

Legal Analysis of Criminal Responsibility of Perpetrators of Narcotics Possession in The National Criminal Code Based on Legal Certainty

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Abstract. *StudyThis article aims to analyze the criminal liability of narcotics possession perpetrators in the National Criminal Code, identify its weaknesses, and formulate a legal reconstruction based on legal certainty. Criminal liability requires the fulfillment of the elements of actus reus, mens rea, capacity to be responsible, and the absence of grounds for cumulative criminal exoneration, as stipulated in the national criminal justice framework. StudyThis demonstrates that the National Criminal Code has accommodated a double-track system that combines criminal sanctions and rehabilitation. However, weaknesses include the unclear demarcation between perpetrators of personal control and distributors, as well as the incomplete harmonization of the National Criminal Code and the Narcotics Law as lex specialis, which has resulted in disparities in sentencing in practice. This study utilizes the Theory of Punishment, Lawrence M. Friedman's Theory of Legal Systems, and Gustav Radbruch's Theory of Legal Certainty, which positions Rechtssicherheit as the foundation of just and measurable norms. Sri Endah Wahyuningsih emphasized that national criminal law reform must be rooted in the nation's noble values in order to realize just and certain punishment..*

Keywords: Criminal Responsibility; Legal Certainty; Narcotics Possession; National Criminal Code.

1. Introduction

The increasing challenges of narcotics trafficking in Indonesia prompted the government to launch the ASTACITA Program under the leadership of President

Prabowo Subianto as a national strategic response.¹This program prioritizes three main pillars: firm action against drug trafficking, rehabilitation for users, and strengthening the capacity of law enforcement officers. Furthermore, ASTACITA integrates anti-narcotics education into schools and communities as part of a comprehensive strategy aimed at significantly reducing drug abuse rates throughout Indonesia.

Within the ASTACITA framework, law enforcement against drug users is not solely repressive but also encompasses preventive and community protection measures. This program emphasizes the importance of harmonizing legal regulations, law enforcement capacity, and public awareness. Every law enforcement action is required to be implemented proportionally and based on the principles of justice and social welfare, thus creating a balance between repressive and preventive functions in combating drug crimes.

The circulation and abuse of narcotics in Indonesia continues to show an alarming upward trend, posing a serious threat to health, social order, and national security. The impact is felt not only by individual users but also by families and the wider social environment, including a rise in drug-related crime. This situation has prompted the government to utilize criminal law as the primary instrument for regulating, preventing, and prosecuting drug trafficking in an effective and structured manner.

Law Number 1 of 2023 concerning the Criminal Code (National Criminal Code) brings a number of important updates to the regulation of narcotics crimes.²One of the most significant changes is the regulation of criminal liability for drug possession, which emphasizes not only prohibitions and potential penalties but also detailed aspects of intent (*mens rea*), culpability, and legal capacity. This aims to ensure that law enforcement is not merely formalistic but also just and proportional, in accordance with the principles of legal certainty and justice.

Criminal liability for drug possession requires a thorough analysis of the relationship between the act (*actus reus*) and the intent (*mens rea*). Andrew Ashworth emphasized that the concept of criminal liability must consider the appropriateness of the act, the offense, and the sanction imposed to ensure the

¹The ASTACITA program is a national strategic program under the leadership of President Prabowo Subianto which is designed to eradicate narcotics trafficking through enforcement, rehabilitation, and anti-narcotics education.

²Law Number 1 of 2023 concerning the Criminal Code (National Criminal Code) introduces a number of important updates to the regulation of criminal acts, including more detailed provisions on criminal liability.

principle of justice is met.³In the context of Indonesian law, Barda Nawawi Arief and Sri Endah Wahyuningsih emphasize the need for a balance between legal certainty, protection of human rights, justice, and social benefit as the basis for just sentencing.⁴

The Islamic legal perspective provides a significant additional dimension in assessing criminal liability through the principle of *maqāṣid al-syarī'ah*, which emphasizes the protection of life (*ḥifẓ al-nafs*), property (*ḥifẓ al-māl*), and social order (*ḥifẓ al-'adl*).⁵The basis for proportionality of punishment is based on the principle of benefit (*al-maslaha*), so that every sanction imposed must take into account the social and moral impact on individuals and communities.⁶In the context of narcotics control, the application of these principles requires that punishment is not merely repressive or retributive, but also takes into account rehabilitative and preventive aspects (preventive measures).⁷

Based on the overall description above, there is an urgent need to systematically examine how the National Criminal Code regulates the criminal liability of perpetrators of narcotics possession, while simultaneously integrating the perspective of modern criminal law with the principles of Islamic law. This study is important to ensure that the criminal sanctions applied are not only in accordance with positive legal norms, but also in line with the principles of substantive justice, legal certainty, and the protection of human rights. Therefore, this research is presented in a thesis proposal entitled "A Legal Analysis of the Criminal Liability of Perpetrators of Narcotics Possession in the National Criminal Code Based on Legal Certainty," which is expected to provide a theoretical and practical basis for law enforcement that is fair, proportional, and

³Andrew Ashworth, *Principles of Criminal Law*, 6th ed. (Oxford: Oxford University Press, 2009), p. 84. See also: Barda Nawawi Arief, *An Anthology of Criminal Law Policy* (Bandung: Citra Aditya Bakti, 2002).

⁴Sri Endah Wahyuningsih, *Principles of Individualization of Criminal Procedure in Indonesian Criminal Law* (Semarang: Diponegoro University Publishing Agency, 2008), p. 45.

⁵*Maqāṣid al-syarī'ah* includes five main objectives: protection of religion (*ḥifẓ al-dīn*), life (*ḥifẓ al-nafs*), reason (*ḥifẓ al-'aql*), descendants (*ḥifẓ al-nasl*), and property (*ḥifẓ al-māl*). See: Al-Ghazali, *Al-Mustashfa min 'Ilm al-'Usul* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1993).

⁶The principle of *al-maslaha* in Islamic law emphasizes that every legal policy must bring benefit to society and prevent harm (*dar' al-mafasid*). See: Yusuf al-Qaradawi, *Fiqh al-Awlawiyyat* (Cairo: Maktabah Wahbah, 1996).

⁷The rehabilitative approach in narcotics law enforcement is supported by various international instruments, including the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which Indonesia has ratified through Law No. 7 of 1997.

in favor of protecting the wider community."

2. Research Methods

To ensure the accuracy and depth of analysis, this research is compiled using the following legal research methods:

1. Types of research

This type of research is normative legal research that focuses on the study of positive legal norms, especially the provisions of laws and regulations that regulate the criminal liability of perpetrators of narcotics possession within the framework of the National Criminal Code (Law Number 1 of 2023).⁸The analysis also includes the principles of criminal law and doctrines that have developed in legal science.

2. Research Approach

This approach uses four complementary approaches.⁹First, the statute approach by examining the National Criminal Code and regulations related to narcotics.¹⁰Second, a conceptual approach to examine the concept of criminal responsibility, mens rea, and possession of narcotics according to criminal law doctrine.¹¹Third, the case approach is used to analyze the application of norms in judicial practice.¹²Fourth, a comparative approach to compare relevant legal arrangements to enrich the analysis.

3. Data source

This study uses secondary data consisting of three legal materials.¹³Primary legal

⁸Soerjono Soekanto and Sri Mamudji, *Normative Legal Research: A Brief Review* (Jakarta: Rajawali Pers, 2015), pp. 13-14.

⁹Peter Mahmud Marzuki, *Legal Research, Revised Edition* (Jakarta: Kencana Prenada Media Group, 2016), p. 133.

¹⁰*Ibid.*, p. 137. The conceptual approach is used to find legal definitions, legal concepts, and legal principles that are relevant to the issues at hand.

¹¹*Ibid.*, p. 158. The case approach aims to determine the judge's ratio decidendi in deciding cases related to the legal issues being studied.

¹²Barda Nawawi Arief, *Anthology of Criminal Law Policy* (Bandung: Citra Aditya Bakti, 2002), p. 7. The comparative approach enriches the analysis by looking at the similarities and differences of legal systems.

¹³Soerjono Soekanto, *Introduction to Legal Research* (Jakarta: UI Press, 1986), p. 52. Secondary legal materials provide an explanation of primary legal materials.

materials include Law Number 1 of 2023 concerning the National Criminal Code and Law Number 35 of 2009 concerning Narcotics. Secondary legal materials include criminal law textbooks, scientific journals, research findings, and the opinions of legal experts. Tertiary legal materials include legal dictionaries and legal encyclopedias, which are used to clarify legal terms and concepts.

4. Data collection technique

Data collection is carried out through library research by systematically reviewing and examining legal materials relevant to the research problem.¹⁴

5. Data Analysis Techniques

The data was analyzed using qualitative analysis methods by interpreting legal norms and doctrines systematically and logically.¹⁵ The analysis is carried out deductively, namely drawing conclusions from general principles of criminal law regarding specific regulations regarding

3. Results and Discussion

3.1. Criminal Responsibility for Narcotics Possession Perpetrators in the National Criminal Code

Current criminal liability for Class I narcotics dealers is repressive, broad, and poorly differentiated, as law enforcement focuses more on fulfilling the elements of the act as stipulated in Law Number 35 of 2009 without a balanced, in-depth analysis of the elements of culpability and the perpetrator's role. The use of quantitative indicators such as the amount of evidence and a special minimum sentencing system results in rigid criminal liability, potentially leading to overcriminalization and disparity in sentencing, and does not reflect the principles of justice, proportionality, and legal certainty. Although the National Criminal Code (Law Number 1 of 2023) prioritizes a more humanistic approach through the principle of culpability and individualization of punishment, narcotics law enforcement practices are still dominated by a repressive approach due to the application of the *lex specialis* principle.

¹⁴Peter Mahmud Marzuki, op.cit., p. 181. Literature study is the main method in normative legal research to obtain comprehensive legal materials.

¹⁵Lexy J. Moleong, *Qualitative Research Methodology* (Bandung: Remaja Rosdakarya, 2014), p. 248. Qualitative analysis emphasizes the depth of understanding of the legal norms and doctrines being studied.

3.2. Weaknesses in Criminal Accountability for Narcotics Possession Offenders in the National Criminal Code

The weakness of criminal responsibility for narcotics possession perpetrators in the National Criminal Code stems from three interrelated root problems: first, the lack of differentiation of perpetrator typologies between users, abusers, and distributors which Barda Nawawi Arief considers to create injustice in the application of sanctions, exacerbated by the ambiguity of the juridical boundaries between possession for personal interests and for distribution so that the principle of *nullum crimen sine lege* (Moeljatno) is reduced, and the spirit of *ultimum remedium* (Sudarto) is distorted when possession of narcotics in small quantities is treated formally without considering the social, psychological, and medical conditions of the perpetrator;¹⁶ second, from the perspective of Friedman's Legal System Theory, the legal substance of the National Criminal Code still contains unclear formulations of crimes which according to Anis Mashdurohatun opens up loopholes for uncontrolled discretion of law enforcement, while Gunarto emphasized that the National Criminal Code is still reactive and has not been anticipatory towards the evolving modes of narcotics control, so that the three components of the legal system (substance, structure, culture) have not worked synergistically;¹⁷ Third, judging from Radbruch's theory of legal certainty which demands justice (*Gerechtigkeit*), utility (*Zweckmäßigkeit*), and certainty (*Rechtssicherheit*) simultaneously the absence of objective quantitative parameters in determining the category of user or dealer (Sudikno Mertokusumo; Eko Soponyono) causes significant disparities in decisions, and the paradox where addicts whose ability to take responsibility is reduced are positioned on a par with dealers with evil intentions (Chairul Huda; Anis Mashdurohatun) reflects a structural inconsistency which, as found by Said Sampara and Okto Berizki Harahap, is directly correlated with the weakening of legal authority and public trust in the narcotics criminal justice system (Achmad Ali).¹⁸¹⁹

¹⁶Barda Nawawi Arief, *Anthology of Criminal Law Policy*, Bandung: Citra Aditya Bakti, 2005, p. 34; Moeljatno, *Principles of Criminal Law*, Jakarta: Rineka Cipta, 2002, p. 165; Sudarto, *Criminal Law I*, Semarang: Sudarto Foundation, 1990, p. 44.

¹⁷Lawrence M. Friedman, *The Legal System: A Social Science Perspective*, New York: Russell Sage Foundation, 1975, pp. 11–16; Anis Mashdurohatun, 'Pancasila-Based Criminal Law Reform', *Journal of Law and Development*, Vol. 49, No. 1, 2019, p. 27; Gunarto, 'Responsive Legal Development', *Journal of Progressive Law*, Vol. 6, No. 2, 2012, p. 45.

¹⁸Gustav Radbruch, *Rechtsphilosophie*, Stuttgart: KF Koehler Verlag, 1950, p. 73; Sudikno Mertokusumo, *Understanding Law: An Introduction*, Yogyakarta: Liberty, 2005, p. 136; Eko Soponyono, 'The Absence of Quantitative Parameters in Narcotics Offenses', *Progressive Law Journal*, Vol. 8, No. 1, 2014, p. 56.

3.3. Legal Analysis of Criminal Responsibility for Narcotics Possession Perpetrators in the National Criminal Code Based on Legal Certainty

Criminal liability of perpetrators of narcotics possession in the National Criminal Code which is based on the principle of *geen straf zonder schuld* (Muladi and Barda Nawawi Arief) and values that live in society (Sudarto) is built on four cumulative elements: *actus reus* (controlling/storing/possessing narcotics without rights as per Law Number 35 of 2009), *mens rea* in the form of *dolus* or *culpa*, the ability to be responsible, and the absence of excuses; and within the framework of the double track system of the National Criminal Code outlined by Dafit Supriyanto Daris Warsito, humanistic punishment demands individualization that does not only pursue a deterrent effect but also social development and reintegration;²⁰ legal certainty in the sense of Radbruch requires that every element of the crime and threat of sanctions be formulated clearly and without multiple interpretations. Normative ambiguity according to Andri Winjaya Laksana has been proven to give rise to disparities in sentencing which are detrimental to justice seekers so that a clear distinction between users and dealers (Sri Endah Wahyuningsih; Bayu Puji Hariyanto) becomes a substantive necessity, and harmonization of the National Criminal Code with the Narcotics Law as *lex specialis* is a prerequisite for realizing normative consistency which has been absent so far;²¹ At the synergistic level, the effectiveness of criminal responsibility is determined by the integrated operation of Friedman's three components: precise substance, a professional and consistent law enforcement structure (Barda Nawawi Arief; Andri Winjaya Laksana and Arpangi), and an internalized legal culture in society (Sri Endah Wahyuningsih and Rismanto; Anis Mashdurohatun) supported by the defendant's psychological

¹⁹Chairul Huda, *From No Crime without Fault to No Criminal Accountability without Fault*, Jakarta: Kencana, 2006, p. 68; Said Sampara, 'Inconsistency of Law Enforcement and Public Trust', *Jurnal Hukum Ius Quia Iustum*, Vol. 18, No. 3, 2011, p. 340; Okto Berizki Harahap, 'Disparity in Sentencing in Narcotics Cases', *Jurnal Hukum dan Peradilan*, Vol. 5, No. 1, 2016, p. 77; Achmad Ali, *Uncovering Legal Theory and Judicial Theory*, Jakarta: Kencana, 2009, p. 203.

²⁰Muladi and Barda Nawawi Arief, *Criminal Theories and Policies*, Bandung: Alumni, 1998, p. 63; Sudarto, *Op.Cit.*, p. 51; Article 1 number 1 of Law Number 35 of 2009 concerning Narcotics; Dafit Supriyanto Daris Warsito, 'The Criminalization System for Narcotics Abusers', *Khaira Ummah Law Journal*, Vol. 12, No. 1, 2017, p. 46.

²¹Gustav Radbruch, *Op.Cit.*, p. 76; Andri Winjaya Laksana, 'Legal Uncertainty in Law Enforcement against Narcotics Abusers', *Journal of Legal Reform*, Vol. 4, No. 1, 2017, p. 88; Sri Endah Wahyuningsih, *Principles of Criminal Individualization*, Semarang: UNDIP Press, 2014, p. 49; Bayu Puji Hariyanto, 'Prevention and Eradication of Drug Trafficking', *Journal of Legal Sovereignty*, Vol. 1, No. 1, 2018, p. 202.

condition as a variable in sentencing (Sisno Pujinoto et al.), multisectoral rehabilitation as a response to addiction (Bambang Tri Bawono et al.), and a commitment to Pancasila values (Sri Endah Wahyuningsih) as well as an integrated criminal justice system (Muladi) as a vehicle for achieving justice, benefit, and legal certainty simultaneously.²²

4. Conclusion

Based on the discussion of Sub Chapters A, B, and C, it can be concluded that the criminal responsibility of perpetrators of narcotics possession in the National Criminal Code (Law Number 1 of 2023) has undergone a significant normative transformation through the adoption of the combined theory of punishment (*verenigingstheorie*), the principle of individualization of punishment, and a double track system that combines criminal sanctions with rehabilitative sanctions as a concrete manifestation of *ultimum remedium* based on Pancasila values, however, its effectiveness is still hampered by three fundamental weaknesses, namely: the lack of differentiation of typologies of perpetrators between users, abusers, and dealers which gives rise to normative ambiguity and erodes the principle of *nullum crimen sine lege*; the three components of Friedman's legal system, substance, structure, and legal culture, have not yet been implemented synergistically, which gives rise to inconsistencies in the application of norms in the field; and the three dimensions of legal certainty of Radbruch (*Bestimmtheit*, *Sicherheit*, and *Voraussehbarkeit*) have not been fulfilled due to the absence of objective quantitative parameters in distinguishing users from dealers, so that in order to realize criminal accountability for narcotics possession that is truly fair, beneficial, and has legal certainty, comprehensive harmonization is needed between the National Criminal Code and the Narcotics Law as *lex specialis*, strengthening the capacity and integrity of law enforcement officers, and transforming the legal culture towards a rehabilitative-restorative paradigm within the framework of an integrated criminal justice system.

²²Sisno Pujinoto, Anis Mashdurohatun, and Achmad Sulchan, 'Judges' Considerations in Deciding on Criminal Cases', *Unissula Law Journal*, Vol. 36, No. 2, 2020, p. 120; Andri Winjaya Laksana et al., 'Legal Uncertainty and Disparity in Narcotics Sentencing', *Journal of Legal Reform*, Vol. 5, No. 2, 2018, p. 202; Bambang Tri Bawono, Dwi Wahyono, and Andri Winjaya Laksana, 'Implementation of Rehabilitation for Narcotics Abusers', *Khaira Ummah Law Journal*, Vol. 14, No. 1, 2019, p. 57; Sri Endah Wahyuningsih, 'Development of Criminal Law Principles in the Criminal Code Based on Godly Values', *Journal of Legal Reform*, Vol. 3, No. 1, 2016, p. 11; Muladi, *Integrated Criminal Justice System*, Semarang: UNDIP Publishing Agency, 2004, p. 5.

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