

Reconstruction of Criminal Sanction Regulations against Narcotic Abusers Not Related to a Drugs Circulation Network Based on Justice Values

Linda Ikawati^{1*}, Eko Soponyono², Sri Endah Wahyuningsih³

¹Doctorate Student of Faculty of Law Sultan Agung Islamic University Semarang, Indonesia

²Faculty of Law Sultan Agung Islamic University Semarang, Indonesia

³Faculty of Law Sultan Agung Islamic University Semarang, Indonesia

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*Corresponding author: Linda Ikawati

Abstract

Narcotics abuse as referred to in Law Number 35 of 2009 concerning Narcotics in general, provides for criminal penalties by judges. It tends to prioritize criminal sanctions if they commensurate with the actions of the perpetrators, with the aim that the perpetrators do not repeat their actions. This paradigm is certainly not suitable when dealing with crimes involving drug abuse, because the narcotics abuser themselves is also a victim. This research uses a statutory approach because it is included in normative legal research where the approach to criminal law legislation and especially narcotics legislation is used as one of the legal research approaches. This result of the research shows that (1) The policy of implementing criminal sanctions for drug users that are not related to narcotics networks in the current legislation cannot be separated from the criminal system adopted by the legal system in Indonesia. (2) Arrangements for the implementation of criminal sanctions against narcotics users who are not related to the narcotics distribution network according to the current law are not based on the value of justice. This can be seen from Law Number 35 of 2009 concerning Narcotics which still causes multiple interpretations or ambiguities in its application, especially to Article 112 and Article 127 of the Narcotics Law. (3) The ideal reconstruction of the formulation in the implementation of criminal sanctions against narcotics users based on the values of justice is by changing the formulation of Article 111 paragraph (1) and 112 paragraph (1) and Article 103 paragraph (1).

Keywords: Reconstruction, Narcotic Abuser, Justice Value.

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INTRODUCTION

In Indonesia, The replacement of colonial laws (Dutch heritage) with national laws (legal reform) in the context of building a national legal system oriented to the Pancasila legal philosophy is urgently needed. Pancasila serves as a frame of reference both for managing personal life and in interacting between humans in society and their surroundings. Pancasila values have become very relevant to build Indonesian legal identity. Likewise in the realm of criminal law, the Criminal Code (*Wetboek van Strafrecht voor Nederlands Indie*, hereinafter abbreviated as W.v.N.I. or W.v.S. (KUHP)) is still in effect [1]. This law comes from the French Criminal Code which was made in 1791 AD. This Criminal Code (W.v.S) that is still used in Indonesia is now about 3 centuries old. When viewed from its outdated law and different cultural communities between the Indonesian people and France or Netherlands community, there are different historical backgrounds accompanied by differences in values

between the two cultures (cultures) of this nation. Considering that the rules regarding fines and imprisonment are still based on the Criminal Code known as a legal product of Dutch colonialism, which has been revised even in its home country. This could pose problems as the philosophical values contained inside are not the basic values of the Indonesian nation, namely the values contained in Pancasila.

In this era, many teenagers use illegal drugs called Narcotics. Drug abuse is not only detrimental to the user but also to society and the environment. Law Number 35 of 2009 concerning Narcotics as the legal basis for the provisions of the laws and regulations governing Narcotics has been compiled and implemented, however, this crime related to Narcotics cannot be compromised. In common, the imposition of a crime by judges tends to be more of a criminal sanction if it is commensurate with the actions of the perpetrators, with the aim that the perpetrators do not repeat their actions. This paradigm is certainly not

suitable when dealing with crimes related to Narcotics as in Narcotics, the perpetrator (addict) is also a "Perpetrator who becomes a victim" [2], as a result of drug addiction.

This problem stems from The implementation of the Head of the National Anti Narcotics Agency Regulation No. 11 of 2014 that has not produced good results. Law enforcement officials prefer prosecution of imprisonment over the application of medical and social rehabilitation to drug users. For example, this can be seen from the directory of the Yogyakarta District Court in 2016 where there are 23 cases of drug users who were sentenced to prison and only 5 cases of drug users who were medically rehabilitated. Determining whether or not medical rehabilitation can be made in the criminal decision is seen from the results of the examination as well as the considerations of the city's Regional National Narcotics Agency (BNN)'s integrated assessment team that they gave to the examining judges.

The lack of clarity in the qualification of the types of offenses is a problem because the penalties for narcotics users and dealers should be different. If not, this can be a matter in law enforcement, such as not being able to carry out medical rehabilitation and social rehabilitation for narcotics users.

In addition, there are differences in legal action between narcotics users who have the initiative to report themselves to then request rehabilitation to BNN, and narcotics users who are caught using narcotics for themselves by the BNN. Narcotics users who report themselves and wish to carry out medical rehabilitation and social rehabilitation to the National Anti Narcotics Agency are not subjected to imprisonment as regulated in Articles 55 and 128 of the Narcotics Law. However, it is different with narcotics users who are caught using narcotics for themselves, as they can be threatened with imprisonment as regulated in Articles 111, 112, and Article 127 paragraph (1) of Law Number 35 of 2009 concerning Narcotics and can't obtain medical rehabilitation and social rehabilitation.

These differences cause a problem when law enforcement officers view all narcotics users as narcotics abusers involved in narcotics crimes [3]. Narcotics abusers are divided into two, namely narcotics dealers and narcotics users, consisting of narcotics addicts and victims of narcotics abusers.

Narcotics users are people who use narcotics for themselves against the law. Narcotics users can also be linked to drug trafficking networks. Therefore, law enforcement must be careful in determining which narcotics users are related to narcotics networks and which are not related to qualifying for appropriate legal action, and to do this, a criminal law policy as part of social policy in achieving public welfare is needed [4]

because if the narcotics criminal law policy has caused ineffectiveness it can be said as an indication that the narcotics criminal law policy is not integrated with social policy and there are errors in the formulation of the criminal law.

This necessity to clarify the form of action of narcotics users who are not involved in narcotics trafficking in the narcotics legislation in Indonesia. Is the act of a narcotics user worthy of being called a criminal offense or is it just an administrative violation. Seeing these conditions, Law No. 35 of 2009 concerning Narcotics should be reviewed again.

These problems are what urges the author to study it further in research with the main problem as follows:

1. How is the analysis of the regulation of criminal sanctions for narcotics users who are not related to the current circulation of narcotics?
2. Why is the regulation of criminal sanctions against narcotics users who are not related to narcotics trafficking currently isn't based on the values of justice?
3. What is the ideal construction of the formulation of criminal sanctions regulations against narcotics users who are not related to the distribution of narcotics based on the values of justice?

METHOD OF RESEARCH

The paradigm used in this study is the constructivism paradigm because this research purpose is to produce a new thought or idea and theory regarding the regulation of criminal sanctions against narcotics users according to Law No. 35 of 2009 based on the values of justice. This research uses a statutory approach. The statutory approach was chosen because, in addition to this type of research, it is included in normative legal research where the approach to criminal law legislation and especially narcotics legislation is used as one of the legal research approaches [5].

RESEARCH RESULT AND DISCUSSION

1. Analysis of the regulation of criminal sanctions for narcotics users who are not related to the current circulation of narcotics

In the legal system in Indonesia, narcotics abuse is qualified as a crime in the narcotics sector which is regulated in Law no. 35 of 2009 concerning Narcotics.

Based on Article 127 of the Narcotics Law, regulates three matters relating to narcotics crimes as follows:

- a. Acts constituting a narcotics crime, namely without rights or against the law (without going through the supervision of a doctor) using narcotics class I is punishable by 4 years in prison, class II is threatened with 2 years in prison and or class III is threatened with 1 year in prison.

- b. In deciding a case, the judge must pay attention to the provisions of articles 54, 55, and 103.
- c. If the abuse as referred to in paragraph (1) can be proven or has been proven to be a victim of narcotics abuse, the abuser is obliged to undergo medical and social rehabilitation.

As seen in Article 127 of the Narcotics Law above, the first thing that needs to be discussed is the "act" that can be categorized as a criminal act. the perpetrator and the crime is a clause that is common and always exists in every criminal policy. However, this is not the case with the second and third matters, namely the necessity for criminals or perpetrators to undergo rehabilitation before serving a sentence, in which the rehabilitation period will be counted as a period of serving a sentence.

What is meant by the second and third things above is a criminal offense using narcotics who has been sentenced to prison by the judge, because he or she who suffers from dependence can serve his prison sentence outside the correctional institution.

The qualifications for narcotics abusers for themselves which are a type of crime without victims are different from other types of qualifications that are categorized as narcotics crimes such as dealers, importers, exporters, carriers, sellers, producers, and other types of actions.

In principle, narcotics abusers for themselves are guaranteed to get rehabilitation, but in Article 127 of Law No. 35 of 2009 concerning Narcotics, narcotics abusers also become subjects who can be convicted and may lose their rehabilitation rights, unless they can prove themselves as a narcotics victim. In the practice of the law in the field, the use of the norms of the article becomes more ambiguous, where even if a narcotics user is for himself is a victim of his actions, he is still subject to criminal sanctions as formulated in Article 127 which usually in the indictment also relates (including) Article 111 or Article 112 because it also fulfills the elements in the norm of the article.

By looking at the provisions of these norms, it can be seen that in principle, narcotics abusers for themselves are subject to criminal sanctions as regulated in Article 127 and the provisions of the norms Article 103 stipulates that a judge "can" decide to place the user to undergo rehabilitation where the rehabilitation period is also calculated as a period of punishment commonly known as the Double Track System.

The application of legal sanctions in the form of rehabilitation for addicts and users as perpetrators of narcotics abuse will certainly reduce the excess capacity of correctional institutions. For example, in the Jakarta Narcotics Correctional Institution (Lapas) which

throughout 2008 was filled with 2,582 people on average, whereas the prison's capacity was only 1,084 people. This excess housing capacity causes problems, including mental health disorders, sexual behavior deviations, disease transmission, crime transmission and acts of violence, the emergence of a slum environment, and the low quality of service to prisoners. In addition, it can reduce the illicit circulation of narcotics itself, because the chain of circulation is broken.

Because of that, the juridical framework that already exists in Law no. 35 of 2009 should be used by judges in deciding narcotics addicts and users, namely Article 127 of Law no. 22 of 1997 concerning Narcotics. Placing narcotics abusers/users into rehabilitation institutions through a judge's decision is an excellent alternative for providing criminal sanctions in the context of the deferent aspect and reformatory aspect of the perpetrators of narcotics abuse and overcoming the illicit trafficking of narcotics compared to applying the perpetrators to imprisonment. Rehabilitation is intended so that users/addicts of illicit trafficking of narcotics are free from their dependence on narcotics.

After the narcotics law has been in effect for more than 12 years, the Supreme Court (MA) issued a circular letter to guide judges, namely Supreme Court's Circular Number 04 of 2010 concerning Placement of Abuse, Victims of Abuse, and Narcotics Addicts into Rehabilitation Institutions. Medical and Social Rehabilitation which is a revision of the Circular Letter of the Supreme Court Number 07 of 2009. Of course, this Circular of the Supreme Court is a step forward in building the paradigm of stopping criminalization or decriminalization of narcotics addicts. Imprisonment for narcotics abusers proved unable to reduce the number of narcotics abusers.

Narcotics abusers for themselves should be positioned as sick people who need treatment and recovery as a result of the negative effects of the abuse of narcotics they use (victims whose rights should be protected as victims) [6]. So that the sanctions that should be applied specifically to narcotics abusers for themselves without being accompanied by other major criminal qualifications are a type of sanction that can restore the situation to its original state, namely in the form of an action sanction. Based on the purpose of punishment, especially that which is relative (deterrence), it is seen that the punishment is aimed at the days to come, namely, to educate those who have done bad things to be good again and sick people, in this case, people who are addicted to narcotics, get better, or free from dependence on drugs [7]. On the other hand, if a narcotics abuser himself uses the narcotic substance, where he is a sick person (dependence on drugs) then it is not appropriate to be responsible for it with imprisonment but must be in the

form of an action that can cure him so that he is free from dependence on these substances and can recover back to society.

2. Analysis of justice value in the regulation of criminal sanctions against drug users that are not related to the circulation of narcotics according to current law

Regarding legal certainty and justice for drug abusers, it has always been a debate as there is a discourse that states that narcotics abusers should be given criminal sanctions in prison. While some state that a user is a victim who needs treatment to return to normal.

The humanistic approach in policy or criminal law reform is seen in Sudarto's opinion which states that: "*as a consequence of the idea of criminal individualization, the criminal system in modern criminal law is in turn oriented towards perpetrators and actions. The types of sanctions that are set include not only criminal sanctions but also action sanctions. This recognition of the equality between criminal sanctions and action sanctions is the basic essence of the double-track system concept*" [8].

The Double-track system is both criminal sanctions and action sanctions. This two-track system stipulates the two types of sanctions on an equal footing. The emphasis on the equality of criminal sanctions and action sanctions within the framework of the double-track system is related to the fact that the elements of reproach/suffering (through criminal sanctions) and elements of coaching (through action sanctions) are equally important, as the criminal sanctions imposed on narcotics addicts as self-victimizing victims are in the form of serving a sentence in prison, while the sanctions for actions given to narcotics addicts as victims are in the form of treatment and/or care provided in the form of rehabilitation facilities.

The importance of implementing rehabilitation for narcotics abusers is that the treatment of addicts will reduce the excess capacity of correctional institutions, besides being able to reduce the illicit trafficking of narcotics, the juridical framework that already exists in Article 54 of the Narcotics Law as the basis for judges can also decide that narcotics addicts and victims of narcotics abuse are obliged to undergo medical rehabilitation and social rehabilitation. However, rehabilitation is an action sanction given to narcotics abusers but does not eliminate the elements of the criminal act.

Placement of addicts and victims of narcotics abusers into rehabilitation institutions is under the purpose of the Narcotics Law, namely Article 4 letter d which states to ensure the regulation of medical and social rehabilitation efforts for narcotics abusers and

addicts. In addition, Article 127 with due observance of Articles 54, 55, and 103 of the Narcotics Law can be used as a guide for making rehabilitation decisions for narcotics addicts and abusers.

In Article 38 of Law Number 35 of 2009 concerning Narcotics, it is stipulated that every Narcotics distribution activity must be accompanied by legal documents. Narcotics addicts and abusers without legal documents or permission from the authorities are qualified to be carried out without rights or unlawful because they are contrary to article 38.

This is related to the element is possessing, storing, controlling, or providing Narcotics Category I. This element consists of several sub-elements that are alternative, meaning that one of these sub-elements must be proven and if one of these sub-elements is proven then the elements of this Article are declared to have been proven and other sub-elements do not need to be proven again.

Next, the element regarding the rules of punishment. The punishment for acts committed for violating Article 112 paragraph (1) is imprisonment for a minimum of 4 (four) years and a maximum of 12 (twelve) years and a minimum fine of Rp.800,000,000.00 (eight hundred million rupiahs) and a maximum of Rp. 8,000,000,000.00 (eight billion rupiah). In the formulation of this punishment, the word "and" is used, which means that it is possible to impose a cumulative penalty. This means that if found guilty of violating the provisions of this article, the perpetrator must be sentenced to imprisonment and a fine, both of which are 2 (two) main types of crime [9].

Article 112 and Article 127 of the Narcotics Law in addition to causing multiple interpretations, also create legal uncertainty that has an impact on justice, especially for narcotics users in its application. The basis of the theory of legal certainty and the rule of law is the origin of the legality as stated in Article 1 Paragraph (1) of the Criminal Code. The article states that no act can be punished unless it has been regulated in advance in the applicable legislation.

3. The ideal construction of the formulation of criminal sanctions regulations against narcotics users who are not related to the distribution of narcotics based on the values of justice

Citing Lamintang's opinion, the formulation of a crime must explicitly contain two elements, namely the subjective element (*mens rea*) and the objective element (*actus reus*). *Mens rea* is an element that attaches or is related to the perpetrator's self and includes everything that contains in his heart. While what is meant by *actus reus* is an element that has to do with the perpetrator's action, including the circumstances in which the perpetrator's action was carried out [10].

The use of Article 112 and Article 127 of the Narcotics Law has created legal uncertainty so that the purpose of the law itself is not fully achieved. This is because, many perpetrators of narcotics crimes are charged with Article 127 of the Narcotics Law, which should be the article for narcotics abusers. There are several alternative formulation policies for Article 112 and Article 127 of the Narcotics Law, namely: by changing Article 112 and Article 127 of the Narcotics Law. The amendment is sufficient to add the elements of the article contained in Article 112 with the element of selling, circulating. With this change, every narcotics criminal cannot hide as a narcotics abuser. This change is necessary to prevent every perpetrator of narcotics crime from escaping the law. With these changes, the legal certainty in Article 112 and Article 127 of the Narcotics Law can be fulfilled as described in the previous sub-chapter.

Law 35/2009 on narcotics, does not explicitly mention the decriminalization of narcotics abusers, but rather the decriminalization of narcotics abusers is constructed in the legal and political policies of state law as enshrined in several Articles of Law 35 of the year 2009 concerning Narcotics. The first reconstruction is regarding the purpose of the enactment of Law Number 35 of 2009 concerning Narcotics is stated in Article 4, especially letters b and d, where the purpose of the Narcotics Law is to:

- a. Prevent, protect and save the Indonesian people from narcotics abuse
- b. Guarantee the arrangement of medical and social rehabilitation efforts for narcotics abusers and addicts

In the second construction, the abuser is threatened with a light sentence specifically against the abuser for himself with a maximum sentence of 4 years, and the abuser who has become an addict is threatened with 6 months in prison. This construction contradicts the general criminal understanding. In general criminal offenses repeat offenders/recidivist punishment is increased by 1/3. Meanwhile, under the Narcotics Law, repeated abusers/addicts are sentenced to be rehabilitated.

In the third reconstruction, the abuser is threatened with a light criminal sentence. Formally, it does not meet the requirements for detention under Article 21 of the Criminal Procedure Code and cannot be injected or linked to the dealer article because it is contrary to the purpose of the Act (first reconstruction). As a way out to ensure that abusers are rehabilitated, investigators, public prosecutors, and judges are given the authority to place them in the Rehabilitation Institute as an alternative to detention as stated in PP No. 25 of 2011 Article 13 letter 4.

The Fourth reconstruction is needed so that judges are given the authority to decide and determine rehabilitation sentences whether proven guilty or not proven guilty of abusers and in a state of dependence (addicts case). The rehabilitation penalty is the same as imprisonment for abusers and in a state of dependence (Article 103).

In the Fifth reconstruction, addicts are narcotics abusers and are in a state of narcotic dependence both physically and psychologically (article 1 point 13). The abuser is threatened with a maximum sentence of 4 years (article 127) which means that the abuser is categorized as an addict and must be rehabilitated (article 54). To determine the role of the suspect as a pure abuser or not, and to determine the level of his narcotic dependence, the suspect must be requested for a medical report/assessment. After having a medical report or being assessed if his role as a narcotics abuser and in a state of dependence is called a narcotics addict, the suspect in being responsible for the criminal process does not meet the requirements for detention as stated in Article 21 of the Criminal Procedure Code.

In the sixth reconstruction, parents or guardians of addicts who are under age are required to report to get rehabilitation, while narcotics addicts with legal age are required to report themselves to get rehabilitation (article 55). Narcotics addicts who have followed the mandatory reporting are not criminally charged (article 128).

The desired impact from the implementation of decriminalization of narcotics abusers is the emergence of the desire of people whose families have become routine abusers or addicts to heal themselves voluntarily or independently and fulfill their obligations as regulated in Law no. 35 of 2009 to report themselves voluntarily to the Reporting Recipient Institution (IPWL) to receive treatment and not be criminally prosecuted (Article 128).

By observing developments in several countries, a new paradigm has emerged in viewing narcotics users/addicts who are no longer viewed as evil behavior (criminals) but as people with chronic diseases who must receive treatment and recovery gradually. In other words, this paradigm leads to efforts to decriminalize narcotics users. The application of criminal law in the form of imprisonment for victims of narcotics users has proven unsuccessful the number of victims of narcotics users who are sentenced to imprisonment is increasing every year. This is what needs to be reviewed regarding the purpose and function of implementing criminal law for victims of narcotics users.

In Indonesia, such a pattern has not been applied, victims of narcotics users are still put in prison, although during the detention process they are allowed to be rehabilitated, it has not become an effective solution.

CONCLUSION

1. The Analysis of the regulation of criminal sanctions for narcotics users that are not related to the circulation of narcotics shows that in the current legislation, it cannot be separated from the criminal system adopted by the legal system in Indonesia. Narcotics abusers for themselves are included in the typology of "self-victimizing victims". The most appropriate thing to give is a sanction of action and not imprisonment. In principle, narcotics abusers for themselves are guaranteed rehabilitation, but in Article 127 of Law No. 35 of 2009 concerning Narcotics, narcotics abusers also become subjects of convicts, unless they can be proven to be narcotics victims. The use of the norms of the article becomes ambiguous where the narcotics user for himself is the victim of his actions but still subject to criminal sanctions as formulated in Article 127 which usually in the indictment also links Article 111 or Article 112.
2. The regulation of criminal sanctions against narcotics users who are not related to the distribution of narcotics according to the current law is not based on the value of justice as Law Number 35 of 2009 concerning Narcotics still causes multiple interpretations or ambiguities in its application, especially to Article 112 and Article 127 of the Narcotics Law. Article 112 and Article 127 of the Narcotics Law are causing multiple interpretations and create legal uncertainty that impacts injustice. For this reason, there are clear legal rules to achieve legal certainty and justice and consistency of the legal structures is needed in the application of the law. In Article 112 of the Narcotics Law, law enforcers must be consistent that the article is used for narcotics criminals only, not for narcotics abusers. This inconsistency will result in the perpetrators of criminal acts applying articles for narcotics abusers and injustice for victims of narcotics abusers. In addition, although the positive law of narcotics crime currently adheres to the Double Track System where judges can decide narcotics abusers to be sentenced to prison or placed in rehabilitation places. therefore, the sentence of rehabilitation is still relatively rare. Most narcotics abusers were sentenced to prison even though the provisions of the Narcotics Law had guaranteed rehabilitation efforts, both medical rehabilitation and social rehabilitation as stipulated in Article 54, Article 56, Article 103, and Article 127 of the Narcotics Law.
3. The ideal reconstruction of the formulation in the regulation of criminal sanctions against narcotics users who are not related to the narcotics

distribution network based on the values of justice, namely by changing the formulation of Article 111 paragraph (1) and 112 paragraph (1). First, the provisions of Article 111 paragraph (1) which initially reads: "*Everyone who without rights or against the law plant, maintain, possess, store, control, or provide Narcotics Category I in the form of plants, shall be punished with imprisonment ...*" later changed in to "*Everyone who without rights or against the law plant, maintain, possess, store, control, or provide Narcotics Category I in the form of plants, with the intention of being transferred to another person shall be punished with imprisonment ...*". Second, the provisions of Article 112 paragraph (1) which initially reads: "*Everyone who without rights or against the law owns, keeps, controls, or provides Narcotics Category I which is not a plant, shall be sentenced to imprisonment...*" need to be changed to: "*Everyone who without rights or against the law owns, keeps, controls, or provides Narcotics Category I which is not a plant, with the intention of being transferred to another person, shall be punished with imprisonment...*" The addition of the sentence "*with the intention of being transferred to another person*" basically serves to distinguish the meaning of the actions of a person who owns, keeps, controls, or provides for later use for himself with someone who owns, keeps, controls, or provides narcotics to be later transferred, either by selling, giving, or by other means of transfer aimed at others. then the word "*can*" in Article 103 paragraph (1) of the Narcotics Law is changed to "*mandatory*" according to article 54, this aims to firmly mandate law enforcement that addicts and victims of narcotics abuse are obliged to undergo medical rehabilitation and social rehabilitation.

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