

Criminal Liability by the Pharmaceutical Industry on the Use of Precursors for Illicit Narcotics in Indonesia: A Review

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Abstract: Purpose of the study: the aim of this study was to review the law enforcement regarding precursors for manufacturing narcotic drugs in Indonesia.

Methodology: This study used normative legal research, which used the law as positive norms that regulates human life, it used several approaches, that were examined various rules of law as well as case approach. The data was collected through literature studies.

Main Findings and Applications of this Study: In Indonesia, the highest regulation in the crime of narcotics is based on the Law of the Republic of Indonesia Number 35 of 2009 concerning Narcotics. The aims of this regulation are to protect the public from precursor's abuse to narcotics; preventing and eradicating illicit traffic of precursors of narcotics; as well as preventing leaks and irregularities.

Novelty: The pharmaceutical industry as a legal entity has the possibility to conduct criminal action such as using precursor for illicit narcotic and if it is proved to be in violation, it will be punished. Furthermore, it requires integration by involving national, regional and international coordination to prevent this criminal liability

Keywords: Precursors, narcotics, pharmaceutical industries, criminal liability.

INTRODUCTION

Based on the Government Regulation of the Republic of Indonesia Number 44 of 2010 concerning precursors, these are substances or starting materials or chemicals that can be used in the manufacture of narcotics and psychotropics. Regulation of precursors consists of procurement and utilizing them for pharmaceutical and non-pharmaceutical industries as well as for research purpose (Indonesia, 2010). The aim of this regulation is to protect people from precursors in illicit drug production.

Obviously precursors are needed in certain sectors of industries, but smuggling of precursor chemicals for illicit drugs industries often occurs, such as big pharmaceutical industries as well as discotheques,

especially in Indonesia. In January 2018, a mass media mentioned that precursor abuse for illicit drugs in Indonesia is imported from other countries (Utami, 2018). The National Narcotic Board of the Republic of Indonesia (*Badan Nasional Narkotika/BNN*) suspected two pharmaceutical industries had been supplying the precursor to illicit drugs syndicates (Utami, 2018).

Misuse of precursors can occur in several activities, such as during the production, distribution, or transportation stages. These activities were conducted by the clandestine dark laboratory, where illicit drugs are produced (Frank, 1983). The phenomenon of the spread of illicit drugs in Indonesia, especially precursors in illicit drug production is a transnational crime and violation of criminal law. In other side, Indonesia is a country based on law (*rechtsstaat*), not based on power (*machtsstaat*) (Siallagan, 2016)). It is also mentioned in Article 1 paragraph (3) of the 1945

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constitution that "Indonesia is a state of law". Based on this background, regulation about smuggling of precursor in illicit drugs is needed, especially in big pharmaceutical industries. The aim of this study was to review the law enforcement regarding precursors for manufacturing narcotic drugs in Indonesia because the law enforcement is still focused on individual and also to depict the prevention strategies to prevent precursor abuse based on the regulation in Indonesia.

MATERIALS AND METHODS

This study used normative legal research, which used the law as foundation of norm, based on the primary and secondary materials. This study also used several approaches, that were examined various rules of law as well as case approach. Primary legal materials consists of article 7(1) law number 10 of 2004 concerning lawmaking, hierarchy law in Indonesia, start form constitution 1945, law or government regulation substitute the law, government regulation, presidential regulation, and local regulations as well as others legal documents, books, scientific journal. In addition, this study used secondary legal materials, as follows Black's law dictionary and Indonesia Dictionary. The data was collected through literature studies. It concluded from the materials using deductive techniques; and started from general statement related to the main problem, furthermore analyzed materials based on criminal law as well as health care responsibility in this case. The author depicts the case and variety of the data from these materials and generates the findings.

RESULTS

In this section, the author described the variety of data from document study in term of the issue of criminal liabilities that still focused on person as well as depict precursor regulation in Indonesia.

Criminal Liability

The issue of criminal liabilities is still guided by the criminal code which is oriented toward the subject of criminal acts by persons and not corporations. The element of criminal action lies in the unlawful objects, while the element of criminal liability is the ability of people to be responsible for their criminal acts (deliberate and negligent) (Priyatno, 2004).

A criminal act is defined by Simons as an unlawful act, committed intentionally or unintentionally by a

person, capable of being responsible for their actions; according to the law, these actions can be punished (Marpaung, 1991). Based on this definition, it can be concluded that the elements of a criminal action consist of human actions (positive or negative): threatened by criminal law; unlawful; making mistakes; conducted by persons that are responsible for their actions.

Van Hamel describes a criminal action as a human act that is regulated by law. It is unlawful (criminal action) and can be valued for error (Van Hamel, 1911). Based on this definition it can be concluded that the elements of a criminal action consist of Human actions defined in law; unlawful; making mistakes; and can be punished. In addition, Vos defined criminal as human behavior which is afforded criminal sanctions by statutory regulations, called *strafbaarfeit*. So, the elements of criminal actions are human behavior and can be threatened by criminal law (Chazawi, 2002). In addition, according (Moeljatno, 2002), there are different elements of criminal actions: actions and consequences; conditions that accompanies the criminal actions; additional criminal situation; objective in law; and subjective in law. Based on the literatures, the elements of criminal actions can be divided into two elements:

1. Objective Elements

a. Human actions that includes the main objective elements as follows:

- 1) Action or positive act;
- 2) Omissions or negative act.

b. Endangered human action such as eliminate life, liberty, property rights, or honor killing.

c. Common conditions:

- 1) Condition before criminal actions
- 2) Condition after criminal actions

d. Punish ability and against the law. Punish ability relates to the reasons that relate to punishment. against the law refers to prohibitions or orders

2. Subjective Elements

There is a principle in criminal law that there is punishment if there are mistakes in the criminal law either intentional or negligent (Sudarto & Sudarto, 1990). Based on the literature, persons can be

punished if they commit criminal actions, but the criminal actions must fulfill the elements of law. The persons must be responsible for the criminal action and there are not any justifications for these criminal actions, also these persons are able to take responsibility for their criminal actions. In addition, the requirements of these actions were against the law; the actions fulfill the objective of criminality; and the subjective condition must be proven before being punished.

Pharmaceutical Industry and Precursor Regulations

The pharmaceutical industry, according to the Regulation of the Minister of Health of the Republic of Indonesia Number 1799/Menkes/Per/XII /2010 concerning the Pharmaceutical Industry is an industry that has a license from the Minister of Health to carry out activities for making legal drug or ingredients for medicine manufacture (Menkes, 2010). The pharmaceutical industry is required to produce drugs or medicines that fulfill requirements, such as efficacy, safety, and quality in the dosage used for health purposes.

The pharmaceutical precursor, according to the Regulation of the Minister of Health of the Republic of Indonesia Number 3 of 2015 concerning the circulation, storage, destruction and report of narcotics, psychotropic, and pharmacy precursors in health care services, is starting substances or chemicals that can be used as raw materials for the pharmaceutical industries or intermediate products, home products, and finished products; these substances contain ephedrine, pseudoephedrine, norephedrine/phenylpropanolamine, ergotamine, ergometrine, or potassium permanganate. Precursors in chemicals used in narcotic drugs according to Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 12 of 2019 concerning the prevention and eradication of the abuse, illicit narcotics and narcotics precursors is starting substances or chemicals that can be used in the manufacture of narcotics. This definition is similar to the attachment of Law of the Republic of Indonesia Number 35 of 2009 concerning Narcotics (P. R. Indonesia, 2009). The regulation of precursors in chemicals used in narcotic drugs, especially in the pharmaceutical industries is based on the hierarchy of the laws and regulations as follows:

1. The 1945 Constitution of the Republic of Indonesia,
2. Law of the Republic of Indonesia Number 35 of 2009 concerning Narcotics,
3. Government Regulations,
4. Presidential Regulations,
5. Ministerial Decrees,
6. Regulation of the Food and Drug Supervisory Agency (*Badan Pengawasan Obat dan Makanan/BPOM*),
7. Ministerial Regulations,
8. Regional Regulations,

Based on the Government Regulation of the Republic of Indonesia Number 44 of 2010 concerning Precursors, it explains that precursors can only be produced by industries that have a license in accordance with the provisions of the legislation (Pemerintah, 2010). The production of precursors for the pharmaceutical industry is carried out in accordance with statutory provisions and Indonesia pharmacopoeia standards.

Precursor storage must be in a safe storage, is separated from the others and legal. In addition, precursors can be imported or exported by licensed industries, accompanied by valid documents, and must obtain an import or export approval letter. Furthermore, the transportation of precursors must be accompanied by valid documents. Also packaging and repacking of precursors can be conducted if the packaging is damaged. Industries must record as well as report including the stock of precursors, the number of precursors delivered and also the precursor that was used by the customer.

The law of the Republic of Indonesia Number 35 of 2009 concerning Narcotics is described in Chapter VIII and mentions that the aims of this regulation are to protect the public from the dangers of precursors abuse to narcotics; preventing and eradicating illicit traffic of precursors of narcotics; as well as preventing leaks and irregularities (P. R. Indonesia, 2009).

DISCUSSION

The Chemical Precursor Used in Illicit Manufacture, Especially in Manufacture of Narcotics Drugs

Narcotics and psychotropics are useful in the field of medicine and science. Psychotropic drugs, especially

IV class, is often used in psychiatry for the treatment of patients (Gimelfarb *et al.*, 2020). Meanwhile, narcotic drugs are used in the medical field as pain medicine (Shen *et al.*, 2018), anesthetic premedication (Shutze *et al.*, 2018), cough medicine (Takahama & Shirasaki, 2007), and substitution therapy for heroin addiction (Gimelfarb *et al.*, 2020). However, there were abuses in narcotic and psychotropic. Illegal narcotics and psychotropic substances are made by clandestine laboratories (Norman, Ciesielski, & Wagner). Based on data from the Indonesia Police (*KT Mabes POLRI*), there is an increase in the finding of the clandestine laboratories which produce methylenedioxymethamphetamine (MDMA) and methamphetamine. During 2001-2006, 34 clandestine laboratories were found in Indonesia, such as in Jakarta, Tangerang, Surabaya, Sidoarjo, Medan, Tanjung Balai Karimun (Riau Islands), and Pangkal Pinang. The largest case was found in the Cikande, where the defendants were an Indonesian and eight foreigners, with a production capacity are more than 4 million tablets per week (Makanan). Abuse in narcotics and psychotropic substances are closely related to the abuse of precursors (Racić).

Prevention to eradicate illicit distribution of precursors requires integration by involving national, regional and international coordination because this crime is conducted not only by individuals but also by well-organized syndicates (Clarke, 2016). Distribution of precursors can be assigned by the pharmaceutical industry; this is explained in Chapter VI, regarding distribution, chapter one, Article 14 of Government Regulation Number 44 of 2010 concerning Precursors (Indonesia, 2010). The supervision of all activities related to precursors must be coordinated by authorized supervisor. This is based on article 18 paragraph 2 of Government Regulation Number 44 of 2010 concerning Precursors. The authorized supervisor has the authority to conduct local inspections and take samples of precursors in production, distribution, storage and distribution facilities, also to verify the documents related to precursors. Supervisor can impose administrative sanction, such as verbal warning, written warning, and temporary suspension of activities or revocation of license. The implementation of prevention and abuse of precursors of narcotics needs to be supported by the existence of an integrated team, especially for the prevention and eradication of precursors of narcotics abuse and illicit trafficking in accordance with Article 7 of the Minister of Home Affairs Regulation Number 12 of 2019.

Law Enforcement in the Precursors for Manufacturing Narcotics Drugs

The pharmaceutical industry as a legal entity has the possibility to conduct criminal action (Skandrani & Sghaier, 2016; Zhao, 2019), and if it is proved to be in violation, it will be punished. According to the Law Number 35 of 2009 concerning Narcotics ("Undang-Undang Republik Indonesia Nomor 35 [Republic of Indonesia Law Number 35]," 2009), Article 129 which states that when an action is carried out by a corporation, penalties are given to corporations that are financial penalties, imprisonment, and fines to the management and additional penalties, such as revocation of business license or revocation of legal entity status.

The misuse of narcotics-psychotropic substances has become a global concern because it has threatened people's lives. Indonesia prevents illegal drug trafficking by preventing the flow of drugs and their precursors in and out of drugs. Indonesia uses the principles of supply and demand reduction and countermeasures in a comprehensive and integrated manner. In addition, Indonesia also has the principle of dealing with drug issues as a shared responsibility

Criminal actions on narcotics precursors are resolved based on Law Number 35 of 2009 concerning Narcotics Article 136, which mentions that narcotics, precursors of narcotics, and the results obtained from the narcotics and precursor of narcotics criminal acts are to be confiscated by state or country. This is also explained in the Government Regulation of the Republic of Indonesia Number 40 of 2013. Authorized parties that implement the prevention and eradication of illicit precursors of narcotics are the Indonesian National Police, the Attorney General's Office, the National Narcotics Agency (*Badan Narkotika Nasional/BNN*), and the Food and Drug Administration (BPOM) ("Undang-Undang Republik Indonesia Nomor 35 [Republic of Indonesia Law Number 35]," 2009).

Based on the Regulation of the Minister of Home Affairs Number 12 of 2019 concerning Facilitation for the Prevention and Eradication of Abuse and Illicit Narcotics and Precursors of Narcotics Article 2, it is stated that the Minister through the Directorate General of Politics and General Government coordinates for the implementation of prevention and eradication of abuse and illicit trafficking of narcotics and precursors of narcotics in provincial areas, and this is entrusted to

the governor; at the district or city level it is entrusted to the mayor, sub district is entrusted to sub district head, and head of the village in accordance with their respective coverage areas.

The abuse of precursors of narcotics in individuals also needs to be investigated and if proven to be committing a criminal action, then subject must be punished refers to law Number 35 of 2009 concerning Narcotics Article 129 points a, b, c, and d, which punishments being imprisonment for a minimum of four years and maximum 20 years and a maximum fine of Rp. 5,000,000,000.00 ("Undang-Undang Republik Indonesia Nomor 35 [Republic of Indonesia Law Number 35]," 2009). This applies to every person who does not have a right and acts against the law, such as: having, keeping, controlling, or providing precursors for the manufacture of narcotics; producing, importing, exporting, or distributing precursors for the manufacture of narcotics; selling, buying, receiving, acting as an intermediary in the sale and purchase, exchange, or deliver precursors for the manufacture of narcotics; carrying, sending, transporting, or transiting the precursor for the manufacture of Narcotics.

Furthermore, Article 131 states that anyone who does not report a crime related to precursors will be punished with imprisonment of at the most, one year or a maximum fine of Rp. 50,000,000.00 (Fifty Million Rupiah). In Article 54, narcotics addicts and victims of Narcotics abuse are required to undergo medical rehabilitation and social rehabilitation. The others punishment in Article 133 paragraph (1) states that every person who orders, promises something, gives an opportunity, recommends, provides convenience, threats, forces, deceives, or induces a child who is underage to commit a criminal act in accordance with Article 129, will be given the death penalty or life imprisonment, or imprisonment for a minimum of five years and a maximum of twenty years and a penal fine at least Rp. 2,000,000,000.00 and a maximum of Rp. 20,000,000,000.00 ("Undang-Undang Republik Indonesia Nomor 35 [Republic of Indonesia Law Number 35]," 2009).

From the witness side, Article 143 states that witnesses who give false information in the investigation of narcotics and precursor of narcotics cases in court, will be punished with imprisonment of at least one year and a maximum of ten years and penal fine of at least Rp. 60,000,000.00 and a maximum Rp. 600,000,000.00. If someone having more than one kilogram or five grams, the perpetrator will be

sentenced to life imprisonment or imprisonment for a minimum of five years and a maximum of twenty years and the maximum fine as referred to in paragraph 1 add 1/3. In addition Article 103 states that Judges examining the narcotics addict case can: decided whether the person can conduct treatment through rehabilitation or not ("Undang-Undang Republik Indonesia Nomor 35 [Republic of Indonesia Law Number 35]," 2009).

Public has the opportunity to help prevent and eradicate the abuse and illicit trafficking of narcotics and precursors of narcotics, this is in accordance with the law Number 35 of 2009 concerning Narcotics Chapter XIII, Article 104. In addition, Article 105 explains that the public has the right and responsibility to do so. Article 107 states that the public can report to the authorized official or the National Narcotics Agency (BNN) if they know the abuse or illicit trafficking of narcotics and precursors of the narcotics ("Undang-Undang Republik Indonesia Nomor 35 [Republic of Indonesia Law Number 35]," 2009). The role of the community can be formed in a forum which is coordinated by the National Narcotics Agency (BNN). Awards are also given by the government to law enforcers and the public who prevent, eradicate abuse and illicit narcotics and precursors of narcotics in accordance with Article 109.

The highest regulation in the crime of narcotics is based on the Law of the Republic of Indonesia Number 35 of 2009 concerning Narcotics. One of these regulations is applied in the context of preventing and eradicating the dangers of abuse and illicit trafficking of narcotics and precursors of narcotics. Obviously, precursors are widely used to improve the health status especially in the field of medicine and health services. Therefore, the availability of certain types of narcotics is still needed.

CONCLUSION

Violations of pharmaceutical companies have an impact on the circulation of narcotic and precursors of narcotics. It will be widespread because there are still clandestine dark laboratories. Misuse of precursors can occur in several activities, such as production, distribution, and transportation stage. This crime is conducted not only by individuals but also by well-organized syndicates. So law enforcement in the crime of abuse of narcotics precursors is needed to prevent and eradicate the abuse and distribution of narcotics and precursors of narcotics. The implementation of

prevention and abuse of precursors of narcotics needs to be supported by the existence of an integrated team, by involving the Indonesian National Police, the Attorney General's Office, the National Narcotics Agency (*Badan Narkotika Nasional/BNN*), and the Food and Drug Administration (BPOM) as well as the community.

Furthermore, in Indonesia, the highest regulation in the crime of narcotics is based on the Law of the Republic of Indonesia Number 35 of 2009 concerning Narcotics. The aims of this regulation are to protect the public from the dangers of precursor's abuse to narcotics; preventing and eradicating illicit traffic of precursors of narcotics; as well as preventing leaks and irregularities. However, it is still needed to increase facilitation of prevention and eradication of abuse and illicit Narcotics Precursor, includes: formulation of regional regulations regarding the prevention and eradication of abuse and illicit narcotics and precursors of narcotics; socialization and implementation of early detection; community empowerment; mapping of identified area as abuse and illicit narcotics or precursors of narcotics; capacity building for medical rehabilitation services; increasing the participation of related agencies and other parties in the implementation of vocational activities; and providing the data and information regarding the prevention and eradication of abuse and illicit narcotics and precursors of narcotics. Further study is needed to collect the primary data in term of the preparedness of the team and community to prevent distribution of narcotics and precursors of narcotics.

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CONFLICT OF INTEREST

Statement the authors declare that they have no conflicts of interest.

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