

**CRIMINAL LAW POLICIES IN THE USE OF MEDICAL MARIJUANA
REVIEWED FROM INTERNATIONAL LAW
(STUDI PUTUSAN 111/PID.SUS/2017/PN SANGGAU)**

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ABSTRACT

Marijuana, which is included in the class I narcotics category, has problems regarding the legality of its use in the medical field. These narcotics are often hampered by regulations, state policies and institutions authorized to supervise and distribute them. This research is aimed at analyzing national and international legal policies regarding the use of medical marijuana for health services. The aim of narcotics law policy in the crime of class I narcotics abuse against other people is for the health and legal analysis of a civil servant in Decision Number: 111/Pid.Sus/2017/PN. Sanggau. This research uses a normative juridical research method which is descriptive analytical in nature using primary, secondary and tertiary legal materials collected using library study techniques and analyzed using qualitative data analysis methods. The results of the research show that the legality of marijuana use in the medical sector does not have a definite equation due to Law Number 35 of 2009 concerning narcotics prohibiting the use of marijuana in the health sector, however Law Number 36 of 2009 concerning health provides space for recommendations and supervision and results in he was not given a permit to use marijuana in decision Number 111/Pid.sus/2017/PN. Sanggau. International legal policy in the Single Convention on Narcotic Drugs in 1961 provides opportunities for the creation of marijuana use in the medical field with clear research.

Keywords: Policy, Criminal Law, International Law, Marijuana, Medical.

A. Introduction

In general, in Indonesia marijuana is an item that is haram or very dangerous.¹ However, marijuana also has benefits if managed properly and is the main source of renewable fuel (EBT), composite materials, ropes, paper, clothing materials, building materials, cosmetics, foodstuffs, and even for medical purposes.² The lack of information that can be researched regarding the use of marijuana in Indonesia makes the situation inversely proportional to what happens abroad. Many expert studies have led to the limited use of marijuana for medical and recreational use in the form of permits and issued by the local government. Musri Musman, a chemist from Syiah Kuala University, Aceh has also conducted literature studies on marijuana for 25 years.³ From various literature that he has collected, there are several lists of diseases that can be overcome by marijuana, among others:

¹ Syamsuk Malik, "Legalisasi ganja dalam sektor medis perspektif hukum", *Jurnal Rechten: Riset hukum dan hak asasi manusia*, 2.2, (2020): 1,

² Peter Dantovski "Kriminalisasi Ganja", (Jakarta: LGN Publishing, 2013), hlm. 60

³ Dhira Narayana dkk, *Hikayat Pohon Ganja*, (Jakarta: Gramedia, 2011), hal. 90

Tabel 1.1 Benefits of Medical Marijuana

Disease Name	
Diabetes	Alzheimer
Amyotrophic Lateral Sclerosis	Epilepsi
HIV	Tuberkulosis
Hepatitis C	Depresi
Gloucoma	Gastrointestinal
Disorder	Mutiple Sclerosis
Fibromyalgia	Osteoporosis
Insomnia	Pruritus

Source : Dhira Narayana, *Hikayat Pohon Ganja*, PT. Gramedia Pustaka, Jakarta, 2013, Hal 189

Based on these facts, it can be seen that the opinion is negative about marijuana so far is not always true with the reality that we see. Many shifts in the world's view of marijuana are slowly starting to be used as a medical drug with the positioning of marijuana as a medicinal plant.⁴ Based on positive law, marijuana as a class I narcotic cannot be used for medical reasons other than scientific.⁵ However, many experts abroad have carried out activities to legalize marijuana for health purposes, the reason is because the benefits of marijuana are so great for human life if processed properly. Article 102 paragraph (1) of Law number 36 concerning health states that with a prescription from a doctor a person is allowed to consume narcotic drugs, which will be difficult to implement if faced with the fact that marijuana is still classified as a class I narcotic.⁶

Based on the process of Determining Criminal Decision Number: 111/Pid.Sus/2017/PN Sanggau on behalf of the defendant Fidelis Arie Sudewarto, there was also a difference of opinion by the panel of judges who heard the case (dissenting opinion), namely prioritizing the principles of legal justice rather than legal certainty.⁷ This is of interest in research because the causal factor in the crime of narcotics abuse in the form of marijuana by the defendant was aimed at treating his wife who suffered from a rare disease. Moreover, in the criminalization process, no material unlawful elements were found or the act was reprehensible and even

⁴ Rahmi Ayunda, "Peluang dan Tantangan Legalisasi Penggunaan Ganja Untuk Kepentingan Medis di Indonesia Ditinjau Dari Perspektif Undang-undang Kesehatan", Jurnal Universitas Internasional Batam, vol 1, 24 Februari 2021, hal. 337

⁵ Ratna WP, *Op.Cit.*, hal. 12

⁶ *Ibid.*, hal. 336

⁷ Putusan Nomor 111/Pid.sus/2017/PN Sanggau, hal. 59

received the public's attention and support to acquit the defendant of all charges from the public prosecutor.⁸ Seeing that the condition of the defendant's wife was not getting better, the defendant continued to struggle to find various alternative treatments obtained from the internet regarding the efficacy of marijuana regarding the treatment of the defendant's wife's illness.⁹

Based on the case of Fidelis Arie Sudewarto, who was accused of using marijuana to treat his wife, this is one of the rare cases where the defendant was forced to use marijuana to treat his wife.¹⁰ Because the ongoing legal process resulted in the death of the defendant's wife. The discourse on overmacht is also related to the definition of noodtoestand (a state of force/emergency situation) which sometimes does not require any psychological encouragement, it is also defined as an emergency or force situation which is considered to provide justification for committing a violation of the law, for example carried out on the basis of social obligations. . Fidelis Arie Suderwarto has experienced a psychological impulse which will first be analyzed from the perspective of overmacht conditions.¹¹

B. Research Methods

A study cannot be said to be research if it does not have a research method.¹² Research methods are one of the factors of a problem that will be discussed.¹³ The study was carried out using secondary data which was analyzed qualitatively using the Desk Research Method. The literature materials used in writing this research are several references originating from the results of research, studies and reviews of several papers which are then summarized into a work of scientific writing.

C. Analysis And Discussion

1. Indonesian Criminal Law Policy regarding the use of Marijuana for Medical purposes

Marijuana or "Cannabis Sativa" is known as an opiate-like substance which has the function of reducing or changing consciousness, taste, intoxication and can cause addiction. History has recorded a long relationship between humans and plants that lasts for thousands of years. Marijuana is never discussed separately despite various coverage regarding developments in regulation, legalization and decriminalization. This is what led to the

⁸ Eddy O.S Hiariej, "*Prinsip-prinsip Hukum Pidana*", (Yogyakarta: Cahaya Astama Pustaka), hal. 190

⁹ Putusan Nomor 111/Pid.Sus/2017/PN Sanggau, hal. 16

¹⁰ *Ibid.*, hal. 39

¹¹ Institut For Criminal Justice Reform, "*Amicus Curiae (Sahabat Pengadilan)*", (Jakarta: ICJR, 2020), hal. 18

¹² Ismail Koto, "Perlindungan Hukum Terhadap Korban Tindak Pidana Terorisme", *Proceeding Seminar Nasional Kewirausahaan*, 2.1, (2021): 1052-1059.

¹³ Ida Hanifah, Ismail Koto, "Problema Hukum Seputar Tunjangan Hari Raya Di Masa Pandemi COVID-19", *Jurnal Yuridis* 8.1, (2021): 23-42.

emergence of social norms regarding marijuana as one of the plants that is prohibited in the world and was recorded in the UN Single Convention on Narcotics and Drugs 1961.

Until now, regulation of medical marijuana specifically in Indonesia has not been regulated because the Narcotics Law does not provide room for the use of narcotics in the health sector. Minister of Health Decree Number: HK.02.02/MENKES/118/2015 only provides space for the purpose of research and scientific development. If the use of marijuana for medical purposes is granted, the first thing to be revised is Narcotics Law No. 35 of 2009 along with related ministry regulations.

This is due to Law number 35 of 2009 concerning narcotics article 8 paragraph 1 which confirms the prohibition of the use of marijuana in the health sector. However, Law number 36 of 2009 concerning Health article 102 paragraph 1 explains that pharmaceutical preparations in the form of narcotics can only be made with a doctor's prescription and are prohibited from being misused. Indonesia's political and narcotics legal policies also have a role in greatly hindering research on marijuana for medical purposes. The non-opening of space by the National Narcotics Agency (BNN) and efforts to prevent research and utilization through campaigns, visions and missions and strengthened by the rejection of the legalization of marijuana by the Constitutional Court in decision number 106/PUU-XVIII/2020, which in essence the MK rejected the test The formal Narcotics Law contains articles prohibiting the use of class I narcotics on the grounds that this policy is the authority of the legislative body to change and strengthen regulations on the use of marijuana. In general, the considerations of the Constitutional Court judges in deciding Case Number 106/PUU-XVIII/2020 were based on the facts at the trial. According to the trial facts, there has never been any scientific evidence for the use of Class I narcotics and no previous research has been carried out in Indonesia. The prohibition on the use of class I narcotics is based on a single convention on narcotics in 1961. Likewise, the unconstitutionality of the Elucidation to Article 6 paragraph (1) letter a and Article 8 paragraph (1) has been refuted because the Petitioners have fulfilled their constitutional rights contained in Article 28C paragraph (1) and Article 28H paragraph (1) of the 1945 Constitution. Therefore, the Constitutional Court judges considered that this article was constitutional and remained binding.¹⁴ It was further explained that the need for certainty as to whether or not Class I narcotics can be used for the purposes of health services and/or therapy has long been a very urgent need. This is proven by the legal facts in the Explanation

¹⁴ Erik Dwi Prasetyo, *Legalisasi Ganja Medis Analisis Putusan nomor 106/XVII/2020*, Jurnal Analisis Hukum, 5.2 (2022): 156

to Article 6 paragraph (1) letter a of Law number 35 of 2009 concerning Narcotics which includes "an express prohibition on the use of Class I Narcotics for therapy". In other words, in fact the "phenomenon" of the need for Class I narcotics to be used for therapeutic purposes has emerged since before the Narcotics provisions were promulgated.¹⁵

2. Comparison between Indonesian National Law and International Law in the Legalization of Marijuana for Medical Purposes

Comparative law, meaning looking for differences and similarities between one legal system and another legal system. The purpose of comparison is to compare legal systems to be able to see their similarities and differences in order to develop law.

The Single Convention on Narcotic Drugs or known as the Single Convention on Narcotics was held in New York from January 24 to March 25 1961. The Convention formulated what substances were included in the narcotics category. Based on the Single Convention on Narcotic Drugs, in 1961 article 28, the use of marijuana for medical and industrial purposes was permitted on a limited basis.

Based on the Single Convention on Narcotic Drugs, in 1961 Article 28, the use of marijuana for medical and industrial purposes was permitted to a limited extent:¹⁶

1. *If a Party permits the cultivation of the cannabis plant for the production of cannabis or cannabis resin, it shall apply there to the system of controls as provided in article 23 respecting the control of the opium poppy*
2. *This Convention shall not apply to the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes.*
3. *The Parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant.*

Meaning of free:

1. If the Party permits the cultivation of cannabis plants for the production of hemp or cannabis resin, the control system as provided for in article 23 applies there to the control system of opium poppy.
2. This Convention does not apply to the cultivation of cannabis plants specifically for industrial purposes (fiber and seeds) or horticultural purposes.

The Parties are obliged to take necessary measures to prevent the misuse of, and illicit circulation of, cannabis plant leaves. The United Nations (UN) Commission on Narcotic Drugs

¹⁵ Putusan Mahkamah Konstitusi nomor 106/XVII/2020, hal. 178

¹⁶ *Single convention on narcotic drugs* 1961

or what is known as the Commission on Narcotic Drugs (CND) from the 1961 Narcotic Convention has decided to remove marijuana from the category of the most dangerous drugs in the world, and it was approved for medical purposes, this was done in December 2020. This decision was taken from the results of a vote conducted by the UN from 53 member countries. Of the 53 states, 27 voted in favor of allowing marijuana for medical use.

Indonesia juga telah meratifikasi 3 konvensi internasional terkait narkotika, antara lain yaitu :

1. Single Convention on Narcotic Drugs 1961 through Law No. 8 of 1976 concerning ratification of the 1961 single convention on narcotics and the protocol that amended it.
2. Convention on Psychotropic Substances 1971 through Law No. 8 of 1996 concerning ratification of the Convention on Psychotropic Substances 1971 (Psychotropic Substances 1971 Convention).
3. Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 through Law no. 7 of 1997 concerning the ratification of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (United Nations Convention on the Eradication of Illicit Traffic in Narcotics and Psychotropic Substances 1988).

From the results of these conventions, there were 2 which had the aim of limited use of marijuana for the development of science and health. However, even though Indonesia has ratified this international convention, until now there has not been a single convention regarding the use or research on medical marijuana carried out in Indonesia. So Indonesia's position needs to be questioned regarding this matter because it is inconsistent in implementing the ratification of international agreements.

The use of marijuana in the health sector is also recognized in the Single convention on narcotic drugs. Article 2 paragraph (5) Amendment to the Single convention on narcotic drugs in 1972 letter b reads:

A Party shall, if in its opinion the prevailing conditions in its country render it the most appropriate means of protecting the public health and welfare, prohibit the production, manufacture, export and import of, trade in, possession or use of any such drugs except for amounts which may be necessary for medical and scientific research only, including clinical trials therewith to be conducted under or subject to the direct supervision and control of the Party.

Translated: A Party shall, if in its opinion the conditions prevailing in its country make it the most appropriate means of protecting the health and welfare of the public, prohibit the

production, manufacture, export and import, trade, possession or use of such medicines except in such quantities as may be necessary only for medical and scientific research, including clinical trials to be conducted under or subject to the direct supervision and control of such Party.

3. Analysis of Criminal Law in Decision number : 111/Pid.Sus/PN Sanggau

The public prosecutor filed a lawsuit under Article 111 paragraph (2) of Republic of Indonesia Law no. 35 of 2009 concerning narcotics and the judge handed down a decision according to the third indictment under Article 116 paragraph (1) of Law number 35 of 2009 concerning narcotics. So it can be concluded that the judge has handed down a decision outside of what was requested by the public prosecutor (*ultra petita*). Permissible *ultra petita* decisions, namely criminal decisions imposed in excess of the demands of the public prosecutor, but with the condition that they do not exceed the maximum criminal threat limit or below the minimum criminal threat as regulated in statutory regulations and based on the indictment. The use of class I narcotics against other people is defined as a form of giving narcotics in solid, liquid or vapor form either with tools or directly to other people for consumption without looking at the perpetrator's inner attitude or evil intentions.

The nature of the act prohibited by criminal sanctions is *mala in se*. This means that the act is basically a disgraceful and immoral act with the aim of regulating the state's right to impose punishment (*ius puniendi*) and guarantee legal order. So that this law has an autonomous nature in the pure sense. .

Based on this description, observing that the prosecutor did not dare to sentence the defendant according to the minimum limit of 4 years and was very far from the sentence that should have been given. So that the opinions regarding demands and decisions made by prosecutors and judges are inconsistent. The reason is that the prosecutor and judge violated the provisions on the length of criminal sentences in Law Number 35 of 2009 concerning Narcotics Article 116 paragraph (1) and gave the impression that they were wrong in applying the law (different norms and actions).

The doctrine of coercion in Article 48 of the Criminal Code also explains if the author acts or does not act due to psychological pressure by other people or circumstances. For the maker there is no free determination of will. He was driven by external psychic compulsion that was so strong that he did things he didn't really want to do. The author's emergency situation is in a dangerous situation that forces or encourages him to commit a violation of the law.

According to the author, the actions carried out by Fidelis can be categorized as actions that were driven by coercive power due to an emergency situation as regulated in Article 48 of the Criminal Code which reads "Whoever commits an act due to the influence of coercive power, will not be punished". That the doctrine of coercion in Article 48 of the Criminal Code also explains if the author acts or does not act due to psychological pressure by other people or circumstances. For the maker there is no free determination of will. He was driven by external psychic compulsion that was so strong that he did things he didn't really want to do. In an emergency situation, the maker is in a dangerous situation that forces or encourages him to commit a violation of the law.

D. Conclusion

Indonesia's criminal law policy regarding the use of marijuana for medical purposes is still a problem due to inconsistent narcotics laws and health laws. The reason is that state political policy also does not open permits for the use of class I narcotics for health services as stated in Law Number 35 of 2009 concerning narcotics Article 8 paragraph (1) for use in the health sector for any reason. However, Article 102 paragraphs (1) and (2) of Law Number 36 of 2009 concerning health provides space for health services using narcotics based on a doctor's prescription and permission from the minister of health. International law as stated in the Single Convention on Narcotic Drugs in 1961 recognizes the use of marijuana in the medical field and requires permission from the authorized institution. According to the Narcotic Drug Convention, the use of marijuana in the medical field is legal as long as it meets the qualifications and evidence and submits research recommendations related to the use of marijuana in the medical field. Meanwhile, Law Number 35 of 2009 concerning narcotics and Law Number 36 concerning health use of marijuana in the medical sector still do not provide legal certainty due to differences in narcotics and health laws. The judge's decision imposed a crime based on Article 116 paragraph (1) of Law no. 35 of 2009 concerning Narcotics is incorrect. The reason is that the element without rights has been proven, namely not having a permit or recommendation from an authorized institution in accordance with the provisions of statutory regulations, the element of every person has been proven which refers to a legal subject, the element of an unlawful act has been proven but it is contrary to the principle of criminal law responsibility which is caused by It is not proven that the perpetrator's mental attitude (*Mens rea*) in committing the criminal act.

References

- Syamsuk Malik, “*Legalisasi ganja dalam sektor medis perspektif hukum*”, *Jurnal Rechten: Riset hukum dan hak asasi manusia*, 2.2, (2020): 1,
- Peter Dantovski “*Kriminalisasi Ganja*”, (Jakarta: LGN Publishing, 2013), hlm. 60
- Dhira Narayana dkk, *Hikayat Pohon Ganja*, (Jakarta: Gramedia, 2011), hal. 90
- Rahmi Ayunda, “*Peluang dan Tantangan Legalisasi Penggunaan Ganja Untuk Kepentingan Medis di Indonesia Ditinjau Dari Perspektif Undang-undang Kesehatan*”, *Jurnal Universtias Internasional Batam*, vol 1, 24 Februari 2021, hal. 337
- Eddy O.S Hiariej, “*Prinsip-prinsip Hukum Pidana*”, (Yogyakarta: Cahaya Astama Pustaka), hal. 190
- Institut For Criminal Justice Reform, “*Amicus Curiae (Sahabat Pengadilan)*”, (Jakarta: ICJR, 2020), hal. 18
- Ismail Koto, “*Perlindungan Hukum Terhadap Korban Tindak Pidana Terorisme*”, *Proceeding Seminar Nasional Kewirausahaan*, 2.1, (2021): 1052-1059.
- Ida Hanifah, Ismail Koto, “*Problema Hukum Seputar Tunjangan Hari Raya Di Masa Pandemi COVID-19*”, *Jurnal Yuridis* 8.1, (2021): 23-42.
- Erik Dwi Prasetyo, *Legalisasi Ganja Medis Analisis Putusan nomor 106/XVII/2020*, *Jurnal Analisis Hukum*, 5.2 (2022): 156