



## Implications of the Application of Article 112 Law Number 35 of 2009 Concerning Narcotics in the Case of Narcotics Criminal Acts in Indonesia

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### **Abstract**

Article 112 of Law Number 35 Year 2009 concerning Narcotics in addition to causing multiple interpretations, also creates a legal uncertainty in its application. For the purpose of the law to be achieved, a legal method that is firm, clear, does not have multiple meanings, is applied consistently, and is maintained with certainty, the above is called legal certainty. legal certainty is a characteristic that cannot be separated from the law itself, especially the written law, the law will lose its meaning if it is not accompanied by a legal certainty because the law cannot be used as a guide to behave again for all people in other words there is no law if there is no law a legal certainty.

**Keywords:** *Implications; Applications; law; Narcotics; Criminal Acts; Indonesia*

### **A. Background**

The law requires that humans in certain concrete situations act according to what should be carried out. Human-generated law, control human life. Legal certainty is a characteristic that cannot be separated from the law, especially for written law. Law without certainty will lose its meaning because it can no longer be used as a code of conduct for all people (*Ubi jus incertum, ibi jus nullum*: where there is no legal certainty, there is no law)<sup>1</sup>.

One orientation of the legal goals according to Gustav Radbruch is legal certainty. According to him, legal certainty is the first claim to the law. The demand is so that he is positive, that is, applies with certainty. The law must be obeyed, so that the law is truly positive<sup>2</sup>. However, legal certainty does not automatically materialize when the enactment and enactment of the law. The law must still be applied by law enforcers (practical law bearers). In order for this legal certainty to be truly realized, certainty must also be required in its application. The Positive Law or Authoritative Text tries to provide answers to the

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<sup>1</sup> Darji Darmodiharjo & Shidarta, *Penjabaran Nilai-nilai Pancasila Dalam Sistem Hukum Indonesia*, Rajawali Pers, Jakarta, 1996, p. 44.

<sup>2</sup> Krisnajadi, *Bab-bab Pengantar Ilmu Hukum Bagian I*, Sekolah Tinggi Hukum Bandung, Bandung, 1989, p. 60.

concrete needs of the community and at the same time aims at seeking certainty and order. However, it must be noted that the certainty of this Authoritative Text can be weakened, both by the obscurity of the law and by changing the law itself. Including the question of enforcement of narcotics crime in Indonesia<sup>3</sup>.

Law enforcement mechanisms such as narcotics<sup>4</sup>, psychotropic substances and other addictive substances are part of the criminal justice system itself. In its development, enforcement of narcotics cases has evolved and made Indonesia a state of drug emergency. Drug abuse<sup>5</sup> in Indonesia has reached a very alarming and dangerous point with targets that have touched all levels of society. This can be seen from a survey conducted by the National Narcotics Agency of the Republic of Indonesia throughout 2018. Based on the survey, there were 3,376,115 people in the 10-59 years age group, that number was a number of drug abusers throughout 2018<sup>6</sup>.

The regulation of Narcotics itself in history is only found in *Verdovende Middelen Ordonnantie (Staatsblad No. 278 jo No. 536)*<sup>7</sup>. This rule is deemed unable to keep up with the development of traffic and means of transportation that encourage the distribution and supply of narcotics to Indonesia. Therefore, based on the Resolution of *The United Nations Economic and Social Council*, Number 1474 (XLVIII) on March 24, 1970 a United Nations conference on the Adoption of the Psychotropic Protocol was conducted to produce the *Convention on Psychotropic Substances 1971*<sup>8</sup>. Based on the results of the convention, the Indonesian government ratified the 1971 Convention on Psychotropic Substances in the Law of the Republic of Indonesia Number 8 of 1996 with *reservation*. Along with its development, the regulation regarding narcotics has undergone several changes. The current regulation regarding narcotics is Law of the Republic of Indonesia Number 35 Year 2009 concerning Narcotics<sup>9</sup>.

Article 1 number 1 of Law Number 35 Year 2009 concerning Narcotics (hereinafter referred to as Narcotics Law) states that Narcotics are substances or drugs derived from plants or non-plants, both synthetic and semisynthetic, which can cause a decrease or change of consciousness, loss of taste, reduce to eliminate pain, and can cause dependence, which are divided into several groups as contained in the appendix to the Narcotics Act. In the preamble of the Narcotics Law states that narcotics on the one hand is a useful drug or material and the development of science and on the other hand can also cause a very detrimental dependency if misused without strict control and supervision.

The Narcotics Law expressly states that narcotics can only be used for the benefit of health services and / or the development of science and technology, this is clearly stated in Article 7. This can be

<sup>3</sup> O. Notohamidjojo, *Makna Negara Hukum*, BPK Gunung Mulia, Jakarta, 1970, p. 80

<sup>4</sup> Narcotics come from English, namely narcotics, which means anesthetic, which in Greek is "*narcosis*" which means to put to sleep or anesthetize. Broadly speaking, narcotics is often mentioned as a substance that can cause feelings of transformation, mood of vision, it happens because the substances contained in narcotics affect the central nervous system. (Kusno Adi, *Kebijakan Kriminal Dalam Penanggulangan Tindak Pidana Narkotika Oleh Anak*, pertama ed, Malang, UMM Press, 2009 p.12). Article 1 number 1 of the Narcotics Law states that narcotics are substances or drugs originating from plants or non-plants, both synthetic and semisynthetic, which can cause a decrease or change of consciousness, loss of taste, reduce to eliminate pain, and can cause dependence, which is distinguished into groups as attached in this Act.

<sup>5</sup> Narcotics abuse is a type of crime that has a very broad and complex social impact. In consideration of letter c of the Narcotics Law, it is stated that narcotics on the one hand is a drug or material that is useful in the field of medicine or health services and the development of science and on the other hand it can also cause a very detrimental dependency if it is misused or used without strict and careful control and supervision. In Article 1 number 15 of the Narcotics Law it is explained that an abuser is a person who uses narcotics without rights or against the law.

<sup>6</sup> Fitri Resnawardhani, *Penegakkan hukum penyalahgunaan obat-obat terlarang di Indonesia menurut Undang-Undang Nomor 35 Tahun 2009 Tentang Narkotika*, *Jurnal Lentera Hukum*, Volume 6 Issue 1, 2019.

<sup>7</sup> Siswanto Sunarso, *Politik Hukum dalam Undang-Undang Narkotika (UU Nomor 35 Tahun 2009)* (Jakarta:Rineka Cipta, 2012). p. 11

<sup>8</sup> *Ibid.*

<sup>9</sup> Kusno Adi, *Kebijakan Kriminal Dalam Penanggulangan Tindak Pidana Narkotika Oleh Anak*, pertama ed (Malang: UMM Press, 2009). p. 12

interpreted that if the narcotics are used for personal interests and without rights, then it can be criminal. The use of class 1 narcotics is restricted to the interests of the development of science and technology and for diagnostic reagents, as well as laboratory reagents after obtaining the Minister's approval of the recommendation of the Head of the Drug and Food Monitoring Agency. The limitation is contained in Article 8 Paragraph (2) of the Narcotics Law. So if someone violates the provisions of the article, criminal sanctions may be imposed.

The number of losses and negative impacts caused by narcotics led the legislators to create Law No. 35 of 2009 which aims to eradicate and tackle narcotics crime. Eradication of narcotics crime through Law No. 35 of 2009 was carried out with the imposition of criminal sanctions, one of which is the existence of a special minimum criminal threat. That is based on the explanation of Law No. 35 of 2009 which states that:

"In reality Narcotics crime in society shows an increasing tendency both quantitatively and qualitatively with widespread victims, especially among children, adolescents, and young people in general. Narcotics crime is no longer carried out individually, but involves many people who together, even an organized syndicate with an extensive network that works neatly and very secret both at national and international level. Therefore, to create a deterrent effect on the abusers and illicit trafficking of Narcotics and Narcotics Precursors, it is regulated regarding the imposition of criminal sanctions, both in the form of special minimum penalties, 20 (twenty) years imprisonment, life imprisonment, and capital punishment. "

The application of criminal sanctions against narcotics and narcotics offenders based on the articles contained in the Narcotics Law. Article that is often used in cases like this is Article 112 of the Narcotics Law. Article 112 of the Narcotics Law consists of 2 paragraphs which read:

"Every person who is without rights or against the law has, holds, controls, or provides Narcotics Group I is not a plant, shall be sentenced to a minimum of 4 (four) years imprisonment and a maximum of 12 (twelve) years and a minimum fine of Rp. 800,000.00.00 (eight hundred million rupiah) and a maximum of Rp.8,000,000,000.00 (eight billion rupiah). "

"In the case of the act of possessing, storing, controlling or equalizing Narcotics of Group I not as plants as referred to in paragraph (1) weighing more than 5 (five) grams, the perpetrators shall be sentenced to life imprisonment or imprisonment for a minimum of 5 (five) years and at most 20 (twenty) years and a maximum fine as referred to in paragraph (1) plus 1/3 (one third) "

In its Enforcement Process, the application of Article 112 raises multiple interpretations and ambiguities. The multi-interpretation article will cause the perpetrators of narcotics crimes (dealers) to take cover as if they were victims of narcotics crimes. This will have an impact on sentencing with a short sentence so as to cause injustice in the implementation process.

## **B. Problem Formulation**

*What is the Implication of the Application of Article 112 Law Number 35 of 2009 Concerning Narcotics in the Case of Narcotics Criminal Acts in Indonesia?*

## **C. Discussion**

The criminal law policy also regulates criminal sanctions. Criminal sanctions that are applied must be adjusted to the needs of the protected community and defend their interests. The limits of

criminal sanctions must also be set based on interests and values in society. The use of criminal sanctions must also provide awareness for the perpetrators of crime. Criminal law policy is inseparable from the stages of formulation policy. The formulation policy is a stage of law enforcement *in abstracto* carried out by the legislators so that this policy can also be called a legislative policy. Legislative policy is a plan from the legislators regarding what will be done in facing certain problems and how to carry out what has been planned<sup>10</sup>. The role of the legislature includes a basic policy that is not only about the criminal but also concerning the types or types of criminal sanctions provided for other criminal powers at a lower level as well as the levels given to them in determining the appropriate criminal sanctions for an offender.<sup>11</sup> A. Murder states that criminal law policy is to determine: *first*, to determine the extent to which criminal provisions apply, need to be amended, and updated, *second* to determine what can be done to prevent the occurrence of a criminal offense, *third* to determine the manner in which investigation, prosecution, justice and criminal conduct must be carried out<sup>12</sup>.

Different criminal application is very detrimental and does not describe a sense of justice because a narcotics user before using narcotics must certainly have or buy first, and when narcotics have been bought or owned, before being used it has been arrested by the police or BNN so that the results of laboratory examination for urine automatically concerned is negative. Logically, against narcotics users subject to Article 127 with a maximum threat of 4 years and may even be subjected to criminal acts in the form of medical and social rehabilitation, it is very unfair if someone who has not been able to use narcotics is subject to Article 112 whose criminal threat is a minimum of 4 (four) years, a maximum of 12 (twelve) years plus a minimum fine of Rp. 800,000,000 (eight hundred million rupiah)<sup>13</sup>.

The Supreme Court (MA) strongly criticizes the products of the DPR and the Government, namely the Narcotics Act, particularly Article 112. According to the Supreme Court (MA) the article governing Narcotics ownership is a waste basket article and a rubber article. In the end, many public prosecutors posted the article to ensnare even addicts and victims of narcotics abuse<sup>14</sup>. There are two tendencies of judges' mindset in handling narcotics abuse cases for themselves, namely the positivistic judge's mindset and the non positivistic mindset of the judge. The first pattern of mindset of judges emphasizes the formal size of the rule text in exploring the truth of the law, the second mindset elaborates the text of the rule of law with the sociolegal context in exploring the truth of the law<sup>15</sup>.

As an example of the case in Decision Number: 161 / Pid.Sus / 2016 / PN.Plg. In this case the defendant was charged as a narcotics agent or dealer, but the Panel of Judges stated in their decision that the defendant was a narcotics user. The case was with the defendants named Dedy Sanjaya and M Kiki Prataman. The two defendants by the Public Prosecutor were charged with the first indictment Article 114 Paragraph (1) jo Article 132 Paragraph (1) of the Narcotics Act and / or the second indictment namely Article 112 Paragraph (1) of the Narcotics Act, and / or a third indictment, namely Article 127 Paragraph (1) Letter a of the Narcotics Law in conjunction with Article 55 Paragraph (1) of the 1st Penal Code<sup>16</sup>.

<sup>10</sup> Dey Ravena & Kristian, *Kebijakan Kriminal (Criminal Policy)*, Kencana, Prenada Media Group, Jakarta., 2017, p. 147.

<sup>11</sup> Barda Nawawi Arief, *Kebijakan Legislatif Dalam Penanggulangan Kejahatan Dengan Pidana Penjara* Universitas Diponegoro, Semarang, 1994, p. 56.

<sup>12</sup> Barda Nawawi Arief, *Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana*, Citra Aditya Bhakti, Bandung, 1993, p. 3.

<sup>13</sup> Dahlan, *Penerapan Pidana Terhadap Penyalah Guna Narkotika Untuk Dirinya Sendiri*, *Jurnal Pembaharuan Hukum*, Volume IV No. 1 Januari - April 2017.

<sup>14</sup> <https://m.detik.com/news/berita/2658245/ma-pasal-112-uu-narkotika-pasal-keranjang-sampah>. accessed Agustus,12, 2019.

<sup>15</sup> *Ibid.*

<sup>16</sup> Pusat Penelitian Data dan Informasi Badan Narkotika Nasional Republik Indonesia, *Survei Nasional Penyalahgunaan Narkotika di 34 Provinsi Tahun 2017*, Annual Report (Jakarta: Badan Narkotika Nasional Republik Indonesia, 2017). p. 28.

In this case the defendant was proven to have possession and possessed narcotics of group 1 non-plant 1 packet of methamphetamine weighing 0.73 gram. From the discovery of the evidence, the defendant should have been charged under Article 112 of the Narcotics Law. In fact, the Panel of Judges handed down the verdict stating that the defendant was a narcotics user or addict or abuser so that the defendant was sentenced to a two-year prison sentence. Unfortunately, sentencing stating that the defendant is a user or addict or abusers of narcotics is not followed or a urine test is done to the two defendants to clarify whether the two defendants are really addicted or not. The defendant in the case should be subject to Article 112 of the Narcotics Law<sup>17</sup>.

In the Case of Sidiq Yudhi Arianto (MA Decision No. 1386 K / Pid. Sus / 2011), in his indictment, the Public Prosecutor charged the defendant with an alternative indictment where in the first indictment the defendant was charged under article 112 paragraph (1) of Law Number 35 Year 2009 concerning Narcotics. In the indictment it was not explained how the police could find out that the defendant had previously purchased the methamphetamine, only explained when he was searched in his left pocket to find 1 packet of methamphetamine weighing 0.2 gram.

In the prosecution stage, the Public Prosecutor claimed the defendant was proven on primair charges and demanded the defendant be sentenced to 4 years in prison and a fine of Rp. 800 million, but the Karanganyar District Court Decision stated that Didik was guilty of violating the criminal act of "abuse of Group I Narcotics for himself" and gave a prison sentence for 10 (ten) months to students. At the Appellate Level, PT Semarang stated the same thing as PN Karanganyar regarding a crime committed by Didik, which was in violation of Article 127 (a) but, PT gave a heavier prison sentence of 1 Year 6 months. Based on the decision of the Appeals, the Public Prosecutor filed an appeal on the grounds of an appeal which essentially argues that the indictment should have been proven as the First and not the Second. The Supreme Court's appeal was rejected by the Supreme Court with some very interesting legal considerations for us to examine.

The following excerpts are considered considerations of the Supreme Court's ruling:

*"Considering, that for these reasons the Supreme Court is of the opinion:*

*That the reasons for the appeal of the Public Prosecutor that according to the legal facts at the trial of the Defendant were proven to have committed a crime as referred to in Article 112 paragraph (1) of Law No. 35 of 2009, not the provisions of Article 127 paragraph (1) letter a as in the a quo ruling. - That the reasons for the appeal of the Public Prosecutor that according to the legal facts at the trial of the Defendant were proven to have committed a crime as referred to in Article 112 paragraph (1) of Law No. 35 of 2009, not the provisions of Article 127 paragraph (1) letter a as in the a quo ruling.*

Accuracy in the indictments will lead to a reduction in cases of error in persona and the imposition of undue criminal penalties. In arbitrary criminal proceedings, which do not meet proper investigation standards, errors often occur in person or the community often mentions it as a wrong arrest. In Educate's case, we can see how the accuracy of the charges held by the Prosecutor and the accuracy of the Judge's decision. When witnesses who are supposed to be faced are not available and evidence as a user with a urine test is also not available, it will be very difficult to state that the indictment is accurate. As a result of inaccurate indictments will result in inaccurate decisions. The messenger to Educator should be rehabilitation and not imprisonment.

Based on some of the decisions above, and the explanation of what is regulated in Article 112 of the Narcotics Law, there are things that cause multiple interpretations or ambiguities in their application.

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<sup>17</sup> Hari Sasangka, *Narkotika dan Psicotropika Dalam Hukum Pidana*, Mandar Maju, Bandung, 2003, p. 35.

Article 112 of the Narcotics Law is widely used to ensnare narcotics offenders, while Article 127 of the Narcotics Law is often applied to victims of narcotics abuse. If you look at the elements contained in Article 112 of the Narcotics Law, that is, every person, without rights or against the law, owns, stores, controls or provides. The purpose of each person is an individual. The meaning of the word has according to the Big Indonesian Dictionary consists of 2 meanings, which is to have and illegally take it to belong.

Muladi further explained that the development of specific minimum sanctions for certain crimes was aimed at reducing disparity in sentences and showing the severity of the relevant crime<sup>18</sup>. That shows that Law No. 35 of 2009 regulates the specific minimum criminal provisions because narcotics crime is a serious and serious crime. The imposition of criminal sanctions in Law No. 35 of 2009 can be seen from its cumulative nature which means that if a person is proven to have committed a narcotic crime then he will be subject to imprisonment and fines.

Storing in the Big Indonesian Dictionary means to place it in a safe place so that it is not damaged, lost, and so on, packed, cleared, fixed. Thus, the element of saving in Article 112 of the Narcotics Law means that the perpetrators put the Narcotics in a safe place. Mastering in the Big Indonesian Dictionary means to rule over (something), hold power over (something). Means mastering in the elements of Article 112 of the Narcotics Law means that the narcotics are under the authority of a person (the perpetrators) or the perpetrators hold the authority over the narcotics. The next element is providing, in the Big Indonesian Dictionary providing contains the meaning of preparing; prepare. Means the element provides in Article 112 of the Narcotics Act means that the person is preparing or preparing narcotics<sup>19</sup>.

Gustav Radbruch stated that the orientation of the goal of the law is legal certainty. he stated that legal certainty is the first claim to the law which demands are in the form of applicable law. He also added that the law must be obeyed so that the law is truly positive<sup>20</sup>. The legal certainty did not manifest itself when enacted and enacted. Laws must still be applied by law enforcement (practical law enforcement). For legal certainty to be truly applied, a legal certainty is needed in its application. Positive law provides answers to the real needs of the community and is aimed at seeking order and certainty. Keep in mind that the legal certainty of this positive law can still be weakened, either by the obscure legal meaning or by changing the law itself<sup>21</sup>.

Speaking of legal certainty, according to O. Notohamidjodo that the purpose of the law is to protect human rights and obligations in society, on the basis of justice to achieve balance and peace and general welfare, and protect social institutions that exist in society<sup>22</sup>. He stated that the presence of the law is closely related to humans and society so that there is harmony between the *rule and value in social life*, the opinion is more oriented to the placement of the *rule of law* towards its goal of being more just and satisfying actual social needs<sup>23</sup>. *Rule of law* has the *Anglo saxon concept* which in the concept of continental Europe is named *rechtsstaat* (rule of law). Article 1 Paragraph (3) of the 1945 Constitution the 4th amendment affirms that the State of Indonesia is a state of law, with this affirmation, the procedures for life in society and the state are governed by law, both written and unwritten laws, so that every community, even the government must comply with applicable law.

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<sup>18</sup> Muladi, *Hak Asasi Manusia, Politik, dan Sistem Peradilan Pidana*, Badan Penerbit Universitas Diponegoro, Semarang, 2002, p. 15.

<sup>19</sup> Koesno Adi, *Diversi Tindak Pidana Narkotika Anak*, Setara Press, Malang, 2015, p. 4 .

<sup>20</sup> Krisnajadi, *Bab-bab Pengantar Ilmu Hukum Bagian I Sekolah Tinggi Hukum Bandung*, Bandung, 1989, p. 60.

<sup>21</sup> *Ibid.*

<sup>22</sup> Notohamidjojo, *Makna Negara Hukum*, BPK Gunung Mulia, Jakarta, 1970, p. 80.

<sup>23</sup> Maya Indah, *Refleksi Pemikiran O.Notohamidjojo Untuk Mewujudkan Cara Berhukum Humanis*, Balaiurang Utama UKSW, Salatiga, 2011, p. 23.

Criminal punishment given to users is not an effective way to repair damage. At the same time, criminal penalties have the potential to be of a violent nature and are therefore limited by procedural formalism. This statement indicates that although the criminal is considered ineffective in dealing with crime, the crime is still needed to reduce the crime rate. There is no country in this world that does not include criminal as one of the sanctions but is related to sanctions for narcotics users or addicts who are considered humanist to be more appropriate to implement rehabilitation measures.

Utrecht said that "legal certainty contains two meanings, namely first, the existence of general rules that make individuals aware of what actions may or may not be done, and second, in the form of legal security for individuals from the arbitrariness of the government because by the existence of general rules that individuals can know what may be charged or done by the State for individuals"<sup>24</sup>. If it is associated with legal certainty for users of narcotics abuse, at least there are laws and regulations that regulate it so that each individual can know what actions may or may not be done.

There are two tendencies of judges' mindset in handling narcotics abuse cases for themselves, namely the positivistic judge's mindset and the non positivistic mindset of the judge. The first pattern of mindset of judges emphasizes the formal size of the rule text in exploring the truth of the law, the second mindset elaborates the text of the rule of law with the sociolegal context in exploring the truth of the law. The importance of the new construction of the judge's mindset departs from the *existing* conditions (study results) of handling cases (abusers of narcotics for himself) by the judges in court currently experiencing a decline or failure to present a just, useful law and protect the interests of society (*social justice*). The positivistic pattern of judges' mindset needs to be rebuilt (reorganized) based on a new progressive mindset in solving the legal problems that have arisen lately that are increasingly complex and complex, especially in solving the problem of narcotics abusers for themselves. The reality or circumstances in which decisions must be taken by taking into account the context. So complex is the reality that it is almost impossible to get a fair decision by relying solely on legalistic considerations. Therefore, the presence of wise and creative legal actors is absolutely necessary to guide a broad and creative interpretation of such rules. A progressive legal actor tries to find and find justice within the limits and in the midst of the limitations of existing legal rules.

## Conclusions

Based on the discussion above, it can be concluded that the legal significance in Article 112 and Article 127 of the Narcotics Law can be said that the articles still have not provided legal certainty. That is because the editorial article which is still multi-faceted and contains multiple meanings. In addition, law enforcers who are inconsistent in the application of the article also cause legal uncertainty. Formulation policy is one of the stages of criminal law policy. The formulation policy consists of 3 (three) stages, namely: *first*, the formulation of a criminal act. *Second*, the formulation of criminal liability. *Third*, formulation of sanctions both criminal sanctions and sanctions in the form of disciplinary action. So, the policy formulation on Narcotics Law that is considered suitable to be applied in the future is to amend Article 112 of the Narcotics Act. This change occurred in the editorial of Article 112 by adding elements of the article contained in Article 112 of the Narcotics Law. The elements of the article only add the word "sell. Circulate "to the editor. With the amendment, every narcotics offender cannot hide in Article 127 of the Narcotics Law. Based on what the authors have explained above, the authors provide suggestions for immediate changes to the Narcotics Law, especially to Article 112. The amendment is very necessary given the increasing number of narcotic offenders who should be charged under Article 112 but charged under Article 127.

<sup>24</sup> Riduan Syahrani, *Rangkuman Intisari Ilmu Hukum*, Citra Aditya, Bandung, 1999, p. 23.

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