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LEGAL DISCOVERY OF JUDGES IN THE CRIMINAL CASES OF NARCOTIC ABUSE BASED ON LAW NUMBER 35 OF 2009

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ABSTRACT

Indonesia is a state based on law which is governed by a just law. This commitment is contained in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states that Indonesia is a constitutional state. Some critical principles of the state of law is the existence of an independent and impartial judiciary and the supremacy of law that contains the principle of equality before the law and the principle of legality (due process of law). In accordance with the principle of a rule of law, Article 24 of the 1945 Constitution of the Republic of Indonesia affirms that the judicial power is an independent power to administer justice to enforce law and justice. Independent judicial powers are described in Article 3 of Law Number 48 of 2009 concerning the Judicial Power (Undang-Undang Kekuasaan Kehakiman/UUKK), namely that in carrying out their duties and functions, judges are obliged to maintain the independence of the judiciary. Other parties outside the judicial power are prohibited from interfering in judicial affairs. The rule of law also requires the principle of legality in all forms, namely that prohibited acts must be formulated in statutory regulations and these regulations must exist before the prohibited act is committed. Article 6 paragraph (2) UUKK states that no one can be brought before the court, unless the law provides otherwise. The principle of legality in criminal law is regulated in Article 1 paragraph (1) of the Criminal Code (Kitab Undang-undang Hukum Pidana/KUHP), which states that an act cannot be punished, except based on the strength of the existing criminal legislation. However, in the face of a concrete case that he/she is confronted with, a judge must make a decision based on law and justice. Law and justice have a broader meaning than statutory regulations. Article 5 Paragraph (1) of UUKK explains that judges are obliged to explore, follow, and understand legal values and a sense of justice that lives in society. This provision emphasizes that judges are not the mouthpiece of the law; they have the obligation to provide a sense of justice to the community. Judges should not be trapped in a vacuum if there is no law, the law is unclear or does not match the value of justice. This study seeks to examine how judges make or discover their legal decisions on criminal cases of narcotics abuse. It argues that in adjudicating criminal cases of the use of narcotics, judges need to find the law, because from the perspective of legism or legal

positivism, Law Number 35 of 2009 concerning Narcotics is unable to provide justice for narcotics abusers for their own use. Narcotics abusers can be subject to criminal sanctions using the article on illicit narcotics trafficking as referred to in Article 111 Paragraph (1), Article 112 Paragraph (1) and Article 114 Paragraph (1) of Law Number 35 Year 2009 concerning Narcotics. The narcotics abuser for their own use should be punished in accordance with Article 127 Paragraph (1) letter a of Law Number 35 Year 2009 concerning Narcotics.

BACKGROUND

A rule-based or constitutional state is a state ruled by a just law. The formulation of a rule of law is stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states that Indonesia is a state based on law. The statement also emphasizes that the law is the highest guideline in the country. Some critical principles of the state of law is the existence of an independent and impartial judiciary and the supremacy of law that contains the principle of equality before the law and the principle of legality (due process of law).

In accordance with the principles of a rule of law, Article 24 of the 1945 Constitution of the Republic of Indonesia affirms that the power of Justice is an independent power to administer the judiciary in order to uphold law and justice. Independent judicial powers are described in Article 3 of Law Number 48 of 2009 concerning Judicial Power (UUKK), namely that in carrying out their duties and functions, judges are obliged to maintain the independence of the judiciary. Other parties outside the judicial authority are prohibited from interfering in judicial affairs.

The purpose of regulating and enforcing the principle of an independent judicial power is not aimed at the perpetrators of the judicial power, let alone the judges as individuals. The aim of an independent judicial power is to protect the public, especially those seeking justice. (Dahlan, 2017) As stated in the *Beijing Statement*, it is the duty of the court to respect and pay attention to the goals and functions of other government institutions, on the other hand, it is the duty of these institutions to respect and pay attention to the objectives and functions of the court. The objectives and functions of the courts are to ensure that all people can live safely in the rule of law, promoting the adherence and protection of human rights.[1] The purpose and function of the court is a form of legal supremacy.

In a law-based state the law has the highest power in a country. The state must obey and obey the law. In a modern legal state, the rule of law refers to "*the rule of law and not of man"* (the law that actually governs a country, not the will of man). Thus the rule-based state is identical to *the rule of law*. (Friedmann, 1960) Normative recognition of the rule of law is reflected in the formulation of legal texts, while empirical recognition is seen in the behavior of people who view law as the highest guideline in social life.

Equality before the law is one of the pillars of upholding a rule of law. Everyone should be treated equally in a court of law and justice, as set out in Article 4 paragraph (1) UUKK, that trials were prosecuted by law to not discriminate between people. Equality before law exists in laws and regulations that are not discriminatory. The rule of law requires the enforcement of the legality principle in all forms, namely that prohibited acts must be formulated in statutory regulations and these regulations must exist before the prohibited act is committed. Article 6 paragraph (2) UUKK states that no one can be brought before the court, unless the law provides otherwise. The principle of legality in criminal law is regulated in Article 1 paragraph (1) of the Criminal Code (KUHP), which states that an act cannot be punished, except based on the strength of existing criminal legislation.

[1]*The Beijing Statement of Principle of the Independence of the Judiciary in the Law in Asia Region*, which was agreed upon at the 6th Conference of Chiefs of the Supreme Court of Asia Pacific in Beijing on 19 August 1995 as amended at the 7th Conference in Manila, August 28, 1997, Article 5 and Article 10.

In dealing with the concrete cases he/she faces, judges make decisions based on law and justice. Law and justice have a broader meaning than statutory regulations, Article 5 paragraph (1) UUKK explains that the judiciary is obliged to explore, follow, and understand the legal values and the sense of justice that live in society. This provision emphasizes that judges are not the mouthpiece of the law; they have the obligation to provide a sense of justice to the community.

Gustav Radbruch, a German philosopher, introduced three basic values of law, namely: justice, legal certainty, and expediency. Justice, certainty, and expediency are axiological values in the philosophy of law. Although these three values are basic legal values, each value has different demands from one another, so that the three of them have the potential to conflict with each other and cause tension between the three values. (Arief, 2010)

Justice is the most difficult aspect of axiology to explain. The enactment of a law in a philosophical manner is always measured by the value of justice it contains. Laws without the value of justice will be abandoned and not obeyed by society. In imposing a decision, judges are obliged to seek and find justice in statutory regulations. Legal reasoning is an important part for judges in making decisions. In the perspective of ideal legal goals, legal reasoning can realize legal objectives in a proportional manner, namely justice, certainty, and expediency. (Hooft, 2010)

In imposing criminal decisions against narcotics abusers, judges have different methods of legal discovery. As in the cassation decision Number 453 K / PID.SUS.2017, the Defendant was charged by the Public Prosecutor at the Tanjung Perak District Prosecutor's Office with alternative charges. In the first indictment, the Defendant's actions were regulated and threatened with funds in Article 112 Paragraph (1) of Law Number 35 Year 2009 concerning Narcotics. In the subsidiary indictment, the Defendant's actions are regulated and subject to punishment in Article 127 Paragraph (1) of the Republic of Indonesia Law Number 35 of 2009 concerning Narcotics. In the more subsidiary indictment, the Defendant's actions are regulated and subject to punishment in Article 127 Paragraph (1) letter a of Law Number 35 Year 2009 concerning Narcotics. Based on the facts revealed in the trial, the Public Prosecutor demanded the Defendant to legally and convincingly declare the Defendant guilty of a criminal act as regulated in Article 112 Paragraph (1) of Law Number 35 Year 2009 concerning Narcotics. Sentenced the defendant to an imprisonment of 7 (seven) years and 6 (six) months and a fine of Rp. 800,000,000.00 (eight hundred million rupiah) subsidiary 6 (six) months imprisonment minus the length of time the Defendant is temporarily detained with orders that the defendant remains detained.

The judge at the Surabaya District Court who examined the case stated that the Defendant was legally and convincingly proven guilty of committing a criminal act without rights and against the law of buying and possessing narcotics class I in non-plant form. Imposing a punishment to the Defendant is therefore punishable by imprisonment of 5 (five) years and a fine of Rp. 800,000,000 (eight hundred million rupiah) provided that if the fine is not paid, it will be subject to imprisonment for 6 (six) months.

Against the decision of the Surabaya District Court, the Defendant and the Public Prosecutor filed an appeal. The Surabaya High Court, which examined the appeal case, prevented the verdict from strengthening the decision of the Surabaya District Court. The Surabaya High Court found the Defendant legally and convincingly proven guilty of committing a criminal act without rights and against the law of buying and possessing narcotics class I in non- plant form. Imposing a punishment to the Defendant is therefore punishable by imprisonment of 5 (five) years and a fine of Rp. 800,000,000

(eight hundred million rupiah) provided that if the fine is not paid, it will be subject to imprisonment for 6 (six) months.

Based on the decision of the Surabaya High Court, the Defendant filed an appeal to the Supreme Court. At the cassation level, the Supreme Court ruled that the Defendant was legally and convincingly proven guilty of committing no criminal abuse of narcotics class I for himself as referred to in Article 127 Paragraph (1) letter a of Law Number 35 of 2009 concerning Narcotics so as to impose punishment to the Defendant with imprisonment of 2 (two) years. In the deliberation of the Supreme Court of Justice, there was a difference of opinion (Dissenting Opinion) from the Chairman of the Panel who examined the case, namely the Chief Justice Dr. H. Suhadi SH, MH, who is of the opinion that the Defendant's actions violate Article 112 Paragraph (1) of Law Number 35 Year 2009 concerning Narcotics.

Based on the example above, the *Judex Facti* of the Surabaya District Court and the Surabaya High Court made different decisions from the Supreme Court, even in the cassation decision there was a *dissenting opinion*. This difference is influenced by the method of legal discovery of each judge in making his/her decision. In this study, we will analyze how legal findings by judges in making decisions on cases of narcotics abusers based on Law Number 35 of 2009 concerning Narcotics.

FORMULATION OF THE PROBLEM

This study seeks to examine how did judges make their legal decisions on the criminal offense of narcotics abusers based on Law Number 35 of 2009 concerning Narcotics?

RESEARCH PURPOSE

This study is aimed at researching and analyzing methods of legal discovery of judges in making decisions against narcotics abusers based on Law Number 35 of 2009 concerning Narcotics.

USEFULNESS OF RESEARCH

Theoretically, the results of this study are expected to contribute to knowledge in the field of law, especially in relation to the methods of law discovery by judges. Practically, the results of this study are expected to provide additional references for judges and other law enforcers in making decisions against narcotics abusers.

RESEARCH METHODS

This study is a normative legal research. Peter Mahmud Marzuki explains that the objects and legal materials of research can be divided into two, namely primary legal materials and secondary legal materials. Primary legal materials are legal materials that are authoritative in nature, meaning they have authority. Primary legal materials consist of the Prevailing Law and judges' decisions. Meanwhile, secondary materials take the form of all legal publications which are not official documents. Publications on law include text books, legal dictionaries, legal journals, and commentaries on court decisions. (Peter, 2006). In relation to this legal research, the object of this research is focused on the problem of narcotics abusers, namely primary legal materials in the form of judges' decisions. For understanding the problem of narcotics abusers in a comprehensive manner, a decision will be taken, namely the cassation decision Number 453 K / PID.SUS. 2017.

DISCUSSION

According to Montesquieu, there are three forms of state and each country has a legal invention that is suitable for each country. First, in a *despotique etat* where there is no statute, and judges adjudicate each individual event based on their personal appreciation by the arbitrator so that legal discovery occurs in an "absolute autonomy". Second, in a *etat republikcain*, there are heteronomous legal findings in which judges applies the law

according to how they sound. Third, in an *etat monarchique*, although judges act as a mouthpiece for the law, they can interpret it by seeking their spirit. Of the three forms of legal discovery, there are autonomous and heteronomous legal discovery systems (Rodrigo, 2014).

There are two schools of thought in legal science that are related to legal discovery made by judges, namely the school of legism/positivism and the school of legal discovery by judges. The legism school emphasizes that the essence of law is written law (statute), so that it seems that this legism school glorifies written law. This school also assumes that there are no legal norms outside of written laws; all societal problems are regulated in written laws. This view that glorifies written laws is an exaggerated view of the power that creates written laws, so that it means that power is the source of law and power is law. (Pantang, 2005) The view of legism is increasingly being abandoned because it is realized that laws are never complete and are not always clear because after all laws cannot possibly keep up with the needs of the times.

The school of legal discovery by judges was interpreted by Paul Scholten as something other than just the application of rules to events. In other words, the regulations must be found, either by way of interpretation or by way of analogy or *rechsvervijning* (narrowing/concreting the law). (Achmad, 1993) Judges' discovery of the law in adjudicating a case is considered to give them authority. Legal scientists also make legal discoveries. The difference is that legal discoveries by judges are law while legal discoveries by legal scientists are not law but science or doctrine. Doctrines that are followed and taken over by judges in their decision becomes law, therefore doctrines are not law but a source of law. (Sudikno, 1993)

In the Indonesian legal system, in examining, hearing, and deciding a case, judges must use the written law as the basis for their decision. If the written law is not clear or does not exist, judges need to seek and find the law. As referred to in Article 10 Paragraph (1) of Law No. 48 of 2009 concerning the Judicial Power, courts are prohibited from refusing to examine, try and decide a case filed on the pretext that the law does not exist or is unclear, and are obliged to examine and judge it. Apart from that, in Article 5 Paragraph (1) of Law No. 48 of 2009 concerning Judicial Power also explains that Judges and Constitutional Justices are obliged to explore, follow and understand the values of law and the sense of justice that live in society. Thus, judges may not refuse to examine, try and decide a case on the grounds that the law does not exist or are unclear, but judges are obliged to explore, follow and understand the legal values and the sense of justice that live in society. For this reason, a judge must have the ability to make legal discovery (*Recht vinding*).

Legal discovery is the process of forming a law by judges or other legal officers who are assigned the task of implementing the law on concrete legal events. It can be said that legal discovery is a process of concretization or individualization of legal regulations (*das Sollen*) which are general in nature by remembering concrete events (*das Sein*). (Sudikno, 2014) Legal discoveries are made because the law is incomplete or unclear, and judges must seek the law and must find the law (*rechtsvinding*). The theory of legal discovery answers questions about the interpretation of laws. Basically, everyone can find law, but legal discoveries made by judges are law, while legal discoveries made by people are doctrines. In legal science, doctrines are not law but a source of law. (Sudikno, 2014).

Laws are formed with the aim of protecting human interests. Therefore, it must be followed, and sanctions are imposed for those who violate them. Legislation that is unclear, incomplete, and unable to keep up with the development of society creates an empty space that must be filled by judges by finding the law through interpretation to discover the soul or spirit of statutory regulations. The discovery of law

by judges is not only applying laws and regulations to concrete events, but also creating and shaping the laws at once (Ahmad Rifai, 2010).

Based on Article 4 of Law Number 35 Year 2009 concerning Narcotics, this Law aims to (1) guarantee the availability of Narcotics for the benefit of health services and/or the development of science and technology; (2) prevent, protect and save the Indonesian nation from abuse of Narcotics; (3) eradicate the illicit trafficking of Narcotics and Narcotics Precursors; and (4) guarantee the arrangement of medical and social rehabilitation efforts for Narcotics abusers and addicts.

The definition of narcotics abuser is contained in Article 1 point 15 of Law Number 35 of 2009 concerning Narcotics. According to this article, an abuser is a person who uses Narcotics without rights or against the law. Regulations for criminal sanctions for self-abuse are regulated in Article 127 of Law Number 35 of 2009 concerning Narcotics, namely, every abuser of (1) narcotics class I for himself shall be sentenced to imprisonment of a maximum of 4 (four) years; (2) Narcotics class II for themselves shall be punished with imprisonment of 2 (two) years; and (3) narcotics category III for themselves shall be punished with imprisonment of 1 (one) year. Judges in deciding cases of narcotics abusers for themselves as mentioned above are required to pay attention to the provisions referred to in Article 54, Article 55, and Article 103 of Law Number 35 of 2009 concerning Narcotics. In the event that the abuser can be proven or proven to be a victim of narcotics abuse, the abuser is obliged to undergo medical rehabilitation and social rehabilitation.

The application of criminal provisions against abusers cause problems in practice. The criminal provisions in Law Number 35 of 2009 concerning Narcotics are not sufficient to provide justice to narcotics abusers. Abusers of narcotics for their own use can be charged using the article that should be applied to people involved in the illicit trafficking of narcotics. The criminal provisions can be seen from Article 111 Paragraph (1), Article 112 Paragraph (2), and Article 114 Paragraph (1) of Law Number 35 Year 2009 concerning Narcotics.

Article 111 Paragraph (1) of Law Number 35 of 2009 concerning Narcotics states that every person without rights or against the law plants, maintains, owns, keeps, controls, or provides Narcotics Category I in the form of plants, shall be punished with imprisonment at the most a minimum of 4 (four) years and a maximum of 12 (twelve) years and a fine of at least Rp. 800,000,000.00 (eight hundred million rupiah) and a maximum of Rp. 8,000,000,000.00 (eight billion rupiah). Then Article 112 Paragraph (1) of Law Number 35 of 2009 concerning Narcotics explains that every person without rights or against the law owns, keeps, controls, or provides Narcotics Category I not plants, shall be punished with imprisonment of at least 4 (four) years and a maximum of 12 (twelve) years and a fine of at least Rp. 800,000,000.00 (eight hundred million rupiah) and a maximum of Rp. 8,000,000,000.00 (eight billion rupiah). Based on the criminal provisions contained in Article 112 Paragraph (1) of Law Number 35 of 2009 concerning Narcotics, the abuser of narcotics for himself has fulfilled the elements of a criminal act, this is because each class 1 abuser of narcotics is not a plant for himself. before using narcotics, it shall be preceded by owning, keeping, or controlling. Furthermore, Article 114 Paragraph (1) of Law Number 35 of 2009 concerning Narcotics states that every person without rights or against the law offers to sell, sell, buy, receive, become an intermediary in buying and selling, exchanging, or handing over Narcotics I shall be sentenced to life imprisonment or imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years and a fine of at least Rp1,000,000,000.00 (one billion rupiah) and a maximum of Rp.10,000,000. 000.00 (ten billion rupiah).

From the explanation above, the criminal provisions contained in Article 114 Paragraph (1), Article 112 Paragraph (1) and Article 114 Paragraph (1) of Law Number 35 Year

2009 concerning Narcotics are applied to narcotics abusers for their own use while they should be subject to criminal sanctions based on Article 127 Paragraph (1) of Law Number 35 of 2009 concerning Narcotics. It can be explained that before a person uses narcotics for himself, of course it is preceded by the act of buying, possessing, keeping or controlling the narcotics. Thus it is appropriate for narcotics abusers for their own use not to be subject to the criminal provisions contained in Article 114 Paragraph (1), Article 112 Paragraph (1) and Article 114 Paragraph (1) of Law Number 35 Year 2009 concerning Narcotics.

In the practice of law enforcement against abusers of narcotics for their own use, the Public Prosecutor often finds out that the Public Prosecutor accuses the Defendant using Article 111 Paragraph (1), Article 112 Paragraph (1) or Article 114 Paragraph (1) of Law of the Republic of Indonesia Number 35 of 2009 concerning Narcotics as an example of the case of cassation decision Number 453 K/PID.SUS.2017. In the indictment, the Prosecutor charged the defendant with Article 112 Paragraph (1) of Law Number 35 Year 2009 concerning Narcotics and *judex facti* The Surabaya District Court and the Surabaya High Court sentenced the Defendant to being found guilty of a criminal act as regulated in Article 112 Paragraph (1) Law Number 35 of 2009 concerning Narcotics. Subsequently, the Supreme Court overturned the decision and handed down a verdict on the Defendant based on Article 127 Paragraph (1) letter a of Law Number 35 of 2009 concerning Narcotics.

Based on the facts revealed at the trial, the Defendant was proven to have purchased methamphetamine/narcotics for Rp. 200,000.00 (two hundred thousand rupiah) from a friend for his own use. After buying the methamphetamine, the Defendant was arrested by the Police with the evidence of methamphetamine of 0.34 grams. The Supreme Court is of the opinion that in making a verdict against a defendant it is not justified to only look at his actions, but also from the intentions (*mens rea*) of the Defendant. Common sense suggests that before someone uses narcotics this must be preceded by buying or controlling the item. The Defendant's act of purchasing narcotics formally fulfilled the elements of a criminal act as regulated in Article 112 Paragraph (1) of Law Number 35 of 2009 concerning Narcotics. However, the purpose of the Defendant to purchase and control was to be used for himself as regulated in Article 127 Paragraph (1) letter a of Law Number 35 of 2009 concerning Narcotics.

CONCLUSIONS AND SUGGESTIONS

Conclusion

Judex facti of the District Court and High Court in making a decision against an accused drug abuser is based on the school of legism in accordance with the provisions of the laws and regulations, giving the value of legal certainty, while the *Judex Juris of the* Supreme Court in giving a verdict on narcotics abuser looks for and finds law in making a decision on the narcotics abusers provide values of benefits and justice.

Judex facti applies legal provisions against narcotics abusers based on Article 111 Paragraph (1) of Law Number 35 of 2009 concerning Narcotics, which explains that every person without rights or against the law plants, maintains, owns, keeps, controls, or provides Narcotics Category I in in the form of plants shall be punished with imprisonment for a minimum of 4 (four) years and a maximum of 12 (twelve) years and a fine of at least Rp. 800,000,000.00 (eight hundred million rupiah) and a maximum of Rp. 8,000,000,000.00 (eight billion rupiah). Then Article 112 Paragraph (1) of Law Number 35 of 2009 concerning Narcotics explains that every person without rights or against the law owns, keeps, controls, or provides Narcotics Category I not plants shall be punished with imprisonment of at least 4 (four) years and a maximum of 12 (twelve) years and a minimum fine of Rp. 800,000,000.00 (eight hundred million rupiah) and a maximum of Rp. 8,000,000,000.00 (eight billion rupiah). Furthermore, Article 114 Paragraph (1) of

Law Number 35 of 2009 concerning Narcotics states that any person without rights or against the law offers to sell, sell, buy, receive, become an intermediary in buying and selling, exchanging, or handing over Narcotics I shall be sentenced to life imprisonment or imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years and a fine of at least Rp1,000,000,000.00 (one billion rupiah) and a maximum of Rp.10,000,000. 000.00 (ten billion rupiah).

The most appropriate legal provisions for narcotics abusers are Article 127 of Law Number 35 of 2009 concerning Narcotics, namely, every abuser of (1) narcotics abuser for their own use of group I shall be sentenced to imprisonment of up to 4 (four) years; (2) Narcotics abusers for their own of class II shall be punished with imprisonment of 2 (two) years; and (3) narcotics abuses for their own use category III shall be punished with imprisonment of 1 (one) year. Judges in deciding cases of narcotics abusers for their own use as mentioned above are required to pay attention to the provisions referred to in Article 54, Article 55, and Article 103 of Law Number 35 of 2009 concerning Narcotics. In the event that the abusers can be proven or proven to be a victim of narcotics abuse, the abusers are obliged to undergo medical rehabilitation and social rehabilitation.

Suggestion

In the provisions of Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, it is clear that judges are obliged to explore, follow, and understand legal values and a sense of justice that lives in society. This confirms that judges are not only mouths of law; they also have the obligation to provide a sense of justice to the public by means of making legal discoveries.

Judges cannot be trapped in a vacuum if there is no law or the law is unclear. In a criminal case prosecuting drug use, judges need to discover the law of their interpretation because from the point of view of legisme or legal positivism, Law No. 35 Year 2009 on Narcotics are not able to give justice to abusers of narcotics for their own use. Narcotics abusers can be subject to criminal sanctions using the articles on illicit narcotics trafficking as referred to in Article 111 Paragraph (1), Article 112 Paragraph (1) and Article 114 Paragraph (1) of Law Number 35 Year 2009 concerning Narcotics, but the narcotics abusers for their own use should be punished in accordance with the provisions in Article 127 Paragraph (1) letter a of Law Number 35 Year 2009 concerning Narcotics.

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