 and or Article 112, Article 114 as well as other articles as long as it fulfills the element of owning, storing, controlling and or purchasing so that the victim of the abuse becomes prison and does not get rehabilitation.

Such law enforcement occurs because there has actually been a disorder of norms (obscure norm) as well as the contradiction between one norm with another norm (conflict of norm). The blurring of the norm is the unclear meaning and limitation of the narcotics definition for oneself where each definition has different meanings and consequences. On the other hand Article 111 and or Article 112, Article 114 as well as other qualification articles of narcotics crime as long as the word has, keep, control and or buy does not mention clearly and firmly about the objective of the article so that the norm of the article can be interpreted and addressed to the self-narcotics abusers (addicts), distributors, sellers, producers, importers and / or other qualified narcotic criminal offenses. In terms of each qualification the act has different meanings, consequences and impacts of loss.

In order to rescue self-narcotics abusers from the threat of imprisonment, what needs to be done is to reformulate the norms of Law No. 35 of 2009, especially regarding the position of narcotics abusers by setting appropriate types of sanctions and providing benefits in accordance with their position and affirmation of the objectives of the article qualification of other narcotic criminal offenses whose elements can be met automatically when a person being self-narcotics abusers.

The central issue in penal policy is the determination of what should be a criminal offense (ie through a criminalization policy), and what sanctions should be imposed on the offender (ie through a penalization policy).³⁸ BardaNawawiArief and Muladi stated that the relationship between the determination of criminal sanctions and the purpose of punishment is an important point in determining the strategy of criminal politics planning. Determining the purpose of punishment can be the basis for determining the means, means or actions to be used.³⁹ Furthermore BardaNawawiArief insists that criminal politics is an integral part of social protection efforts and efforts to achieve social welfare. Therefore, the ultimate goal or the ultimate goal of criminal politics is the protection of society to achieve the welfare of society.⁴⁰

In order to reformulate the sanctions policy especially for the future narcotics user by applying action sanction it is necessary to consider the type or form of appropriate and beneficial action sanction in order to save the self-narcotics abusers (addicts). To determine the type of sanctions such action needs to pay attention to several things like the convention of countries in the world reflects a new paradigm to avoid criminal justice. Restorative justice (hereinafter translated as restorative justice) is a popular alternative in many parts of the world for handling criminals who are problematic with the law as it offers comprehensive and effective solutions.⁴¹

In order to fully understand the relevant and ideal types of action sanctions that should be applied to self-narcotics abusers we can see from the purpose of making which is also as spirit in Law Number 35 Year 2009 as stipulated in Article 4 (d): to guarantee regulation of medical and social rehabilitation efforts for drug abusers and addicts. It is then reaffirmed in Article 54 that the narcotic addict and the narcotics abusers victims are required to undergo medical rehabilitation and social rehabilitation. This indicates that the sanction that should be applied to the self-narcotics abusers is in the form of action sanction in the form of medical rehabilitation and social rehabilitation and not criminal sanction as regulated in Article 127.

Although the acts committed by a self-narcotics abusers fulfill the element of the qualification of other narcotic criminal acts as set forth in Articles 111, 112, 114 and other articles which fulfill the element of owning, storing, controlling and or purchasing sanctions to be applied are sanctions of action whose form in the form of medical rehabilitation and social rehabilitation. Medical rehabilitation in question is an integrated process of treatment activities to relieve addicts from narcotics dependence. While Social Rehabilitation is a process of recovery activities in an integrated, physical, mental and social, so that former drug addicts can re-socialize in public life.⁴²

Hence, the guidance criteria that should be used to apply rehabilitation for the perpetrators of narcotics crime is seen from the attitude of the mind (*mensrea* / criminal intention) from the crime offender. If the perpetrator of a criminal act of narcotics performs an act and proves that his inner attitude is in accordance with his actions, then it is appropriate to apply the most severe criminal punishment for the perpetrator of such narcotics in order to combat the illicit trafficking of narcotics which is a transnational crime. For example if Mr. X sells, distributes, imports and or manufactures a substance in the form of narcotics where he intends to benefit from his actions or even it is his a livelihood for him then it is appropriate and reasonable if the master X is subject to heavy criminal sanctions either in the form of imprisonment, fines and / or even death sentence.

But even if the act of self-narcotics abuser meets the element of qualification of criminal acts set forth in another article, as long as the intention (*mensrea* / criminal intention) the offender is to be used alone as a result of a dependence on the narcotics then the offender should not be applied criminal sanctions imprisonment but rather to strictly regulate sanctions of action in the form of medical rehabilitation and social rehabilitation. Or in the simplest sense, self-narcotics abusers without any other types of

³⁸MuladidanBardaNawawiArief, *Op, Cit*, page 160.

³⁹*Ibid*, page 95.

⁴⁰BardaNawawiArief, *BungaRampaiKebijakanHukumPidana, PerkembanganPenyusunanKonsepKUHP Baru, Op. Cit*, page 4.

⁴¹DewidanFatahillah A. Syukur, *Mediasi Penal: Penerapan Restorative Justice di PengadilanAnak Indonesia*, RinekaCipta, 2013, page 4.

⁴²General Provisions of Law Number 35 Year 2009, Article 1 (16) and (17)

criminal qualification such as circulating, selling, importing, producing not subject to criminal sanction of imprisonment but obligatory for rehabilitation.

For example, if A is dependent on narcotics, where in order to calm himself for a suffering dependence he suffered from buying the narcotics, so that he as the owner also control and even save with the intention to stock the next use for himself. In this case the A must be rehabilitated and not imprisoned even if the element has met other criminal qualifications as provided for in Articles 111, 112, 114 and other articles. All the elements are met for such actions. Since the primary purpose in owning, storing, controlling or even purchasing is for self-use which happens to fulfill the element of the qualification of another narcotic crime.

Or in order to reformulate the future narcotics law, it should make an affirmation that Articles 111, 112, 114 and other articles which fulfill the elements have, keep, control and or purchase are articles directed against distributors, importers, persons producing and qualifying narcotics crimes the other and not aimed at the narcotics abusers for themselves. If the self-narcotics abusers fulfill that element and it is evident that the perpetrator's inner attitude (criminal intention) is nothing more than to be used for himself then in order to rescue the narcotics victim for himself the judge is required to decide to impose sanctions acts of medical rehabilitation and social rehabilitation for the offender.

By eliminating criminal provisions and requiring rehabilitation of narcotics abusers, at least it can save both the present and the future of the abuser, and on the other hand, can reduce the burden of conflict and losses suffered by the state. Because with this criminal policy that always decides to imprisonment for the narcotics abuser to self it actually adds the burden of suffering for him because the user has actually lost the past due to the use of narcotics he uses, the present and also lost his own future and as well as the future generation of the Indonesian nation due to the negative impact of a criminal imprisonment applied to it.

Sanction of action in the form of rehabilitation for narcotics abusers in accordance with the purpose of punishment is the theory of treatment that argues that punishment is very appropriate directed to the perpetrators of crime, not on his actions. The punishment referred to by this stream is to provide treatment and rehabilitation to the offender in lieu of punishment. This flow is based on the reason that the offender is a sick person, requiring treatment and rehabilitation.⁴³

So in this case the perpetrators of narcotics abusers are sick people who need treatment in the form of a treatment and rehabilitation in the form of medical rehabilitation and social rehabilitation without the imprisonment. So rehabilitation for self-narcotics abusers is an effective alternative sanction that suits the criminal condition rather than with the nature of evil in order to restore it to its original state so as to reintegrate with society.

This is in accordance with the dr. KusmanSuriakusumah, Sp.Kj.MPH⁴⁴, drug users can fully recover must fulfill four things: Drugs free (free drug), Crime free (free from criminal) Productive (work) and Health life (For healthy life), For ex-narcotics abusers can said to be productive, if former drug abusers are able to work alone. It is therefore necessary for those activities that can open networks to obtain employment so that the narcotics abusers are fully recovered and distanced themselves from the illicit drugs.

So the central point of reformulating sanctions in future narcotics laws is to place a self-narcotics abusers as a sick person who needs treatment and rehabilitation and not as a criminal so he can recover back to his original state . With the realization of such a thing, the government program that is rescue for narcotics abusers (narcotics addicts) can also be realized.

Implementing rehabilitation of self-narcotics abusers is a type of action sanction that can restore the original state or type of sanction that reflects the value of restorative justice. Implementation of this rehabilitation can use health facilities such as hospitals and health centers in Indonesia.⁴⁵

Where the potential for rehabilitation services in Indonesia is very large with 2,200 hospitals and 11,000 health centers spread across Indonesia.²³ Massive rehabilitation in order to save self-narcotics abusers, we can compare with Thailand that has successfully rehabilitated four hundred thousand people per year using hospitals and institutions of health barracks.

In comparison the formulation of narcotics abuser arrangements can be seen in the Portuguese state. The arrangement in Portugal (Portugal's Law 30/2000) states that drug addicts who have narcotics for their own use remain forbidden, but violations of these measures will be considered administrative offenses and are no longer considered criminal. Decriminalization policy in Portugal does not mean that placing narcotics abusers as legal, but strictly separating narcotics abusers from dealers or sellers, is then treated differently.

By eliminating the fear of prosecution against narcotics abusers, Portugal has succeeded in encouraging, motivating, and allowing abusers to heal themselves and become an example for the environment. Reflecting on the successes in Portugal, various countries have begun to consider decriminalization of narcotics abusers.

⁴³RudolfJ.Gerber and Patrick D. Mcanany, *Philosophy of Punishment dalamThe Sociology of Punishment & Correction*, 1970.

⁴⁴Majalah SINAR edisi II – 2014 BadanNarkotikaNasionalRepublikIndonesia, SinergitasBNN dan POLRI dalam P4GN, halaman43.

⁴⁵AnangIskandar (Kepala BNN), *Roger, Layakditahanatau di rehab*, ILC di TV One, 25 Februari 2014.

The best practices in overcoming the use of narcotics internationally, especially in Australia, also shows that the diversion to treatment and rehabilitation for narcotics users has proven to be more effective and cheaper than imprisonment. Drug and Alcohol Review (2001) 20,281-294 Diversion strategies for Australian drug-related offenders. This spirit fits in with the reintegration philosophy of the penitentiary program already existing in Law Number 35 Year 2009 as stated in Article 127 (3) and Article 128 (3). These articles should be a priority in law enforcement for users and addicts.

As the success achieved by the country then Indonesia should be able to see that the law enforcers in this case Police, Public Prosecutor, BNN (National Narcotics Agency) or judge to place the narcotics abusers as a sick person as well as a victim of a crime that must be rehabilitated so that the focus of law enforcement to Ahead is catching a dealer who is a true narcotics criminal.

Implementation of Article 111 or Article 112 of Law Number 35 Year 2009 against self-narcotics abusers when viewed from the perspective of law has fulfilled the provisions in accordance with the elements of the article, but when viewed from the perspective of justice and policy, the application of the article is the same once not appropriate because a self-narcotics abusers should be viewed as a victim of the narcotics crime itself it would be very unfair if against self-narcotics abusers applied Article 111 or Article 112 of Law Number 35 Year 2009.

In general, self-narcotics abusers are people who are still in a very productive age that is the next generation of the nation. If these self-narcotics abusers are only imprisoned for years without proper and correct healing then imagine the future of the convicts in prisons or prisons, narcotics can be obtained.

To punish the prisoners of self-narcotics abusers and to place them in prisons is not a proper and wise measure because these self-narcotics abusers will not recover from dependence on narcotics and this action also causes the occupancy rate to exceed the capacity because most of the residents of Correctional Institutions are the narcotics abusers.

To know when a user can apply the provisions of Article 127 of Law Number 35 Year 2009 is to first be known that the purpose of an abuser is buying, receiving, mastering and carrying narcotics is true to use for himself. Determining a person's goal of mastering, possessing, accepting or buying narcotics is essential for the proper application of criminal provisions. The Supreme Court of the Republic of Indonesia has issued Circular Letter Number 4 Year 2010 dated April 7, 2010 which can be used as a reference to determine whether a person is self-narcotics abuser or not.

With regard to legal reconstruction, Article 111, Article 112 and Article 114 are reserved for dealers and not for abusers (addicts). As well as in the case of narcotics abuse for yourself meets the element of qualification of narcotics crime set forth in another article then it must be assessed from the attitude of mind / mensrea from the offender, as long as his inner attitude to be used alone for his dependency needs then the judge must decide to apply action sanction in the form medical rehabilitation and social rehabilitation.

Law enforcers ranging from investigators, BNN, prosecutors and judges should understand and be able to take the policy that the self-narcotics abusers is a victim and the sick who need treatment so it is not feasible to apply imprisonment. Implementation of imprisonment is a futile act in which the state will also suffer huge losses and especially the victims will increasingly suffer a more widespread loss.

To accommodate Article 54 of Law Number 35 Year 2009, addicts, abusers and victims of narcotics abusers in criminal application need to be reconstructed Law Number 35 Year 2009 in Article 127 paragraph (1) as follows:

NO	Article	Original	Draft Reconstruction
1	127 paragraph (1)	Any Abuser:	Every Addict, Abuse and Victim:
		a. Narcotics class I for self-narcotic abuser shall be punished with imprisonment for a maximum of 4 (four) years	a. Narcotics class I for self-narcotic abuser must be rehabilitated for 1 (one) year
		b. Narcotics Group II for self-narcotics abuser shall be punished with imprisonment for a maximum of 2 (two) years; and	b. Narcotics Group II for self-narcotics abuser must be rehabilitated for a maximum of 6 (six) months; and
		c. Narkotika golongan III bagi diri sendiri dipidana dengan pidana penjara paling lama 1 (satu) tahun	c. Narkotika golongan III bagi diri sendiri wajib direhabilitasi paling lama 3 (tiga) bulan

D. CONCLUSION

By eliminating criminal provisions and requiring rehabilitation of self-narcotics abusers, at least it can save both the present and the future of the abuser. On the other hand, it can reduce the burden of conflict and losses suffered by the state. Because with this criminal policy that always decides to imprisonment for the self-narcotics abusers, it actually adds a burden of suffering for him, because the user has actually lost the past due to the use of narcotics, he also loses the present and also lose his own future and as

well as the future generation of the Indonesian nation due to the negative impact of a criminal imprisonment applied to it. The penalty of action in the form of rehabilitation for the self-narcotics abusers in accordance with the purpose of punishment is the theory of treatment that argues that punishment is appropriate to be directed to the offender, not to his actions. The punishment referred to by this stream is to provide treatment and rehabilitation to the offender in lieu of punishment. This flow is based on the reason that the perpetrator of the crime is a sick person requiring treatment and rehabilitation. Renewal of criminal law policy toward narcotics-based justice user against Law Number 35 Year 2009, namely in Article 127 paragraph (1) Every Addict, Abuse and Victim of Abuse must be rehabilitated.

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