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Depenalization of Drug Abuse Criminal Act as a Humanist Criminal Law Policy

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Abstract
The purpose of this research is to analyze and evaluate ratio legis of criminal sanctions against perpetrators of narcotics abuse and policy reformulation of humanist sanction arrangements against narcotics abusers in the future. This research is a legal research that uses statutory and conceptual approaches. The results of study: (1) ratio legis of providing criminal sanctions against narcotics abusers as referred to in Act Number 35 Year 2009 concerning Narcotics is that the formers of the Act still adhere to the retrebutive paradigm. The target of rehabilitation is only limited to victims of drug abuse, not drug abusers; (2) the policy reformulation of sanctions against drug abusers in the future is no longer using criminal law means. The means used are non-penal means that remove criminal sanctions and replace them with rehabilitation measures.
Keywords: *Criminal Law Policy; Drug Abuse.*

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Introduction

The crime of narcotics and narcotics precursors is a crime that is a scourge for the future of the Indonesian nation, because the illicit trafficking of narcotics and narcotics precursors in Indonesia and even in various parts of the world has been organized. The modus operandi of the drug mafia is complex and sophisticated. Under such circumstances, the nation's young people become indirect victims of narcotics abuse as a result of the illicit trafficking of narcotics and narcotics precursors, so that they have the potential or even have actually damaged their future which should be able to contribute to the progress of the nation and state of Indonesia.

Narcotics on the one hand are drugs or materials that are useful in the field of treatment or health services and the development of science and on the other hand can also cause dependence which is very detrimental if abused or used without strict and careful control and supervision. To harmonize the disorientation of the positive and negative sides, these considerations became one of the bases for the formulation of Act Number 35 of 2009 concerning Narcotics, with the hope that the utilization of narcotics in the field of health and scientific development with mitigation of the risks of narcotics abuse will be harmonious.

Legislators when forming Act Number 35 of 2009 concerning Narcotics had four ideals, namely:

1. Ensure the availability of narcotics for the benefit of health services and/or the development of science and technology;
2. Prevent, protect, and save the Indonesian people from narcotics abuse;
3. Eradicate illicit trafficking of narcotics and narcotic precursors; and
4. Ensure the regulation of medical and social rehabilitation efforts.[1]

In this regard, according to Anang Iskandar, who is a high-ranking police and anti-narcotics abuse activist, the judge should not make the mistake of imposing imprisonment on drug abusers, because the philosophy of Act Number 35 of 2009 concerning Narcotics is to prevent, protect, and save and guarantee arrangements for medical and social rehabilitation for abusers and addicts, while dealers must be eradicated. Because in fact, people who abuse drugs are addicted as a result or victim of the evil circulation of narcotics and narcotics precursors, so the appropriate legal prescription given to people who abuse drugs is to require them to undergo rehabilitation, not to be sentenced to deprivation of liberty such as imprisonment. Act Number 35 of 2009 concerning Narcotics is based on a health approach in dealing with drug abusers that is based on protection, scientific values and has special excuses for abusers not to be imprisoned. Act Number 35 of 2009 concerning Narcotics even recognizes the concept of forgiveness by requiring people who abuse drugs to report to the Institution for Mandatory Reporting (*Institusi Penerima Wajib Lapor/IPWL*).[2]

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[1] Ruslan Renggong, *Hukum Pidana Khusus: Memahami Delik-Delik Di Luar KUHP* (Prenadamedia 2019). [131].

[2] Anang Iskandar, *Politik Hukum Narkotika* (Elex Media Komputindo 2021). [86-89].

On the other hand, Chapter VX on the provision of criminal sanctions, Article 127 paragraph (1) of Act Number 35 of 2009 concerning Narcotics explicitly stipulates that a person who abuses narcotics is punishable by between 1 (one) and 4 (four) years imprisonment. Based on Article 1 point 15 of the Act, a misuser is a person who uses Narcotics without the right or against the law. *Definiendum* abusers is also found in the *definien* in terminology narcotics addicts in Article 1 point 13, namely people who use or abuse narcotics and are in a state of dependence on narcotics, both physically and psychologically. But on the other hand, Article 127 paragraph (2) regulates that in addition to imprisonment of the abuser, the abuser or victim of abuse is also required to undergo medical rehabilitation and social rehabilitation through a judge's decision.

The concept of correction for abusers in Act Number 35 of 2009 concerning Narcotics is not very clear and firm, the Act cannot be said to embrace the concept of a double track system for abusers, nor is it firm on the concept of rehabilitation for abusers as the primum remedium. However, I am of the opinion that the Law adheres to the concept of criminal deprivation of liberty as the primum remedium, which also applies to drug abusers. This can be seen in the systematics of Act Number 3 of 2009 concerning Narcotics in Chapter XIII on the role of the community, Chapter XIX on rewards and directly referring to Chapter XV on the provisions of criminal sanctions in which there is Article 127 which contains the threat of imprisonment for drug abusers.

From the perspective of criminal law science, there is no denying that misuse of drugs is a criminal act, because he is considered to want and know that misusing drugs is against the law. However, from the perspective of victimology, which is a social science that assists the science of criminal law, in a causal relationship, the abuser is a victim as a result of the producers and traffickers of narcotics and precursors as a cause. Victims of drug abuse experience 2 (two) things, first, the abuser is a victim of the actions of others, in this case the producers and traffickers of illicit drugs and precursors. Secondly, the person who abuses drugs experiences

self-victimization as a result of his/her actions, namely abusing drugs unlawfully.[3] Thus, the abuser has experienced victimization.

If it is analogous to unqualified and damaged rice caused by pests, then it is not the rice that is destroyed, but the pests that must be destroyed. In this context, it is not the abusers who are sick with addiction and then destroyed, but the producers and traffickers of illicit and precursor drugs that should be destroyed by being sentenced to deprivation of liberty or even for certain reasons can be sentenced to death. Therefore, drug abusers should not be subjected to criminal sanctions of deprivation of liberty, but they should be given protection and care.

Since the first criminal law in Indonesia, criminal law has only focused mostly on the perpetrators of criminal acts or does not recognize the paradigm of balancing the interests of perpetrators and victims. Whereas in a criminal offense that should also be highlighted and given protection is the victim, because it is the victim who has suffered losses. However, very few criminal laws are found to provide protection to victims.[4] In this context, drug abusers are characterized as crime without victim, because they do not harm others, but on the contrary, they seem to be enjoying the forbidden goods in the form of narcotics.

According to Jeremy Bentham, the philosophical of criminal sanctions are:

1. Preventing all offenses;
2. Preventing the most evil offenses;
3. Suppresses crime;
4. To minimize loss or cost. [5]

According to him, criminal law should not be used as retaliation against perpetrators, but only for the purpose of preventing crime.[6] In this regard, drug abusers should not be sentenced to deprivation of liberty such as imprisonment, because if the abuser must be incarcerated in a correctional institution, of course

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[3] Vivi Ariyanti, 'Kedudukan Korban Penyalahgunaan Narkotika Dalam Hukum Pidana Indonesia Dan Hukum Pidana Islam' (2017) 11 Al-Manahij: Jurnal Kajian Hukum Islam.

[4] Rusnianti et al, 'Penyalahgunaan Narkotika Dan Psikotropika Menurut Undang-Undang Nomor 35 Tahun 2009 Dari Perspektif Viktimologi' (2022) 28 Disiplin Jurnal Ilmu Hukum. [162].

[5] Muladi dan Barda Nawawi Arief, *Teori-Teori Dan Kebijakan Pidana* (Alumni 1992). [31].

[6] *ibid*.

the correctional process for the abuser in the correctional institution will cost a lot of money to feed or other care for the abuser, not to mention the costs that must be borne by the state for rehabilitation that must also be given to the abuser. Another potential consequence of incarcerating an abuser in a correctional institution is the possibility that the abuser will become more adept at committing other criminal offenses, due to the influence of other inmates who teach them to commit other misconduct. Therefore, the correct prescription for the correction of abusers must be given appropriately, with the intention of preventing other violations of the law or other misconduct.

In line with that, according to Sahetapy, the improvement of drug abusers should be oriented towards the philosophy of Pancasila, the improvement of the abusers should be aimed at liberation. Abusers are actually in the realm of evil thoughts and confined from the social reality they face that abusing drugs is wrong. So that the repairs given to drug abusers must really be aimed at liberation from the evil mind and social reality in which he is confined.[7]

In line with Peter Mahmud Marzuki's opinion, law as a social norm must also emit morals, the morals referred to here are love and togetherness towards fellow humans in order to continue and maintain human existence in social life.[8] The love in question should also be given to drug abusers through humanist legal instruments or by providing protection to drug abusers themselves, with the hope that after drug abusers undergo repairs and are free from drug dependence, someone who abuses drugs can return to mingle in the community in continuing and maintaining their existence in community life.

Therefore, the threat of criminal sanctions of deprivation of liberty for drug abusers as stipulated in Act Number 35 of 2009 concerning Narcotics should be eliminated or depenalized by providing improvements to abusers using other means (non-penal). As the opinion expressed by Marc Ancel, through criminal law policy as a science and art that has a practical purpose, namely to enable Act Number 35

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[7] *ibid*. [97].
[8] Peter Mahmud Marzuki, *Pengantar Ilmu Hukum* (Kencana 2015). [42-43].

of 2009 concerning Narcotics to be reformulated, which is expected to regulation for drug abusers who are sick with addiction.[9] The criminal law policy referred to in this context is a policy at the formulation stage only, namely the stage of formulating Act by the legislature.

Based on the entire description above, it is necessary to conduct further research regarding the *ratio legis* of criminal sanctions against narcotics abusers in Act Number 35 of 2009 concerning Narcotics and reformulation of humanist sanction regulation for criminal offenders who abuse narcotics.

Research Method

This research is a legal research that seeks the truth of coherence with legal principles,[10] is there coherence in the provision of criminal sanctions against drug abusers in Act Number 35 of 2009 concerning Narcotics with legal principles and is there coherence in the regulation of sanctions against drug abusers in the future with legal principles. This research uses statutory and conceptual approaches. Primary legal materials consist of Act Number 35 of 2009 concerning Narcotics and meeting on reports discussion of the draft Act Number 35 of 2009 concerning Narcotics to determine and analyze the *ratio legis* of criminal sanctions against narcotics abusers. Primary legal materials are linked to secondary legal materials consisting of books, journal articles and the Manuscript Academic of Act Number 35 of 2009 concerning Narcotics and the Manuscript Academic of the Draft Act Narcotics in the future. Legal materials are analyzed and evaluated which can later provide prescriptive research results.

Ratio Legis of Criminal Sanctions for Narcotics Abuse in Act Number 35 of 2009 concerning Narcotics

When discussing sanctions, in essence criminal sanctions are the hallmark of

[9] Mahsun Ismail, 'Kebijakan Hukum Pidana Cyberpornography Terhadap Perlindungan Korban' (2018) I Jurnal Hukum Ekonomi Syariah. [122].

[10] Peter Mahmud Marzuki, *Penelitian Hukum* (Kencana 2005). [47].

criminal law itself, namely the provision of pain to someone who commits a criminal offense, including the provision of sanctions that are nestapa against people who abuse narcotics as regulated in Act Number 35 of 2009 concerning Narcotics. Helbet L. Packer states that criminal sanctions are very necessary, because otherwise a person cannot live in the present or the future because of the great language that threatens one's life.[11] It cannot be imagined that if the criminal sanction is eliminated, it is certain that most of human life will be filled with prohibited goods in the form of narcotics.

The advancement of a country goes hand in hand with the development of organized crime. One of the crimes that began to rage in Indonesia is the illicit trafficking of narcotics.[12] Because with the illicit trafficking of narcotics, it results in someone abusing narcotics unlawfully. So that Act Number 35 of 2009 concerning Narcotics was enacted as an effort to answer these problems. One of the objectives of the enactment of Act Number 35 of 2009 concerning Narcotics is to support the interests of health and science by ensuring the availability of narcotics, preventing the use of narcotics that are not in accordance with the rules (for narcotics abusers), and eradicating illicit narcotics trafficking.[13]

In addition to criminal sanctions, Act Number 35 of 2009 concerning Narcotics, there are also administrative sanctions in the law. These sanctions are administrative sanctions such as written warnings, oral warnings, temporary suspension of production activities, up to revocation of processing licenses and procurement of precursors. Of course, such sanctions are not given to people who abuse drugs.[14]

In relation to criminal sanctions, according to Romli Atmasasmita, there is a wrong mindset regarding the function and role of criminal law. First, the application

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[11] Dahlan, *Problematika Keadilan Dalam Penerapan Pidana Terhadap Penyalah Guna Narkotika* (Deepublish). [27].

[12] Virginia VV dan Rehnalemken G, 'Ratio Legis Pengaturan Rehabilitasi Dalam Tindak Pidana Narkotika (Studi Putusan Nomor: 114/ Pid.Sus/ 2020/ Pn.Lbo)' (2022) 11 Recidive: Jurnal Hukum Pidana dan Penanggulangan Kejahatan. [29].

[13] Deni Setya BY dan Baiq SR, 'Ketidaktepatan Penjatuhan Pidana Penjara Terhadap Penyalahguna Narkotika' (2020) 5 Jurnal Ius Constituendum. [179].

[14] Tahegga Primananda A dan Kristy Anita, 'Rejuvenasi Peraturan Pengelolaan Prekursor: Ratio Legis dan Efektivitas' (2022) 2 Jurnal Kajian Pembaruan Hukum. [119].

of Criminal Law must always end with punishment and imprisonment. Second, in serious crimes the retributive function and purpose must be doubled rather than minor crimes and even the principle of “ultimum remedium” must be ruled out.[15] This is evidenced in the systematics of the chapters in the law which directly refer to Chapter XV regarding criminal provisions in which there is Article 127 in Act Number 35 of 2009 concerning Narcotics which contains the threat of imprisonment for narcotics abusers. Thus, it is very clear that the law adheres to the concept of criminal deprivation of liberty against drug abusers as the primum remedium.

Article 127 paragraph (1) in Act Number 35 of 2009 concerning Narcotics basically threatens punishment for people who abuse narcotics for themselves, be it narcotics class I, II and II. Furthermore, Article 127 paragraph (3) regulates that if the abuser can be proven or proven to be a victim of narcotics abuse, then only social and medical rehabilitation which is mandatory or imperative is undertaken by the abuser. What is meant by a victim of narcotics abuse in the explanation of Article 54 is someone who accidentally uses narcotics because they are persuaded, tricked, cheated, forced, and/or threatened to use narcotics.

However, if the victim of drug abuse is not proven, then the judge who examines and tries the perpetrator of drug abuse, based on Article 127 paragraph (2), must pay attention to Article 54, Article 55[16] and Article 103. Furthermore, in Article 103, the judge can order that the abuser undergo treatment and/or care through rehabilitation. Thus, the provision of rehabilitation is facultative, this is indicated by the word “can” in the construction of Article 103. Thus, it is clear that the imposition of criminal sanctions against drug abusers has a retrebutive paradigm and is still primum remedium and rehabilitation of drug abusers not mandatory. In fact, people who abuse drugs are not criminals who should be given the prescription of criminal sanctions, but people who abuse drugs are victims as a result of the illicit

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[15] Made Sugi Hartono et al, ‘Konstruksi Hukum Pidana Yang Berkemanfaatan Dalam Penanganan Tindak Pidana Penyalahgunaan Narkotika’ (2023) 9 Jurnal Komunikasi Hukum. [560].

[16] See also Article 13 of Government Regulation Number 25 of 2011 concerning the Implementation of Mandatory Reporting of Narcotics Addicts.

trafficking of narcotics and narcotics precursors which is difficult to eradicate, so that someone who abuses the illicit goods causes his life to be chaotic and shackled.

Therefore, it is interesting to know the existence of Article 127 of Act Number 35 of 2009 from a closer distance from the perspective of legal theory. In the formation of legal rules, legal theory is concerned with the technicalities of finding the ontological basis and ratio legis of the provisions in certain laws.[17] Meanwhile, the ontological basis itself concerns everything that exists or the existence of something.[18]

The ontological basis referred to refers to the background of narcotics laws, especially regarding the regulation of sanctions against drug abusers that are retrebutive. The background of why drug abusers are subjected to retrebutive sanctions can be seen from the ontological basis outlined in the academic paper or treatise. The ontological basis in question can be traced from the reports meeting on discussion of the draft Act Narcotics in parliament which contains the views of legislators.[19]

To see the background of an Article in a Act, it is necessary to see the *ratio legis* of the Article. Ratio legis is defined as the thinking behind the provisions of the Act.[20] The following is the *ratio legis* of why abusers are subjected to retrebutive sanctions, which was conveyed by dr. Mariani Akib Baramuli, MM as Deputy Chairperson of the Special Committee of the Golkar Party Faction delivered at the Plenary Meeting of the Discussion of the draft Act on Amendments to Act Number 22 of 1997 concerning Narcotics as follows:

> “...For example, regarding the Domestic Violence Act, the title of anti-domestic violence changed during our discussion. The title changed but the intent and purpose remains the same that we will eradicate the abuse of drugs, to make an efficiency, we from these factions expect that we are efficient in the title, so that in the end this Act really protects our people from the protection against the dangers that threaten us now, we will treat the law the

[17] Peter Mahmud Marzuki, *Teori Hukum* (Kencana 2020). [10].

[18] Zainal Arifin Mochtar dan Eddy O.S. Hiariej, *Dasar-Dasar Ilmu Hukum: Memahami Kaidah, Teori Asas Dan Filsafat Hukum* (Red and White Publishing 2021). [217].

[19] Adriano et al, *Eksistensi, Fungsi, Dan Tujuan Hukum Dalam Perspektif Teori Dan Filsafat Hukum: Dalam Rangka Memperingati 80 Tahun Guru Kami Prof. Dr. Frans Limahelu, S.H., LL.M* (Kencana 2020). [45].

[20] Peter Mahmud Marzuki, *Teori Hukum*, *Op., Cit*. [22].

> same and we will eventually repeal the two Acts, namely the Act Narcotics and Psychotropic....”[21].

Meanwhile, the background of the need for amendments to Act Number 22 of 1997 on Narcotics is in the Manuscript Academic of Draft Act Number 35 of 2009 concerning Narcotics, especially in relation to the *ratio legis* of abusers being sentenced to retrebutive sanctions such as imprisonment, namely::

> “…In order to increase preventive and repressive efforts, it is necessary to reform Act Number 22 of 1997 concerning Narcotics, including an increase in the threat of punishment, including the number of criminal penalties including special minimums and special maximums, as well as types of criminal threats including imprisonment and fines related to narcotics crimes and narcotics precursor abuse. In addition, in an effort to improve curative, rehabilitative and promotive efforts for victims of narcotics abuse, it is necessary to have standardization in the rehabilitation of victims of narcotics abuse, both medical and social rehabilitation so that rehabilitation can be effective” [22].

Based on the reports meeting on discussion and the Manuscript Academic of Draft Act Number 35 of 2009 concerning Narcotics above, it turns out that one of the legislators who formulated the draft Act is a doctor and not a jurist who masters the *ars*, so that the construction of his thinking is not appropriate if an abuser is eradicated, let alone the threat of punishment is increased. Eradicating abusers means that the abusers are eradicated or destroyed by threatening them with criminal sanctions. In fact, what should be eradicated or destroyed are drug dealers and dealers by threatening them with criminal sanctions in a Act, not abusers.

Misusers are people who are sick with addiction and are being shackled due to the barbaric actions of drug dealers and dealers. The prescription of sanctions that should be given to people who abuse drugs is not a punishment, but rather rehabilitation. The legislator seems to maintain the same punishment for abusers as previously stipulated in Article 85 of Act Number 22 of 1997 concerning Narcotics, which maintains retrebutive sanctions and the threat of punishment is exactly the

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[21] Di sampaikan pada Masa Persidangan III di Dewan Perwakilan Rakyat Republik Indonesia, hari Kamis, 7 Maret 2007 Pukul 10:00-11:00 WIB oleh Mariani Akib Baramuli, ‘Risalah Rapat Paripurna Pembahasan RUU Tentang Tentang Perubahan Atas Undang-Undang Nomor 22 Tahun 1997 Tentang Narkotika Pada Masa Persidangan III’ (2007). [8].

[22] Setjen DPR RI, ‘Naskah Akademik Rancangan Undang-Undang Tentang Narkotika’ (2005). [8].

same as Article 127 of Act Number 35 of 2009 concerning Narcotics, as well as rehabilitative with the provision that the rehabilitation period is also counted as a period of serving a sentence.

The mission of the amendment to Act Number 22 of 1997 concerning Narcotics as referred to in the Manuscript Academic is curative, rehabilitative and promotive, which is only limited to victims of drug abuse, but not to abusers or addicts. In fact, abusers, addicts and victims of narcotics abuse are people who are equally sick with addiction and should not be sentenced to retaliatory or retrebutive sanctions. The prescription that should be given to drug abusers, addicts and victims of drug abuse is that they should be equally given rehabilitation.

Apart from that, the current modern criminal law paradigm is no longer a retributive paradigm that seems retaliatory but emphasizes more on corrective, rehabilitative and restorative aspects. Corrective is related to the offender's mistake that must be corrected. While rehabilitative is in the context of correcting the mistakes of the perpetrator and at the same time also rehabilitating victims of certain crimes. Meanwhile, restorative emphasizes the recovery of crime victims.[23] Because the qualification of drug abuse is a crime without victim that does not cause victims, the rehabilitation undertaken by the abuser automatically includes correction of the abuser's mistake and restoring the situation of the abuser as before, before being trapped in drug abuse.

Reformulation of Humanist Sanction Regulations for Criminal Offenders who Abuse Narcotics

In the reformation of criminal law, the topic of alternatives to deprivation of liberty has always occupied a central position. However, in reality, deprivation of liberty is difficult to be abolished. This cannot be separated from the philosophy of deprivation of liberty punishment such as imprisonment to ensure the security of prisoners and provide opportunities for prisoners to be rehabilitated. However,

[23] I Made Walesa Putra, 'Ideologi Pancasila Sebagai Dasar Tujuan Pemidanaan dalam Pembaharuan Hukum Pidana Nasional' (2022) XVII Vyavahara Duta. [58].

on the other hand, the criminal deprivation of freedom also causes the convicts to experience dehumanization due to prolonged stay in the criminal school (correctional institution), so that in the end the convicts experience losses in the form of inability to continue their lives productively in the society.[24] Of course, such problems are also faced by a prisoner who abuses narcotics in a correctional institution.

Law enforcers who feel proud because of their achievements in law enforcement imprisoning by detaining based on sufficient preliminary evidence against drug offenders such as misusers is wrong. Indeed, legal formal, drug abusers are threatened with punishment under Article 127 of Act Number 35 of 2009 concerning Narcotics, whereas from the point of view of victimology, drug abusers are victims of narcotics crimes who should receive protection like victims of other crimes, while dealers should be given appropriate punishment.[25]

The public often has a misperception of misusers, as if misusers are equated with drug and drug precursor traffickers. The public considers it appropriate and correct to investigate, detain, prosecute, checked and then sentenced to imprisonment.[26] So in this state of public perception, Peter Hoefnagels stated that in order to utilize the mass media to positively influence the public that people who abuse drugs are not criminals.[27] That way the public no longer stigmatizes the abuser as a criminal, but rather as someone who is sick with addiction or shackled due to drug dependence who deserves attention.

The practice of imprisonment given to drug abusers has caused Indonesia to have a narcotics emergency, this is because the abusers become recidivists, making it difficult for Indonesia to avoid a narcotics emergency.[28] When judges decide on imprisonment for drug abusers, it will still have a bad impact because the energy of illicit drug trafficking in Indonesia does not go away, even though law enforcement

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[24] Muladi dan Barda Nawawi Arief, *Op., cit*. [76-78].
[25] Anang Iskandar, *Op., cit*. [79-80].
[26] *Ibid*. [88].
[27] Muladi dan Diah Sulistyani RS, *Kompleksitas Perkembangan Tindak Pidana Dan Kebijakan Kriminal* (Alumni 2016). [161].
[28] Anang Iskandar, *Op., cit*. [39].

against drug traffickers is carried out brilliantly, such as imposing the death penalty. Currently, more than 60% of prison inmates are drug abusers and traffickers, and the composition is mostly drug abusers. This condition certainly makes it difficult for prison officers to carry out security if the prisoners are relapsing, because the correctional institution officers themselves do not have the duties and functions to rehabilitate their prisoners.[29] Thus, there has been an over criminalization in law enforcement which has led to the overload of officers from the apparatus in the criminal justice system. Therefore, Hulsman reminded "criminalization must not result in overloading the capacity of penal machinery".[30]

Drug abuse, which is considered a crime, is a humanitarian and social problem, so it cannot simply be included, regulated and threatened with punishment in concrete legal rules.[31] Therefore, Nigel Walkel reminded the principles of limiting the use of penal means, namely:

1. Do not use penal means only for the purpose of retaliation;
2. Do not use penal means to punish acts that are not harmful or dangerous;
3. Use other means that are more effective and lighter than penal means;
4. Do not use penal means if the harm or danger arising from the imposition of punishment will be greater than the harm or danger of the criminal offense committed;
5. The prohibition stipulated in the criminal law should not contain a more dangerous nature than the act to be prevented.[32]

In line with that, Herbert L. Packer also warned not to use criminal sanctions carelessly, indiscriminately or generalize between abusers and illicit drug dealers and drug precursors.[33] This is what Peter Mahmud Marzuki calls the principle of *suum cuique tribuere*, which means giving everyone what is their share, so do not be generalized. The law must bring peace by providing fair regulation, namely regulation that protect interests in a balanced manner,[34] be it the interests

[29] Anang Iskandar, *Penegakan Hukum Narkotika: Rehabilitatif Terhadap Penyalah Guna Dan Pecandu, Represif Terhadap Pengedar* (Elex Media Komputindo 2019). [94].

[30] Muladi dan Barda Nawawi Arief , *Op., cit*. [130].

[31] Dey Ravena dan Kristian, *Kebijakan Kriminal (Criminal Policy)* (Kencana 2017). [1].

[32] Barda Nawawi Arief, *Beberapa Aspek Kebijakan Penegakan Dan Pengembangan Hukum Pidana* (Citra Aditya Bakti 1998) 75–76. [75-76].

[33] *ibid*. [76]

[34] Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, *Op., cit.* [131–133].

of protecting the wider society to avoid the dangers of narcotics and narcotics precursors, eradicating illicit trafficking of narcotics and narcotics precursors and also the interests of improving the abusers who are being shackled or sick with addiction themselves.

Through criminal law policy regarding the regulation of sanctions against narcotics abusers, it is hoped that Act Number 35 of 2009 concerning Narcotics can make it better in the future. This criminal law policy is a rational arrangement of crime control efforts in society, including the acts of narcotics abuse as a result of illicit trafficking of narcotics and narcotics precursors, with the ultimate goal of achieving the happiness of society, a healthy and refreshing cultural life free from the influence and dependence of narcotics.[35]

Rational drafting efforts in criminal law policy to control crime in the field of narcotics consist of 3 (three) stages, the first is formulation, the second is application and the third is execution. This formulation is the stage of law formation *in abstracto* by the legislature or law making. This stage is the most strategic stage, because at this stage it is expected that there will be guidelines for the following stages.[36] Therefore, at this stage of formulation it is important to make the morals embodied in the principle of justice as a guideline in the formation of laws. The law must contain morals that are based on reason, if the law in question does not contain morals then it is not worthy of being called a law, but is nothing but a product of oppression against drug abusers who are shackled or sick with addiction that does not deserve imprisonment. Thus, if the law does not contain morals, it will not have validity and binding force.[37]

As explained earlier, what is meant by morality here is love and togetherness towards fellow humans in order to continue and maintain human existence in life. The love in question should also be given to drug abusers by reformulating drug laws that are humanist or rich in humanitarian values by providing protection and

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[35] Muladi dan Barda Nawawi Arief, *Op., cit*. [157–158].
[36] *ibid*. [173].
[37] Peter Mahmud Marzuki, *Teori Hukum, Op., cit.* [103].

improvement to drug abusers themselves, with the hope that after drug abusers undergo improvement and are free from drug dependence, they can return to mingle in society to continue and maintain their existence in the world.

When determining the direction of criminal law policy, it will be faced with 2 (two) determination matters, namely:

1. What actions should be made a criminal act; and
2. What sanctions should be used or imposed on offenders criminal act.[38]

In determining what sanctions should be given to drug abusers, the legislator in formulating the narcotics act should use a humanist approach. Because by using a humanist approach, the sanctions given to drug abusers are in accordance with civilized human values and also raise awareness of drug abusers, namely awareness of human values and social values.[39] This was also said by Aristoteles according to which the law must be aimed at achieving a better human life.[40] Therefore, the prescription of sanctions given to drug abusers who are shackled and addicted as a result of the illicit trafficking of narcotics and narcotics precursors is not a criminal deprivation of liberty such as imprisonment. Even if imprisonment must be imposed, there must be limitative exceptions.

Meanwhile, the paradigm of law enforcement against drug abusers as regulated in Act Number 35 of 2009 concerning Narcotics is to place imprisonment as a premium remedium with a single threat system and not alternated with other actions such as rehabilitation which is imperative. This can be proven by the existence of Article 127 in Chapter XV regarding criminal provisions which before the Chapter there were no other Chapters that made the abusers repaired or whatever the name was humanist.

Article 127 paragraph (1) of Act Number 35 of 2009 concerning Narcotics threatens criminal sanctions against people who abuse drugs, but based on Article 127 paragraphs (2) and (3) of the Act, people who abuse drugs and victims of

[38] Muladi dan Barda Nawawi Arief, *Op., cit.* [160].
[39] *ibid*. [167].
[40] Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, *Op., cit*. [96].

abuse are required to undergo rehabilitation at the same time. Therefore, with the threat of punishment against people who abuse drugs as the primum remedium, it is appropriate for Act Number 35 of 2009 concerning Narcotics to be reformulated immediately, especially regarding the regulation of sanctions against people who abuse drugs and other uncertainties in the context of protection and protection.

The philosophical foundation of Manuscript Academic of the Draft Act concerning the Amendment to Act Number 35 of 2009 concerning Narcotics is in accordance with the purpose of independence contained in Paragraph IV of the Preamble of The 1945 Constitution the Republic of Indonesia, namely:

> "…protect the entire Indonesian nation and the entire Indonesian homeland as well as to advance the general welfare, educate the nation's life, and participate in implementing world order based on independence, lasting peace and social justice".

The Draft Act provides protection to all Indonesian people from various acts that can harm, both physical and non-physical threats, because the dangers of narcotics are also a threat to the physical and psychological. Through the Draft Act, the state seeks to prevent the abuse and illicit trafficking of narcotics and narcotic precursors. In addition, the state also seeks to handle the abuse and illicit trafficking of narcotics and narcotics precursors by orienting towards improving the quality of health and life.[41]

The juridical basis that exists in the Manuscript Academic of the Draft Act concerning the Amendment to Act Number 35 of 2009 concerning Narcotics is that rehabilitation regulate have not been comprehensively regulated in the Narcotics Act. This can be seen in the absence of qualifications or criteria such as what kind of drug abuse users can be given rehabilitation.[42] Thus, the government has actually paid attention to such problems since 2018, but the fact is that until now Act Number 35 of 2009 concerning Narcotics has not been amended.

Current law enforcement trends have shifted from retrebutive to restorative

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[41] Badan Pembinaan Hukum Nasional, 'Naskah Akademik Rancangan Undang-Undang Tentang Perubahan Atas Undang-Undang Nomor 35 Tahun 2009 Tentang Narkotika' (Kementerian Hukum dan HAM 2018). [99].

[42] *ibid.* [103].

and rehabilitative law enforcement. Rehabilitative law enforcement against drug abusers is law enforcement starting from arrest, investigation, prosecution and trial by using forced efforts in the form of placement into rehabilitation institutions and sanctions in the form of rehabilitation sanctions. Therefore, the government program in eradicating drug crimes, both prevention and rehabilitation of drug abusers, is "balanced" with the eradication of illicit trafficking of narcotics and narcotics precursors, this program is called prevention and eradication of drug abuse and illicit trafficking (*Pencegahan dan Pemberantasan Penyalahgunaan dan Peredaran Gelap Narkotika/*P4GN).[43]

In line with that, law enforcement in abstracto through criminal law policy, the future Narcotics Act is divided into several clusters. The division of the cluster is on the basis of providing different legal treatment between abusers, victims of abuse, addicts with distributors and dealers drug in formulating the articles of punishment, which include:

> Cluster 1:
> Articles 111 to 126 are intended to punish producers, dealers, couriers, and distributors. The distinction of whether a person is categorized as a dealer or a courier or a dealer is made based on evidence in court with a minimum sentence range of 4 years to a maximum sentence of 20 years. Small-scale dealers are punished with a minimum sentence of 4 (four) years, while dealers are punished with a maximum sentence of 20 years or life imprisonment or death penalty.
> Cluster 2:
> Article 127 and Article 128 are intended for abusers, victims of abusers and addicts. In this article, the criminal provisions are omitted, for abusers, victims of abuse and addicts, rehabilitation measures are provided.[44]

The rehabilitation of drug abusers, victims of abusers and addicts in the Draft Act Narcotics is also new, namely rehabilitation carried out by the Integrated Assessment Team (*Tim Asesmen Terpadu/*TAT), which consists of a legal team and a team of doctors who are tasked with conducting an assessment of a person who abuses, victims of abusers and addicts arrested by law enforcers, with due regard to:

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[43] Anang Iskandar, *Op., cit*. [68–69].

[44] Badan Pembinaan Hukum Nasional, *Op., cit*. [110–111].

1. The level of dependency;
2. The form of approach or therapy used;
3. The length of time for Rehabilitation;
4. The place of implementation of Rehabilitation;
5. ndications of involvement in illicit drug trafficking networks, drug precursors and/or new psychoactive substances; and
6. Other things needed in handling the case.

If the results of the TAT assessment state that a person arrested by law enforcers is a drug abuser who consumes drugs, with criteria:

1. Not involved in illicit drug trafficking networks, narcotic precursors and new psychoactive substances;
2. Positively using narcotics or new psychoactive substances;
3. The evidence found does not exceed the amount of use for 1 (one) day as stated in Appendix III which is an integral part of this Act; and
4. Abuser who undergo Rehabilitation through the legal process no more than 2 (two) times.

The TAT then issues a determination for rehabilitation, in which case the legal process does not need to proceed to the level of investigation and prosecution. However, it is sufficient to apply for a rehabilitation determination by the TAT to the head of the local district court. However, if the results of the TAT assessment conclude that a person arrested by law enforcers is a drug abuser who consumes drugs as well as a courier, drug distributor and/or drug dealer, then the TAT issues a recommendation that the case be continued to the law enforcement process.[45]

In addition, the future Act Narcotics has clarified the distinction between the definitions of abusers, victims of abusers and addicts. In Act Number 35 of 2009 concerning Narcotics there is confusion between the definitions of the three, so that the impact is as if the handling is equated with drug dealers or distributors. *Definiendum* of abusers in Article 1 number 15 seems to also be found in *definien* of narcotics addicts in Article 1 number 13 and seems to connote narcotics users, because there is the term “using”. So that such vagueness has violated 8 (eight) principles of the formation the legal rule by Lon Fuller in his theory ‘eight ways to fail to make a law’, one of the 8 (eight) principles is that the legal rule is made in a

[45] *ibid.* [111–113].

formulation that is easily understood by the general public.[46] However, the future Act Narcotics has clarified the definition between the three, namely:

> "Abuser is an individual who uses narcotics or new psychoactive substances without the right or against the law";
> "Addict is an abuser who is in a state of dependence, both physically and psychologically";
> "Victim is someone who is tricked, helpless, coerced, and/or threatened into using narcotics or new psychoactive substances who is not yet an addict criteria".[47]

With the new definition formula and sanction regulation for drug abusers in the Draft Act Narcotics that will be passed in the future, it will certainly provide legal protection for abusers by positioning rehabilitation as a primum remedium. Such a criminal law policy is more humanist and humanizes humans. Among the many principles of law, the most fundamental principle is to humanize humans, because basically the house of law is the house of mankind. So that in the context of this kind of criminal law policy, the law does not seem scary and instead has the impression of radiating love and love for drug abusers. They cannot necessarily be sentenced. Those who have lost their way in life due to drug addiction need rehabilitation, not punishment.

Conclusion

Ratio legis of providing criminal sanctions against drug abusers regulated in Act Number 35 of 2009 concerning Narcotics turned out to be that one of the legislators who was a doctor (not jurists) at that time had a retrebutive or retaliatory paradigm, so that criminal sanctions as stipulated in Article 85 of Act Number 22 of 1997 concerning Narcotics threatened against abusers must be maintained. One of the legislators missions regarding the amendment to Act Number 22 of 1997 is that rehabilitation measures are given only to victims of narcotics abuse, not to drug

[46] Philipus M. Hadjon, 'Potret Sistem Hukum Indonesia Era Reformasi: Kegagalan Dalam Pembentukan Peraturan Perundang-Undangan Hukum Administrasi', *Prosiding Seminar Nasional oleh UBAYA dan Badan Pengkajian MPR RI* (2019). [40].

[47] Badan Pembinaan Hukum Nasional, *Op., cit*. [106–107].

abusers or drug addicts.

Reformulation of humanist sanction regulation for criminal act who abuse narcotics in the future narcotics Act criminal sanctions are eliminated. Misusers, victims of abuse and addicts are given rehabilitation measures. The future narcotics Act also contains a novelty, namely the Integrated Assessment Team (TAT) consisting of a legal team and a team of doctors who are tasked with conducting an assessment of a person who is a abuse, victim of abuse and addict arrested by law enforcers. The TAT is authorized to determine that the three categories in question be rehabilitated, so that the legal process does not need to continue to the level of investigation, prosecution and rehabilitation is sufficient through the determination of the head of the local district court. However, if the results of the TAT assessment conclude that a person arrested by law enforcers is a drug abuser who consumes drugs as well as a courier, drug distributor and/or drug dealer, then the TAT recommends that the legal process continue.

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