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## Distinction Between Victims and Criminals In Relation To Using Narcotics Illegally in Indonesia

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### Article's Information

### Abstract

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*It is unprecedented that the Act Number 35, 2009 on Narcotics has incorporated the term of victims towards illegal users of narcotics which cannot be convicted for the crime and provided them with treatment at special rehabilitation center as worded in Article 103 (1) (b) of the Act. However, Article 103 (1) (a) of the Act also provides the possibility for those using narcotics illegally to be convicted. It causes law enforcers might find it difficult to differentiate between victims and criminals concerning this violation. This research aims to discuss the definition of illegal narcotic users under the Narcotic Act 2009 and the criteria used by law enforcers in distinguishing between victims and criminals. This is a juridical normative*



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*research by using the method encompassing document analysis of the Narcotic Act 2009 and other relevant laws will be adopted in discussing the issue. This research reveals that the Act recognises the users of illegal narcotics as fully victims if they use narcotics with a certain amount for themselves only and considers the illegal narcotics users as criminals if they provide the substances for other people. The Act has governed illegal using of the substances in Articles 1 points (13), (15), 7, 111, 112, and 114. Surprisingly, the Act provided both fully victims and victims of being found guilty first treatment in the rehabilitation centre for certain period.*

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## A. Introduction

Drug abuse has been a global problem that does is not limited by regional or state borders threatening all aspects of our lives.<sup>1</sup> The Government of the Republic of Indonesia has estimated that the number of drug users in Indonesia is 200,000, but some NGOs have predicted that the numbers are higher.<sup>2</sup> Narcotic National Board has found that 2,2% of the Indonesian population is using the drug.<sup>3</sup> The problem of using the drug has been very worrying as Indonesia geographically Indonesia is located between three continents, and there is a rapid development of technology and science. The usage of narcotics out of medical prescription, without guidance from doctor and its usage causing side effects and inability to work at home and office, study at school, and interact in the community.<sup>4</sup> Addiction to narcotics is caused by substance tolerance added with high doses and pessimistic diagnostic, which have unresisting characters, prone to add the doses and the dependence on physic and psychology.<sup>5</sup> Illegally usage of narcotics is not purposed at medicating. It is used not based on the prescription issued by a physician or doctor or professional medical staff who have

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<sup>1</sup> Elviza Rahmadona and Helfi Agustin, "FAKTOR YANG BERHUBUNGAN DENGAN PENYALAHGUNAAN NARKOBA DI RSJ PROF. HB. SA'ANIN," *Jurnal Kesehatan Masyarakat Andalas* 8, no. 2 (April 1, 2014): 60–66, <https://doi.org/10.24893/JKMA.V8I2.127>.

<sup>2</sup> Sara L.M. Davis, Agus Triwahyuono, and Risa Alexander, "Survey of Abuses against Injecting Drug Users in Indonesia," *Harm Reduction Journal* 6, no. 1 (October 24, 2009): 1–6, <https://doi.org/10.1186/1477-7517-6-28>.

<sup>3</sup> MAUDY PRITHA AMANDA, SAHADI HUMAEDI, and MEILANNY BUDIARTI SANTOSO, "PENYALAHGUNAAN NARKOBA DI KALANGAN REMAJA (ADOLESCENT SUBSTANCE ABUSE)," *Prosiding Penelitian Dan Pengabdian Kepada Masyarakat* 4, no. 2 (July 31, 2017): 129–389, <https://doi.org/10.24198/jppm.v4i2.14392>.

<sup>4</sup> Fransiska Novita Eleanora, "BAHAYA PENYALAHGUNAAN NARKOBA SERTA USAHA PENCEGAHAN DAN PENANGGULANGANNYA (Suatu Tinjauan Teoritis)," *Jurnal Hukum*, vol. 25, July 13, 2020, <http://jurnal.unissula.ac.id/index.php/jurnalhukum/article/view/203>.

<sup>5</sup> *Ibid.*

authorization for this.<sup>6</sup> The causes of illegally using narcotics are; the willingness to try, know, deal with new challenges, show rebellious behavior, reject adult standards, show anger, and protest toward social dilemma, morality, and political community.<sup>7</sup>

Article 1 of the Law Number 35, 2009 on Narcotics (hereinafter Narcotics Law 2009) provides that narcotics is a substance or drugs derived from plantation or non-plantation, synthetic or semi-synthetic that can cause drop or awareness loss, feeling loss, relieve or disappear pain and may cause addiction that is categorized in several groups in this Law. Someone who is being addicted uses narcotics illegally, and it is a violation of the Narcotics Law 2009. One of the most critical issues is whether they are also violating the Narcotics Law 2009.<sup>8</sup> Although Law Number 22, 1997 on Narcotics had regulated those who consume narcotics or drugs illegally are considered to be criminals, the Narcotics Law 2009 has worded it differently. The Narcotics Law 2009 has not clearly stated whether they are victims of drugs or narcotics abuse or violate the Narcotics Law 2009.<sup>9</sup> However, the Narcotics Law 2009 provides an opportunity for law enforcers to implement a non-penal approach towards illegal narcotics users in Indonesia.<sup>10</sup>

Gloria Lai, Fransiska Asmin, and Ruth Birgin have reviewed the recent implementation of policies and practices concerning the control of narcotics usage in Indonesia and pinpointed some remaining vital obstacles and issues.<sup>11</sup> The researchers revealed that the Narcotics Law 2009 keeps illegal users of drug users remained criminals for violating the Narcotics Law 2009, making them far away from essential health services.<sup>12</sup> Tommy Busnarma has discussed the imposition of fines towards the perpetrators of the Narcotics Law 2009 and the obstacles faced in the implementation of such punishment as worded in the Narcotics Law 2009.<sup>13</sup> Dian Herdian Silalahi has revealed that the efforts done in dealing with narcotics crime in Indonesia are to find the root of the cause of illegal use of narcotics, to prevent people from using it illegally, and to punish those who are using narcotics without a permit from a physician or based on a prescription from physician or doctor.<sup>14</sup> Novi Novitasari dan Nur Rochaeti has identified the causes of using narcotics illegally and found that the reasons for using it are looking for a new sensational experience, lacking confidence, and feeling failure in life.<sup>15</sup> Andri Winjaya Laksana has revealed that the hurdles found in the

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<sup>6</sup> Agnes Dewanti Purnomowardani and - Koentjoro, "PENYINGKAPAN-DIRI, PERILAKU SEKSUAL, DAN PENYALAHGUNAAN NARKOBA," *Jurnal Psikologi* 27, no. 1 (2000): 60–72, <https://doi.org/10.22146/JPSI.7010>.

<sup>7</sup> *Ibid.*

<sup>8</sup> Dina Novitasari, "Rehabilitasi Terhadap Terhadap Anak Korban Penyalahgunaan Narkoba," *Jurnal Hukum Khaira Ummah* 12, no. 4 (December 10, 2017): 917–26, <http://lppm-unissula.com/jurnal.unissula.ac.id/index.php/jhku/article/view/2567>.

<sup>9</sup> *Ibid.*

<sup>10</sup> Ricardo and Paul, "UPAYA PENANGGULANGAN PENYALAHGUNAAN NARKOBA OLEH KEPOLISIAN (STUDI KASUS SATUAN NARKOBA POLRES METRO BEKASI)," *Jurnal Kriminologi Indonesia* 6, no. 3 (2012), <http://www.ijil.ui.ac.id/index.php/jki/article/view/1105>.

<sup>11</sup> Gloria Lai, Asmin Fransiska, and Ruth Birgin, "Drug Policy in Indonesia," *SSRN Electronic Journal*, August 22, 2013, <https://doi.org/10.2139/ssrn.2290259>.

<sup>12</sup> *Ibid.* 1

<sup>13</sup> Tommy Busnarma, "PENERAPAN SANKSI PIDANA DENDA TERHADAP PELAKU TINDAK PIDANA PENYALAHGUNAAN DAN PEREDARAN GELAP NARKOTIKA DI PENGADILAN NEGERI PADANG," *Soumatara Law Review* 2, no. 1 (May 1, 2019): 172, <https://doi.org/10.22216/soumlaw.v2i1.3559>.

<sup>14</sup> Dian Herdian Silalahi, "Penanggulangan Tindak Pidana Penyalahgunaan Narkotika Di SATRES Narkoba Polres Tebing Tinggi," *Jurnal Ilmiah Penegakan Hukum* 5, no. 2 (February 11, 2019): 60, <https://doi.org/10.31289/jiph.v5i2.2182>.

<sup>15</sup> Novi Novitasari and Nur Rochaeti, "Proses Penegakan Hukum Terhadap Tindak Pidana Penyalahgunaan Narkotika Yang Dilakukan Oleh Anak," *Jurnal Pembangunan Hukum Indonesia*, vol. 3 (PROGRAM STUDI

implementation of rehabilitation for the illegal users of narcotics are laws governing this issue is conflicting with each other, making law enforcers find it difficult to rehabilitate them.<sup>16</sup> Herindarasti has revealed that the decriminalization policy made by the Government of the Republic Indonesia becomes the manifest of law reforms regarding massive illegal narcotics consumption in Indonesia, and it has been in line with the United Nations Office on Drugs and Crime (UNODC).<sup>17</sup>

The ongoing researches above have not discussed whether using narcotic illegally falls into a criminal violation or not based on the Narcotics Law 2009. The Narcotics Law 2009 does not specify the circumstance that illegally consumes narcotics will fall into the victims, not the criminals. Thus, this research will fill the discussion of the question on the circumstances used in applying the Narcotic Law 2009 on those who are using narcotics illegally. This research aims to identify the definition of illegal narcotic users under the Narcotic Law 2009 and discuss the criteria that law enforcers consider in determining whether they are interpreted as victims who need rehabilitation or criminals that must be punished under the Narcotics Law 2009. A purely qualitative research method encompassing document analysis of the Narcotic Law 2009 and other relevant laws will be adopted in discussing the issue.

## B. Discussion

### 1. The Legislation on Illegal Users of Narcotic Under the Narcotic Law 2009

Using narcotics illegally is due to several causes from personal factors, such as knowledge, behavior, personality, age, supports, trial, occupation, family feud, economy, and group influence.<sup>18</sup> In the legal process, a distributor or a producer would be considered a user or a user could also be fallen into a distributor or a producer.<sup>19</sup> Illegally using narcotics will negatively affect a person, community, and the life of humankind and cause damages for the state's security, economy, and politic.<sup>20</sup> The number of illegal narcotics users in Indonesia has been very worrying; hence it should be the task of the Indonesian Government to immediately overcome the cases of using narcotics illegally in the country nowadays.

Article 1 point 15 of the Narcotic Law 2009 provides that an illegal narcotics user is anyone using narcotics illegally or against the law.<sup>21</sup> Against the law is defined by violating the existing law that has been enforced. Meanwhile, Article 1 point 13 states that someone who is addicted to narcotics is using or abusing narcotics in the condition that is dependent on

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MAGISTER ILMU HUKUM FAKULTAS HUKUM UNIVERSITAS DIPONEGORO, January 30, 2021), <https://doi.org/10.14710/JPHI.V3I1.96-108>.

<sup>16</sup> Andri Winjaya Laksana, "TINJAUAN HUKUM PEMIDANAAN TERHADAP PELAKU PENYALAHGUNA NARKOTIKA DENGAN SISTEM REHABILITASI," *Jurnal Pembaharuan Hukum* 2, no. 1 (July 8, 2016): 74, <https://doi.org/10.26532/jph.v2i1.1417>.

<sup>17</sup> Sinta Lusya Valentina Herindrasti, "Drug-Free ASEAN 2025: Tantangan Indonesia Dalam Penanggulangan Penyalahgunaan Narkoba," *Jurnal Hubungan Internasional* 7, no. 1 (2018), <https://borang.umy.ac.id/index.php/jhi/article/view/3944>.

<sup>18</sup> Qomariyatus Sholihah, "EFEKTIVITAS PROGRAM P4GN TERHADAP PENCEGAHAN PENYALAHGUNAAN NAPZA," *Jurnal Kesehatan Masyarakat* 10, no. 2 (January 1, 2015): 153, <https://doi.org/10.15294/kemas.v10i2.3376>.

<sup>19</sup> Sri Purwatiningsih, "PENYALAHGUNAAN NARKOBA DI INDONESIA," *Populasi* 12, no. 1 (July 19, 2001), <https://doi.org/10.22146/jp.12275>.

<sup>20</sup> Ahmad Syafi'i, "PENYALAHGUNAAN NARKOBA DALAM PERSPEKTIF HUKUM POSITIF DAN HUKUM ISLAM," *HUNAFI: Jurnal Studia Islamika* 6, no. 2 (August 15, 2009): 219, <https://doi.org/10.24239/jsi.v6i2.135.219-232>.

<sup>21</sup> Vivi Ariyanti, "Kedudukan Korban Penyalahgunaan Narkotika Dalam Hukum Pidana Indonesia Dan Hukum Pidana Islam," *Al-Manahij: Jurnal Kajian Hukum Islam* 11, no. 2 (December 1, 2017): 247–62, <https://doi.org/10.24090/mnh.v11i2.1300>.

narcotics either physically or psychologically.<sup>22</sup> It means that anyone under the Narcotic Law 2009 has different legal terms towards the definition of consuming narcotics illegally or against the law and being addicted to narcotics that are not punishable under the Narcotic Law 2009. Article 7 of the Narcotic Law 2009 provides that using narcotics is legal when used only for medical reasons and/or for scientific and technological development. Under Article 8 of the Narcotic Law 2009, the I class of narcotics as mentioned in this Law can only be used for scientific and technological development and not for health, meaning that consuming this 1<sup>st</sup> category will violate criminal Activity.<sup>23</sup>

Article 127 (1) of the Narcotic Law 2009 has worded that everyone illegally uses category I to be punished with four years of imprisonment, category II with two years of imprisonment, and category III with one year of imprisonment. This Article becomes the legal basis in imposing criminal sanctions towards the illegal users of narcotics by judges. However, there is also the possibility to impose a non-penal sanction, namely rehabilitation under the Narcotic Law 2009.<sup>24</sup> It has been in line with the idea that illegal user of narcotics is a violator of the Narcotic Law 2009 or illegally using narcotics. It seems that this law forgets that the illegal users of narcotics are also the victim that should be protected their rights.<sup>25</sup> In current law enforcement practice, the prosecution office often charges illegal narcotics users with Articles 111, 112, and 114 of the Narcotic Law 2009.<sup>26</sup> Article 111 (1) of the Narcotic Law 2009 has worded that everyone who illegally plants, keeps, possesses, or owns narcotics with the first category of plantations can be punished from 4 (four) to 12 (twelve) years of imprisonment and can be fined from IDR 800 million to IDR 8 billion.<sup>27</sup> In case someone keeps narcotics mentioned above that more than 1 (one) kilograms or more than 5 (five) trees, Article 111 (2) rules that the punishment that can be imposed is between 5 (five) and 20 (twenty) years imprisonments and fine maximally IDR 8 billion-plus a third of it.<sup>28</sup> In terms of it are not plantations, Article 112 (1) states that the maximum of imprisonments and fines are similar to the punishment provided in Article 111 (1) of the Narcotic Law 2009, and if it exceeds 5 (five) grams, the punishment that can be imposed under Article 112 (2) is similar to what has been provided in Article 111 (2) of this Law.<sup>29</sup> Moreover, Article 114 (1) has ruled on the punishment imposed towards a currier of the category I narcotics. The punishments that can be imposed are imprisonment between 5 and 10 years and fines between 1 and 10 billion. Furthermore, Article 114 (2) of the Narcotic Law 2009 states that someone who offer narcotics of category I in the forms of plantation which more than 1 kilogram or more than five trees or non-plantation narcotic which more than 5 grams to be sold, to trade, to buy, to be a currier, to change, to accept and to give can be sentenced to death, whole life imprisonment or temporary imprisonment between 6 and 20 years and fine maximally ten billion-plus a third of it.<sup>30</sup> The legislation on the currier in this Law has been criticized as

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<sup>22</sup> *Ibid.* p.250.

<sup>23</sup> Noni Surhayanti, "PROGRESIVITAS DALAM PENEGAKAN HUKUM PENYALAHGUNA NARKOTIKA," *Kertha Patrika* 39, no. 2 (December 5, 2017): 133, <https://doi.org/10.24843/kp.2017.v39.i02.p05>.

<sup>24</sup> Bandaharo Saifuddin, "Korban Penyalahgunaan Narkotika Dibawah 1 Gram Harus Direhabilitasi Bukan Pidana Penjara," *JUSTITIA: Jurnal Ilmu Hukum Dan Humaniora* 1, no. 2 (August 2, 2019): 15, <https://doi.org/10.31604/justitia.v1i2.15-22>.

<sup>25</sup> *Ibid.* 17.

<sup>26</sup> *Ibid.* 19.

<sup>27</sup> Suisno Suisno, "TINJAUAN YURIDIS PERANTARA TINDAK PIDANA NARKOTIKA MENURUT UNDANG-UNDANG NOMOR 35 TAHUN 2009," *Jurnal Independent* 5, no. 2 (September 1, 2017): 69, <https://doi.org/10.30736/ji.v5i2.75>.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.* p.77.

<sup>30</sup> *Ibid.* p.78.

some fall into the trap, meaning that they are not intentional to be a courier. The implication of making a courier and a distributor of illegal narcotics under this Law has caused many are trapped. Thus, it is recommended there should be a separate law governing a sanction towards a courier.<sup>31</sup>

In addition, Article 127 (2) of the Narcotic Law 2009 has regulated that in considering Article 127 (1) above, judges should pay attention to Articles 54, 55, and 103 of the Narcotic Law 2009.<sup>32</sup> This Article regulates using narcotics illegally by a person, meaning using narcotics without supervision from a physician or doctor.<sup>33</sup> Article 127 of the Narcotic Law 2009 has stated that a person who illegally uses narcotics can be subjected to a criminal and may lose its rehabilitation rights unless such a user can prove that he is not a criminal but a victim of narcotic abuse.<sup>34</sup> Proving using narcotics illegally to be falling into victims of narcotics is problematic because it needs to look from the beginning of narcotics abuse by the person.<sup>35</sup> In addition, there is the fact that the user of illegal narcotics to be fallen into the victim's category should show that the person is encouraged, asked, cheated, and/or threatened to illegally use narcotics.<sup>36</sup> Article 111, 112, 114, and 127 of the Narcotics Law 2009 has multiple meanings of using narcotics illegally. Such various terms used – users and addicted users - in this Narcotics Law 2009 has perplexed law enforcers in determining which one is fallen into victims or criminals. It is like two facets of a coin; on the one side, it is called a criminal or a violator of using the drug illegally. On the other side, it is also a victim of narcotics abuse or known as self-victimizing victims.<sup>37</sup> It seems that in determining who is interpreted as a victim or a criminal, the Narcotics Law 2009 has left it to law enforcers by identifying both circumstances of falling into a victim who needs for getting to be rehabilitated or a violator who is criminally liable for violating this Narcotics Law 2009.

## **2. Criteria Used in Assessing Whether Illegal Users of Narcotics Under the Narcotics Law 2009 are Victims or Criminals**

Article 54 of the Narcotics Law 2009 has put an obligation of providing rehabilitation for those who are addicted to narcotics and victims of using narcotics illegally.<sup>38</sup> Meanwhile, Article 55 of the Narcotics Law 2009 has obliged parents or guardians of those who are addicted to narcotics that are underage to report to get cured and treatment through rehabilitation, and adults who are addicted are obliged to report by themselves or get reported by their family in terms of having rehabilitation.<sup>39</sup> In addition, Article 103 of the Law states that judges may decide or determine those who are addicted to narcotics to participate in medical and social rehabilitation.<sup>40</sup> It shows that under the Narcotics Law 2009, medical and

<sup>31</sup> *Ibid.* p.79.

<sup>32</sup> Riki Afrizal and Upita Anggunsuri, "Optimalisasi Proses Asesmen Terhadap Penyalah Guna Narkotika Dalam Rangka Efektivitas Rehabilitasi Medis Dan Sosial Bagi Pecandu Narkotika," *Jurnal Penelitian Hukum De Jure* 19, no. 3 (September 30, 2019): 259, <https://doi.org/10.30641/dejure.2019.v19.259-268>.

<sup>33</sup> Parasian Simanungkalit, "MODEL PEMIDANAAN YANG IDEAL BAGI KORBAN PENGGUNA NARKOBA DI INDONESIA," *Yustisia Jurnal Hukum* 1, no. 3 (December 1, 2012), <https://doi.org/10.20961/yustisia.v1i3.10090>.

<sup>34</sup> Hera Saputra and Munsharif Abdul Chalim, "Penerapan Sistem Pidana Terhadap Pelaku Tindak Pidana Penyalahgunaan Narkotika (Studi Kasus Di Polda Jateng)," *Jurnal Daulat Hukum* 1, no. 1 (March 7, 2018), <https://doi.org/10.30659/jdh.v1i1.2630>.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Afrizal, Riki, and Upita Anggunsuri, *Op.cit.* 264.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

social rehabilitation can be imposed by judges towards those who are addicted to narcotics. In other words, someone who is illegally using narcotics may not always be considered criminals under this latest law. However, it is not easily determined who is a victim or a criminal. Article 127 of the Narcotics Law 2009 has worded that someone addicted to narcotics is criminally liable.

The Circular Letter of the Supreme Court Number 4, 2010 (later called as the SEMA 2010) concerning the Placement of Narcotics Misuse, Victims of Misuse into Medical and Social Rehabilitation Institution and the Joint Regulation Between Indonesian's Head of Supreme Court, Minister of Law and Human Rights of the Republic of Indonesia, Minister of Health of the Republic of Indonesia, Minister of Social the Republic of Indonesia, General Attorney of the Republic of Indonesia, the Chief of the Indonesian Police and National Board of Narcotics Number 01/PB/MA/III/2014, Number 03, 2014, Number 11, 2014, Number 3, 2014, Number PER-005/A/JA/03/2014, Number 1, 2014 and Number PERBER/01/III/2014/BNN concerning the Handling of the Addicted to Narcotics and Victims of Narcotics Misuse into Rehabilitation Intuition has provided an opportunity for narcotics' illegal users to be considered as victims, not as criminals.<sup>41</sup> The laws mentioned above have been in line with Article 54 of the Narcotics Law 2009, requesting illegal narcotics users to be placed in a rehabilitation center. In addition, Article 103 (1) (b) of the Narcotics Law 2009 has stated that judges may decide that illegal users of narcotics are considered non-criminals ordered to follow treatments and/or medical services provided in the rehabilitation center. Article 103 (1) (b) of the Narcotics Law 2009 has provided that not all illegal users of narcotics can behold criminally liable. The reason for putting illegal users of narcotics as victims have been following the victim's meaning the United Nations Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power that a person who is individually or collectively have been suffering harm either physical or mental injury as a violation of criminal laws.<sup>42</sup> Self-victimizing victims in narcotics illegal use also deserve to be protected through a non-penal approach, that is, rehabilitation. However, there might still be an arbitrary in imposing a non-penal approach for similar users.

Article 103 (1) (a) states that the punishment imposed on those using narcotics illegally violated the Narcotic Law 2009. This Article is purposed at illegal users of narcotics. However, they have been deemed criminals and must follow the treatment and medical service in the rehabilitation center as the non-criminals users (victims) do. Article 103 (2) has ruled that the time spent in the rehabilitation center for those found guilty of violating the Narcotics Law 2009 is counted as the imposed punishment. It means that they are also considered victims even though they are found guilty of committing narcotics crimes. It seems weird that on the one side, illegal users of narcotics are considered as victims; however, on the other side, this Law also recognizes the users of narcotics as criminals who are also deemed as victims that must be put in rehabilitation. The consequence of the Narcotics Law 2009 introduces a double-track system in dealing with those illegal users of narcotics through penal sanctions (imprisonment), which is counted to be punishment and obligation to follow the treatment as a non-penal sanction. It can be said that the recent law on narcotics in Indonesia is unprecedented in terms of handling the illegal users of narcotics.

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<sup>41</sup> Vivi Ariyanti, "THE VICTIMS OF DRUGS ABUSE AND THEIR LEGAL STATUS IN THE INDONESIAN NARCOTICS LAW," *International Journal of Business, Economics and Law* 13, no. 4 (2017), <http://ijbel.com/wp-content/uploads/2017/10/LAW-66.pdf>.

<sup>42</sup> Mahfud Jufri, "The Roles of Victims in the ICC: Victims' Protection or the Accused's Fair Trial Right Violation?," *Hasanuddin Law Review* 5, no. 1 (April 28, 2019): 28, <https://doi.org/10.20956/halrev.v5i1.1423>.

Since it is difficult to find the limit between differentiating illegal users of narcotics deemed victims or criminals, the Circular Letter or *Surat Edaran* (SEMA) 2010 has provided some guidelines. One of the essential guidelines for the judges to consider the illegal users of narcotics as criminals is the SEMA 2010. In convicting illegal users of narcotics as the perpetrators of misusing narcotics under the Narcotics Law 2010, the SEMA 2010 requires an expert of narcotics addiction or a psychiatrist to state that they are victims, not criminals.<sup>43</sup> To punish illegal users of narcotics based on Article 103 of the Narcotics Law 2009, point 2 of the SEMA 2010 requires the perpetrator is caught in the Law possessing at least 1 gram of methamphetamines, 2,4 grams (8 pcs) of ecstasies, 1,8 grams of heroines or cocaine, 5 grams of marijuana or coca leaves or mescaline, 3 grams of psilocybin or phencyclidines, 2 grams of LSD, 1 gram of fentanyl, 0.5 gram of methadone, 1,8 gram of morphine, 0,96 grams of pethidine, 72 grams of codeine or 32 grams of buprenorphine.<sup>44</sup> In addition, the process of identifying victims and criminals is also ruled in the SEMA 2010. Before convicting the illegal users of narcotics, it requires a statement from the laboratory stating that the user positively uses narcotic and the judge's referenced psychiatrist's letter. Moreover, the user does not involve in illicit drug trading.<sup>45</sup> In assessing the illegal users of narcotics, an assessment is compulsorily needed. To make the diagnosis towards the addicted users to narcotics, the Integrated Assessment Team is established, which comprises of a doctor, a psychologist, police, a Narcotics National Board Member, a prosecutor of the public prosecution office, and an official of the Ministry of Law and Human Rights which has the power to assess whether the illegal users of narcotics being considered as victims, the addicted user illicit traders or smugglers of narcotics.<sup>46</sup> Moreover, the team also has the right to determine the severity of the illegal users of narcotics and recommend therapy towards the victims of narcotics and the addicted users to narcotics.<sup>47</sup> If the result of the assessment reveals that the illegal users of narcotics are not getting involved in the illicit narcotics traffic or trading; hence they might be considered victims of narcotics crimes or addicted individuals to narcotics.<sup>48</sup> The assessment might be conducted (based on the request from an investigator, a prosecutor, or a judge) in all levels of criminal justice processes, from investigation to trial processes, without waiting for the court's decision.<sup>49</sup> If the victims or the addicted persons to narcotics voluntarily report/herself to the police or the Narcotics National Boards, there would be no such requests. They are direct to be referred to the compulsory report institution.<sup>50</sup>

In practice, judges find it difficult to deal with the ambiguity of the limit between illegal users and illicit possession of narcotics under the Narcotics Law 2009. There is the Supreme Court Directive Number 3, 2015 on the Implementation of Plenary Meeting Result of the Indonesian Supreme Court as the guidance in a Court Tasks Implementation Ruling the Criminal Law Section stating that a judge based on legal facts in the trial may ignore minimum criminal rules in the Narcotics Law 2009 by considering sufficient consideration.<sup>51</sup> In other words, judges may ignore the special minimum rules under the Law if the users' statuses are victims and not perpetrators. Article 127 of the Narcotics Law 2009 may be

<sup>43</sup> Arief Wibowo et al., "Jurnal Analogi Hukum Pelaksanaan Sema 4 Tahun 2010 Bagi Pelaku Penyalahgunaan Narkotika Dalam Penyidikan Kepolisian," *Jurnal Analogi Hukum* 1, no. 1 (December 17, 2019): 34–39, <https://doi.org/10.22225/1.1.1.1458.34-39>.

<sup>44</sup> The Circular Letter of the Supreme Court Number 4, 2010

<sup>45</sup> *Ibid.*

<sup>46</sup> Afrizal, Riki, and Upita Anggunsuri, *Op.cit.*, p.265.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, p.266.

<sup>49</sup> Narcotics National Board Regulation Number 11, 2014

<sup>50</sup> *Ibid.*

<sup>51</sup> Busnarma, Tommy, *Op.cit.*, p.183.



ignored its penal application if the illegal users of the drugs only consume a tiny amount of narcotics and not acting as distributors of narcotics.<sup>52</sup> The Supreme Court Directive Number 3, 2015 has provided that the public prosecution office that charges illegal users of narcotics with Articles 111 and 112 of the Narcotics Law 2009 and fails to prove these articles have been violated by the accused because the accused (the illegal users) have violated Article 127 of the Narcotics Law 2009 based on the SEMA 2010 that the accused used in a small amount of narcotics only, the judges may decide sufficiently based on the charges aforementioned with a discretion to waive a special minimum punishment.<sup>53</sup> It is clear that if the illegal users of narcotics fulfill the requirements of being caught in the Law and at least possess one of the amounts mentioned above of narcotics above, the illegal users of narcotics are still convicted judges as the addicted individuals to narcotics. Thus they are still considered as persons committing narcotics crime. Meanwhile, in case they are besides possessing one of those minimum amounts of narcotics and being caught while using one of those narcotics types at least, they are also illicitly trading or distributing narcotics, the judges based on the SEMA 2010 are not allowed to circumvent the Supreme Court Directive Number 3, 2015 that allows them to be convicted under the special minimum punishment.

The recognition process of who is precisely the victims in the case of illegal use of narcotics might be easier when referring to the SEMA 2010. The victims are illegal users of narcotics who use the substance illegally below 1 (one) gram for themselves, known through the assessment result conducted by the Integrated Assessment Team above. Unlike the addicted persons to narcotics who can be convicted to be criminally liable for committing narcotics crime even though they are also deserved to be put in the rehabilitation center as what has been regulated under Article 103 (1) (a) of the Narcotics Law 2009, the victims of narcotics under Article 103 (1) (b) cannot be convicted of violating the Narcotics Law 2009 or they cannot be held liable for committing narcotics crime. In addition, it is likely that the criminals who have been convicted for committing drug abuse to be placed in prison instead of the rehabilitation center for getting the treatments as their roles in illicitly distributing or providing drugs for other people.<sup>54</sup> Therefore, as the victims of narcotics crime, they are entitled to the victims' rights. One of them is the right to rehabilitation in governmental centers or institutions.<sup>55</sup> Therefore, the terms of victims under the Narcotics Law 2009 refer to persons who are addicted to narcotics (can be convicted of committing crime or criminals) and victims of narcotics abuse (cannot be punished or convicted of violating narcotics). Both of them are obliged to follow treatment in a medical rehabilitation center and/or social rehabilitation center.<sup>56</sup> It seems that is the rulings under Article 103 (1) (a) of the Narcotics Law 2009 is purposing at not automatically considering the addicted individuals to narcotics free of criminal charges and easily get rehabilitated in fact, those who are addicted is to narcotics are not only using the drugs for themselves but also providing for other people.<sup>57</sup> It can be said that the incorporation of Article 103 (1) (a) with criminal charges into the Narcotics Law 2009 is a precautionary approach towards illegal users of narcotics who are also providing this illegal substance for other people.

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<sup>52</sup> *Ibid.*

<sup>53</sup> The Supreme Court Directive Number 3, 2015 on the Implementation of Plenary Meeting Result of the Indonesian Supreme Court as the Guidance in a Court Tasks Implementation Ruling the Criminal Law Section.

<sup>54</sup> Muslikan Muslikan and Muhammad Taufiq, "PELAKSANAAN ASSESMEN TENTANG REHABILITASI TERHADAP KORBAN PENYALAHGUNAAN NARKOTIKA DITINJAU DARI PERATURAN PERUNDANG-UNDANGAN," *JURNAL ILMIAH LIVING LAW* 11, no. 1 (March 18, 2019): 61, <https://doi.org/10.30997/jill.v11i1.1639>.

<sup>55</sup> *Ibid.* p. 21

<sup>56</sup> Muslikan, Muslikan, and Muhammad Taufiq. *Op.cit.*, p.74.

<sup>57</sup> *Ibid.*

### C. Conclusion

To sum up, several articles are governing illegal narcotics use under the Narcotics Law 2009. These are Article 1 points 13 concerning persons who are addicted to narcotics, Article 1 point 15 regarding persons who are misusing narcotics or using the substances against the law, or the using of the substances are out of the purposes that have been worded in Articles 7 that is only used for health, science and/or technology. Illegal use of narcotics causes a breach of the Narcotics Law 2009 and can be held criminally liable for committing narcotics crime as ruled in Articles 111, 112, 114 of the Narcotics Law 2009. Criteria used in assessing whether illegal users of narcotics can be considered victims or criminals are using narcotics (for their use or also provide it for other people) and the amount of narcotics possession when getting caught in the Law. The distinction between victims and criminals can be perplexed as the Narcotics Law 2009 separates the addicted to narcotics and the victims of narcotics illegal use or abuse. In addition, the Law also recognizes the criminals to be the victims and orders them to stay in the rehabilitation center for a certain period. However, what is very clear is that the victims are using such illegal substances less than 1 (one) gram for themselves, which results in they cannot be held criminally liable for committing narcotics crime. It would be easier to understand the terms of victims and criminals in using narcotics illegally if the SEMA 2010 and the Joint Regulation between the Supreme Court Chief and the other six government bodies assigned with this issue are included in the Narcotics Law 2009.

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