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A critique of legal positivism in law enforcement against narcotics abusers in Indonesia

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ABSTRACT

Law enforcement against narcotics abusers in Indonesia is predominantly characterized by a punitive approach that results in prison overcrowding, despite the normative legal framework adopting a double-track system. This practice is deeply rooted in the rigid paradigm of legal positivism adhered to by law enforcement officials. This study aims to: (1) analyze Hans Kelsen's legal positivism within the practice of narcotics law enforcement; and (2) critique the application of this positivist approach in achieving substantive justice. Employing a doctrinal legal research method, this study utilizes a case approach (Samarinda District Court Decision No. 1045/Pid.Sus/2019/PN Smr) alongside a statutory approach. The findings reveal two key points. First, the practices of law enforcement officials strictly reflect Hans Kelsen's Pure Theory of Law, focusing solely on *das Sollen* (the fulfillment of statutory elements) while disregarding *das Sein* (the sociological reality that the suspect is an abuser). Second, the case analysis exposes a judicial paradox: although the judge's considerations were non-positivistic (acknowledging the defendant's need for rehabilitation), the final verdict remained positivistic (imposing imprisonment) due to the procedural failure to conduct an integrated assessment during the investigation stage. The study concludes that rigid legal positivism fails to realize substantive justice and utility, prioritizing procedural certainty at the expense of human recovery.

Keywords: legal positivism; Hans Kelsen; substantive justice; narcotics abuse

1. INTRODUCTION

Narcotics abuse has long posed a serious threat to social stability and public health in Indonesia. The scale of this issue has compelled the state to adopt strict policies; however, the chosen approach has undergone continuous evolution. Historically, the state's dominant response has manifested in a punitive approach, emphasizing strict criminal law enforcement (Arief, 2010). Through this paradigm, all parties involved in narcotics abuse, including victims of abuse, are positioned as criminals who must be subjected to penal sanctions, particularly imprisonment (Kurniawan et al., 2024). However, over time, this punitive approach has revealed fundamental weaknesses. One primary failure is its inability to significantly reduce the prevalence of narcotics abusers. Conversely, this approach has generated serious derivative problems, such as prison overcrowding, high recidivism rates, and social stigmatization that hinders the recovery process of addicts (Badan Narkotika Nasional, 2022).

At the global level, there is a growing consensus among international scholars and public health institutions that the punitive approach to drug policy is systematically flawed and counterproductive (Csete et al., 2016). Studies across various jurisdictions demonstrate that rigid criminalization of simple drug possession exacerbates health crises, fuels prison overcrowding, and fails to reduce the demand for illicit substances (Kolind & Duke, 2016). As an alternative, prominent frameworks in countries like Portugal and Canada have shifted towards depenalization and public health-oriented interventions, proving that addressing addiction as a medical condition rather than a criminal offense significantly improves recovery outcomes and reduces societal costs (Fischer & Daldegan-Bueno, 2023). This international shift underscores the urgency for Indonesia to evaluate its positivistic law enforcement practices.

Currently, the handling of narcotics abuser cases can be conducted through an integrated assessment following the issuance of Supreme Court Circular Letter (SEMA) No. 4 of 2010, Joint Regulation No. 1 of 2014, Regulation of the Head of the National Narcotics Agency No. 11 of 2014, and several other legal regulations. These regulations establish the integrated assessment mechanism as a health-based approach to handling narcotics abusers. The integrated assessment is a comprehensive examination process conducted by a Legal Team and a Medical Team to determine the level of addiction and whether the abuser is affiliated with a trafficking network, ultimately to formulate a rehabilitation plan. Law Number 35 of 2009 concerning Narcotics also adopts a double-track system, comprising a legal approach manifested in penal sanctions and a health approach manifested in action sanctions, namely rehabilitation. However, the imposition of rehabilitation sanctions requires an integrated assessment as a prerequisite (WP, 2017).

In the investigation stage, the submission of integrated assessment requests for abusers possessing evidence below the threshold set by SEMA No. 4 of 2010 still faces obstacles. Imprisonment remains the primary law enforcement choice compared to the health approach through rehabilitation. This is often viewed as the easier option in handling narcotics cases, rather than navigating the lengthy process required to place a defendant into the rehabilitation system via integrated assessment. The impact of imprisonment on abusers is detrimental, often causing them to become further entrenched in narcotics circulation while incarcerated. This situation obscures the effectiveness of narcotics law enforcement in Indonesia (Panjaitan, 2020). The following data from the Indonesia Drugs Report, taken from the Directorate General of Corrections' SDP across 33 provinces, illustrates the number of narcotics detainees in Indonesia for the year 2025:

Table 1. Total Narcotics Detainees in Indonesia in 2025

Year	Dealer	Abuser	Total Narcotics Detainees
2025	76.712	64.304	141.016

Source: Indonesia Drugs Report 2025

Based on Table 1, there are 64,304 narcotics abusers, constituting approximately one-quarter of the total prison population (Badan Narkotika Nasional, 2025). This demonstrates the dominance of legal positivism in narcotics law enforcement in Indonesia. Legal positivism holds that there must be a strict separation between law and morality—between the law as it is (*das Sein*) and the law as it ought to be (*das Sollen*) (Erwin, 2012). Furthermore, positivists argue that even harsh legal norms are acceptable as law provided they meet formal criteria (Khubby et al., 2022).

In practice, there is a philosophical clash between the health approach mandated by Law Number 35 of 2009 and the integrated assessment mechanism regulated in Joint Regulation of 2014, versus the stance of Indonesian law enforcement officials who tend to adhere to Hans Kelsen's legal positivism. Officials often do not question the *mens rea* of a suspect possessing, storing, or controlling narcotics (elements of Articles 111/112 of Law No. 35 of 2009), but rather focus on the rigid application of article elements that are technically designed for traffickers, not abusers (Hafrida, 2016). According to Hans Kelsen, the law must be purified from non-juridical elements such as sociological, political, historical, and ethical factors. For Kelsen, law is a "category of ought" that regulates human behavior as rational beings. In this context, legal science does not question "how the law ought to be" but whether the law is positive law (*ius constitutum*), not the ideal law (*ius constituendum*) (Friedmann, 1990).

This phenomenon of conflict between the ideal of substantive justice (rehabilitation) and positivistic law enforcement practices (procedural certainty) is clearly recorded in the case study of Samarinda District Court Decision No. 1045/Pid.Sus/2019/PN Smr. In this decision, the defendant, Arya Putra Pratama was arrested for possessing 0.19 grams of methamphetamine, a specific amount well below the SEMA No. 4 of 2010 threshold. In its considerations, the Panel of Judges openly acknowledged that the defendant was an abuser and explicitly stated that "the defendant should have received rehabilitation." However, ironically, the verdict imposed was imprisonment for one year and six months. This decision resulted from the failure of law enforcement officials to conduct an assessment during the investigation stage, trapping the judge in a framework of procedural formality focused solely on fulfilling the criminal element of possession (DetakKaltim.Com, 2020).

Based on this background, the research questions of this study are: (1) how is Hans Kelsen's legal positivism manifested within the practice of narcotics law enforcement in Indonesia? and (2) how can the application of this positivism be critiqued concerning the realization of substantive justice through rehabilitation? (Study of Samarinda District Court Decision No. 1045/Pid.Sus/2019/PN Smr). The objective of this study is to examine and analyze Hans Kelsen's legal positivism in the practice of narcotics law enforcement in Indonesia and to analyze the critique of the application of legal positivism in achieving substantive justice in the form of rehabilitation, based on Samarinda District Court Decision No. 1045/Pid.Sus/2019/PN Smr.

This study employs a doctrinal or normative legal research method (Alfarisi et al., 2026). This method aligns with Soerjono Soekanto's perspective, emphasizing that legal research aims to discover principles, norms, and applicable positive legal rules (Sutarto, 2021). The primary approach used is the case approach, focusing on an in-depth analysis of legal application within a specific court decision. This is reinforced by the statute approach to compare the judicial decision with the prevailing legal framework (Muhaimin, 2020).

Data for this study were gathered through library research. The primary legal materials consist of the Samarinda District Court Decision No. 1045/Pid.Sus/2019/PN Smr. Secondary legal materials comprise relevant statutes such as Law Number 35 of 2009 concerning Narcotics, the 2014 Joint Regulation concerning the Handling of Narcotics Addicts, and SEMA No. 4 of 2010, alongside academic books and scientific journals related to the research topic (Fajar & Achmad, 2019).

The collected legal materials were analyzed qualitatively. This study dissects the legal reasoning (*ratio decidendi*) within the Samarinda District Court Decision to identify how law enforcement officials rigidly apply legal norms while neglecting the factual reality of the suspect as an abuser and the ultimate objective of rehabilitation. The results of this case analysis are subsequently contextualized within the

framework of legal positivism, specifically Hans Kelsen's Pure Theory of Law, to construct a philosophical critique and address the research problem.

2. STATE OF THE ART

In previous research, the critique of legal positivism in narcotics law enforcement has been discussed from various perspectives. Research titled *"Tinjauan Yuridis Terhadap Pertimbangan Hakim..."* by Rani Juwita analyzed the reasoning of judges in the Pekanbaru District Court who imposed special minimum sentences. The study examined whether the practice of judges deviating from minimum statutory threats aligns with the positivist paradigm or leans towards moral judgment.

Furthermore, research titled *"Kritik Dasar Aliran Positivisme Teori Hans Kelsen..."* by Nur Immawati Amaliyah, Parid Sidik, and Abd Gani focused on the critique of Hans Kelsen's pure theory of law regarding the polemic of cannabis legalization in Indonesia. This study highlighted how the positivistic Narcotics Law hinders the use of cannabis for medical purposes and urged for clear regulation.

Based on several previous studies, the focus tends to be divided between the judicial practice of special minimum sentencing and the policy debate on medical cannabis. The primary novelty of this study does not merely reiterate existing critiques of positivism in narcotics law enforcement. Rather, it sharply dissects a specific phenomenon in the form of a "judicial paradox". This paradox occurs when a judge, employing non-positivistic reasoning, openly acknowledges that a defendant is an abuser entitled to rehabilitation, yet is systematically forced to impose a positivistic prison sentence. Therefore, this study fills a critical gap in the literature by deeply analyzing how procedural failures at the investigation stage (specifically the absence of an integrated assessment) structurally constrain the judge's authority, compelling them to deliver a rigid verdict that sacrifices substantive justice for procedural certainty.

3. DISCUSSION

3.1. Analysis of Hans Kelsen's Legal Positivism in Narcotics Law Enforcement Practices

Positivism is a school of legal philosophy that conceives law as *ius* which has been positivized into *lege* or *lex* to ensure certainty regarding what constitutes law. Consequently, law is defined as rules solely concerning positive law. Legal science does not discuss whether positive law is good or bad, nor does it address the effectiveness of law in society (Samekto, 2015).

A prominent figure in legal positivism is Hans Kelsen. Kelsen explains that law is a system of norms based on "oughts" (*das Sollen*). Norms are products of human thought that are deliberative in nature. A norm becomes a norm simply because it is willed to be so, not based on morality or values of goodness (Astomo, 2014). Thus, if the law has determined a certain pattern of behavior, then everyone ought to behave according to that pattern. Briefly, "one must conform to what has been determined." This is where the normative nature of law lies. The necessity and obligation to obey the law exist solely because it has been juridically and formally determined, not because of the values contained within the material law itself. From this, we recognize the term juridical-normative (Tanya et al., 2013).

In the context of narcotics abuse, legal positivism is strictly applied. The granting of criminal status to narcotics abusers is inseparable from the influence of views dominating the formation and application of criminal law. The concept of criminalizing narcotics abusers stems from the assumption that narcotics are solely for medical and scientific purposes. Therefore, any action outside these purposes is considered a crime because the negative impact of illegal narcotics use endangers human life (Alfarisi et al., 2025).

Indonesian law enforcement officials tend to be punitive, directing abusers toward imprisonment even though they are fundamentally "sick" individuals requiring rehabilitation. Under legal positivism, imprisoning abusers is not "wrong" because it is explicitly regulated in Articles 111, 112, and 114 of Law No. 35 of 2009. Proving the elements of possessing, storing, or controlling (Article 112) or buying/selling is procedurally easier than proving the status of an abuser. Therefore, proving the physical act of 'possession' mathematically fulfills the formal requirements of the law (*das Sollen*), completely excusing

investigators from the complex burden of proving the suspect's psychological dependency or actual intent (*das Sein*).

Based on Joint Regulation No. 1 of 2014 concerning the Handling of Narcotics Addicts and Victims of Narcotics Abuse into Rehabilitation Institutions, the integrated assessment mechanism for narcotics abusers with evidence below the threshold of Supreme Court Circular Letter No. 4 of 2010 has been regulated. This allows investigators the option, if they find a suspect eligible for rehabilitation, to submit a request for an integrated assessment to the Provincial or Regency/City National Narcotics Agency.

Normatively, the goal of this integrated assessment mechanism is to make the handling of narcotics abusers more objective and targeted (Andini et al., 2023). If applied consistently and maximally, this rule would have positive impacts such as reducing prison overcrowding and reducing demand for narcotics. However, the normative ideal (*das Sollen*) of this Joint Regulation clashes with the positivistic practices of law enforcement officials, facing significant obstacles. The evidence thresholds as regulated in SEMA No. 4 of 2010 (See Table 2).

Table 2. Evidence Thresholds for Narcotics Abusers Eligible for Integrated Assessment

No	Type Of Narcotics	Threshold
1	Methamphetamine group	1 gram
2	MDMA group (ecstasy)	2.4 gram or 8 pills
3	Heroin group	1.8 gram
4	Cocaine group	1.8 gram
5	Cannabis group	5 gram
6	Coca leaves	5 gram
7	Mescaline	5 gram
8	Psilocybin group	3 gram
9	LSD group	2 gram
10	PCP group	3 gram
11	Fentanyl group	1 gram
12	Methadone group	0.5 gram
13	Pethidine group	0.9 gram
14	Morphine group	1.8 gram
15	Codeine group	72 gram
16	Buprenorphine group	32 mg

Source: (Mahkamah Agung Republik Indonesia, 2010).

The existence of Articles 112 and 114 is not merely a technical obstacle, but a structural flaw within the law that perpetuates positivistic enforcement. There is a fatal ambiguity within the phrases "possessing, storing, controlling" or "buying," because logically, every abuser must "possess" narcotics before consuming them. The absence of a definitive boundary separating 'possession for personal consumption' from 'possession for trafficking' provides leeway for law enforcement to enforce the most rigid interpretation. Consequently, officials can easily fulfill the das Sollen elements of penalization and completely disregard the das Sein reality that the suspect is merely a user, thereby causing the objective of rehabilitation to fail as early as the investigation stage.

Furthermore, the dominance of legal positivism is not solely driven by statutory ambiguity, but also by the culture of institutional bureaucracy. The rigid positivistic approach (imprisonment) provides 'metric certainty' for law enforcement agencies, such as achieving case clearance targets (P-21). Conversely, issuing rehabilitation recommendations through an integrated assessment is often vulnerable to public suspicion regarding transactional practices or bribery. Therefore, hiding behind the strict text of the law becomes the safest institutional harbor. This indicates that law enforcement officials consciously sacrifice substantive justice (rehabilitation) to maintain formal bureaucratic accountability.

3.2. The Paradox of Legal Positivism: A Critical Analysis of Decision No 1045/Pid.Sus/2019/PN Smr

Rooted in the premise that law consists of written sovereign commands enforced by sanctions, the legal theory of positivism appears rigid, strictly textual, and detached from moral teachings. Judges, when resolving legal cases, are often trapped by formal rules, reducing their position to mere "mouthpieces of the law" (*la bouche de la loi*). This affects the primary goal of law, which is to uphold justice; in positivism, justice tends to be formal or procedural justice, not substantive justice (Islamiyati, 2018).

According to Indonesian legal philosopher O. Notohamidjojo, legal science requires assessment in two aspects: the content of legal regulations and the implementation of law. However, both aspects of a jurist's work are bound by moral norms, justice, *aequitas*, truth, and goodness. The more bound they feel by these moral norms, the better their quality as a jurist and legal authority, and the greater their contribution to legal development and society (Notohamidjojo, 1975). This view reinforces the reason that legal positivism in Indonesia cannot stand alone but requires another dimension to harmonize legal certainty and justice.

Regarding the paradox of legal positivism in narcotics law enforcement in Indonesia, this study analyzes Samarinda District Court Decision No. 1045/Pid.Sus/2019/PN Smr. This decision is not merely an ordinary case, but a perfect case study dissecting the contradictions in the narcotics criminal justice system and demonstrating the dominance of positivism at the law enforcement level.

The case involved the defendant, Arya Putra Pratama, arrested with evidence of one packet of methamphetamine weighing 0.19 grams net. Facts revealed in court clearly positioned the defendant not as a dealer, but as an abuser. The defendant purchased the narcotics through a joint purchase (*patungan*) with a friend for communal consumption. The defendant also admitted to purchasing narcotics three times for personal use. Based on the weight of evidence far below the SEMA No. 4 of 2010 threshold (1 gram for methamphetamine) and the purpose for personal use, the defendant was an ideal candidate for an Integrated Assessment to receive rehabilitation.

However, the peak of contradiction in this case came from the legal reasoning of the Panel of Judges itself. In the decision, the judge openly and directly criticized the performance of law enforcement officials at the previous stage. The judge stated: "since the investigation stage, the investigator did not make any effort to assess the defendant, which is very necessary to determine whether the defendant is an abuser, a victim of abuse, or a Narcotics addict." The judge even emphasized that conducting an assessment is a legal obligation for the investigator, especially since the evidence found did not exceed 1 (one) gram. Through this consideration, the judge consciously acknowledged that a fundamental procedural failure had occurred since the beginning of the legal process (Putusan Pengadilan Negeri Samarinda No. 1045/Pid.Sus/2019/PN Smr).

After identifying this failure, the Panel of Judges explicitly opined that the defendant "is actually a Narcotics Abuser and the defendant should receive rehabilitation." The judge even stated disagreement with the Public Prosecutor's demand for 7 years imprisonment. Here lies the paradox. Despite fully realizing that the defendant was entitled to rehabilitation, the verdict imposed was imprisonment for 1 year and 6 months. This decision shows how the judge, despite having a progressive understanding, was ultimately trapped in the systemic framework presented to them. The absence of assessment results in the case file due to the investigator's negligence left the judge in a difficult position to fully implement action sanctions (rehabilitation), leading to a compromise path by imposing penal sanctions (imprisonment) (Hikmawati, 2022). This structural constraint arises because the Indonesian criminal justice system (KUHAP) relies heavily on the investigation dossier (BAP) and the prosecutor's indictment. When investigators fail to introduce medical assessment results into the dossier, material evidence (das Sein) regarding the defendant's level of addiction completely vanishes from the trial facts. The judge, tightly bound by the formal evidentiary principles of procedural law, lacks a solid juridical foundation to order rehabilitation. Ruling for rehabilitation without medical records and integrated assessments in the dossier risks violating evidentiary principles and being perceived as exceeding judicial authority (*ultra petita*). This perfectly illustrates that positivism does not merely operate within the realm of legal theory, but has

manifested into a procedural chain that shackles judicial independence; a systemic failure in one subsystem (investigation) automatically paralyzes the rationality of justice in another subsystem (Alfarisi et al., 2024).

Through the law enforcement paradigm with the *ultimum remedium* approach in handling narcotics abusers, a fundamental philosophical shift occurs. Law enforcement officials no longer act as pure "Kelsenians" focusing only on *das Sollen* (fulfillment of Articles 111, 112, and 114). Instead, they are forced to see *das Sein* (the sociological fact that the defendant is a sick person) and the value of justice (that rehabilitation is more beneficial than prison). The *ultimum remedium* approach is the antithesis of rigid positivism which views criminal law as *primum remedium*.

The necessity of shifting towards this ultimum remedium and health-oriented approach is strongly supported by global empirical evidence. Evidence-based policy research emphasizes that the public good is optimally served when drug policies prioritize health interventions over punitive sanctions (Babor et al., 2018). Furthermore, international models, such as the Portuguese framework, have demonstrated that removing criminal penalties for simple drug possession and diverting abusers to health commissions drastically reduces the burden on the criminal justice system without increasing drug use rates (Hughes & Stevens, 2010). Contemporary realist reviews of depenalization and diversion programs further confirm that providing structured alternatives to criminalization significantly improves socio-health outcomes for abusers (Stevens et al., 2022). In the Indonesian context, the Integrated Assessment was theoretically designed to be this exact type of diversion mechanism; however, its potential is consistently neutralized by the rigid positivistic mindset of law enforcement.

The Samarinda District Court decision is noteworthy because the Panel of Judges consciously exhibited an attitude that deviated from pure positivism. In their considerations, the judges clearly incorporated non-legal considerations prohibited by Kelsen, namely sociological facts (the defendant is an abuser) and moral values (the defendant should receive rehabilitation). The judge in this decision refused to execute regulations purely positivistically. This consideration is a direct critique of Hans Kelsen's Pure Theory of Law, which demands the separation of law from facts and morals.

This study argues that, the paradox where non-positivistic judicial reasoning contrasts with a positivistic verdict proves the failure of the Pure Theory of Law when applied rigidly. This demonstrates that legal positivism, in its pursuit of legal certainty, sacrifices two other legal objectives: utility and substantive justice. Utility is sacrificed because imposing imprisonment creates state burdens through prison overcrowding and fails to reduce narcotics demand. Simultaneously, substantive justice is denied because the legal system punishes a health condition (addiction) rather than facilitating recovery, ultimately criminalizing the victim of the disease rather than dismantling the illicit trade network. This case serves as concrete evidence that law enforcement in Indonesia, particularly in complex narcotics cases, cannot be purified from sociological considerations and the philosophy of justice living in society.

4. CONCLUSION

Based on the analysis, this study draws two main conclusions. First, the practice of law enforcement against narcotics abusers in Indonesia strongly reflects Hans Kelsen's legal positivism paradigm. Law enforcement officials at the investigation and prosecution levels tend to act positivistically, focusing solely on *das Sollen* (the fulfillment of normative elements under Articles 111, 112, and 114 of the Narcotics Law) and disregarding *das Sein* (the factual reality that the suspect is an abuser).

Second, the fundamental critique of legal positivism is vividly demonstrated through the judicial paradox in Samarinda District Court Decision No. 1045/Pid.Sus/2019/PN Smr. In this case, the Panel of Judges employed non-positivistic reasoning by acknowledging sociological facts and substantive justice values—explicitly stating the defendant required rehabilitation. However, the final verdict remained strictly positivistic (imposing imprisonment) because the judge was structurally trapped by procedural failures initiated during the investigation stage.

This decision proves that the Pure Theory of Law, when applied rigidly, fails to realize substantive justice and legal utility, settling instead for mere procedural certainty. Therefore, this study recommends a systemic paradigm shift among law enforcement officials—particularly investigators and prosecutors—

from rigid positivism toward a restorative justice approach. Law enforcement must evaluate the suspect's *mens rea* holistically. If factual evidence (*das Sein*) indicates a positive urine test, evidence weight below the SEMA No. 4 of 2010 threshold, and no history of recidivism, the integrated assessment mechanism must be prioritized, thereby correctly positioning criminal law as the *ultimum remedium*.

Ethical Approval

Ethical approval was not required for this study.

Informed Consent Statement

Informed consent was not obtained for this study.

Authors' Contributions

SA contributed to conceptualization, formal analysis, and writing – original draft preparation. KEN contributed to methodology and theoretical framework. AK contributed to validation and writing – review and editing.

Disclosure Statement

The authors report no potential conflicts of interest was reported by the author(s).

Data Availability Statement

The data presented in this study are available upon request from the corresponding author for privacy reasons.

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