

Legal Analysis of Formulation of Child Narcotics Dealer

Arhjayati Rahim¹ M. Said Karim² Muhadar³ Syamsuddin Muchtar⁴

1. PhD student at Postgraduate Program Hasanuddin University

2. Professor on Legal Science, Faculty of Law, Hasanuddin University and as a Promotor

3. Professor on Legal Science, Faculty of Law, Hasanuddin University and as a co-Promotor

4. Associate Professor on Legal Science, Faculty of Law, Hasanuddin University and as a co-Promotor

Abstract

Indonesia is “a state of law” or “rechtstaat” which is its governance and society based on *Pancasila* (Five State Principles) and Constitution of the Republic of Indonesia 1945. It is known also as a state with various cultures and its noble character. However, it is commonly to be heard lately a slogan “Indonesia as emerging narcotics state”. Narcotics circulation in Indonesia juridically is allowed by law (valid) with some certain reasons, such as for medicine and research purposes. The rule of it can be seen in article 7 of the Law No. 35 of 2009 on Narcotics. Articles 111 to 148 the law No. 35 of 2009 state that “any person that without right or against the law who circulates the narcotics will be punished”. The article 133 subsection (1) and (2) of the law No. 35 of 2009 is the only article of the Law states it. However, the article only puts the child as a victim of the adult person who circulates the narcotics. The provision related to the dealer narcotics can be seen in article 111, 112, 113, 114, 115, 116, and 127 of the Law No. 35 of 2009.

Keywords: Formulation, Narcotics, Child Dealer.

1. Introduction

Indonesia is “a state of law” or “rechtstaat” which is its governance and society based on *Pancasila* (Five State Principles) and the Constitution of the Republic of Indonesia 1945. It is known also as a state with various cultures and its noble character. However, it is commonly to be heard lately a slogan “Indonesia as emerging narcotics state”. The slogan can be found either in newspaper, television, or internet.

Narcotic dealers networking in Indonesia increase every year. Topography of Indonesia as “an archipelago state” is targeted as a market potential of narcotic dealers. National Narcotics Council (hereinafter referred to BNN) predicts that narcotic users in Indonesia will increase. In 2015 for example, it was predicted the number of narcotics users to reach 5,1 billion.¹ Troels Vester then states that Indonesia has become a major distribution (trade) of narcotics (drugs). They are traded and smuggled by drugs international syndicate. Indonesia as a state with number of young population very high is basically a target market for dealers to distribute the narcotics. Demand of it also practically is very high.²

Seeing some facts as mentioned above, narcotics circulation in Indonesia juridically is allowed by law (valid) with some certain reasons, such as for medicine and research purposes. However, use of narcotics in fact does not conduct in right ways as Law stated. The Law on Narcotics and Psychotropics permits the use of drugs in appropriate ways neither its doses nor its use for medicine and research purposes in order to give some benefits for human beings. When the drugs are abused either its doses or its uses, it will create disaster not only to the users but also for the state in broad sense.³ For this situation also, the drugs are becoming a potential business to get “money” for the business people.

Article 7 of the Law No. 35 of 2009 on Narcotics states that “narcotics can only be used for the benefit of health and/or the development of science and technology”. Article 11 then states that “the minister give special permission to produce narcotic for the certain Pharmaceutical Industry, which already has a license in accordance with the provisions of the legislation, and after being audit by the National Agency of Drug and Food Control”.

Narcotic cases involving a child either in the context of a criminal actor or a victim is common in Indonesia. As a crime, its actors are not only adult but also a child. Therefore, some prevention and control of delinquency must be conducted sooner.⁴ Based on BNN’s note, the number of narcotic suspects is increasing, including elementary school students. In 2007, the number of narcotics users in elementary school level was 4.138. It increased gradually to reach 5.087 students.⁵

Those samples as stipulated above show that the elementary school students as the suspects basically do not realize the effect of their activities in abusing drugs. They will know then when they are arrested and must go to the court.

¹<https://id-id.facebook.com/BebaskanIndonesiaDariJeratanNarkoba>, accessed 12 April 2016.

²<http://www.kompasiana.com/phadli/j> Indonesia, accessed 29 April 2016.

³ Suhasril. 2005, *Tindak Pidana Narkotika*. Ghalia Indonesia, Bogor, p. 89.

⁴Nandang Sambas. 2010. *Pembaharuan Sistem Pemidanaan Anak di Indonesia*. Graha Ilmu, Yogyakarta, p. 103.

⁵<http://www.berita99.com/.../wow-2015-pengguna-narkoba-di-indo>. accessed 29 April 2016.

In term of narcotic dealers conducted by a child, it will be governed by some laws such as the Law No. 35 of 2009 on Narcotics, The Law No. 5 of 1997 on Psychotropics, The la No. 11 of 2012 on System of Child's Court, and the Law No. 35 of 2014 on Amandement of the Law no. 23 of 2002 on Child Protection. Those laws basically will be a legal basis when the perpetrator is a child. However, those laws also are possible to be against one to another in the context of child as the suspect.

Based on data 2011-2014, the child dealers were increased dramatically almost 300 %. In 2012, the number of child dealers were 17. It increased 31 people in 2013 and would be 42 persons in 2014. The age of them was variety. According to Asrorun¹, it was 184 child detainees in Tangerang Child's Penitentiaries (hereinafter referred to Lembaga Pemasyarakatan Anak – Lapas Anak) and 84 of them were involving in narcotic cases. He states further that narcotic threat to the child clearly increased.²

Narcotics circulation conducted by the child is also taking place in almost Indonesian big cities. In Makassar, it was a case in 2016, which AY – a girl who 16 years old – arrested by Narcotic Division of Police Station in Maros. She arrested when she went to cargo of Sultan Hasanuddin Airport to ask her stuff from Ambon that has not arrived.³ Another example is narcotics circulation in Siantar. JS (15 years old) arrested by Siantar Army called Denpom in one of shops (Warong) in Gang Pulo Batu, Bah Kapul, Siantar Sitalasari. According to Sudarman Setiawan⁴, the arrest of JS was based on information collected from the society.⁵ It was further sample when Police Division Kalibaru, North Jakarta arrested a child (AA) 16 years old as a suspect of narcotic seller. He suspected also as the narcotic dealer.⁶

Articles 111 to 148 the law No. 35 of 2009 govern criminal provision. Those articles state that “any person that without right or against the law who circulates the narcotics will be punished”. The question arises from those articles are how about if the dealer is a child? Which law should be applied? The Law No. 35 of 2009 clearly stipulates that the narcotic dealers must be punished either they are adult or child. The article 133 subsection (1) and (2) is the only article of the Law states it. However, the article only puts the child as a victim of the adult person who circulates the narcotics.

Therefore, this paper will elaborate the idea of narcotic dealer conducted by the child personally and initiatively. It will analyze also whether there is conflict of interest between the law No. 35 of 2009 and the Law No. 35 of 2015 on Child Protection.

2. Regulation of Child Narcotic Dealer

Regulation related to child narcotic dealers is governed in various laws. One of the laws is the Law No. 35 of 2009 in which the criminal provision and the fine are higher than the previous law on Narcotics. It also discusses production mechanism and provided narcotics for some purposes. Related to punishment, it not only focuses on the punishment itself, but also it provides rehabilitation facilities for the users. Other law is the Law No. 11 of 2012 concerning System of Child Court. It governs dispute mechanism through diversion. It means that the child must be protected either mentally or physically.

To see and analyze comprehensively, the discussion of those laws will be focused on the Law No. 35 of 2009 concerning Narcotics. One of its consideration states that “to improve health standards of Indonesian human resource in order to embody people's prosperity, it is imperative to conduct improvement efforts in health treatment and service sector, inter alia by attempting for the availability of certain Narcotics type which is very required as the medicine and conducting prevention and eradication against the abuse and illicit traffic of Narcotics and Narcotics Precursor”.

The Law No. 35 of 2009 basically is new law concerning narcotics in Indonesia. It is Indonesian government efforts to deal with narcotic circulation. The principle of law in this Law is justice, service, humanity, orderliness, protection, security, scientific values, and legal certainty.⁷ Those principles are in line with Pancasila especially in the context of justice, legal certainty, and equality under the law as stipulated in article 27 subsection 1 of the Constitution of the Republic of Indonesia 1945.

The law is enacted effectively 14 September 2009. It replaced the Law No. 22 of 1997 on Narcotics. The Law No. 22 of 1997 was deemed irrelevant and could not cover some modus of narcotics. However, some critics emphasize then that the Law No. 35 of 2009 substantively is still the same with the old one. There is no a significant change on it, except the provision of rehabilitation and authority of BNN.

¹He is the Head of Indonesian Protection Children Commission.

² <http://nasional.harianterbit.com/nasional/2015%20/04/27/26608/25/25/Jumlah-Anak-di-Bawah-Umur-yang-Jadi-Pengedar>. accessed 12 April 2016.

³<http://www.tribunnews.com/regional/2016/01/18/gadis-16-tahun-ini-dijebak-polisi-kemudian-ditangkap?page=2> accessed 30 March 2016.

⁴He is a commander of Denpom I/1 Pemantangsiantar.

⁵<http://www.metroSiantar.com/2015/04/16/186370/anak-15-tahun-jual-sabu/> accessed 29 March 2016.

⁶[http://www.Republika.co.id/29 March 2016](http://www.Republika.co.id/29%20March%202016).

⁷ See article 3 The Law No. 35 of 2009 on Narcotics.

Related to the child narcotic dealers, therefore, the paper will elaborate clearly to see how this law is working effectively, as followings:

1. Production

The meaning of “production” in the Law No. 35 of 2009 can be seen in Chapter I on term “General provisions”. Article 1 subsection 3 states “production as any activity or process to prepare, manufacture, and produce Narcotics directly or indirectly through extraction or non-extraction from natural resources or chemical synthetic or its combination, including to package and/or modify Narcotics form.”.

The term of production in this article explains that it is “a verb” or any activity to provide prepare, manufacture, and produce Narcotics directly or indirectly through extraction or non-extraction from natural resources or chemical synthetic or its combination, including to package and/or modify Narcotics form.”

There is development and new modus of narcotics crime in practice – called New Psychoactive Substance (hereinafter referred to NPS). According to Ali Juhardi, it is 44 types of narcotics in Indonesia, but only 18 types are put in the Law No. 35 of 2009 and 26 types of it are excluded from the Law No. 35 of 2009.

This situation basically creates a problem for law enforcement officers to enact the Law particular for those types excluded of the Law. It is a legal vacuum due to they are out of scope of the Law No. 35 of 2009. The consequence of it, the perpetrators are impossible to be punished because the Law does not govern it.¹ Therefore, to deal with this issue, 26 of NPS must be registered in order to give legal certainty and the Law must be revised to add those NPS in the scope of Law.

Table 1
The List of NPS and its Derivative circulated in Indonesia –
No Regulate in Annex Health Ministry Decree (PERMENKES) No. 13 Tahun 2014

No	Chemical Name	Effect	General Name	Type
1	Catha edulis consist of cathinone dan cathine	Psychostimulant	5-fluoro AKB 48	Cathinone dan Cathine
2	5-Fluoro AKB84	Halusinogen, effect of cannabinoid dan toxic	MAM 2201	Synthetic cannabinoid
3	MAM 2201	Halusinogen, effect of cannabinoid dan toxic	4 APB	Synthetic cannabinoid
4	1-benzofuran-4-yl-propan-2-amine	Stimulant, halusinogen, and toxic	BZP	Turunan Phenethylamine
5	1-Benzylpiperazine	Euphoria increase heart rate, dilatation pupil and toxic	Mcpp	Turunan Piperazine
No	Chemical Name	Effect	General Name	Type
6	1-(3-Chlorophenyl)piperazinw	increase heart rate, dilatation pupil and toxic	TFMPP	Derivative of Piperazine
7	1-(3-Trifluoromethylphenyl)piperazine	increase heart rate, dilatation pupil and toxic	a-MT	Derivative of Piperazine
8	2-(1H-indol-3-yl)-1-methyl-ethylamine	Euphoria, emphaty, psychedelic, stimulant, dan anxiety	Kratom mitragynine dan speciogynine	Derivative of Tryptamine
9	Mitragyna speciosa consist of mitragynine dan speciogynine	Its effect such as opiate and cocain	Ketamine	Extraction, the plant extract
10	2-(2-chlorophenyl)2-(methylamino)cyclohexan-1-one	Halusinasi, euphoria, Psycotomynetic	Methoxetamin	Ketamin
11	(RS)2-(3-methoxyphenyl)-2-(ethylamino)cyclohexanone	Halusinasi, euphoria, Psycotomynetic	Ethylone (bk-MDEA, MDEC)	Derivative of Ketamin
12	3,4-Methylenedioxy-N-ethylcathinone	Stimulant, euphoria	Buphedrone	Derivative of cathinone
13	4-methyl buphedrone	Stimulant, euphoria	5-MeO-MiPT	Derivative of cathinone
14	5-methoxy N,N-methylisopropyltryptamine	Stimulant, halusinogen	FUB-144	Derivative of Tryptamine
15	(1-(4-fluorobenzyl)-1H-indol-	Halusinogen, effect of	AB-CHMINACA	Synthetic

¹See the legality principle. Nullum Delictum Nulla Poena Sine Pravia Lege Poenali.

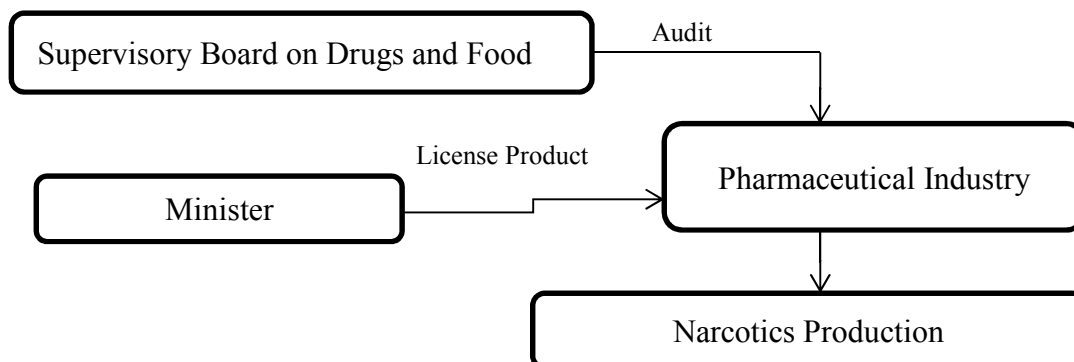
	3-yl)(2,2,3,3-tetramethylcyclopropyl)methanone	cannabinoid and toxic		cannabinoid
16	N-[(1S)-1-(aminocarbonyl)-2-methylpropyl]-1-(cyclohexylmethyl)-1H-indazole-3-carboxamide	Halusinogen, effect of cannabinoid and toxic	AB-FUBINACA	Synthetic cannabinoid
17	N-[(1S)-1-(aminocarbonyl)-2-methylpropyl]-1-[(4-fluorophenyl)methyl]-1H-indazole-3-carboxamide	Halusinogen, effect of cannabinoid and toxic	5-fluro AKB 48	Synthetic cannabinoid
No	Chemical Name	Effect	General Name	Type
18	Naphthalen-1-yl-(-4-pentyloxynaphthalen-1-yl)methanone	Halusinogen, effect of cannabinoid and toxic	CB 13	Synthetic cannabinoid
19	1-(4-Chlorophenyl)-2-(methylamino)propan-1-one	Halusinogen, effect of cannabinoid and toxic	4-chlorometchatino ne	Derivative of cathinone
20	Methyl 2-({1-[(4-fluorophenyl)methyl]-1H-indazole-3-carbonyl}amino)-3-methylbutanoate	Halusinogen, effect of cannabinoid and toxic	FUB-AMB	Synthetic cannabinoid
21	N-(1-amino-3-methyl-1-oxobutan-2-yl)-1-pentyl-1H-indazole-3-carboxamide	Halusinogen, effect of cannabinoid and toxic	AB-PINACA	Synthetic cannabinoid
22	[1-(5-fluoropentyl)-1H-indazol-3-yl](naphthalen-1-yl)methanone	Halusinogen, effect of cannabinoid and toxic	THJ-2201	Synthetic cannabinoid
23	1-naphthalenyl(1-pentyl-1H-indazol-3-yl)-methanone	Halusinogen, effect of cannabinoid and toxic	THJ-018	Synthetic cannabinoid
24	N-(1-Amino-3,3-dimethyl-1-oxobutan-2-yl)-1-(4-fluorobenzyl)-1H-indazole-3-carboxamide	Halusinogen, effect of cannabinoid and toxic	ADB-FUBINACA	Synthetic cannabinoid
25	N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-(cyclohexylmethyl)-1H-indazole-3-carboxamide	Halusinogen, effect of cannabinoid and toxic	ADB-CHMINACA	Synthetic cannabinoid
26	methyl 2-{{1-(cyclohexylmethyl)-1H-indol-3-yl}formamido}-3,3-dimethylbutanoate	Halusinogen, effect of cannabinoid and toxic	MDMB-CHMICA	Synthetic cannabinoid

Source : Balai Laboratorium Uji Narkoba BNN, September 2016

Article 11 of the Law No. 35 of 2009 furthermore stipulates that “Minister shall provide specific permit to produce Narcotics to certain licensed Pharmaceutical Industry pursuant to regulations and legislations after being audited by Supervisory Board on Drugs and Food. It means that the Minister has an authority to give permission of producing narcotics.

It is also clear that narcotics production is permitted as long as the Pharmaceutical Industry has license from the government (the Minister). For clear explanation, it can be see in table (chart) 2 below:

Chart 1
An Authority to Produce Narcotics



The chart as mentioned above show that the only authority to produce narcotics is the pharmaceutical industry. Therefore, if there is a person or corporation who produces Narcotics is invalid. Derivative of the law No. 35 of 2009 is Health Ministry Decree No. 1010/MENKES/PER/XI/2008 concerning Drugs Register.

2. Storage and Reporting

Narcotics are substances or drugs derived from plants or non-plants, either synthetic or semi-synthetic, which can cause degradation or alteration of consciousness, loss of taste, reduce or eliminate the pain, and can lead to dependence.

The use of narcotics does not fit to the Law No. 35 of 2009 will create legal impact to criminal sentences. Considering its dangerous, narcotic storage also is discussed and governed in article 14 of the Law No. 35 of 2009. It states that:

1. Narcotics controlled by Pharmaceutical Industry, pharmaceutical large trader, state-owned storage facility for pharmaceutical preparation, dispensary, hospital, public health center, clinic, doctor and science institution shall be required to be stored in a specialized way.
2. Pharmaceutical Industry, pharmaceutical large trader, state-owned storage facility for pharmaceutical preparation, dispensary, hospital, public health center, clinic, doctor and science institution shall be required to prepare, submit, and keep periodic report about inclusion and/or exclusion of Narcotics under their control.
3. Further clauses about specialized storage procedures as referred to paragraph (1) thereto and period, form, content, and reporting procedures as referred to in paragraph (2) shall be governed under Ministerial Regulation.
4. Infringement against clause about storage as referred to in paragraph (1) and/or clauses about reporting as referred to paragraph (2) shall be charged administrative penalty by the Minister upon recommendation from Head of Supervisory Board on Drugs and Food in form of:
 - a. reprimand;
 - b. warning;
 - c. administrative penalty;
 - d. temporary activity termination; or
 - e. license revocation.

Regulation on storage and reporting as stipulated in article 14 states that the narcotics can be stored, as followings:

- a. Pharmaceutical industry;
- b. Big Pharmaceutical Trader;
- c. Storage facilities provided by the pharmaceutical government;
- d. Pharmacy;
- e. Hospital;
- f. Center of Health's Society;
- g. Doctor; and
- h. Scientific institution.

Those storage places as mentioned in the article are the only storage of narcotics. Mechanism of storage must fullfill certain standard and criteria and reporting must be reported annually. Those procedures is made to avoid misuse of the narcotics and to control the narcotics. Regulation of storage and reporting is governed specifically in Health Ministry Decree No. 3 of 2015 concerning Circulation, Storage, Extermination, and Reporting Narcotic, Psychotropic, and Pharmaceutical Precursor.

3. Circulation

Circulation of narcotics in Indonesia shows that the number of narcotics abuse either in the number of it and its modus increase every year. Therefore, law enforcement on it must be improved optimally.

It is some articles in the law No. 35 of 2009 govern narcotic's circulation. Those articles are article 35, 36, 37, and 38.

Article 35

Circulation of Narcotics shall cover any activity or series of activity to supply or submit Narcotics either in the framework of commerce, instead of trading or transfer, for the interest of health service and science and technology development.

Article 36

- (1) Narcotics in form of finished medicine may be circulated only after obtaining circulation permit from the Minister.
- (2) Further clauses about requirements and procedures of Narcotics circulation permit in form of finished medicine as referred to in paragraph (1) shall be governed under Ministerial Regulation.
- (3) To obtain circulation permit from the Minister, Narcotics in form of finished medicine as referred to in paragraph (1) thereto shall go through registration with Supervisory Board on Drugs and Food.
- (4) Further clauses about requirements and procedures of Narcotics registration in form of finished medicine as referred to in paragraph (3) shall be governed under Regulation of Head of Supervisory Board on Drugs and Food.

Article 37

Narcotics Group II and Group III which is in form of raw material either natural or synthetic used for drugs production shall be governed under Ministerial Regulation.

Article 38

Any activity of Narcotics circulation shall be required to be accompanied with valid documents.

It is clear that based on those article, circulation of narcotics must obtain permission from the Minister to be traded in the form of finished medicine and development of science and technology.

4. Criminal Provision

Narcotics is possible to be abused. Therefore, it is governed under Chapter XV of the Law No. 35 of 2009. To clarify its substance of the provision, the provisions will be elaborated, as followings:

a. Ownership of Narcotics

It is governed in article 111 and 112 of the Law No. 35 of 2009. Article 111 states that:

- (1) Any person which is not entitled or against the law to plant, maintain, own, keep, control, or provide Narcotics Group I in form of plant shall be sentenced for imprisonment minimum 4 (four) years and maximum 12 (twelve) years and penalty minimum Rp. 800,000,000.00 (eight hundred million rupiah) and maximum Rp. 8,000,000,000.00 (eight billion rupiah).
- (2) In case of the action to plant, maintain, own, keep, control, or provide Narcotics Group I in form of plant as referred to in paragraph (1) thereto which the weight exceeding 1 (one) kilogram or exceeding 5 (five) trees, the perpetrator shall be sentenced for life or imprisonment minimum 5 (five) years and maximum 20 (twenty) years and penalty maximum as referred to in paragraph (1) thereto plus 1/3 (one-third).

Formula of article 111 consists of 2 subsection, which focuses on Narcotics Group I in form of plant and no more 1 (one) kilogram, which shall be sentenced for imprisonment minimum 4 (four) years and maximum 12 (twelve) years and penalty minimum Rp. 800,000,000.00 (eight hundred million rupiah) and maximum Rp. 8,000,000,000.00 (eight billion rupiah). It also focuses on Narcotics Group I in form of plant as referred to in paragraph (1) thereto which the weight exceeding 1 (one) kilogram or exceeding 5 (five) trees, the perpetrator shall be sentenced for life or imprisonment minimum 5 (five) years and maximum 20 (twenty) years and penalty maximum as referred to in paragraph (1) thereto plus 1/3 (one-third).

The element substance of the article 111 both subsection (1) and (2) is the same, except to type and weight of the narcotics as mentioned earlier. The element substance of the article, as following:

(i) *Any Person*

The word "any person" in substance of the article either in Indonesia Criminal Code (Kitab Undang-Undang Hukum Pidana – KUHP) or excluding KUHP is pivotal. Eventhough, the word "any person" sometimes is replaced by the word "anyone". Both phrases have same conotation to refer person or someone (naturalijk persoon). This is important because it is referring to person who can be categorised as a perpectrator and has responsibility.

According to Coke, person are two sorts, person natural created of god, and person incorporate or politique by the policy of man. Therefore, they are called bodies politique.¹

¹Curzon, L.B. 1979. *Jurisprudence*. M&E Hand Book. p. 228. See also Dudu Durwara Machmudin, 2000, *Pengantar Ilmu Hukum Sebuah Sketsa*. PT. Refika, Bandung, p.32.

Since people are born, people have been “subject of law” without racial discrimination. People are equal before the law. Even, they die or still in pregnant process, the child has become “legal subject”. Basically, people as a legal subject have rights and duties but not all people can do their rights and duties in appropriate ways. It is because to do their rights and duties, they have to have capacity to do as if it. Someone is categorized incapable to do so – called *Persone Miserabile*.¹ They are:

- a). People under 21 years old and un-married;
- b). People (adult) under “pardon - *kuratele*”;
- c). A wife under civil Law (Dutch).

Therefore, it can be said that someone can be responsible to his/her act, except for someone who categorises as *Persone Miserabile*

(ii) *Not Entitled or against the Law*

The element of “not entitled or against the law” is very important to determine whether it is a crime or not. In the case of the Law No. 35 of 2009, the pharmaceutical industry, Health Ministry, and Supervisory Board on Drugs and Food are the official organ to produce, licence, circulate, and store narcotic. Out of those organ mean illegal and are against the Law.

According to Theory of *Wederrechtelijk* in KUHP, the term *Wederrechtelijk* means to clarify that there is an illegal action. However, there is other terms to show its meaning, such as *rechtswidris*, *Unrecht*, *Onrechtmatig* as mentioned in *Hoge Raad* (Jurisprudence), January 31, 1919 (N.J. 1999 W. 10365). *Onrechtmatig* has not only meaning to what is against people interest or against to legal obligation of the perpetrator, but also what is against to either moral or order of the society.² According to Lamintang, *wederrechtelijk* is differed to be 2 (two) models:³

- 1). *Formale wederrechtelijk*. It means that an act is only considered as *wederrechtelijk* if the act fulfill all requirements as stipulated in delict formula pursuant to the Law;
- 2). *Materiale wederrechtelijk*. It means that an act is not only considered as *wederrechtelijk* if it fulfill the requirement of the law, but also it is including unwritten law.

Satochid Kartanegara furthermore states that *formale wederrechtelijk* is referred to the Law, while *Materiale wederrechtelijk* is referred to both the Law and principle of law called *algemene beginsel*.⁴

Van Bommel then explains “*against the law*”, as followings:⁵

- 1). Against to fidelity in the society related to other person or property;
- 2). Against to an obligation determined by the Law;
- 3). No rights or own authority;
- 4). Against to rights of third party; and
- 5). Against to an objective law.

It can be concluded from some scholars opinion that term “*wederrechtelijk*” is more appropriate to be used than term “*Onrechtmatig*”.⁶

(iii) *To plant, maintain, own, keep, control, or provide*

The word “to plant” is one of elements in article 111. It must be narcotics group I in form of plant. Therefore, someone who plant the narcotics group I will be charged in this article. To maintain, own, keep, control, or provide themselves basically are continuously acts amongst them (the acts). It is because when someone own something, it must control or keep it. So, when it is maintained, it must be owned.

The most interesting things in the article 111 is the word “to plant”. The meaning to plant according to Indonesia Dictionary is different to its meaning in the article. According to the Indonesia Dictionary, “to plant” is meant “*to plant or to put seeds, seedling, cuttings, and so on in the ground in order to be grown –as a fruit tree*”.

According to the author, the word to plant has same conotation to the word “to produce”. Both words are intended to produce something. It can be said then that the word “to plant” in article 111 is aimed to produce plant as categorized as narcotics group I. Therefore, according to the author, the word “to plant” must be put in other article, out of article 111, and must have its own criteria,

¹ Achmad Ali. 2009, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (JudicialPrudence) Termasuk Interpretasi Undang-undang (Legisprudence)*. Kencana Prenada Media Group, Jakarta, p.224.

² See Leden Marpaung, 1991, *Unsur-Unsur yang Dapat Dihukum*. Sinar Grafika, Jakarta, p.44.

³ *Ibid.*, p.45.

⁴ *Ibid.*

⁵ *Ibid.* 46

⁶ Teguh Prasetyo, 2005, *Hukum Pidana Materiil Jilid 1*. Kurnia Kalam, Yogyakarta, p.22.

elements, and criminal provision.

Article 112 of the law No. 35 of 2009 states that:

- (1) Any person which is not entitled or against the law to plant, maintain, own, keep, control, or provide Narcotics Group I not in form of plant shall be sentenced for imprisonment minimum 4 (four) years and maximum 12 (twelve) years and penalty minimum Rp. 800,000,000.00 (eight hundred million rupiah) and maximum Rp. 8,000,000,000.00 (eight billion rupiah).
- (2) In case of the action to plant, maintain, own, keep, control, or provide Narcotics Group I not in form of plant as referred to in paragraph (1) thereto which the weight exceeding 5 (five) kilograms, the perpetrator shall be sentenced for life or imprisonment minimum 5 (five) years and maximum 20 (twenty) years and penalty maximum as referred to in.

Article 111 and 112 do not only cover the owner of the narkotic group I, but also they cover provider and producer narcotics due to the word "to plant" inside those articles. It can be said then that those articles are against to article 114 of the Law No. 35 of 2009.

Related to discuss as stated above, the Indonesian Supreme Court (hereinafter referred to MA) criticizes the House of Representatives (hereinafter referred to DPR) and the Government decision relating to the Law of Narcotics. According to MA, the ownership provision as mentioned in the Law (article 112) is like "a rubbish bin".¹

The reason of the point of view of MA is that the article is potential to create "a gap". For example, there is someone just hold the narcotics, he/she does not intend to use or to sell or doesnot know about it. According to this article, the person can be arrested and sentenced eventhough he/she just hold it. This article actually does not consider the use and purpose of the narcotics in control of a person.

Both article 111 and 112 can be applied to narcotic dealer. It is because they cover either active user, passive user, and dealer. However, both articles create conflict of interests to other article, which governs specifically the narcotics dealers with more higher sentence.

It is time to elaborate more related to the dealer narcotics as focused of this paper, as followings:

a. The Dealer

Etymology, the word "dealer" in (bahasa) Indonesia is resulted from the word "edar" and added with prefix "peng". The word "edar" itself means circulation. Prefix "peng" to complete the word "edar" means "any activities to circulate". As governed in the Law No. 35 of 2009, the narcotics circulation is any activities to circulate and surrender the narcotics. The narcotics circulation must be addressed to medicine and development science and technology only. If, they are misused to be illegal, article 113 the Law No. 35 of 2009 governs it.

Article 113 states that:

- (1) Any person which is not entitled or against the law to produce, import, export, or distribute Narcotics Group I shall be sentenced for imprisonment minimum 5 (five) years and maximum 15 (fifteen) years and penalty minimum Rp. 1,000,000,000.00 (one billion rupiah) and maximum Rp. 10,000,000,000.00 (ten billion rupiah).
- (2) In case of the action to produce, import, export, or distribute Narcotics Group I as referred to in paragraph (1) thereto in form of the plant which the weight exceeding 1 (one) kilogram or exceeding 5 (five) trees or not in form of plant which the weight exceeding 5 (five) grams, the perpetrator shall be sentenced to death, or imprisonment for life, or imprisonment minimum 5 (five) years and maximum 20 (twenty) years and penalty maximum as referred to in paragraph (1) thereto plus 1/3 (one-third).

Article 113 states some elements that must be fulfilled to sentence a perpetrator, as followings:

1. Any person is not entitled or against the law;
2. To produce, import, export, or distribute.

The formula article 111 and 112 as explained above is similar to article 113. As stated in article 11, pharmaceutical industry is the only organ of state to produce narcotics as mandated by the Health Minister after audited by Supervisory Board on Drugs and Food. Person or corporation is prohibited to produce it.

Related to export and import of the narcotics, they have been governed comprehensively in article, 23, 24, 25, 26, 27, and 28. They are:

Article 23

Regulations and legislations regarding goods transportation shall remain applicable for transportation of Narcotics unless otherwise stipulated in the Law or later governed under clauses of the Law.

Article 24

¹<http://news.detik.com/berita/2658245/ma-pasal-112-uu-narkotika-pasal-keranjang-sampah>.

- (1) Each transportation of the imported Narcotics shall be required to be accompanied with valid documents or letter of export approval on Narcotics pursuant to regulations and legislations in exporting country and Letter of Import Approval on Narcotics issued by the Minister.
- (2) Each transportation of the exported Narcotics shall be required to be accompanied with Letter of Export Approval on Narcotics issued by Minister and valid documents or letter of import approval on Narcotics pursuant to regulations and legislations in any exporting country.

Article 25

Person in charge in transporting import of Narcotics entering jurisdiction of the Republic of Indonesia shall be required to bring and be responsible upon the completeness of Letter of Import Approval on Narcotics from Minister and valid documents or letter of import approval on Narcotics pursuant to regulations and legislations in any exporting country.

Article 26

- (1) Exporter of Narcotics shall be required to provide Letter of Export Approval on Narcotics from Minister and valid documents or letter of import approval on Narcotics pursuant to regulations and legislations in any importing country to the person in charge in the export transportation company.
- (2) Person in charge in the export transportation company shall be required to provide Letter of Export Approval on Narcotics from Minister and valid documents or letter of import approval on Narcotics pursuant to regulations and legislations in any importing country to the person in charge in transporting.
- (3) Person in charge in transporting export on Narcotics shall be required to bring and be responsible upon the completeness of Letter of Export Approval on Narcotics from Minister and valid documents or letter of import approval on Narcotics pursuant to regulations and legislations in any importing country.

Article 27

- (1) The transported Narcotics must be stored in the first chance in special package or in a safe place within the ship sealed by ship captain witnessed by the dispatcher.
- (2) Ship captain shall prepare minutes about the transported cargo of Narcotics.
- (3) Ship captain in no later than 1 x 24 (one time twenty four) hours after arrived in destination port shall be required to report Narcotics loaded onto his ship to the local head of customs office.
- (4) Unloading of Narcotics cargo shall be made in the first chance by ship captain witnessed by the officer of customs and excise.
- (5) Ship captain identified any Narcotics without documents or letter of export approval or letter of import approval within the ship shall be required to prepare minutes, perform security conduct, and in the transit port shall immediately report and submit the Narcotics to the authorized party.

Article 28

Clause as referred to in Article 27 shall be applicable as well for pilot in airline transportation.

Those articles regulate the process of export import legally. If does not do so, the export-import activities will be illegally and can be punished.

Another provision govern related to “the narcotic dealer” is article 114. The article states that:

- (1) Any person which is not entitled or against the law offers to be sold, sell, purchase, receive, being intermediary within transaction, exchange, or deliver Narcotics Group I shall be sentenced for imprisonment for life or imprisonment minimum 5 (five) years and maximum 20 (twenty) years and penalty minimum Rp. 1,000,000,000.00 (one billion rupiah) and maximum Rp. 10,000,000,000.00 (ten billion rupiah).
- (2) In case of the action to offer to be sold, sell, purchase, being intermediary within transaction, exchange, deliver or receive Narcotics Group I as referred to in paragraph (1) thereto which in form of the plant the weight exceeding 1 (one) kilogram or exceeding 5 (five) trees or not in form of plant the weight exceeding 5 (five) grams, the perpetrator shall be sentenced to death, or imprisonment for life, or imprisonment minimum 6 (six) years and maximum 20 (twenty) years and penalty maximum as referred to in paragraph (1) thereto plus 1/3 (one-third).

Article 114 states some elements that must be fulfilled to sentence a perpetrator, as followings:

1. Any person is not entitled or against the law;
2. offering to be sold, sell, purchase, receive, being intermediary within transaction, exchange, or deliver

Both article 113 and 114 emphasize that the act in the article is dangerous and can be categorized as extraordinary crime. So, the perpetrator shall be sentenced to death or imprisonment for life.

Related to courier (porter), the law No. 35 of 2009 has governed also. The qualification of act to be classified as a courier can be seen in article 115, as following:

- a. Courier

Article 115

- (1) Any person which is not entitled or against the law to bring, dispatch, transport, or transit Narcotics Group I shall be sentenced for imprisonment minimum 4 (four) years and maximum 12 (twelve) years and penalty minimum Rp. 800,000,000.00 (eight hundred million rupiah) and maximum Rp. 8,000,000,000.00 (eight billion rupiah).
- (2) In case of the action to bring, dispatch, transport, or transit Narcotics Group I as referred to in paragraph (1) thereto in form of the plant the weight exceeding 1 (one) kilogram or exceeding 5 (five) trees, the perpetrator shall be sentenced imprisonment for life or imprisonment minimum 5 (five) years and maximum 20 (twenty) years and penalty maximum as referred to in paragraph (1) thereto plus 1/3 (one-third).

Article 115 states some elements that must be fulfilled to sentence a perpetrator, as followings:

1. Any person is not entitled or against the law;
2. To bring, dispatch, transport, or transit.

Article 115 subsection 2 has meaning that every action as stipulated in it must be completed with permission from authority organ as stated by the Law.

According to the author, the elements of the article can be charged to someone who is commanded to dispatch the narcotics. It is possibility indeed that the narcotics are not his/her mine or do not known what the package is.

This situation will bring a polemic in terms of implementation of the article because there is no differentiate between the elements "do not his/her mine or do not known what the package is". It is possible to create injustice when someone who is sentenced but he/she does not know his/her crime.

Basically, article 115 subsection 2 has similarity to article 112, 113 subsection 2, and 114 subsection 2 in the context of the narcotics weight exceeding 1 (one) kilogram or exceeding 5 (five) trees. It will be charged with heavy narcotics classification. However, it excludes for narcotic group I non plant.

In terms of narcotic group I non plant, the suspect will be charged with article 115 subsection 1, which the sentence will be imprisonment minimum 4 (four) years and maximum 12 (twelve) years and penalty minimum Rp. 800,000,000.00 (eight hundred million rupiah) and maximum Rp. 8,000,000,000.00 (eight billion rupiah)

b. Narcotic Abuser

The meaning of narcotic abuser is stipulated in article 1 subsection 15 of the Law No. 35 of 2009. It states that abuser shall mean any person who unrightfully or unlawfully consume narcotics. Its sanction then is governed in article 127, as followings:

- (1) Any Abuser shall be as follows:
 - a. Narcotics Group I for own-self shall be charged under imprisonment for maximum 4 (four) years;
 - b. Narcotics Group II for own-self shall be charged under imprisonment for maximum 2 (two) years; and
 - c. Narcotics Group III for own-self shall be charged under imprisonment for maximum 1 (one) year.
- (2) In trying the case as referred to paragraph (1) thereto, the judge shall be required to observe the clause as referred to in Articles 54, 55 and 103.
- (3) In case of the Abuse as referred to in paragraph (1) thereto can be proven or proven as the victim of Narcotics abuse, the Abuser shall be required to go through medical and social rehabilitation.

Article 127 governs that narcotic group I for self purpose is classified as general crime. Its sentence will be imprisonment for 1 year and must go to medical rehabilitation. It is quite different to the previous law that the sentence must be 4 or 5 year in jail maximum and has no rehabilitation. Therefore, it can be said that its elements are 3 in terms of narcotic groups (I, II, and III) and 3 in terms of types of sentences. To make it simple, it can be seen in table 2:

Table 2
Criminal Formulation Pursuant to the Law No. 35 of 2009

Type of Crime	Narcotic Group	Category of Act against the Law					
		I	II	III	IV	V	VI
In jail	Group I	4 – 12 years 5 – 20 years	4 – 12 years 5 – 12 years	5 – 15 years 5 – 20 years	5 – 20 years 6 – 20 years	4 – 12 years 5 – 20 years	5 – 15 years 5 – 20 years
	Group II	-	3 – 10 years 5 – 15 years	4 – 12 years 5 – 20 years	4 – 12 years 5 – 20 years	3 – 10 years 5 – 15 years	4 – 12 years 5 – 20 years
	Group III	-	2 – 7 years 3 – 10 years	3 – 10 years 5 – 15 years	3 – 10 years 5 – 15 years	2 – 7 years 5 – 15 years	3 – 10 years 5 – 15 years
Imprisonment for Life	Group I	Heavy Category in form of plant and exceed 1 kg and exceed 5 trees.	Heavy Category > 5 gram in form of nono-plant	Heavy Category > 1kg or 5 trees (in form of plant and >5 gram (non-plant)	Heavy Category > 1kg or 5 trees (in form of plant and >5 gram (non-plant)	Heavy Category > 1kg or 5 trees (in form of plant and >5 gram (non-plant)	Cause death or pemanantly disable
	Group II	-	-	Heavy Category > 5 gram	Heavy Category > 5 gram	-	Cause death or pemanantly disable
	Group III	-	-	-	-	-	-
Death Penalty	Group I	-	-	Heavy Category > 1kg or 5 trees (in form of plant and >5 gram (non-plant)	Heavy Category > 1kg or 5 trees (in form of plant and >5 gram (non-plant)	-	Cause death or pemanantly disable
	Group II	-	-	>5 gram (non-plant)	>5 gram (non plant)	-	Cause death or pemanantly disable
	Group III	-	-	-	-	-	-
Penalty (fine)	Group I	800 jt- 8M + 1/3	800 jt-8 M + 1/3	1M -10 M +1/3	1M-10M + 1/3	800JT- 8M + 1/3	1M-10M +1/3
	Group II	-	600jt- 5M + 1/3	800JT-8M + 1/3	800JT- 8M +1/3	600JT-5M +1/3	800 JT-8M+ 1/3
	Group III	-	400JT- 3M +1/3	600JT- 5 + 1/3	600JT- 5 M + 1/3	400JT- 4 M +1/3	600 JT-5 M + 1/3

Notes:

Category I	:	To plant, maintain, own, keep, control, or provide
Category II	:	To own, keep, control, or provide
Category III	:	To produce, import, export, or distribute
Category IV	:	To offer to be sold, sell, purchase, receive, being intermediary within transaction, exchange, or deliver
Category V	:	to bring, dispatch, transport, or transit
Category VI	:	To use Narcotics Group I against another person or providing Narcotics Group I for being used by another person

Table 2 as mentioned above shows that the Law No. 35 of 2009 does not formula specifically on the child facing narcotics case. Therefore, when the child is facing the case of narcotics, he/she will be treatment as an adult perpetrator. In this context, the criminal process of the child will be far away from protection of child's rights. The use of the word "any person against the law" does not clarify age and limited age for someone (child) who uses or abuses the narcotics. As it is known, the child basically does not understand and does not know what they are doing.

Related to criminal responsibility, pursuant to the author, it is very important to be considered before deciding that whether the child can be sentenced as stipulated in narcotics provision or not. The criminal responsibility is connected to "the soul of the perpetrator" when he/she is doing his/her acts. Incapability to be responsible of the acts, pursuant to Vos it is one of the elements of *Strafbaarfeit* and *feit*. Article 6 subsection 2 of the Law No. 48 of 2009 on Judicial Power states that "nobody can be punished, except the court has confidence that someone is considered to be responsible and stated "guilty" over his/her act (charging over his/her self).

According to the author, Article 6 subsection 2 of the Law No. 48 of 2009 at least has 3 (three) legal principles as a criminal sentence basis. Firstly, legality principle as stipulated in article 1 subsection 1 of KUHP states that "no punishment without something is governed by Law. Secondly, culpability principle that states that "no punishment without fault" (*afwijzigheid van alle schuld*). Finally, principle of "no punishment without against the law" (*afwijzigheid van alle materiele wederrechtelijkheid*).

Related to discuss on criminal responsibility, Roeslan Saleh states that the meaning of crime to

someone who conduct a crime and can be punished, it depends on whether his/her act has “ a fault’ or not.¹ According to explanatory memory (*Memorie Van Toelichting*), there is 2 things to be accepted as irresponsibility of the perpetrator, as followings:²

1. The perpetrator has not been given to choose free what is prohibited or not by the Law;
2. The perpetrator realizes that his/her act is against to the law, but he/she does not understand his/her acts.

In terms of article 111 and 112 of the Law No. 35 of 2009 that to punish the perpetrator, it is basically not only limited to someone who owns, storages, keeps, or provides illegally (against the law), but also it must be proved whether there is a mistake inside the body of the accused to own and keep the narcotics; what is the purpose and how to get them.

Referring to fault (*schuld*) doctrine as known in criminal law, it must consist of elements intention, negligence, and can be responsible.³ Bambang Poernomo states that “fault” consists of psychology and juridicial aspects. Psychology’s aspect is a basic to do crimination first and then the acts can be responsible in criminal law. Therefore, the basic fault of the perpetrators is whether there is inner relationship between the perpetrators and its act.⁴

In the context of the child facing narcotic case, it must be seen the inner relationship between the child and his/her act (fault). Age’s limitation also becomes one of elements to determine requirement of “fault” as stated by Moeljatno, as followings:⁵

1. To act crime (against the law);
2. Over certain age is able to be responsible;
3. To act “fault” such as intention and negligence; and
4. No reason to be forgiven

It can be concluded that if there is no evidence to show a “fault” or schuld as required in article 111 and 112 of the Law, the accuser based on culpability principle can not be charged to own the narcotic even if gramatically the accuser act based on legality principle has fulfilled the requirement of owning or keeping the narcotics.

3. Conclusion

The crime of Narcotics has been transnational in nature committed under a high *modus operandi*, sophisticated technology supported by a wide organization network, and already took victims particularly among youth which is very harmful against the life of people, nation and the state.

Related to the narcotics acts and its abuse including narcotic dealer, the Law No. 35 of 2009 govern in article 111, 112, 113, 114, 115, 116, and 127. However, the Law itself does not govern spesifically about child narcotics dealer. In terms of it, the child is treatment as adult narcotic abuser or dealer. This is becoming a critic to the law. Therefore, it would be better if the formula of those provisions must be changed or reformulated.

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¹ Roeslan Saleh. 1981. *Sifat Melawan Hukum dari perbuatan Pidana*. Aksara Baru, Jakarta, p.146.

² Andi Hamzah. 1991. *Asas-asas Hukum Pidana*. Jakarta: Renika Cipta. hlm 104

³ *Ibid*. hlm. 103

⁴ Bambang Poernomo. 1985. *Asas-Asas Hukum Pidana*. Ghalia Indonesia, Jakarta, p. 45.

⁵ Moeljatno. 1993. *Perbuatan Pidana dan Pertanggung jawaban Dalam Hukum Pidana*, Bina Aksara, Jakarta. p..164.

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