

Problems in Deciding the Case of Narcotics Abuse (The application of Article 127 of Law No. 35 of 2009 on Narcotics)

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Abstract. The abuse of narcotics is now a common enemy that encourages the formation of various related regulations. However, on the implementation level, there are problems in deciding cases of narcotics abuse, especially related to the application of Article 127 of Law no. 35 of 2009 on Narcotics. This study aims to identify problems in deciding cases of narcotics abuse in order to identify the solution. The method used in this research is normative juridical. The results showed that there are two main issues that arise. First, the tendency of the Prosecutor to indict the abuser by Article 111 or 112 of Law no. 35 of 2009. Although there is currently a SEMA no. 3 of 2015, in which judges may violate the specific minimum criminal threats, the application of SEMA still creates a polemic. Secondly, the perspectives of prosecutors and judges who tend to convict drug abuse prisoners rather than ordered to rehabilitate them.

1 Introduction

Narcotics abuse has spread to some parts of society in big cities and small towns, and even the distribution is difficult to stop. Drug abuse is used not for the purpose of treating diseases but is used intentionally to achieve "certain awareness" because of the influence of drugs on the soul. Generally, Indonesian people are currently faced with conditions that are very worrying due to the rampant use of various kinds of narcotics and psychotropic substances [1].

In connection with the above explanation, illegal narcotics circulation must be immediately addressed, given the negative effects that will be caused not only to users but also to families, communities, to nations and countries [2]. This is what prompted the government to issue various regulations, starting from Law No. 5 of 1997 concerning Psychotropics, Law No. 9 of 1976 concerning Narcotics which was later replaced by Law No. 22 of 1997 and then replaced with Law No. 35 of 2009 concerning Narcotics which apply to this day. In fact, as a form of the government's seriousness in combating narcotics circulation and handling of narcotics abusers, a National Narcotics Agency (BNN) was formed.

According to Mardani [3], drug abuse in the perspective of criminal law includes:

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"Plant, store, control papaver plants, coca plants, or cannabis plants, produce without rights, cultivate without rights, extradite without rights, convert without rights, mix or provide drugs, save for possession or for inventory or to possess, carry without rights, send without rights, transport or transit without rights, import without rights, export without rights, offer to be sold without rights, distribute without rights, sell without rights, but without rights, deliver without rights, receive without rights, become an intermediary in buying and selling, and give narcotics to others without rights".*

Narcotics abusers as regulated in Article 1 number 15 Law No. 35 of 2009 is a person who uses narcotics without rights and against the law. Therefore, it can be understood that narcotics abusers are prohibited if their use is without legal rights and intentions. However, various efforts with the issuance of regulations and the establishment of the National Narcotics Agency (BNN) seem to have not been able to significantly prevent and reduce narcotics abusers in Indonesia. In fact, based on the survey data for 2017, the proportion of the largest abusers based on groups included: 59% were workers, 24% were students, and 17% were the general population [4]. Workers and students are basically groups that have intelligence and knowledge about the prohibition and danger of narcotics and even those who have a great chance of being exposed to the socialization of drug abuse prevention.

This is certainly a question regarding the effectiveness of criminal sanctions that have been imposed on abusers during this time, and their influence on the prevention of narcotics abuse in Indonesia. Factually, this is inseparable from problems in deciding cases of narcotics abusers, especially related to the application of Article 127 of Law No. 35 of 2009 concerning Narcotics. Article 127 essentially regulates criminal sanctions for any narcotics abusers of Groups I, II, and III, as well as medical and social rehabilitation that can be applied to them. However, the implementation leaves a problem in the application of Article 127, so Law No. 35 of 2009 is far from being effective.

Based on the aforementioned explanations, the formulation of the problem that will be discussed in this article is related to problems in deciding cases of narcotics abuse related to the application of Article 127 of Law No. 35 of 2009 concerning Narcotics. The research method used is normative juridical.

2 Objective of the Study

This study aims at identifying and analysing various problems in deciding cases of narcotics abuse related to the application of Article 127 of Law No. 35 of 2009 concerning Narcotics.

3 Methodology

The research methodology used in this research is normative juridical, with several approaches namely statute approach, analytical approach, and conceptual approach. Research specifications are prescriptive, secondary data is obtained by literature study and analyzed by qualitative normative analysis methods.

4 Discussion

Article 127 of Law No. 35 of 2009 concerning Narcotics, regulates that:

1. Every abuser:
 - a. Narcotics Group I used for themselves is sentenced to a maximum of 4 years imprisonment;
 - b. Narcotics Group II used for themselves is sentenced to a maximum of 2 years imprisonment;

- c. Narcotics Group III used for themselves is sentenced to a maximum of 1 year imprisonment.
2. In deciding the case as referred to in Number (1), the judge must pay attention to the provisions referred to in Article 54, Article 55, and Article 103;
3. In the event that an abuser as referred to in Number (1) can be proven or proven to be a victim of narcotics abuse, the abuser is obliged to undergo medical rehabilitation and social rehabilitation.

In connection with the above formula, Article 54 of Law No. 35 regulates that addicts and victims of narcotics abuse must undergo medical and social rehabilitation, and Article 55 regulates compulsory reporting for drug addicts to obtain rehabilitation. Article 103 regulates the rehabilitation of narcotics addicts, both those found guilty and those not proven to have committed Narcotics crimes. Based on Article 127 Number 3 above, victims of drug abuse are also required to undergo medical and social rehabilitation. Referring to this, it appears that there is a double track system. On the other hand, related to narcotics abusers based on narcotics groups, it appears that the criminal provisions in Article 127 Number 1 are much lighter than Article 111 and 112 of Law No. 35 of 2009.

However, based on the formulation of the problem proposed, regarding "problems in deciding cases of narcotics abusers related to the application of Article 127 of Law No. 35 of 2009 concerning Narcotics", the results of the study identify two problems in cases of narcotics abusers, among others, as follows.

First, the tendency of the Public Prosecutor to indict Abusers with Article 111 or 112 rather than Article 127 of Law No. 35 of 2009. This is reinforced by the results of research from the Institute for Criminal Justice Reform, Rumah Cemara, and Empowerment and Justice Action against 32 decisions of the Surabaya District Court in order to see the tendency of criminal justice processes for addicts and drug users in Surabaya, obtained that: [5]

"The majority of Prosecutors use articles that aim to ensnare users with high imprisonment, namely Article 111 or Article 112 as much as 48% compared to 33% for Article 127 which should be used for drug abusers and addicts. The purpose of entrapment drug abusers and addicts with imprisonment articles are increasingly clear by the inclusion of Article 111 or Article 112 as a primary or first indictment with 63% versus 0% or zero for Article 127. The majority of judges decide to use Article 111 or 112 with 60% of decisions, even though in the indictment, the Prosecutor also charged with Article 127".

The above shows that even though the actions of the Abuser meet the elements of Article 127, there is a tendency not Article 127 to be used as a basis for primary charges, demands or decisions. This is certainly a problem in deciding cases of narcotics abusers. For example, in decision No. 220/Pid.Sus/2017/PN.Pwt, with primary charges Article 114 Number 1 and secondary charges Article 112 Number 1 of Law No. 35 of 2009, while the 6-year claim refers to secondary charges. In legal considerations, the judge explained that:

"Even if proven by Article 112 Number 1, based on these legal facts, it turns out that the Defendant was only a Narcotics Group I user for himself as stated in Article 127 Number 1, in this case the Public Prosecutor did not charge him. Based on these considerations, the Public Prosecutor did not claim Article 127 Number 1, even though the Article is in accordance with the legal facts, it is reasonable for the Panel of Judges to impose criminal charges on the Defendant by deviating the minimum criminal provisions in the Prosecutors' subsidiary charges".

The decision above shows that the Prosecutor did not indict Article 127 of Law No. 35 of 2009, while the legal facts indicate that the Prosecutor should indict him with Article 127. This is what then encourages the judge to remain based on secondary charges, only to deviate the minimum criminal provisions in particular, in which case the judge refers to the Supreme Court Circular (SEMA) No.3 of 2015 concerning the Enforcement of the Results of the Room Plenary Meeting of the Supreme Court in 2015. The criminal room legal formulation A.1 regulates that:

"The judge in examining and deciding the case must be based on the Public Prosecutor's Indictment. The Prosecutor charged with Article 111 or Article 112 of Law No.35 of 2009 concerning Narcotics, but based on the legal facts revealed at the hearing it was proven Article 127 of Law No.35 of 2009, in which this article was not charged. The defendant is proven to be a user and the amount is relatively small (SEMA No. 4 of 2010), then the judge decides according to the indictment but can deviate from the special minimum criminal provisions".

SEMA No. 3 of 2015 can indeed be a solution if there is a case as above, and the issuance of the SEMA shows that there is a tendency for the Prosecutor to charge the Abuser not with Article 127 but Article 111 or Article 112. However, the SEMA can bring new problems, where on the one hand it brings justice to abusers, and on the other hand there is no legal certainty with the breach of special minimum criminal provisions and the imposition of indictments as the basis for the judge to decide, which is not in accordance with the facts of the law in court. It should also be understood that a SEMA basically does not have binding legal force, thus it is very possible to make a disparity in decisions.

Second, there is still a tendency for prosecutors and judges to sentence prisoners to narcotics abusers rather than ordering them to rehabilitate them. There is SEMA No. 4 of 2010 concerning the Placement of Abuse, Narcotics Abuse and Addicts into the Institute of Medical Rehabilitation and Social Rehabilitation but seems far from implementation, even in some aspects it can be considered a failure. This can be seen from the results of research by the Institute for Criminal Justice Reform, Rumah Cemara, and Empowerment and Justice Action [5], that:

"The majority of the demands of the Public Prosecutor (JPU) for the defendant were imprisonment (90%), only a few demanded the imposition of rehabilitation (10%). This is proof that the Prosecutor very rarely demands rehabilitation for narcotics defendants. Judges also still have a perspective to imprison drug users. Not granted the request to rehabilitate users is an important finding, that judges basically do not pay attention to the provisions in SEMA. The majority of judges decide to use Article 111 or 112 with 60% of decisions, even though in the indictment, the Prosecutor also charged with Article 127. Even out of the total verdicts, only three convicted men were given rehabilitation measures (6%) and the three were children. Other similarities are that two of the three have been detained in rehabilitation centers. The assumption that the tendency of the judge to place the convicted person in the rehabilitation place after being convicted in a rehabilitation center was confirmed by this finding".

The explanation above shows that there are problems related to the application of Article 127, where the perspective of imprisoning abusers, both users and addicts is still stronger than rehabilitating them, so that the indictment and decisions do not refer to Article 127. It is as if only Article 127 Number 1 that can still be implemented, without regard to the provisions of Numbers 2 and 3 of Article 127 which regulate medical and social rehabilitation for addicts.

Emphasis on the equality of criminal sanctions and action sanctions within the framework of the double track system is actually related to the fact that elements of denunciation or suffering (through criminal sanctions) and elements of coaching (through action sanctions) are equally important, and both are accommodated in the sanctions system of criminal law [6]. However, narcotics abusers are more oriented to imprisonment sanctions, so that action sanctions do not have an equal position with criminal sanctions.

In connection with the purpose of punishment, there is a relative theory, which is said to be a tool to prevent the emergence of a crime, with the aim that the public order is maintained [7]. Whereas in the combined theory, in addition to recognizing that the imposition of criminal sanctions is held to repay the perpetrators, it is also intended that the perpetrators can be corrected so that they can return to the community [8]. However, in the case of narcotics abusers, the tendency of criminal purposes is more in retaliation, so that as if a person being trapped as a narcotics abuser is an absolute mistake and deserves to be criticized. This is certainly quite alarming, considering on the one hand narcotics are extraordinary crime and an organized trans national crime, while on the other hand narcotics are easily accessible to various groups including children, so that preventive prevention effectiveness can be questioned. On the basis of this, the perspective of the Prosecutor and Judge as an extension of the state should provide space for abusers to undergo rehabilitation.

5 Conclusion

There are problems in deciding cases of narcotics abusers, namely the lack of application of Article 127 to narcotics abusers. This is because: First, the tendency of the Prosecutor to indict abusers with Article 111 or 112 rather than Article 127 of Law No. 35 of 2009. Even though SEMA No. 3 of 2015 can be a solution to this, but this SEMA still causes polemics, namely bringing legal uncertainty through the breach of specific minimum criminal provisions and the occurrence of decision disparities. Secondly, there is still a tendency for prosecutors and judges to imprison narcotics abusers instead of ordering them to rehabilitate them, so that the demands and decisions are not fully grounded in Article 127. This indicates that there is no equality between action sanctions and criminal sanctions, and the aim of prosecution is more oriented to retaliation.

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