

Analysis of Criminal Responsibility for Narcotics Abuse Based on Positive Criminal Law

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Abstract. *This study aims to analyze criminal responsibility for narcotics abuse within the framework of Indonesian positive criminal law, particularly in the context of legal reform through the 2026 National Criminal Code (KUHP). The background of this research is based on the paradigm shift in criminal law from a repressive approach toward a more humane and substantively just orientation. The main issues examined are how criminal responsibility is constructed for narcotics abusers and how users are positioned both as offenders and victims within the national criminal justice system. This research employs a normative legal method using statutory, conceptual, and philosophical approaches. Legal materials consist of primary, secondary, and tertiary sources, which are analyzed qualitatively through deductive reasoning. The study focuses on the provisions of Law Number 35 of 2009 concerning Narcotics and its relevance to the National Criminal Code, particularly regarding the principles of criminal responsibility, legality, and the development of restorative justice approaches. The findings indicate that Indonesian positive criminal law has adopted a double track system in addressing narcotics abuse, combining criminal sanctions and rehabilitative measures. However, in practice, there remains a gap between normative provisions and their implementation, particularly in distinguishing between users, addicts, and traffickers. Therefore, a more progressive and integrative criminal policy is required to ensure the realization of a humane, proportional, and substantively just criminal justice system.*

Keywords: *Criminal; Justice; Law; Narcotics; Responsibility.*

1. Introduction

The reform of national criminal law through the enactment of the 2026 National Criminal Code marks a fundamental shift in the direction of Indonesian legal policy. This reform positions criminal law not merely as a repressive tool of the state, but rather as *a tool of social engineering* oriented toward protecting human dignity

and achieving substantive justice.¹This orientation aligns with the vision of President Prabowo Subianto's administration through the Asta Cita Program, which affirms the supremacy of law, social justice, and the protection of human rights as the primary foundations of sustainable national development.

In this context, national criminal law is directed to function more humanely and proportionally. Criminal law is no longer positioned solely as a means of punishment (*punitive-oriented*), but rather as a social control mechanism aimed at creating order, justice, and benefit for society. This paradigm demands a fundamental shift in how we view criminals and the purpose of punishment itself.

As a conceptual catalyst, the creation of the 2026 National Criminal Code reflects the state's effort to break away from the colonial criminal law paradigm and toward a national criminal law system rooted in the values of *living law*, Pancasila, and developments in modern criminal law thought. This transformation has direct implications for the need to reconstruct fundamental concepts of criminal law, including criminal responsibility and the orientation of punishment.

Furthermore, the humanist orientation of criminal punishment does not exist in a vacuum, but is rooted in the nation's legal ideals (*rechtsidee*) which originate from Pancasila and the 1945 Constitution of the Republic of Indonesia. The Constitution expressly places health as part of human rights through Article 28H paragraph (1) which states that everyone has the right to live in physical and spiritual prosperity, to have a place to live, and to have a good and healthy living environment and has the right to receive health services.²This provision is a philosophical justification that the state is obliged to protect the minds and health of its citizens from the dangers of narcotics abuse, so that handling narcotics users cannot simply stop at criminalization, but must provide space for the recovery of physical and spiritual health.

This affirmation is reinforced by Article 28I paragraph (4) of the 1945 Constitution of the Republic of Indonesia which places the protection, advancement, enforcement, and fulfillment of human rights as the responsibility of the state, especially the government.³Within this framework, the protection of the mind (*hifz al-'aql*) and soul (*hifz al-nafs*) as known in the discourse of *maqasid al-syari'ah* has a meeting point with the ideals of Indonesian constitutional law, namely that efforts to protect the mind and human health from damage due to narcotics are legal objectives that are protected simultaneously by the constitution and by religious values that exist in society. Thus, the policy of criminal responsibility for

¹Barda Nawawi Arief, *Anthology of Criminal Law Policy: Developments in the Drafting of the New Criminal Code*, 4th ed., Kencana Prenada Media Group, Jakarta, 2011, p. 23.

²Republic of Indonesia, *1945 Constitution of the Republic of Indonesia*, Article 28H paragraph (1).

³Republic of Indonesia, *1945 Constitution of the Republic of Indonesia*, Article 28I paragraph (4).

narcotics users should be directed towards realizing the protection of these constitutional rights, not reducing them through a purely repressive approach.

One crucial issue emerging within the reform framework is the regulation of criminal liability for drug users. Drug crimes are multidimensional, closely related to health, social, economic, and humanitarian aspects. Therefore, their handling cannot be simply equated with other conventional crimes, which focus solely on violations of legal norms.

In current law enforcement practices, drug users tend to be positioned as pure criminals who must be sentenced to prison and fines. This repressive approach emphasizes retributive justice, without providing adequate space for individual recovery or social reintegration of perpetrators into society.

This repressive tendency is not merely an abstract issue, but is clearly reflected in the empirical reality (*das sein*) of the Indonesian correctional system. Based on data from the Correctional Database System presented at a working meeting with Commission III of the House of Representatives in April 2026, the number of inmates in correctional institutions and detention centers in Indonesia has reached 278,376 people, while the ideal capacity is only 146,260 people, resulting in overcrowding of approximately 90 percent.⁴Of this number, 150,202 people, or approximately 54 percent, are convicts and detainees for narcotics cases, consisting of 96,176 people with the status of dealers/dealers and 54,026 people with the status of users.⁵This number of users, which has reached more than 54,000 people, is actually more in need of a touch of recovery through medical and social rehabilitation than imprisonment.

The dominance of drug-related inmates as the main contributor to overcrowding in correctional institutions has been ongoing for a long time and is structural in nature. Data from the Directorate General of Corrections shows that of the approximately 255,435 inmates in correctional institutions, 139,088 are inmates for drug offenses.⁶In concrete terms, extreme overcrowding occurs, for example, in the Kutacane Class IIB Correctional Institution, which has a capacity of only 100 inmates but houses 370 inmates and detainees, and in East Kalimantan, which has a capacity of 3,586 inmates, it is actually occupied by 12,537 inmates, or 250 percent over capacity.⁷This reality underscores the urgency of a paradigm shift

⁴National Narcotics Agency, "Correctional Database System Data Presented in the Working Meeting of Commission III of the Indonesian House of Representatives," as quoted in *CNN Indonesia*, "BNN Reveals Prison Overcapacity Reaches 90 Percent, Majority of Prisoners Are Drug Inmates," April 7, 2026, <https://www.cnnindonesia.com>, accessed June 4, 2026.

⁵*Ibid.*

⁶Directorate General of Corrections, "Unraveling the Problem of Overcrowding in Prisons/Detention Centers," <https://www.ditjenpas.go.id>, accessed June 4, 2026.

⁷FHUI Institute for Scientific Studies, "Criminalization Without Fault: The Reality of Law Enforcement Regarding Narcotics in Indonesia," <https://lk2fhui.law.ui.ac.id>, accessed June 4, 2026;

from imprisonment to a restorative and rehabilitative justice approach for drug users.

This repressive approach has the potential to ignore the criminological reality that drug users are often dependent on addictive substances, which affects their self-control and rationality. From a victimology perspective, drug users can also be viewed as victims of substance abuse, whether due to environmental pressures, socioeconomic conditions, or weak prevention and rehabilitation systems.

This more humanistic perspective aligns with the thinking of Barda Nawawi Arief, who asserts that modern criminal justice should be aimed not only at protecting society but also at reforming offenders.⁸ Criminal justice that ignores the humanitarian dimension has the potential to exacerbate social problems and increase the rate of recidivism.

On the other hand, the principle of legality is a fundamental principle in criminal law that serves to guarantee legal certainty and protect citizens from arbitrary state action. The principle of *nullum delictum nulla poena sine lege* asserts that no act can be punished without a clear and firm legal basis in statutory regulations.⁹

The 2026 National Criminal Code presents new dynamics in the application of the principle of legality, especially with the inclusion of a restorative justice approach (العدالة التصالحية) as part of national criminal law policy. This approach emphasizes restoration of the original state, dialogue between the parties involved, and the social reintegration of the perpetrator as the primary goals of resolving criminal cases.

However, the application of restorative justice in drug cases faces significant normative challenges. The National Criminal Code maintains relatively severe criminal penalties for various forms of drug crimes, particularly those related to possession, possession, production, and illicit trafficking. This situation creates tension between restorative and repressive approaches within the criminal justice system.

These regulations are reflected in Part Five on Narcotics Crimes, which criminalizes unauthorized possession, storage, control, or provision of narcotics based on their classification. The threat of imprisonment and fines is determined in stages, taking into account the type and quantity of narcotics possessed as indicators of the seriousness of the crime.

compare *detikNews*, "Overcoming Prison Overcrowding," March 20, 2025, <https://news.detik.com>, accessed June 4, 2026.

⁸Barda Nawawi Arief, *Problems of Law Enforcement and Criminal Law Policy in Crime Prevention*, 3rd ed., Kencana, Jakarta, 2010, p. 87.

⁹Moeljatno, *Principles of Criminal Law*, 9th ed., Rineka Cipta, Jakarta, 2015, p. 25.

The larger the quantity of narcotics possessed, the more severe the criminal penalties that can be imposed, ranging from a fixed term to life imprisonment. Furthermore, for certain acts related to the production, import, export, and distribution of large quantities of narcotics, national criminal law allows for the application of the most severe penalties to protect the interests of the wider community.

In law enforcement practice, the line between drug users and illicit traffickers is often blurred. This situation has the potential to lead to injustice, especially if drug users who are consumptive and dependent are treated the same as perpetrators of organized drug crimes.

From a legal perspective (legal basis), the sharpening of the problem lies in the potential for norm conflict (*normenconflict*) and legal uncertainty between the Special Crimes Section regarding narcotics in the 2026 National Criminal Code and the criminal provisions that are still in force in Law Number 35 of 2009 concerning Narcotics. On the one hand, the National Criminal Code contains separate narcotics criminal provisions; on the other hand, the National Criminal Code still states the validity of special laws as a reference for the classification and quantity of narcotics. This situation raises the question of which norm should take precedence when there are differences in qualifications or criminal threats for the same act.¹⁰

This uncertainty stems from the clash of two principles for resolving normative conflicts: the principle of *lex specialis derogat legi generali*, which places the Narcotics Law as a special provision, and the principle of *lex posterior derogat legi priori*, which places the National Criminal Code as a more recent regulation. Without adequate formulation of transitional provisions and harmonization, law enforcement officials are likely to face confusion in determining the basis for criminal punishment, the qualifications of the act, and the severity of sanctions for drug users. Such inconsistencies contradict the demands of the principle of legality, which requires certainty, clarity, and firmness in the formulation of criminal norms.

Furthermore, the provisions regarding the classification and quantity of narcotics in the National Criminal Code continue to refer to specific laws on narcotics. This demonstrates the systemic link between general criminal law and specific criminal law, which demands consistency between legal substance, law enforcement structure, and legal culture in the application of the principle of legality and sentencing policies.

¹⁰Republic of Indonesia, *Law Number 1 of 2023 concerning the Criminal Code* , Article 622 and Article 624; compare with *Law Number 35 of 2009 concerning Narcotics* , Articles 111–127.

2. Research Methods

This research is normative legal research *with* a descriptive-analytical nature. Normative legal research positions law as a norm or rule contained in legislation, court decisions, and the doctrines of legal experts.¹¹ The descriptive-analytical nature is used to systematically explain the provisions on criminal liability for drug users in the 2026 National Criminal Code, while also analyzing them critically based on the principle of legality and a restorative justice approach. This research model aligns with Soerjono Soekanto's view that normative legal research aims to examine the level of synchronization, consistency, and normative implications of a legal rule within a positive legal system.¹² To answer the problem comprehensively and systematically, this study employs three approaches to normative legal research. As normative legal research, this study relies on literature review, making legal materials the primary object of analysis.

3. Results and Discussion

3.1. Qualifications and Parameters of Criminal Responsibility for Narcotics Abusers in the Framework of Synchronizing Law Number 35 of 2009 and the National Criminal Code

The qualifications and parameters of criminal responsibility for drug abusers are a legal issue that requires precision, especially after Indonesia entered a new phase of criminal law codification through the enactment of Law Number 1 of 2023 concerning the Criminal Code (hereinafter referred to as the National Criminal Code) which came into effect on January 2, 2026. Doctrinally, criminal responsibility *is* defined as the reprehensible state of the perpetrator of a crime so that he deserves to be punished for the actions he committed, provided that he has fault (*schuld*) and the ability to be responsible (*toerekeningsvatbaarheid*).¹³ This construction is based on the principle of *geen straf zonder schuld* (no punishment without fault) which has now received normative confirmation in Article 36 paragraph (1) of the National Criminal Code, so that punishment is no longer solely based on doctrine, but has become a binding positive legal norm.

Before moving on to the technical aspects, it is important to emphasize that any discussion of criminal responsibility cannot be separated from the shifting orientation of the objectives of punishment (*strafdoel*). The contemporary criminal law paradigm has shifted away from a narrow retributive approach toward an integrative approach that balances deterrence, prevention, and rehabilitation.

¹¹Soerjono Soekanto and Sri Mamudji, *Normative Legal Research: A Brief Review*, 17th ed., RajaGrafindo Persada, Jakarta, 2015, p. 13.

¹²Soerjono Soekanto, *Introduction to Legal Research*, 3rd ed., UI Press, Jakarta, 1986, p. 51.

¹³Moeljatno, *Principles of Criminal Law*, 9th ed., Rineka Cipta, Jakarta, 2015, p. 165.

¹⁴The National Criminal Code itself explicitly embraces multidimensional objectives of punishment, as outlined in Article 51, which focuses not only on preventing crime but also on the correctional system of the convict, resolving conflicts, and fostering a sense of remorse in the perpetrator. This orientation serves as the philosophical framework for assessing the status of drug abusers.

Within this framework, criminal responsibility requires the integration of an unlawful act (*actus reus*) as an objective element and a reprehensible mental attitude (*mens rea*) as a subjective element, whether in the form of intent (*dolus*) or negligence (*culpa*). The problem becomes complex when these two elements are applied to drug abusers, because Law Number 35 of 2009 concerning Narcotics positions drug abusers ambivalently, namely as both perpetrators of criminal acts (*offenders*) and as victims (*victims*) who require rehabilitation. ¹⁵This ambivalence is the starting point for the need for clear qualifications and measurable parameters.

Normatively, Article 1 number 15 of Law Number 35 of 2009 defines an abuser as a person who uses narcotics without rights or against the law. For this act, Article 127 paragraph (1) threatens a prison sentence whose gradation is adjusted to the narcotics class, namely a maximum of 4 (four) years for Class I, a maximum of 2 (two) years for Class II, and a maximum of 1 (one) year for Class III. ¹⁶As a special law (*lex specialis*), this law has been in effect based on the adage *lex specialis derogat legi generali*, so that its provisions override the general rules in the Criminal Code inherited from the colonial era.

The enactment of the National Criminal Code fundamentally changes this landscape. Through Article 622 paragraph (1) letter w, the provisions of Articles 111 to 126 of Law Number 35 of 2009 as amended by Law Number 11 of 2020 concerning Job Creation are declared revoked and no longer valid, and their provisions are then integrated into Articles 609 to 611 of the National Criminal Code. ¹⁷It should be noted that this revocation is selective, because based on the transitional provisions, only Articles 112, 113, 117, 118, 122, and 123 are replaced by Articles 609 and 610 of the National Criminal Code, while a number of other illicit trafficking articles are maintained with adjustments to the criminal threat.¹⁸

¹⁴Barda Nawawi Arief, *Anthology of Criminal Law Policy: Developments in the Drafting of the New Criminal Code*, 5th ed., Kencana Prenadamedia Group, Jakarta, 2016, p. 33.

¹⁵Anang Iskandar, *Narcotics Law Enforcement: Rehabilitative for Abusers and Addicts, Repressive for Dealers*, 1st ed., PT Elex Media Komputindo, Jakarta, 2019, p. 47.

¹⁶Republic of Indonesia, *Law Number 35 of 2009 concerning Narcotics*, State Gazette of the Republic of Indonesia 2009 Number 143, Article 127 paragraph (1).

¹⁷Republic of Indonesia, *Law Number 1 of 2023 concerning the Criminal Code*, State Gazette of the Republic of Indonesia 2023 Number 1, Article 622 paragraph (1) letter w.

¹⁸Supreme Court of the Republic of Indonesia, *Reorientation of Criminalization of Narcotics Crimes Post-January 2, 2026*, Center for Legal and Judicial Research and Development, Jakarta, 2026, p. 12.

To understand the implications of this integration, it is necessary to examine the anatomy of the new norms. Article 609 of the National Criminal Code defines the actions of any person who without the right to possess, store, control, or provide narcotics, while Article 610 broadens the scope of actions to include offering for sale, distributing, selling, purchasing, and acting as an intermediary in narcotics transactions.¹⁹ This formulation essentially adopts the substance of the circulation articles in the Narcotics Law, so that the classification and quantity of narcotics still refer to the laws and regulations that technically regulate narcotics. Thus, the National Criminal Code acts as a parent (*lex generalis*) that accommodates the basic norms, while the Narcotics Law continues to function as a complement in the technical-administrative realm.

A crucial issue within this synchronization framework lies in the fact that Article 127 of Law Number 35 of 2009, the primary basis for criminalizing drug abusers, is not included in the list of articles repealed by the National Criminal Code. Consequently, this provision remains in effect as a specific norm, while Article 609 of the National Criminal Code, which defines unauthorized acts of possessing, storing, controlling, or providing narcotics, contains elements that overlap with the qualifications of drug abusers.²⁰ This overlapping norm has the potential to create overlapping qualifications (*concursum*) and open up disparities in determining the basis for criminal liability for perpetrators.

If these overlapping norms are not addressed carefully, there is a risk of overcriminalization of drug users. In practice prior to the enactment of the National Criminal Code, perpetrators who should have been charged under Article 127 were often charged with the more severe article on possession, resulting in the neglect of the right to rehabilitation and overcrowding in correctional institutions. Therefore²¹, the introduction of the National Criminal Code should be interpreted as a corrective measure to re-establish the boundaries of qualifications, not as an instrument that perpetuates excessive criminalization practices.

To close this gap, the parameters that are the essential difference between drug abusers and dealers must be consistently adhered to, namely the purpose of drug possession (*animus possidendi*). If the possession is intended for personal consumption with the amount of evidence limited to daily use, then the perpetrator is qualified as a drug abuser; conversely, if the possession is oriented towards distribution, then the perpetrator is qualified as a dealer.²² These

¹⁹Republic of Indonesia, *Law Number 1 of 2023 concerning the Criminal Code*, State Gazette of the Republic of Indonesia 2023 Number 1, Articles 609–610.

²⁰Romli Atmasasmita, *Reconstruction of the Systematic Lex Specialis Principle in the Indonesian Criminal Law System*, 1st ed., Kencana Prenadamedia Group, Jakarta, 2024, p. 88.

²¹Supriyadi Widodo Eddyono and Erasmus AT Napitupulu, *Criminal Law Politics in Handling Narcotics Abuse*, 1st ed., Institute for Criminal Justice Reform, Jakarta, 2018, p. 24.

²²Anang Iskandar, *op. cit.*, p. 102.

evidentiary parameters are strengthened by Supreme Court Circular Letter Number 4 of 2010 which requires expert testimony, urine test results, and an assessment of the weight of the evidence as instruments to differentiate the categories of perpetrators.

In the sanction dimension, the synchronization of the two regulations actually shows a paradigmatic convergence towards rehabilitative justice. Article 127 paragraph (2) and paragraph (3) of Law Number 35 of 2009 requires judges to pay attention to the provisions of rehabilitation as stipulated in Article 54, Article 55, and Article 103, so that drug abusers who are proven to be victims are required to undergo medical rehabilitation and social rehabilitation. This approach is in accordance with the *treatment theory* which places recovery as the goal of punishment.²³ A similar spirit is now reinforced by Article 105 paragraph (1) of the National Criminal Code which stipulates that rehabilitation includes medical, social, and psychosocial rehabilitation as a form of action (*maatregel*) for perpetrators who are dependent on narcotics.²⁴

Thus, the ideal synchronization framework is not achieved through conflict, but through the principle of *lex specialis systematicis*, namely the placement of the Narcotics Law as a special legal system that remains subject to the general principles in the National Criminal Code as long as it is not regulated differently. This construction gives rise to a two-track system (*double track system*) that combines criminal penalties (*straf*) for dealers and measures (*maatregel*) in the form of rehabilitation for abusers, so that the parameters of criminal responsibility are not standardized, but rather individualized (*individualization of punishment*) according to the concrete conditions of the perpetrator.²⁵

The implication of this two-track construction is the expansion of judicial discretion *in* determining whether a perpetrator deserves criminal punishment or sufficient rehabilitation. The removal of specific minimum penalties in some articles after synchronization does provide flexibility, but at the same time requires guidelines to prevent discretion from degenerating into arbitrariness.²⁶ In this context, the presence of sentencing guidelines through both Supreme Court Regulations and Circular Letters is an urgent need to provide measurable benchmarks regarding the weight of evidence, the perpetrator's role, and the potential for rehabilitation, so that the resulting justice is truly proportional.

²³Sri Endah Wahyuningsih, *Principles of Criminal Individualization in Islamic Criminal Law and National Criminal Law Reform*, Diponegoro University Publishing Agency, Semarang, 2013, p. 156.

²⁴Eddy OS Hiariej, *Principles of Criminal Law in the National Criminal Code*, 1st ed., Cahaya Atma Pustaka, Yogyakarta, 2023, p. 211.

²⁵Muladi and Barda Nawawi Arief, *Criminal Theories and Policies*, 5th edition, Alumni, Bandung, 2010, p. 158.

²⁶Supreme Court of the Republic of Indonesia, *op. cit.*, p. 19.

Furthermore, the convergence toward rehabilitative justice finds a solid foundation of values within the perspective of Islamic law. Drug abuse is viewed as an act that damages reason (إفساد العقل / *ifsād al-'aql*), so that its handling is not directed solely at retribution, but rather at efforts to restore and maintain reason as one of the main objectives of sharia.²⁷ Thus, the rehabilitative approach in positive criminal law is truly intertwined with the principle of benefit (مصلحة / *maṣlaḥah*), which is the spirit of every legal determination in Islam.

Ultimately, the harmonization of Law Number 35 of 2009 and the National Criminal Code affirms that criminal liability for drug abusers must be oriented towards substantive justice that balances legal certainty, *utility*, and justice. Such an orientation is also in line with the objectives of sharia (*maqāsid al-syarī'ah*), especially the protection of reason (*ḥifẓ al-'aql*), because the rehabilitation of drug abusers is essentially an effort to restore the function of reason for the realization of public welfare.²⁸ With this framework, the reform of national criminal law is expected to be able to provide humanistic, proportional, and just law enforcement.

3.2. What is the position of drug users as both perpetrators and victims from a positive criminal law perspective?

The position of drug users in Indonesian positive criminal law presents a unique legal complexity, as the individuals involved are placed in an ambivalent position, namely as perpetrators of criminal acts and as victims of their own actions. Therefore, the legal approach cannot be limited to merely normative dimensions but requires a comprehensive examination, considering philosophical, sociological, and legal aspects to achieve substantive justice grounded in humanitarian values.

Conceptually, drug users are classified as criminals for committing prohibited acts, namely using narcotics without authorization or against the law, as regulated in Law Number 35 of 2009 concerning Narcotics. However, developments in contemporary legal thought show a more progressive paradigm shift, which also views users as victims who inflict harm on themselves (*self-victimizing victims*) due to the dependence caused by addictive substances.²⁹

In victimology studies, this dual position is not an anomaly, but rather falls under the category of victims who are also perpetrators, as known as *victimless* crime, meaning that no other party is directly harmed. The explanation of Article 54 of Law Number 35 of 2009 even explicitly limits the definition of victims of drug abuse

²⁷Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach*, The International Institute of Islamic Thought, London, 2008, p. 248.

²⁸Ahmad Khisni, *Development of Islamic Legal Thought*, 2nd ed., Unissula Press, Semarang, 2011, p. 88.

²⁹Anang Iskandar, *Narcotics Law Enforcement: Rehabilitative for Abusers and Addicts, Repressive for Dealers*, 1st ed., PT Elex Media Komputindo, Jakarta, 2019, p. 51.

to people who accidentally use narcotics because they are persuaded, tricked, deceived, or forced.³⁰ This limitation is what in practice gives rise to debate, because not all abusers can easily prove themselves to be victims in this narrow sense.

Within the framework of classical criminal law, criminal responsibility rests on the fulfillment of the elements of fault (*schuld*) and the capacity to take responsibility (*toerekeningsvatbaarheid*). However, in cases of drug abuse, these two elements are often problematic, given that dependency can affect the perpetrator's ability to freely exercise control over their will. Therefore, assessing criminal responsibility requires a more flexible and contextual approach.

The normative regulation regarding users as perpetrators of criminal acts is expressly contained in Article 127 paragraph (1) of Law Number 35 of 2009, which stipulates that those who abuse narcotics for themselves can be subject to imprisonment according to the class of narcotics used.³¹ The elements of the crime in this provision include the act of using narcotics, carried out without rights or against the law, and aimed at one's own interests as the subject of the perpetrator.

On the other hand, the law also recognizes the victimological dimension of drug abusers, as reflected in Article 54, which requires drug addicts and victims of drug abuse to undergo medical and social rehabilitation. This provision implicitly emphasizes that the state views addiction as a condition requiring therapeutic treatment, not simply a penal approach. Furthermore, Article 103 grants judges discretionary authority to decide or order that drug addicts undergo treatment and/or rehabilitation, which embodies a double-track system *that* combines criminal sanctions (*punishment*) with action (*treatment*).³²

The commitment to this action approach has become even stronger since the enactment of Law Number 1 of 2023 concerning the Criminal Code on January 2, 2026. Article 105 paragraph (1) places rehabilitation, both medical, social, and psychosocial, as a form of action (*maatregel*) for perpetrators who are dependent on narcotics.³³ Thus, the dual position of narcotics users now has a stronger foundation, because national criminal law has systematically provided a recovery path as an alternative to imprisonment, not just an optional supplement.

This affirmation is in line with the idea that criminal law policy in dealing with drug abuse should be directed towards substantive justice, by placing the perpetrator

³⁰Republic of Indonesia, *Law Number 35 of 2009 concerning Narcotics*, State Gazette of the Republic of Indonesia 2009 Number 143, Explanation of Article 54 letter a.

³¹Republic of Indonesia, *op. cit.*, Article 127 paragraph (1).

³²Muladi and Barda Nawawi Arief, *Criminal Theories and Policies*, 5th edition, Alumni, Bandung, 2010, p. 158.

³³Republic of Indonesia, *Law Number 1 of 2023 concerning the Criminal Code*, State Gazette of the Republic of Indonesia 2023 Number 1, Article 105 paragraph (1).

as a legal subject who has the right to obtain recovery through rehabilitation, a transformation from the paradigm of retributive justice to restorative justice. In³⁴line with that, the reconstruction of criminal responsibility needs to be based on the principle of substantive justice so that criminal law is not trapped in rigid procedural formalities, but is able to provide real and effective justice for society.³⁵

This argument is supported by studies showing that rehabilitative approaches are more effective in reducing recidivism rates than punitive approaches, thus, recovery-based treatment is seen as more directly addressing the root causes of drug abuse.³⁶Howard Zehr emphasized that the primary goal of criminal justice is to repair the harm caused by crime, not simply to provide retribution; in the context of narcotics, this recovery includes rehabilitation and social reintegration of users.³⁷

To gain a more comprehensive perspective on the status of drug users as both perpetrators and victims, it is necessary to examine regulatory practices in several countries through a comparative law approach. This comparison is not intended to be copied blindly, but rather to consider relevant treatment models for national criminal law reform, while simultaneously addressing the global trend of moving from a repressive approach to a health - *oriented approach*. Such comparative studies are commonly undertaken in legal research as a means to understand how similar problems are resolved by different legal systems, as well as to explore values that can enrich the formation of national law.³⁸

Portugal is often cited as the most influential example. Through Law No. 30 of 2000, effective July 1, 2001, Portugal decriminalized the use and possession of all narcotics in quantities not exceeding an average ten-day consumption requirement. Drug use remains a prohibited act, but is handled through an administrative process, not a criminal one.³⁹Apprehended users are directed to the Commission for the Prevention of Drug Dependence (*Comissão para a Dissuasão da Toxicodependência*), which is under the health authority and consists of a legal expert and two medical or social workers, with the authority to assess the degree of dependency on a case-by-case basis. This model positions users fully as individuals in need of treatment, rather than as convicts.

³⁴Eko Soponyono, *Criminal Law Policy in Combating Crime* , 1st ed., Pustaka Magister, Semarang, 2012, p. 71.

³⁵Sri Endah Wahyuningsih, *Principles of Criminal Individualization in Islamic Criminal Law and National Criminal Law Reform* , Diponegoro University Publishing Agency, Semarang, 2013, p. 156.

³⁶Andri Winjaya Laksana, "A Review of Criminal Law for Narcotics Abusers with a Rehabilitation System" , *Khaira Ummah Law Journal*, Vol. 12, No. 4, 2017, p. 798.

³⁷Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* , Herald Press, Scottsdale, 1990, p. 181.

³⁸Barda Nawawi Arief, *Comparative Criminal Law* , 12th edition , Rajawali Pers, Jakarta, 2015, p. 4.

³⁹Caitlin Elizabeth Hughes and Alex Stevens, "What Can We Learn from the Portuguese Decriminalization of Illicit Drugs?" , *British Journal of Criminology*, Vol. 50, no. 6, 2010, p. 1002.

It's worth noting that the success of the Portuguese model rests not solely on the removal of criminal penalties, but rather on its combination with substantial investment in health services and harm reduction programs. Studies show that after two decades of implementation, Portugal has seen a significant decline in HIV transmission rates among injecting drug users and a reduction in the social costs of drug use, without the surge in prevalence that many had feared.⁴⁰ This lesson underscores that a paradigm shift requires adequate institutional support and budgeting, not simply a change in normative formulation.

The Netherlands took a different path through a tolerance policy (*gedoogbeleid*) based on the *Opium Act* 1976. The Netherlands clearly differentiated between high-risk narcotics (*hard drugs*) and low-risk narcotics (*soft drugs*) with the aim of separating markets, so that cannabis users were not exposed to the circulation of hard drugs.⁴¹ Based on the principle of opportunity, public prosecutors were given the freedom to not prosecute possession of small amounts of cannabis for personal use, so that the number of convictions against users was relatively low and law enforcement was focused on the distribution of hard drugs.

Thailand, meanwhile, illustrates a fascinating transition from a highly repressive regime to a recovery-oriented one. Through its Narcotics Code, which came into effect on December 9, 2021, Thailand prioritizes rehabilitation over imprisonment for small-scale drug abusers, treating them as patients rather than criminals.⁴² However, drug use and possession for personal gain have not been fully decriminalized, so offenders still face criminal consequences if they refuse treatment. This experience demonstrates that paradigm shifts are not always complete and often leave tensions between rehabilitative rhetoric and enforcement practices.

4. Conclusion

Based on the analysis, criminal liability for drug abuse in Indonesian positive criminal law is essentially built on the principle of guilt (*schuld*) as in the principle of *geen straf zonder schuld*. Law Number 35 of 2009 concerning Narcotics emphasizes that drug abusers can still be held criminally responsible, particularly through the provisions of Article 127. However, the regulation also accommodates a rehabilitative approach through medical and social rehabilitation as a more humane form of treatment. Thus, the national criminal law system is not solely repressive, but has moved towards a more balanced approach between punishment and rehabilitation. Although normatively there is a progressive legal

⁴⁰Hannah Laqueur, "Uses and Abuses of Drug Decriminalization in Portugal", *Law & Social Inquiry*, Vol. 40, no. 3, 2015, p. 765.

⁴¹Ardian Adhiatma and colleagues, "Legal Policy for Drug Users in Indonesia and the Netherlands", *Journal of Creativity Student*, Vol. 7, No. 1, 2022, p. 40.

⁴²Gloria Lai, *Thailand Reforms Drug Laws to Reduce the Impacts of the Criminal Justice System*, International Drug Policy Consortium, Bangkok, 2021, p. 3.

basis, in practice the implementation of the rehabilitative approach is still not optimal so that the goal of substantive justice has not been fully realized. The results of the study indicate that drug users in Indonesian criminal law have an ambivalent position, namely as perpetrators of criminal acts and as victims of dependence (self-victimizing victims). Normatively, users can be subject to criminal penalties based on Article 127 of Law Number 35 of 2009, but at the same time are also recognized as subjects entitled to rehabilitation as regulated in Article 54 and Article 103. This legal construction reflects the application of a double track system approach that combines criminal sanctions and rehabilitative measures. Therefore, drug users cannot be positioned solely as perpetrators of crime, but must be understood within a more comprehensive framework by considering the aspects of dependency and their socio-psychological conditions.

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