

# The criminal liability of sea freight forwarding services in transito narcotics crimes



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## Article Info

Received: 22 October 2023

Revised: 27 December 2023

Accepted: 25 February 2024

## Keywords:

Narcotics;  
Criminal liability;  
Postal Service;

## Abstract

*This study analyzes the problems in the golden triangle of narcotics and criminal liability of sea freight forwarding services in transito narcotics crimes. The purpose of this research is to find out how the problems in the golden triangle of narcotics and criminal liability of sea freight forwarding services in transito narcotics crime. Based on the results of research and discussion, it can be seen that the golden triangle of narcotics has complex problems and requires assistance from other countries to overcome narcotics problems in their own countries. Through research and discussion, it is also known that there is no regulation on the transportation of narcotics by sea but it is different from the transportation of narcotics using the post. When using the post, the delivery service can be held criminally liable if it knows that the goods sent are narcotics, but if the delivery service does not know that the goods sent are narcotics then it cannot be held criminally liable. Although the delivery service cannot be held criminally liable if it does not know that the goods sent are narcotics, it can still be held legally liable, namely as a witness.*

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## 1. Introduction

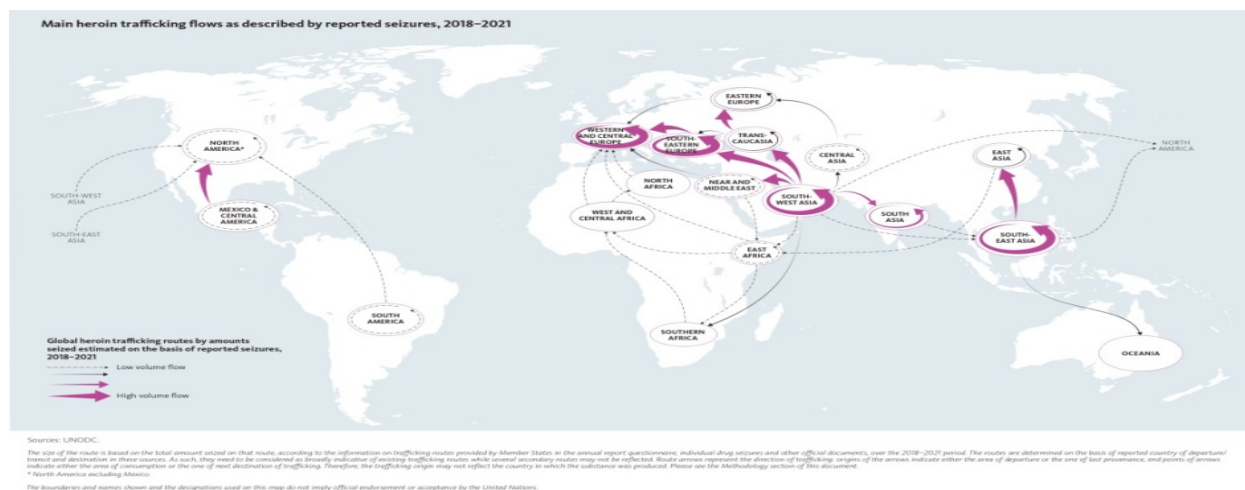
Indonesia in dealing with increasing narcotics cases and increasingly sophisticated modus operandi amended Law Number 22 of 1997 with Law Number 35 of 2009 concerning Narcotics. Despite the renewal of the Narcotics Law, the number of cases of narcotics crimes in Indonesia continues to increase. In 2019 there were 36,478 cases of narcotics crime and increased to 36,954 cases of narcotics crime in Indonesia. Then the question is why narcotics crimes in Indonesia are still increasing even though changes have been made to the Narcotics Law.

The prevalence rate of drug abusers in Indonesia increased to 1.95% in 2021, which was previously only at 1.80%, dominated by the use of marijuana. Narcotics on the one hand have benefits in the fields of health and research but also have negative effects in the form of addiction. Addiction arises due to the continuous use of narcotics which

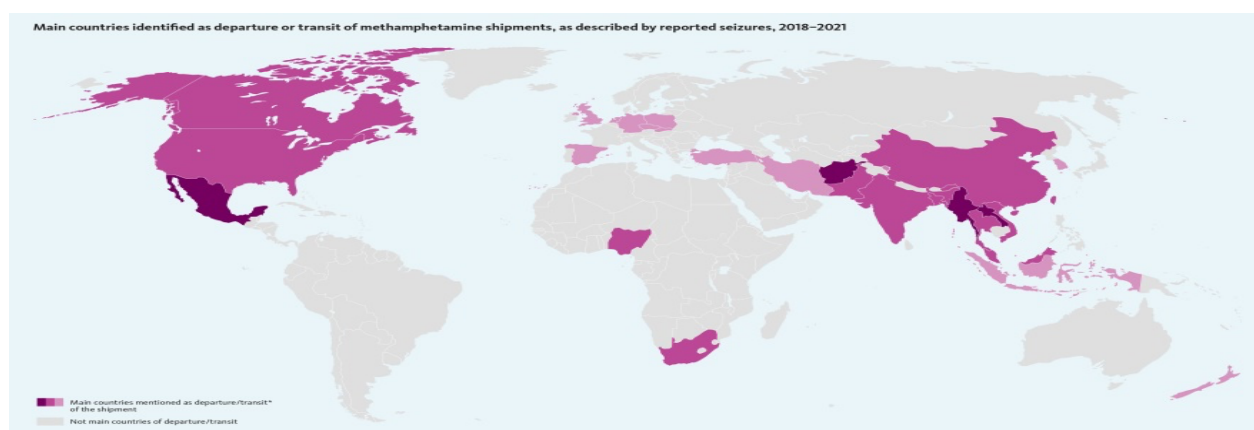
[doi:https://doi.org/10.33061/wh.v30i1.9877](https://doi.org/10.33061/wh.v30i1.9877)

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results in damage to parts of the brain to create dependence.<sup>1</sup> There are several factors that influence the increase in the prevalence of narcotics abusers in Indonesia, namely (1) people who still rely on narcotics as their livelihood, especially in Aceh where farmers often grow marijuana; (2) ineffective rehabilitation to break addiction from narcotics; (3) influence from the surrounding environment; and (4) the large number of smuggling of narcotics from abroad in Indonesia.<sup>2</sup>



**Picture 1: Heroin Distribution Map**



**Picture 2: Countries Identifies as Departures or Transit of Metamphetamine Shipment**

Indonesia is located between two oceans and two continents making it a very vulnerable place to smuggle narcotics. Based on the picture above, it can be seen that Indonesia is one of the transit points for methamphetamine. It is not surprising that

<sup>1</sup> I Made Setiawan and others, 'Report on Injecting Drug Use in Bali (Denpasar and Kuta): Results of an Interview Survey', *International Journal of Drug Policy*, 10.2 (1999), 109–16 <[https://doi.org/10.1016/S0955-3959\(98\)00071-1](https://doi.org/10.1016/S0955-3959(98)00071-1)>.

<sup>2</sup> John Strang and others, 'Drug Policy and the Public Good: Evidence for Effective Interventions', *The Lancet*, 379.9810 (2012), 71–83 <[https://doi.org/10.1016/S0140-6736\(11\)61674-7](https://doi.org/10.1016/S0140-6736(11)61674-7)>.

methamphetamine is the most prevalent drug crime in Indonesia with 22,950 cases.<sup>3</sup> The high circulation of heroin in Indonesia is inseparable from the existence of the golden triangle (Myanmar, Laos, and Thailand) which is one of the main suppliers of opium and heroin in the world. With the existence of narcotics transit, the Narcotics Law includes a new criminal offense called narcotics transito. Article 1 paragraph 12 of the Narcotics Law defines transitory narcotics as the transportation of narcotics from one country to another country through and stopping in the territory of the Republic of Indonesia where there is a Customs Office with or without means of transportation. Narcotics smuggling routes enter through Singkawang, Tarakan, North Sumatra, Aceh, Riau, and Riau Islands using sea routes through the South China Sea, Malacca Strait, Malaysia, and the Philippines. Based on data released by the Central Bureau of Statistics, North Sumatra is a province that has the most cases of narcotics crime among other provinces in Indonesia with 5,949 cases.<sup>4</sup> One of the reasons why North Sumatra is the province that has the most cases of narcotics crime is that North Sumatra is one of the smuggling routes through the Strait of Malacca (sea route).

The vast coastline and many illegal ports used for loading and unloading narcotics make it difficult for law enforcers to eradicate narcotics in Indonesia. The use of sea routes in smuggling narcotics is because the sea is so vast that it is difficult to detect and the use of increasingly advanced technology can also facilitate smuggling.<sup>5</sup> The problem that occurs is that narcotics smuggled by sea often use cargo ships or containers that run a legal business that is also used for commercial trade.<sup>6</sup> This of course makes it difficult for narcotics officers to check the goods contained on cargo ships or containers and can be used as a loophole in smuggling narcotics. Abuse of power by law enforcers is also an important factor in why drugs can be smuggled into Indonesia, for example in the case of Freddy Budiman who admitted that he was able to run a massive narcotics business from inside prison due to the help of high-ranking police officers, soldiers, and correctional institutions (Lapas).

## 2. Research Method

The author uses normative legal research in conducting this research with a conceptual

<sup>3</sup> Stuart Yeh, 'The Electronic Monitoring Paradigm: A Proposal for Transforming Criminal Justice in the USA', *Laws*, 4.1 (2015), 60–81 <<https://doi.org/10.3390/laws4010060>>.

<sup>4</sup> Rian Saputra and others, 'Reform Regulation of Novum in Criminal Judges in an Effort to Provide Legal Certainty', *JILS (Journal of Indonesian Legal Studies)*, 6.2 (2021), 437–82 <<https://doi.org/10.15294/jils.v6i2.51371>>.

<sup>5</sup> Gideon Lasco, 'Kalaban: Young Drug Users' Engagements with Law Enforcement in the Philippines', *International Journal of Drug Policy*, 52 (2018), 39–44 <<https://doi.org/https://doi.org/10.1016/j.drugpo.2017.11.006>>.

<sup>6</sup> Gideon Lasco, 'Drugs and Drug Wars as Populist Tropes in Asia: Illustrative Examples and Implications for Drug Policy', *International Journal of Drug Policy*, 77 (2020), 102668 <<https://doi.org/https://doi.org/10.1016/j.drugpo.2020.102668>>.

approach so that the nature of research in this study is prescriptive.<sup>7</sup> The conceptual in question is a dissection of primary and secondary legal materials related to transito narcotics, the primary legal materials in question are: a. Law Number 17 of 2008 concerning Shipping; b. Law Number 35 of 2009 concerning Narcotics; c. Law Number 38 of 2009 concerning Posts; and d. Law Number 1 of 2023 concerning the Criminal Code;. Meanwhile, secondary legal materials used include books, journals, reports, and other research results related to transito narcotics. So as to produce a comprehensive and critical analysis through the deductive method in analyzing the legal materials used in this study.<sup>8</sup>

### 3. Results and Discussion

#### The Golden Triangle of Narcotics



Picture 3: Shan State Map

The spread of narcotics, especially in Southeast Asia, is inseparable from the contribution of the golden triangle located on the borders of Myanmar, Laos, and Thailand. Despite a significant decline since 1996, Myanmar remains one of the largest narcotics supplying

<sup>7</sup> M Yazid Fathoni and Acasio Fernandez, 'Establishment of Land Court in Indonesia : An Effort to Realise Justice Based on Pancasila', *Journal of Law, Environmental and Justice*, 1.2 (2023), 86–104 <<https://doi.org/10.62264/jlej.v1i2.6>>.

<sup>8</sup> Rian Saputra, M Zaid, and Devi Triasari, 'Executability of the Constitutional Court ' s Formal Testing Decision : Indonesia ' s Omnibus Law Review', *Journal of Law, Environmental and Justice*, 1.3 (2023), 244–58 <<https://doi.org/10.62264/jlej.v1i3.18>>.

countries in the world with an estimated 37,300 hectares of land used to grow poppies.<sup>9</sup> Shan State is one of the regions with the most drug production in Myanmar apart from Kachin State which is estimated to produce 461 metric tons of opium annually or 90% of all opium production in Myanmar.<sup>10</sup> This is inseparable from the contribution of the Communist Party of Burma (CPB) leadership that controls the Shan area. Ceasefire agreements arising from the civil war in Myanmar forced the Myanmar government to grant CPB special autonomy to manage the Shan region, limiting the Myanmar government's access and influence to combat drugs in the region. The Myanmar government also granted several rights to armed groups as a result of the civil war that contributed to the opium boom, namely: (1) providing protection to drug dealers and armed groups to produce opium; (2) armed groups are given semi-autonomous areas that will be used to produce opium; and (3) allowing them to organize themselves politically in the form of civil society.<sup>11</sup>

After the civil war, Shan state leaders used the money earned from opium sales to build infrastructure such as roads, schools, hospitals, factories, and power plants.<sup>12</sup> In addition to the granting of special autonomy that led some states in Myanmar to make narcotics production their main income, there are several other influencing factors, namely: (1) structural poverty as a result of the civil war; (2) the ease of opium cultivation that can be done on various lands and limited water; (3) disputes over productive land by companies that force people to look for alternative employment opportunities; (4) the emergence of drug cartels that organize the sale and cultivation of opium; (5) narcotics have become the daily life of Myanmar people that existed before the civil war and are inherent in the structure of political economic development in several regions; and (6) prolonged conflict that makes it difficult to control access to armed groups that occupy areas planted with opium.<sup>13</sup> Considering the complexity of the problem of narcotics, which is not only as an escape, environmental influences, etc., narcotics is an issue that is often discussed by the world. Handling narcotics cannot be done by one country alone but requires systematic cooperation to stop the circulation and smuggling of narcotics. Myanmar is one example of a country that cannot handle the problem of narcotics in its own territory due to poverty, terrorism and prolonged conflicts that require people to turn to producing narcotics to meet their daily needs.

<sup>9</sup> Debbie Ann Loh, Emma Plugge, and Marie-Claire Van Hout, 'Continuity of Opioid Substitution Treatment between Prison and Community in Southeast Asia: A Scoping Review', *International Journal of Drug Policy*, 112 (2023), 103957 <<https://doi.org/https://doi.org/10.1016/j.drugpo.2023.103957>>.

<sup>10</sup> Daniel Wolfe and Roxanne Saucier, 'In Rehabilitation's Name? Ending Institutionalised Cruelty and Degrading Treatment of People Who Use Drugs', *International Journal of Drug Policy*, 21.3 (2010), 145–48 <<https://doi.org/https://doi.org/10.1016/j.drugpo.2010.01.008>>.

<sup>11</sup> Hai Thanh Luong, 'Why Vietnam Continues to Impose the Death Penalty for Drug Offences: A Narrative Commentary', *International Journal of Drug Policy*, 88 (2021), 103043 <<https://doi.org/https://doi.org/10.1016/j.drugpo.2020.103043>>.

<sup>12</sup> Muhammad Atif and others, 'Drug Utilization Patterns in the Global Context: A Systematic Review', *Health Policy and Technology*, 6.4 (2017), 457–70 <<https://doi.org/https://doi.org/10.1016/j.hlpt.2017.11.001>>.

<sup>13</sup> Camille Therese C Yusay and Nico A Canoy, 'Healing the Hurt amid the Drug War: Narratives of Young Urban Poor Filipinos in Recovering Families with Parental Drug Use', *International Journal of Drug Policy*, 68 (2019), 124–31 <<https://doi.org/https://doi.org/10.1016/j.drugpo.2018.10.009>>.



## Examining Indonesia's Criminal Code's Definition of Criminal Responsibility

In criminal law, accountability is recognized. Responsibility in this case aims to ensure that a criminal defendant can be held accountable or not for the criminal acts he committed. In addition, criminal responsibility for a person who commits a criminal offense can be carried out if the person has fulfilled the guidelines for criminal responsibility, namely the principle of legality relating to the wrongdoing of the person.<sup>14</sup> The application of criminal liability, a person who is to be held accountable can be found guilty if they meet the criteria, namely the existence of a criminal act committed by a person, the ability to be responsible for a person, guilt in the form of intent or negligence, and the absence of excuses. A person who commits a criminal act can be held accountable if the act committed is against the law. Unlawful acts are acts that are prohibited and can be threatened with criminal sanctions. One of the main elements of an objective criminal offense is the unlawful nature, this is related to the principle of legality contained in Article 1 paragraph 1 of the Criminal Code. In determining whether an act can be subject to punishment, the legislator makes the unlawful nature a written element.<sup>15</sup>

The application of responsibility also depends on whether a person who commits a criminal act has the ability to be responsible. The ability to be responsible has the meaning of a normal or healthy mental condition and has a person's mind in distinguishing good and bad things.<sup>16</sup> In foreign terms, criminal responsibility is referred to as *theokenbaardheid* theory or criminal responsibility which leads to the criminalization of a person with the aim of whether the person can be held accountable for the criminal acts he committed. In the current criminal law, the principle of guilt applies in the criminal liability system. The principle of guilt is the proof of the existence of elements of guilt in addition to the elements of criminal acts in a criminal act that can lead to the punishment of a person.<sup>17</sup>

In Article 36 paragraph 1, it can be seen that a person who commits a criminal offense can only be held accountable if he commits it intentionally or due to negligence. However, such accountability can be excluded if: not fulfilling the elements of the criminal offense (Article 37 letter a of the Criminal Code), a person who commits a criminal offense is mentally or intellectually disabled in a state of acute relapse (Article 39 of the Criminal Code), a child who is not yet twelve years old when committing a criminal offense (Article 40 of the Criminal Code), a forced defense (Article 43 of the Criminal Code), and forced by a force that cannot be

<sup>14</sup> Karsten Lunze and others, 'Compulsory Treatment of Drug Use in Southeast Asian Countries', *International Journal of Drug Policy*, 59 (2018), 10–15 <<https://doi.org/https://doi.org/10.1016/j.drugpo.2018.06.009>>.

<sup>15</sup> Basma Al-Ansari and others, 'Alcohol Policy in Iran: Policy Content Analysis', *International Journal of Drug Policy*, 73 (2019), 185–98 <<https://doi.org/https://doi.org/10.1016/j.drugpo.2019.07.032>>.

<sup>16</sup> Jennifer Hasselgård-Rowe, 'Detaining People Who Use Drugs in Cambodia: A Dual-Track System', *International Journal of Drug Policy*, 93 (2021), 102911 <<https://doi.org/https://doi.org/10.1016/j.drugpo.2020.102911>>.

<sup>17</sup> Jie Yang and Melita J Giummarra, 'Compulsory and Voluntary Drug Treatment Models in China: A Need for Improved Evidence-Based Policy and Practice to Reduce the Loaded Burden of Substance Use Disorders', *International Journal of Drug Policy*, 92 (2021), 103063 <<https://doi.org/https://doi.org/10.1016/j.drugpo.2020.103063>>.

restrained or forced with threats, pressure or force (Article 42 of the Criminal Code).<sup>18</sup>

The existence of exceptions to criminal liability is a form of balance between the right to indict from the public prosecutor and the right to deny and defense from the defendant. Therefore, if a person can prove that he is one of the categories that can not be held accountable as mentioned above, he can be free or released from the charges of the public prosecutor. Therefore, the public prosecutor must be able to prove the article he is charged with using existing evidence. The public prosecutor can also use subsidiary charges and superseding charges to prevent the release or acquittal of the defendant if the public prosecutor is unable to prove the article he is charged with because there are subsidiary charges or superseding charges. The fulfillment of the elements of a criminal offense is one of the important factors in criminal liability. In every court decision, it can be seen in the judge's consideration, that the judge must look at article by article charged to a person by the public prosecutor and then look at element by element using existing evidence to assess whether the person fulfills the elements of the crime charged so that he can be held accountable.

According to WHO, disability is a decrease in ability that results in limitations and inability to perform an activity in a way that is normal for humans. Mental disability according to the explanation of Article 38 of the Criminal Code is the disruption of the functions of thought, emotion, and behavior, including psychosocial, schizophrenia, bipolar, depression, anxiety, personality disorders, and developmental disabilities that affect the ability of social interaction such as autism and hyperactivity. Meanwhile, intellectual disability is the disruption of thinking functions due to below-average intelligence levels such as slow learning, mental disabilities and down syndrome. Article 38 and Article 39 of the Criminal Code are general in nature, which can apply to all forms and forms of criminal acts.<sup>19</sup>

Another exception to liability is a person who commits a criminal offense who is mentally or intellectually disabled. A person who has a normal mental and intellectual state can only regulate behavior in accordance with the concept of behavior that is considered good by society, a person with mental and intellectual disabilities cannot be held accountable because he does not regulate his behavior in accordance with the concept of behavior that is considered good by society.<sup>20</sup> People with mental disabilities cannot necessarily be exempted from criminal liability, only mental and intellectual disabilities that are in a state of acute relapse can be exempted from criminal liability. The benchmark used will be determined by an expert. If the expert determines that the person is not in a state of acute recurrence, he/she can still be convicted but the punishment imposed will be reduced or can be given an action (Article 38 of the Criminal Code). This is because persons with mental and intellectual disabilities are only considered less able to regulate their behavior so as to cause a criminal

<sup>18</sup> Ridwan Ridwan, 'Pertanggungjawaban Hukum Pidana Terhadap Pelanggaran Rahasia Medis', *Jurnal Hukum & Pembangunan*, 49.2 (2019), 338 <<https://doi.org/10.21143/jhp.vol49.no2.2007>>.

<sup>19</sup> Rini Wulandari, 'Pertanggungjawaban Pidana Terhadap Pelaku Abortus Provocatus Criminalis (Tindak Pidana Aborsi)', *Jurnal Rechtsens*, 8.2 (2019), 199–208 <<https://doi.org/10.36835/rechtsens.v8i2.534>>.

<sup>20</sup> Rocky Marbun, 'Komunikasi Instrumental Berbasis Trikotomi Relasi: Kewenangan Interpretasi Penyidik Dalam Menetapkan Seseorang Sebagai Tersangka', *Jurnal Hukum Pidana Dan Kriminologi*, 2.1 (2021), 20–33 <<https://doi.org/10.51370/jhpk.v2i1.10>>.

act.

The difference in the regulation of persons with disabilities between the new Criminal Code and the old Criminal Code is clear. The old Criminal Code used the term mental disability while the new Criminal Code uses mental and intellectual disabilities. The use of the terms mental and intellectual disabilities in the author's opinion is a more appropriate step, the inclusion of types of disabilities such as schizophrenia, bipolar, down syndrome, etc. can also avoid misinterpretation of the intended disability in the Criminal Code. The use of the term disability is also appropriate, this is because it is in accordance with various applicable laws and regulations, for example in Article 1 paragraph 1 of Law Number 8 of 2016 concerning Persons with Disabilities and Law Number 19 of 2011 concerning the Ratification of the Convention on the Rights of Persons with Disabilities.

Another difference is that in the old Criminal Code, if a person is proven to have a mental disability due to growth or impairment due to illness, the judge can only order to put the person in a mental hospital, for a maximum of one year of probation. Whereas in the New Criminal Code a person with mental and intellectual disabilities can still be subject to criminal charges but the punishment imposed will be reduced, persons with mental and intellectual disabilities can only be released from criminal liability if they are in a state of acute relapse which will later be determined by an expert. If a child under the age of twelve commits a criminal offense, law enforcers may impose an action in the form of participation in education, guidance and mentoring at a government institution or social welfare organization for a maximum period of six months (Article 41 of the Criminal Code). According to the elucidation of Article 40 of the Criminal Code, the determination of the minimum age of twelve years old is based on consideration of the emotional, intellectual, and mental maturity of the child. If a child under the age of twelve commits a criminal offense, the juvenile criminal justice system applies. In the juvenile justice system, diversion can be applied. Diversion is the transfer of case settlement from criminal justice to outside criminal justice so that children can avoid imprisonment and avoid the negative stigma that arises.

Forced defense (*noodweer*) is a right to provide legal resistance (*rechtsverdediging*), which is considered a legitimate act according to the law because the defense carried out is a *rechtsverdediging*-effort.<sup>21</sup> Forced defense can also eliminate the ability to be criminally responsible for someone, but there are several conditions, namely the defense carried out is not proportional to the attack or threat of an instant attack and the defense caused by mental shock caused by the attack or threat of an instant attack. Forced defense here refers to forced defense that exceeds the limit (*noodweer exces*) as a result of intense mental shock. The other requirements are that the attack must be unlawful or a crime and the attack must be sudden or immediately threatening.<sup>22</sup> The next exception to criminal liability is the existence of coercion. Duress is divided into absolute and relative duress. Absolute coercion according to

<sup>21</sup> Lidya Suryani Widayati, 'Pidana Mati Dalam Ruu Kuhp: Perlukah Diatur Sebagai Pidana Yang Bersifat Khusus?(Death Penalty In The Bill Of Criminal Code: Should Regulated As A Special Punishment?)', *Negara Hukum: Membangun Hukum Untuk Keadilan Dan Kesejahteraan*, 7.2 (2017), 167–94.

<sup>22</sup> Ifrani Ifrani, 'Grey Area Antara Tindak Pidana Korupsi Dengan Tindak Pidana Perbankan', *Jurnal Konstitusi*, 8.6 (2016), 993 <<https://doi.org/10.31078/jk866>>.



the elucidation of Article 42 of the Criminal Code is a situation that causes the perpetrator to have no other choice so that the perpetrator cannot refuse. Meanwhile, relative coercion uses mental pressure as a benchmark, meaning that a person may experience mental pressure but not because of something that comes from outside himself, but because of objections based on his own mind, so that it cannot eliminate the punishment.

In the Criminal Code, two types of criminal liability apply, namely strict liability and vicarious liability. According to Prof. Eddy O.S Hiariej, strict liability is the imposition of criminal liability in the absence of evidence of guilt (intent or negligence) to the perpetrator of a criminal offense. Meanwhile, vicarious liability is the imposition of criminal liability on a person for acts committed by others provided that they have a "superior and subordinate relationship" or "employer and employee relationship" or "employment relationship". The Criminal Code provides an explanation of strict liability and vicarious liability contained in the explanation of Article 37. The naming of strict liability is because if a person's actions have fulfilled the elements of a criminal offense then he can be subject to punishment. Whereas in vicarious liability, a person can be held criminally liable for acts committed by others as a result arising from orders or actions or doing work for him, so it can be seen that vicarious liability can only apply if there is a superior and subordinate relationship.

### **Freight forwarding services' criminal liability in transito narcotics crime if unaware of shipment**

The liability system for narcotics crimes is strict liability, it can be seen that the 2009 Narcotics Law explicitly states that every act without rights related to narcotics either directly or indirectly is part of a narcotics crime. Strict liability is the imposition of criminal liability in the absence of evidence of guilt (intent or negligence) to the perpetrator of a criminal offense. Meanwhile, according to Marise Cremona, strict liability is criminal responsibility for the actions that a person commits by not requiring guilt for one or more elements of the criminal act he committed. Strict liability is generally found in the civil realm but can also be used in the criminal realm in order to accelerate and facilitate the eradication of criminal acts in this case narcotics.<sup>23</sup> Strict liability initially developed in the 19th century in England as a result of the industrial revolution and its use increased in the 20th century because in evidence, especially in criminal law, there were problems in proving the element of guilt, therefore in law enforcement strict liability began to be used in criminal cases.<sup>24</sup> The basis for the application of strict liability is only limited to certain and limited provisions, among others (1) the crime committed is specific and particular in nature, such as socially harmful crimes; (2) the act committed is an unlawful act contrary to prudence and legal propriety; (3) the acts committed are acts that are strictly prohibited because they are included in criminal offenses that endanger the public; and (4) the act or activity as a whole is carried out by not taking

<sup>23</sup> Sakti Aminullah, 'Asas Strict Liability Dalam Tindak Pidana Narkotika', *Jurnal Jurist Duction*, 1.2 (2018), 726, <https://doi.org/10.20473/jd.v1i2.11021>

<sup>24</sup> Randikha Prabu Raharja Sasmitha, Sigid Suseno, and Patris Yusrian Jaya, 'The Concept of Reasons for Eliminating Corporate Crime in Criminal Law in Indonesia', *Heliyon*, 9.11 (2023), e21602 <<https://doi.org/https://doi.org/10.1016/j.heliyon.2023.e21602>>.

reasonable precautions.<sup>25</sup>

The application of strict liability in the Narcotics Law is not clearly written but its application can be seen in the Articles of the Narcotics Law, for example in Article 15 of the Narcotics Law which contains the elements of every person, without the right or against the law and carrying, sending, transporting or transmitting narcotics class I. Based on this Article, it can be seen that if a person is caught carrying, sending, transporting, or transmitting narcotics, they can be subject to the Article and fulfill the elements in the Article. This is very detrimental because without any proof of guilt. The problem arising from this is that law enforcers do not provide a clear ownership status of narcotics and only look at whether the person at the time of arrest has narcotics. In addition, in the Narcotics Law if someone is caught carrying narcotics but he is not a user then the act is classified as a narcotics crime.<sup>26</sup>

Narcotics are not clearly mentioned in Law Number 17 Year 2008 concerning Shipping but the Shipping Law uses the terminology of dangerous goods. Although the regulation of narcotics in the Shipping Law cannot be found, it can be explicitly seen in Article 45 paragraph (3) letter i which states that one of the classifications of dangerous goods is based on other hazardous materials or substances. Unlike the Shipping Law, the Postal Law clearly and explicitly continues to use narcotics terminology which is classified as prohibited goods, this can be found in Article 32 paragraph (2) letter a of the Postal Law. The question that arises then is why lawmakers do not use narcotics terminology in the Shipping Law because narcotics are very likely to be sent using ships by legal or illegal methods and Indonesia is a transit point for narcotics smuggling as explained above. The Shipping Law stipulates several requirements related to dangerous goods, namely (1) requirements for the transportation of dangerous goods; (2) submission and approval to the syahbandar if carrying dangerous goods when docked; (3) provision of storage and handling procedures for dangerous goods; and (4) supervision of loading and unloading of dangerous goods. Criminal sanctions in the Shipping Law relating to dangerous goods are only regulated in a limited manner, for example, criminal sanctions can be imposed if a person violates the requirements for the transportation of dangerous goods, does not inform the syahbandar when carrying dangerous goods, loading and unloading dangerous goods without the approval of the syahbandar.<sup>27</sup>

This is very different when looking at the Postal Law which has regulated in more detail regarding the transportation of narcotics. In article 29 of Law Number 38 of 2009 concerning Posts explains that if the postal organizer is proven not to know the goods sent with the shipping document and is not opened by the postal organizer, the postal organizer cannot be prosecuted. Based on Article 29 of the Postal Law, it can be seen that the Article is not only

<sup>25</sup> Bandy X Lee, 'Causes and Cures X: Criminal Justice Approaches', *Aggression and Violent Behavior*, 31 (2016), 237–42 <<https://doi.org/https://doi.org/10.1016/j.avb.2016.11.002>>.

<sup>26</sup> Linda Gröning and others, 'Remodelling Criminal Insanity: Exploring Philosophical, Legal, and Medical Premises of the Medical Model Used in Norwegian Law', *International Journal of Law and Psychiatry*, 81 (2022), 101776 <<https://doi.org/https://doi.org/10.1016/j.ijlp.2022.101776>>.

<sup>27</sup> Arlie Loughnan and Tony Ward, 'Emergent Authority and Expert Knowledge: Psychiatry and Criminal Responsibility in the UK', *International Journal of Law and Psychiatry*, 37.1 (2014), 25–36 <<https://doi.org/10.1016/j.ijlp.2013.10.002>>.

binding on the sender and recipient but also binding on law enforcement if it is later discovered that the goods sent are narcotics. Although the 2009 Narcotics Law applies strict liability in its liability, postal operators who are caught carrying narcotics and do not know and do not open goods that turn out to be narcotics, postal operators cannot be subject to criminal liability.

Although the delivery service does not know that the goods sent are narcotics, it still has legal responsibility. The responsibility is in the form of being a witness in court. According to Article 1 point 26 of the Criminal Procedure Code, a witness is a person who can provide information for the purpose of investigation, prosecution, and trial of a criminal case that he himself, he saw himself, and he experienced himself. According to Article 32 paragraph (2) letter a of the Postal Law, it is explained that there are goods that are prohibited from being sent using postal services, namely Narcotics, psychotropic drugs, and other illegal drugs. Furthermore, Article 32 paragraph (3) of the Postal Law explains that the delivery of prohibited goods as mentioned above can still be carried out in accordance with the provisions of laws and regulations but until now there has been no further regulation regarding this matter.

Another problem related to transshipment of narcotics is the Shipping Law, which does not clearly and explicitly regulate the transportation of narcotics using ships. The implementing rules of the Shipping Law also do not contain detailed regulations regarding the transportation of narcotics. Implementing regulations are important for officers in the field so that officers have references, instructions and can provide legal certainty so that they do not make mistakes while on duty. Although the Narcotics Law has regulated the transshipment of narcotics, harmonization of each regulation is still needed to create an integrated system.<sup>28</sup> This can result in a legal vacuum (*rechtsvacuum*) in the criminal act of transito narcotics using expedition delivery services. A legal vacuum is a condition where there is no regulation governing a matter so that there is a legal vacuum governing certain norms in society. A legal vacuum can occur because there are obstacles in drafting regulations from both the legislature and the executive which require a long time, besides that the existence of a legal vacuum can also be caused if in a regulation there are several articles that are unclear or even incomplete. The consequence of a legal vacuum is the absence of legal certainty (*rechtsonzekerheid*) which can lead to legal chaos.<sup>29</sup>

### **Transito narcotics crime: freight forwarding services criminally liable when knowing goods are narcotics**

According to Article 32 paragraph (2) letter a of the Postal Law, it is explained that there are goods that are prohibited from being sent using postal services, namely Narcotics, psychotropic drugs, and other illegal drugs. Furthermore, Article 32 paragraph (3) of the

<sup>28</sup> Krzysztof Szczucki, 'Ethical Legitimacy of Criminal Law', *International Journal of Law, Crime and Justice*, 53 (2018), 67–76 <<https://doi.org/https://doi.org/10.1016/j.ijlcj.2018.03.002>>.

<sup>29</sup> E Lea Johnston and others, 'Diminished Criminal Responsibility: A Multinational Comparative Review', *International Journal of Law and Psychiatry*, 91 (2023), 101919 <<https://doi.org/https://doi.org/10.1016/j.ijlp.2023.101919>>.

Postal Law explains that the delivery of prohibited goods as mentioned above can still be carried out in accordance with the provisions of laws and regulations but until now there has been no further regulation regarding this matter.<sup>30</sup> This can result in a legal vacuum (*rechtsvacuum*) in the criminal act of transito narcotics using expedition delivery services. A legal vacuum is a condition where there is no regulation governing a matter so that there is a legal vacuum governing certain norms in society. A legal vacuum can occur because there are obstacles in drafting regulations from both the legislature and the executive which require a long time, besides that the existence of a legal vacuum can also be caused if in a regulation there are several articles that are unclear or even incomplete.<sup>31</sup> The consequence of a legal vacuum is the absence of legal certainty (*rechtsonzekerheid*) which can lead to legal chaos.

If the postal organizer knows that the goods sent are narcotics, it can be subject to criminal liability. This is regulated in Article 47 of the Postal Law and if it is proven that the postal organizer violates this can be sentenced to a maximum of 5 (five) years and a maximum fine of Rp 1,000,000,000 (one billion rupiah). In addition to this article, postal organizers may be subject to Article 115 of the Narcotics Law if proven to have intentionally transmitted class I narcotics, Article 120 of the Narcotics Law if proven to have intentionally transmitted class II narcotics, Article 125 of the Narcotics Law if proven to have intentionally transmitted class III narcotics, and Article 129 of the Narcotics Law if proven to have intentionally transmitted narcotics precursors for the manufacture of narcotics.

Besides strict liability, vicarious liability can also be applied to the Narcotics Law. However, there are two conditions in the application of vicarious liability that are very important and must be met, namely there must be a relationship such as an employment relationship between the employer and the employee or worker and the criminal act committed by the worker or employee must be related to the scope of work performed. The core of vicarious liability is the transfer of responsibility to another person. Vicarious liability is found throughout the world's legal systems, not only in civil law systems. From a historical perspective, vicarious liability arose in medieval times as a result of a servant's mistake which resulted in the employer having to take responsibility for the servant's mistake. This is an implication that arises because the employer does something through orders or under the command of his employer and the servant's actions will be considered as the employer's actions.<sup>32</sup>

Vicarious liability is considered to be a controversial and dynamic form of liability, which has evolved considerably in the UK as a way of adjusting to evolving social circumstances.<sup>33</sup>

<sup>30</sup> Eva Nave and Lottie Lane, 'Countering Online Hate Speech: How Does Human Rights Due Diligence Impact Terms of Service?', *Computer Law & Security Review*, 51 (2023), 105884 <<https://doi.org/https://doi.org/10.1016/j.clsr.2023.105884>>.

<sup>31</sup> Christian Laue, *Virtual Worlds and Criminality*, *Virtual Worlds and Criminality*, 2011 <<https://doi.org/10.1007/978-3-642-20823-2>>.

<sup>32</sup> Norbert Konrad and Birgit Völlm, 'Forensic Psychiatric Expert Witnessing within the Criminal Justice System in Germany', *International Journal of Law and Psychiatry*, 37.2 (2014), 149–54 <<https://doi.org/10.1016/j.ijlp.2013.11.012>>.

<sup>33</sup> M Murdian, 'Criminal Responsibility in the Execution of the Contract for the Procurement of the Government', *Jurnal IUS Kajian Hukum Dan Keadilan*, IV.1 (2016), 2–26.

The form of social development, for example, is the form of employment relationship that changes with the times, for example, employers and servants become workers and superiors, to workers who are hired on temporary contracts through agents. The challenge that arises in the application of vicarious liability is the conception of the employment relationship that continues to change along with changes in labor practices and increasing industrial sophistication. The applicable law must be able to determine which relationships arise into liability and which do not, the law must also be able to determine the limits of the scope of liability.

The application of criminal liability to the employer is basically an affirmation that the employer is the main person responsible for the actions of the workers.<sup>34</sup> In its development, corporate criminal liability is divided into three, namely criminal liability imposed on the management, criminal liability imposed on the management and/or corporation, and criminal liability imposed on the management and corporation. In the 2009 Narcotics Law, the type of corporate criminal liability used is criminal liability imposed on the management and corporation.<sup>35</sup> Narcotic Law adheres to a double track system, meaning that there are two sanctions that can be imposed on the perpetrator, namely criminal sanctions and actions. The use of action sanctions in the Narcotics Law is in the form of rehabilitation for narcotics addicts, because basically the perpetrators of narcotics addicts when viewed through the perspective of victimology are self victimizing victims, so that if the perpetrators of narcotics addicts are only given criminal sanctions, this step is not appropriate because narcotics addicts are seen from the health aspect as people who experience addiction or can be said to be sick people.

Research in 10 major cities in Indonesia (Jakarta, Bandung, Surabaya, Medan, Bandar Lampung, Pontianak, Makassar, Manado, Mataram, and Denpasar) showed that more than 55% of respondents had used drugs for 10 years and 85% of respondents were drug addicts. Based on this research, it is appropriate that if a person is proven to be an addict and not a drug dealer, he should be given rehabilitation law to break the addictive nature of narcotics. Access to rehabilitation is also a major problem in eradicating drug abuse. The inequality of access to rehabilitation between cities in Indonesia is 5.4% to 35%, while since 2001 the United Nations Office on Drugs and Crime has set a target for ASEAN countries to increase rehabilitation services by 10% each year. Family, friend and community support for drug addicts plays an important role, increasing the chances of rehabilitation by 4 times. The use of customs with communication styles and verbal or non-verbal messages can also be used to counsel drug addicts, as for some people local customs and norms have a more pronounced effect than just what the counselor says.

Stigmatization in society is also one of the problems for drug addicts to get out of drug

<sup>34</sup> M. Alvi Syahrin, 'The Immigration Crime and Policy: Implementation of PPNS Authorities on Investigation', *Journal of Indonesian Legal Studies*, 3.2 (2018), 175–94 <<https://doi.org/10.15294/jils.v3i02.27512>>.

<sup>35</sup> Lilik Mulyadi, 'Eksistensi Hukum Pidana Adat Di Indonesia : Pengkajian Asas, Norma, Teori, Praktik Dan Prosedurnya', *Jurnal Hukum Dan Peradilan*, 2.2 (2013), 225 <<https://doi.org/10.25216/jhp.2.2.2013.225-246>>.



addiction. Indonesia, which is predominantly a religious society, has a negative stigma towards drugs, for example in Java there is the term "moh limo" taught by Sunan Kalijaga where one of the contents is "moh madat" or not wanting to smoke opium. Such stigmatization can inhibit community members from treating drug addicts so that they can be free from addiction. Distrust and bad perception of rehabilitation is also one of the barriers. The motivation of the addict also plays an important role. High motivation for treatment is related to self-efficacy<sup>36</sup> and reflects that the person is ready to take steps to change. This self-efficacy can later support rehabilitation so that the results achieved can be maximized.<sup>37</sup> Double track system can also be applied to corporation in narcotics crime. Corporations can be subject to imprisonment if they are proven to have legally and unlawfully committed the criminal offense of Article 111, Article 112, Article 113, Article 114, Article 115, Article 116, Article 117, Article 118, Article 119, Article 120, Article 121, Article 122, Article 123, Article 124, Article 125, Article 126, and Article 129 of the Narcotics Law which is imposed on the management. As for the corporation, revocation of business license and/or revocation of legal entity status can be imposed, and fines can also be imposed on corporations with an aggravation of three times the fine imposed.

Punishment using the double track system is not only found in the Narcotics Law but also in several other laws and regulations, for example in Law Number 32 of 2009 concerning Environmental Protection and Management.<sup>38</sup> Article 119 of the Environmental Protection and Management Law regulates the punishment for corporations which can be in the form of confiscation of profits obtained from criminal acts, closure of all or part of the place of business and activities, repair of criminal acts, obligation to do what is neglected without rights, and / or placing the corporation under guardianship for a maximum of three years. Although corporations can be sanctioned in the form of fines and administrative sanctions which are only limited in accordance with the applicable provisions, it is a good step so that corporations always remain law-abiding. The existence of non-criminal policies in the double track system aims to protect the community in order to improve public welfare and as a preventive measure carried out before the occurrence of a crime.<sup>39</sup>

Postal Law does not regulate corporations that deliver prohibited goods, including narcotics. The Postal Law only regulates that if someone intentionally sends prohibited goods, they can be subject to a maximum imprisonment of five years or a maximum fine of one billion rupiah. Corporations certainly cannot be penalized if they intentionally use the post as a means of sending narcotics, which refers to the Postal Law. According to the Postal Law,

<sup>36</sup> Tharek Z and others, 'Relationship between self-efficacy, self-care behaviour and glycaemic control among patients with type 2 diabetes mellitus in the Malaysian primary care setting', *BMC Fam Pract.* 19.39 (2018), doi:10.1186/s12875-018-0725-6

<sup>37</sup> Hendi Yogi Prabowo, 'Re-Understanding Corruption in the Indonesian Public Sector through Three Behavioral Lenses Hendi', *Facilities*, 35.6 (2015), 925–45 <<https://doi.org/10.1108/JFC-08-2015-0039>>.

<sup>38</sup> Taufikur Rohman and Sugiharto, 'Penerapan Model Double Track System Bagi Korporasi dalam Tindak Pidana Lingkungan Hidup'. *Dekrit (Jurnal Magister Ilmu Hukum)*, 13.1 (2023), 38, <https://doi.org/10.56943/dekrit.v13n1.155>

<sup>39</sup> Gjalte de Graaf, Leo Huberts, and Tebbine Strüwer, 'Integrity Violations and Corruption in Western Public Governance: Empirical Evidence and Reflection from the Netherlands', *Public Integrity*, 20.2 (2018), 131–49 <<https://doi.org/10.1080/10999922.2017.1350796>>.

corporations (postal operators) can only be subject to administrative sanctions in the form of written warnings, fines, and/or license revocation if the corporation does not provide a network and interconnection to other postal operators.

#### 4. Conclusion

In Article 36 paragraph 1 of the Criminal Code stipulates that a person who commits a criminal offense can only be held accountable if he commits it intentionally or through negligence. However, such liability can be excluded if: the elements of the crime are not fulfilled, the person committing the crime is mentally or intellectually disabled in a state of acute recurrence, the child was not yet twelve years old when he/she committed the crime, he/she was forced to defend himself/herself, and was forced by an irresistible force or was forced by threats, pressure or force. In the Criminal Code, there are two forms of criminal liability, namely strict liability and vicarious liability. Strict liability is a criminal liability if it is imposed on a person if he has fulfilled the elements of a criminal offense then he can be subject to punishment. Meanwhile, in vicarious liability, a person can be held criminally responsible for the acts committed by others as a result of the order or act or doing work for him. If looking at the Shipping Law, there are many gaps regarding the transportation of narcotics, which is caused by the absence of definite arrangements. Unlike the Shipping Law, the Postal Law already has arrangements relating to the transportation of narcotics. Although there are several things regulated in the Postal Law, the Postal Law is better than the Shipping Law. This should be an important thing to do legal reform considering that Indonesia is one of the countries that is a transit point for narcotics smugglers. Although the Narcotics Law is the main choice in enforcing the law, the regulation of the transportation of narcotics is clearly an important matter to be included in future legal reforms. Delivery services can be subject to criminal liability if they know the goods are narcotics and can be subject to Article 115 of the 2009 Narcotics Law if proven to have intentionally transited class I narcotics, Article 120 of the 2009 Narcotics Law if proven to have intentionally transited class II narcotics, Article 125 of the 2009 Narcotics Law if proven to have intentionally transited class III narcotics, and Article 129 of the 2009 Narcotics Law if proven to have intentionally transited narcotics precursors for the manufacture of narcotics. If the transito uses the post, it can be subject to Article 47 of the Postal Law and if it uses shipping services by air, it can be subject to Article 419 of the Aviation Law. Meanwhile, if by sea, the shipping service can be subject to criminal liability if it violates the requirements for the transportation of dangerous goods and if it does not notify the Syahbandar before docking that it is carrying dangerous goods.

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