

THE VAGUENESS OF THE NORM OF ENTRAPMENT IN DRUG OFFENSES BY LAW ENFORCEMENT OFFICERS IN THE FUTURE

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Abstract

Undercover buying and controlled delivery are investigative techniques regulated by Law Number 35 of 2009 concerning Narcotics. This provision does not regulate the limitations for investigators when carrying out this technique. In practice, this technique does not work effectively, resulting in the failure of the investigation. So this study discusses how the application of Undercover buying and controlled delivery current supervision and how the formulation of criminal law policies in dealing with cases of entrapment of narcotics crimes committed by law enforcement officers in the future. This study uses normative research. The research results show that First, there is a need for renewal of covert buying techniques and supervised delivery. This is because there are 3 (three) legal problems in its implementation, namely there are still informants who are involved in narcotics trafficking, closed access to public information regarding covert purchasing techniques and delivery under supervision by the National Narcotics Agency and the potential for fabrication of cases. Therefore, in the future it is necessary to have the right formulation to overcome this by implementing regulations and legal standards for investigating narcotics crimes.

Keywords: *Undercover Buying and Controlled Delivery, Narcotics, Entrapment*

1. INTRODUCTION

The handling of criminal offenses in Indonesia is fully regulated in Law Number 8 of 1981 concerning the Criminal Procedure Code. The handling of criminal offenses in the Criminal Procedure Code includes investigation, investigation, detention, submission of case files from the police to the prosecutor's office until the verdict of the court judge both at the first level and review. The handling of criminal cases starts from the investigation stage first after a report. A report is a notification submitted by a person due to rights or obligations to an authorized official about a criminal event that has occurred or is occurring or is suspected of occurring. (Kemal Demawan, 2015). From the report received by the police, if the report meets the requirements for an investigation, the investigation process can immediately begin. Article 1 Point 5 of the Criminal Procedure Code provides an understanding of the investigation that: "Investigation is a series of investigator's actions to seek and find an event suspected of being a criminal offense in order to determine whether or not an investigation can be carried out in the manner regulated in this law."

From this definition, the investigation stage can be interpreted as a stage to search and find whether the event suspected of being a criminal offense can be investigated. Article 1 Point 2 of the Criminal Procedure Code defines investigation as a series of investigator actions in the case and according to the method regulated in the Criminal Procedure Code to seek and collect evidence with which the evidence makes light of the criminal offense that occurred and to find the suspect. In handling criminal cases, the investigation stage is very important. It is this stage that determines that a person has been suspected of committing a criminal offense based on evidence that has been collected by the investigator. (Andi Sofyan, 2014).

The investigation process is regulated in Articles 106 to 136 of KUHP. In these provisions, the investigation includes reporting, examination, termination, administration of investigation and submission of investigation files. The handling of criminal acts regulated in the Criminal Procedure Code turns out to be unable to reach several special crimes that are organized and extraordinary in nature such as narcotics, terrorism, money laundering, and corruption. The handling of special crimes has significant differences, especially in the investigation stage. This is due to the nature of the criminal act is organized so that it requires investigation techniques that can dismantle the criminal act. In this regard, the handling of narcotics crimes has its own specificity. According to Article 75 letter j of Law Number 35 of 2009 concerning Narcotics, in the investigation stage, Investigators have the authority to carry out covert purchase techniques and delivery under supervision. This technique is commonly known as the entrapment technique

carried out by law enforcement officers. (Iqbal Taufik, 2017). Furthermore, this can be done on a written order from the leader as stated in Article 79 of the Narcotics Law which reads that Investigation techniques for covert purchase and delivery under supervision as referred to in Article 75 letter j are carried out by Investigators on a written order from the leader. The investigator in question is an Investigator of the National Narcotics Agency (BNN Investigator), so the superior order in Article 79 of the Narcotics Law is the superior of the BNN. In simple terms, the reason for regulating this technique in the Narcotics Law aims to capture and dismantle narcotics crimes. This is because narcotics crimes are so neat and difficult to dismantle that they require special techniques and have a high risk.

There are several cases where police officers have handled drug abuse crimes using covert purchase techniques, one of which is the case decided by the Palangkaraya District Court Number 96/Pid.Sus/2020/PN. Plk, where the handling used a covert purchase technique of 1 (one) package of shabu worth Rp 300,000.00 (three hundred thousand rupiah) which was carried out by members of the police based on a covert purchase investigation warrant. The covert purchase technique is a technique often used by police investigators in uncovering cases of criminal acts of narcotics abuse. However, from a formal juridical point of view, the use of this technique by police investigators is not regulated in the Narcotics Law.

The use of covert purchase and supervised delivery techniques is not unique to Indonesia. This technique has long been used by police investigators in America to uncover drug trafficking cases. Even in some cases, American courts consider the technique to be closely related to entrapment. In handling drug offenses in America, the accused is given the opportunity to provide a statement that he has been framed for committing a crime. In this case, if the Defendant states that he was framed, then law enforcement must prove that at the time of arrest there was no seduction or inducement to make the Defendant commit a crime. This can be found in the decision of *United States v. Blich*, 773 F.3d 837, 844 (7th Cir. 2014).

The inducement or seduction that must be proven, is more than just an invitation by law enforcement to commit a crime, because in this case the law enforcement agent or informant initiates contact with the accused, suggesting or providing an opportunity to commit a crime so that it is not enough to just induce or seduce. This means that it can be interpreted as making repeated persuasion efforts, sending informants, promises of rewards in carrying out the crime, friendship or any other action that creates a risk that a person who would not commit a crime if left alone will do so in response to law enforcement efforts. (Mochtar Kusumaatmadja, 2000).

Judging from the description above, it shows that the techniques of covert purchase and delivery under surveillance are not much different from the entrapment actions carried out by police officers in America. It is just that there is a difference when the case has entered the court, where the defendant can submit a defense that he has been framed to commit a crime. Although this technique is part of an investigative technique aimed at dismantling drug trafficking networks or syndicates, there is no form and method of implementation and no regulation of the authority of police officers in using this technique. This could potentially lead to entrapment, which is generally prohibited in criminal procedure law and has been affirmed in Supreme Court Decision Number 10K/Pid.Sus/2015.

Based on this description, the author assumes that there is a need for a special study regarding the implementation limitations of the covert purchase technique and delivery under supervision in Article 75 letter j of the Narcotics Law. It aims to understand and analyze this technique to uncover narcotics trafficking in Indonesia.

2. RESEARCH METHODS

This research uses a normative research method, a research that has been contained in writing in the legislation, and uses a statute approach, conceptual approach, and case approach. The procedure for collecting legal materials is to collect primary materials first and then associated with secondary legal materials, so that this research is presented using prescriptive analysis to find the results of the enactment of covert purchase and delivery techniques under supervision. (Mamudji & Soekanto, 2009).

3. RESULTS AND DISCUSSION

3.1. Enforcement of Covert Purchase and Supervised Delivery Techniques

Narcotics crime is a crime that is specifically regulated in Indonesian legislation contained in Law Number 35 of 2009 concerning Narcotics (Narcotics Law). The existence of the Narcotics Law is directed to further streamline the prevention and eradication of narcotics abuse and illicit trafficking. This is because currently the circulation of Narcotics Crime is no longer carried out individually, but involves many people together, even an organized syndicate with a wide network that works neatly and very secretly both at the national and international levels. Due to these conditions, the method of handling narcotics crimes has also developed, this can be seen in the method of investigation by means of covert purchase and delivery under supervision as regulated in Article 75 Letter j of the

Narcotics Law. The existence of these methods of investigation is used to reveal the abuse and illicit trafficking of narcotics. The regulation of these methods is a process that is closely related to the collection of evidence that can determine who the suspect is and whether it is true that an event is a criminal offense. In addition, in this case it can be known the role of the suspect in a criminal act of narcotics abuse as a user, dealer or producer. (Tuti Kelana Sembiring, 2022).

The provision of Article 75 Letter J of the Narcotics Law states that the technique of covert purchase and delivery under supervision is only given to Investigators from the National Narcotics Agency (BNN). However, long before it was regulated in the Narcotics Law, Police Investigators had used this technique based on the provisions of Field Manual No. Police: Juklap/04/VIII/1983 on Tactics and Techniques for Purchasing Narcotics and Psychotropic Substances as amended by Decree No. Skep/1250/XI/2000 on the Revision of the Set of Guidelines and Technical Guidelines for the Criminal Investigation Process (Juklak and Juknis of Criminal Investigation).

The guidelines state that undercover techniques are part of the investigation process. Over time, undercover purchase and delivery techniques have weaknesses in uncovering drug crime cases and have the potential for entrapment, such as one of the cases that occurred in 2021 experienced by Boni where he was searched by 3 (three) men who claimed to be members of the police and asked about goods (narcotics) that Boni did not know. This case is a development of a search previously carried out by police investigators on Boni's friend Ari who is suspected of being a drug dealer. Drugs. However, police investigators did not arrest him because during the examination process the transaction account used by Ari was a fake account. The case shows that there is a potential violation of a person's rights in a criminal case handling. (Melinda Theresa Olivia Lelet, *e.al.*, 2022).

The existence of this technique changes the old paradigm that tends to be reactive to crime, to proactive. Police officers do not only move when a crime has occurred and then arrest the perpetrator, but are more proactive or try to catch the perpetrator before a crime is committed. With this proactive nature, the implementation of this technique has the potential to violate the principles of democratic policing. (Komang Tri Sundari Dewi, *et.al.*, 2021). Democratic policing is policing that is consistent with the rule of law and its values such as accountability and transparency. In the implementation of this technique, police investigators often commit illegal and unpunished acts. According to the author, there are several assessments related to the implementation of the covert purchase and supervised delivery techniques currently used by law enforcement officers.

1. There are still informants who fall into narcotics trafficking

For the police, the existence of the Juklak and Juknis of Criminal Investigation is the legal basis for implementing the covert purchase and delivery techniques under supervision. This also shows that the technique of covert purchase and delivery under supervision is an investigation technique that has been applied by police investigators in dismantling illicit drug trafficking long before the enactment of the Narcotics Law. However, even though this has been going on for a long time, there are still obstacles in its application. (Dhani Catra Nugraha, 2016). This is because not all members of the police, especially investigators in charge of Narcotics Investigation, have adequate capabilities in terms of understanding, knowledge and experience in implementing covert purchase and delivery techniques under supervision including skills in disguise. As a result, many cases of narcotics crimes that use this technique fail before implementation. Even in some cases, not a few members of the police are involved in narcotics trafficking with the lure of the benefits that will be obtained.

2. Closed access to information related to the implementation of covert purchase techniques and handover under supervision by BNN

The Narcotics Law regulates the role of the community to prevent the practice of drug abuse. It is not uncommon for investigators to use the community as informants to uncover drug trafficking. From a legal perspective, this is indirectly an order for the community to play an active role in assisting law enforcement officials in uncovering drug crimes. Although the provisions of Article 99 of the Narcotics Law provide legal protection for informants not to mention the name and address of the reporter or things that give the possibility of knowing the identity of the reporter. (Elvi, 2020). However, there is no guarantee that the informant will be protected after the disclosure of the reported distribution.

In addition, BNN as an institution established by the Narcotics Law has a role in investigating drug-related crimes. Therefore, in the Narcotics Law the process of investigation and investigation is specifically regulated as previously described. This means that BNN has a major role in handling narcotics crimes. One of the authorities granted in the investigation process is the technique of covert purchase and delivery under supervision. Technically, BNN has regulated specifically related to the method of covert purchase and delivery under supervision contained in the Regulation of the Head of the National Narcotics Agency Number 4 of 2011 concerning Covert Purchase Investigation Techniques (PBNN 4/2011).

However, the regulation is not accessible to the public as stated in Supreme Court Decision Number 282 K/Tun/2013. At the cassation level, the judge rejected the cassation request because he considered information about BNN's investigation techniques called P3N (Investigation and Investigation, Narcotics Precursors) as strategic documents and closed information or relevant to Article 17 letter a number 1 of Law Number 14 Year 2008 concerning Public Information Disclosure. (Achmad Fikri Rasyidi, 2016). So it cannot be blamed if the public is reluctant to be involved, especially as informants in the process of investigating criminal acts of narcotics trafficking.

3. Potential for case fabrication

The investigation process using the covert purchase and delivery under supervision technique is actually something that can be carried out effectively if supported by the ability and understanding of the technique. Instead of being expected to work effectively, however, this technique is often misused by unscrupulous police officers. Around April 2022, a narrative circulated that police trapped citizens with drugs in Binjai, North Sumatra. Not only that case, in 2015, the Supreme Court had previously uncovered several engineering cases committed by members of the police. (Bella Febrina & I.G.A Stefani Ratna Maharani, 2022).

There are 3 (three) factors that influence the engineering of cases, namely First, indifference to the handling process, in this case law enforcers in conducting the examination process without regard to the weight of the examination, it is not uncommon for discriminatory practices to occur where small cases are considered meaningless because of the pursuit of quantity work achievements. Second, ignoring the quality that should be used as a reference for every law enforcer. For example, the success of investigators is only measured by the number of arrests, operation targets and time limits given by superiors. Third, law enforcement deviations occur due to the motive of making the target of the operation as an object of extortion. In fact, this is often based on requests from certain parties in exchange for material or other promises. (Sujamto, 2014).

With supervised delivery and covert purchase investigation techniques, Investigators can directly enter into drug trafficking networks. This is because with these techniques Investigators act as people who are part of the drug trafficking network, namely as sellers or buyers. This means that these investigation techniques have a role in obtaining evidence of narcotics crime effectively, namely buyers or sellers of narcotics in a state of being caught red-handed. The provisions of Article 1 Point 19 of the Criminal Procedure Code provide a definition of being caught red-handed is the arrest of a person while committing a criminal offense, or immediately after a while the criminal offense is committed, or immediately afterwards is called out by the public as the person who committed it, or if immediately afterwards an object suspected of having been used to commit the criminal offense is found on him which shows that he is the perpetrator or co-perpetrator or assists in committing the criminal offense.

3.2. Criminal Law Formulation Policy in Handling Narcotics Crime Entrapment Cases in the Future

Criminal law formulation policy is part of criminal law politics. The scope of criminal law politics can include formulative, applicative, and executive policies. The essence of criminal law politics is how to formulate a good criminal law and provide guidelines in the making (legislative policy), application (judicial policy) and implementation (executive policy) of criminal law. The formulative stage is a very decisive stage for the next stages because at this stage it will be determined what actions will be made into criminal offenses. Policy formulation is a strategic stage of the overall operation or functionalization of criminal law. A good regulation if not implemented in accordance with the rules will be useless. So all these expectations have the same position and contribute equally in law enforcement. (Barda Nawawi Arief, 2018).

According to Barda Nawawi Arief, the meaning and essence of a criminal law formulation policy is seen from the point of view of a policy approach:

1. As an ingredient of social policy, criminal law reform is essentially part of an effort to control social problems in order to achieve or support national goals.
2. As part of criminal policy, criminal law reform is essentially part of efforts to protect society
3. As part of law enforcement policy. Criminal law reform is essentially part of an effort to update the substance of the law in order to make the law more effective.

Entrapment in the practice of handling narcotics crime cases is an authority granted by law to law enforcement officials. This is contained in Article 75 Letter j of the Narcotics Law which states that BNN Investigators are authorized to use covert purchase techniques and delivery under supervision when conducting investigations. Meanwhile, for police investigators, the operational guidelines and technical guidelines for criminal investigations are the basis for the use of entrapment or covert purchase techniques and delivery under supervision. In tackling the problem of a criminal act, according to Barda Nawawi Arief, there are three stages of concretization or functionalization/operationalization of criminal law from the point of view of criminal law policy. First, the stage of

determination/formulation of criminal law by lawmakers (formulative/legislative policy stage). Second, the stage of criminal law implementation by law enforcement officials or courts (applicative/judicial policy stage). And third, the stage of criminal implementation by the criminal execution apparatus (executive/administrative policy stage).

From the description above, it appears that the central issue is about the authority and regulation of the authority itself in the functionalization of criminal law policy. Authority in the functionalization of criminal law policy includes formulation authority or legislative policy, application authority or judicial policy, and execution authority or executive policy. Based on several problems in the implementation of covert purchase techniques and delivery under supervision, it is necessary to formulate policies in the future in terms of handling narcotics trafficking, among others:

1. Implementing regulations are needed

Basically, the formation of implementing regulations with various types and hierarchies in the executive environment aims to make the norms contained in one provision of the law more detailed and specific to facilitate the implementation of state governance. However, in practice, not all laws are further regulated by implementing regulations. Conceptually, according to Maria Farida Indrati, Implementing Regulations (*verordnung*) and Autonomous Regulations (*Autonome Satzung*) are regulations located under the law that function to implement the provisions of the law. Implementing Regulations (*verordnung*) originate from delegation authority, while Autonomous Regulations (*Autonome Satzung*) originate from attribution authority. (Maria Farida Indrati, 2021).

Based on the problems that have been described, it shows that the application of Article 75 Letter j of the Narcotics Law still often fails to be implemented. One of the factors causing the failure of this technique is the lack of knowledge and ability to implement the technique. This is the basis for the establishment of a special regulation governing the implementation of this technique. Although in this case there has been a Regulation of the Head of the National Narcotics Agency Number 4 of 2011 concerning Covert Purchase Investigation Techniques, unfortunately these provisions cannot be accessed by the public based on the Supreme Court's decision.

2. The Need for Legal Standards for The Investigation off Narcotics Crimes

In the United States, law enforcement officers are required to prove that the arrest of a defendant for drug offenses was not based on entrapment. Entrapment in criminal acts can be defined as a defense to criminal liability when the defendant was not predisposed to commit the charged crime before the intervention of the government's agents and the government's conduct induced him to commit it. The government agents in question are law enforcement officials. From this definition, there are things that must be proven by the defendant in the case of entrapment, namely the existence of inducement by law enforcement officials to commit a crime and feel that the criminal act was against his will.

In addition, the United States has a standard of application in the event of an allegation of entrapment by law enforcement officials. According to a brief issued by the Bureau of Justice Assistance entitled Narcotics Control Technical Assistance Program, there are 3 (three) standards applied by American police officers to determine the existence of entrapment, namely the subjective predisposition test, the objective police conduct test and (3) the combined predisposition/police conduct test. This standard is used to assess whether a drug crime handling process contains entrapment. (Nina Chaerina, 2018).

This means that if someone commits a criminal offense regulated in written law, there are elements that must be considered. As is the case with narcotics crimes, the element of every person who buys, carries, controls and/or distributes in the Narcotics Law is one of the elements of intentionality that is already present in the perpetrator. Whether or not there is a trap, it has no effect on people who commit narcotics crimes. This is because, basically, narcotics crime is anyone who is caught possessing/carrying/controlling narcotics without a valid permit can be said to have committed a criminal offense. (Riza Alifianto Kurniawan, 2018).

There is only a distinction that exempts law enforcement officers from being criminally punishable under the Narcotics Law. The provisions of Article 79 Letter j of the Narcotics Law and the Guidelines and Technical Guidelines for Criminal Investigation imply that there must be a warrant in implementing the covert purchase and supervised delivery techniques. However, this is not the legal standard of narcotics crime investigation. Rather, this can lead to potential violations of the rights of suspects, because the nature of the written order indirectly provides some authority for law enforcement personnel.

Based on this description, the handling of drug trafficking cases should be reformed. Moreover, the investigation authority has not been effective in handling narcotics trafficking in Indonesia. Whereas in the explanation of the Narcotics Law it has been expressly stated that the purpose of the investigation technique given to law enforcement

officials is to eradicate narcotics trafficking that occurs in society. However, some of the things described above show that the handling has not been running effectively in accordance with the policies in the Narcotics Law.

4. CONCLUSION

Law No. 35/2009 on Narcotics authorizes BNN Investigators to conduct investigations using covert purchase and supervised delivery techniques as stipulated in Article 75 Letter j of the Narcotics Law. Meanwhile, the police also have the authority to conduct these techniques based on Decree No. Skep/1250/XI/2000 on the Revision of the Set of Guidelines and Technical Guidelines for Criminal Investigation Processes. During the enactment of this technique, there were several problems, even resulting in the frequent failure of the application of this technique, including the existence of informants who were involved in drug trafficking, closed access to information related to the implementation of the covert purchase technique and delivery under supervision by BNN and the potential for case engineering. These problems have often occurred since the technique was regulated, even though the purpose of this investigation technique is expected to catch drug dealers along with evidence.

For these problems, it is necessary to formulate a policy formulation to overcome the blurred meaning of the investigation technique in Article 75 Letter j of the Narcotics Law. The absence of implementing rules makes the understanding and skills of law enforcement officers unskilled in carrying out this technique. Therefore, implementing regulations that regulate in detail the limits of authority, legal protection and other provisions need to be made specifically in the implementing regulations. Reflecting on the United States, there are legal standards in conducting investigations using entrapment techniques. In this case, Indonesia should be able to set a standard of investigation in dealing with the problem of drug trafficking. With this reference, the focus on covert purchase techniques and delivery under supervision will be more focused.

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