Imposition of Penalty below the Special Minimum in Narcotics Crime

Astry Novi Lidarti
Kejaksaan Negeri Pringsewu, Indonesia, Email: astrynovilidarti@gmail.com

Submitted: April 10 2023; Reviewed: May 08 2023; Accepted: May 16 2023

Article’s Information

| **keywords:** | Law number 35/2009 on Narcotics regulates the special minimum punishment. However, judges violate the minimum criminal limit, causing legal certainty and justice friction. This article examines legal certainty in consideration of judges in punishing the special minimum in narcotics crime cases. This research uses normative and empirical legal approaches through literature, document analysis, case studies, and resource person interviews. Based on the results of the research and discussion, it is concluded that the sentence below the special minimum in narcotics cases is based on the judge's legal consideration that the defendant is a drug abuser himself, the urine test results are negative, the amount of narcotics possessed is small, and the defendant is not proven to sell or become an intermediary in the sale and purchase of narcotics. In his consideration, the judge combines the laws relating to narcotics with the legal facts of the trial so that the judge's decision to impose a sentence below the special minimum has legal certainty. |
| **DOI:** | https://doi.org/10.25041/ip.v4i1.2988 |

A. Introduction

In a criminal case, an effort is needed to provide justice for justice seekers. A judge must therefore have excellent legal analytical skills, honesty, morality and ethics. Unlike the Public Prosecutor who defends the interests of the victim and the attorney who defends the interests of their client/defendant, the Judge himself/herself must not take sides in the trial process and solely uphold justice.¹

Given that the Indonesian legal system adopts an alternative approach to sentencing, judges are free to interpret the law. Currently, several laws and regulations have a special minimum

punishment related to the purpose of punishment, namely to improve the convicts and the community and to prevent crime. The formulation of special minimum punishment occurs in order to reduce the inequality (disparity) of punishment and show the severity of the offense.\textsuperscript{2} Criminal disparity is "the application of unequal punishment to the same criminal acts or criminal acts that are different in nature such as the provisions of Law Number 35 of 2009 concerning Narcotics (Narcotics Law)".\textsuperscript{3}

Article 1 paragraph (1) of the Criminal Code stipulates that "criminal law must be based on the law, meaning that the punishment must be based on the law, the application of the severity of the punishment imposed is certainly for a judge adjusted to what motivates and consequences of the perpetrator's actions, especially in the application of the type of imprisonment, but if certain laws have normatively regulated certain articles on punishment with special minimum threats",\textsuperscript{4} as indicated in Article 112 paragraph (1) "Narcotics Law."

The judge must comply with the provisions of the law, especially those concerning the imposition of special minimum sentences. However, the judge is not only the spokesperson of the law; they must also find the law on a case or investigate the values in society. So far, many rules regulate and guide judges in carrying out their responsibility to decide a case. It would certainly be a problem if the facts showed many mitigating indicators for the defendant about a particular criminal offense, in this case, a narcotics case.

Although explicitly the formulation of the offense formulation determines a special minimum punishment, in reality, the special minimum limit deviates based on certain legal considerations. Juridically, the problem that arises is the friction between justice and legal certainty. This was the case in "Decision Number 49/Pid.Sus/2022/PN Kot with the defendant Widi Catur Pamungkas Bin Maryanto (deceased). The defendant was charged with an alternative charge, namely Article 114 paragraph (1) of the Narcotics Law with the threat of life imprisonment or imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years and a fine of at least Rp1,000,000,000,00.00 (one billion rupiah) and a maximum of Rp10,000,000,000,000.00 (ten billion rupiahs), or Article 112 paragraph (1) of the Narcotics Law with a minimum imprisonment of 4 (four) years and a maximum of 12 (twelve) years and a fine of at least Rp800,000,000,000.00 (eight hundred million rupiah) and a maximum of Rp8,000,000,000,000.00 (eight billion rupiah) ".

After the Panel of Judges deliberated on the mitigating and aggravating circumstances of the defendant, the charges of the Public Prosecutor were basically in line with the opinion of the Judges. However, the Judges did not fully agree on determining the duration of imprisonment and the amount of fine to be imposed on the defendant. The Panel of Judges, in their reasoning, stated that "the defendant was proven to have violated Article 127 paragraph (1) letter an of the Narcotics Law. Considering that the defendant's urine test result was negative, the Public Prosecutor did not charge Article 127 paragraph (1) letter an of the Narcotics Law. Therefore, the judge sentenced the defendant to a punishment below a certain minimum.

\textsuperscript{2} Erna Dewi, Sistem Minimum Khusus Dalam Hukum Pidana (Semarang: Pustaka Magister, 2013).
\textsuperscript{3} Muladi, Hak Asasi Manusia, Politik, Dan Sistem Peradilan Pidana (Semarang: Badan Penerbit Universitas Diponegoro, 2002).
One of the considerations was based on the Virtual Technical Guidance and Judicial Administration by the Head of the Supreme Court of the Republic of Indonesia for the 4 (four) Judicial Environments throughout Indonesia, which stated:

“In the practice of the Defendant who buys or controls or possesses narcotics but has the criteria as a user, and the Public Prosecutor's indictment does not contain the charge of Article 127 paragraph (1) letter an of Law Number 35 the Year 2009 concerning Narcotics, with consideration of a sense of justice. There is no indication that the Defendant is distributing the narcotics; the Judge may impose a sentence below the special minimum provisions while still imposing a fine.”

Furthermore, referring to "section A number 1 of Supreme Court Circular Letter No. 3 the Year 2015", it states that:

"Judges deciding and examining cases must be based on the Indictment of the Public Prosecutor (Article 128, paragraphs 3 and 4 of KUHAP). If the prosecutor charges Article 111 or Article 112 of Law No. 35 of 2009 concerning Narcotics (Narcotics Law), but based on the legal facts revealed in the trial, Article 127 paragraph (1) letter an of the Narcotics Law is proven, the defendant is proven to be a user. The amount is relatively small (SEMA 4 of 2010), then the judge decides according to the indictment but can deviate from the special minimum criminal provisions by making sufficient considerations." The novelty of this research is about the imposition of punishment under the special minimum in narcotics cases based on the consideration of the judge's decision and the facts of the trial.

Based on the above background, SEMA should stay within the provisions of the law. This is because SEMA only aims to fulfill the legal vacuum and needs the power to regulate like a law. Therefore, to find out the basic consideration of Judges who punish a certain minimum in terms of legal certainty, it is important to write this article. To answer the problems in this article, normative juridical and empirical juridical methods are used through reviewing court decisions and observing the community. The data in this article is collected through a literature study, a case study, a document study, and interviews with resource persons.

B. Discussion

1. Basis of Judges' Legal Consideration in Imposing Punishment under Special Minimum in Narcotics Case

The special minimum punishment is widely applied in laws outside the Criminal Code, including the Narcotics Law, although the Criminal Code itself does not recognize special minimum punishment. According to the "lex specialis derogat legi general" principle, which means special law overrides general law." The functionalization of special minimum punishment aims to prevent the gap/disparity of court decisions. In practice, there is often a gap/disparity in court decisions, namely the condition where the main punishment differs from the court decision in the same/similar case.

Special minimum punishment, on the other hand has a negative impact, which often causes a clash between justice, benefit and legal certainty. Positive law that emphasizes legal certainty

---


has yet to align with justice, resulting in friction between justice and legal certainty. Likewise, in the case of narcotics criminal cases, special minimum punishment is often overridden by Judges because they prioritize justice over legal certainty. In other words, there will be an injustice for the defendant when the special minimum provision is applied because the criminal act committed is not proportional to the punishment.

MacKenzie states that to examine the various factors taken into consideration by judges in deciding criminal cases, several theories can be used, including the theory of balance and the theory of "ratio decidendi". According to the theory of balance, judges in deciding cases must consider the interests of the parties and the elements determined by statutory regulations. Then based on the theory of 'ratio decided, the philosophical aspects underlying the legislation must be considered by the judge in deciding the case. Consideration of this philosophical aspect aims to produce fair law enforcement for all parties.

The judge must provide appropriate and correct considerations in making a decision. The consideration is in writing, which is then read in a trial open to the public. The essence of the judge's decision is like a "crown" so that in giving a decision, the judge must consider all aspects, both juridical, philosophical, and sociological aspects. Based on the research on the decision of "Kota Agung District Court Number: 49/Pid.Sus/2022/PN Kot", the criteria considered by the judge in imposing a sentence below the certain minimum include:

1) "The defendant is only a user or abuser of these drugs;
2) The defendant consumed the narcotics only for himself;
3) The urine test result was negative;
4) The amount of narcotics used is relatively small; and
5) There is no indication that the defendant sold, brokered, exchanged, or delivered narcotics."

The above criteria relate to the defendant's personality and the crime. Circumstances relating to the defendant's person include the defendant's behavior in using drugs for his purposes. In this context, the circumstances considered by the judge are very varied. This condition is understandable because the Criminal Code does not regulate sentencing guidelines for Judges. Whereas for law enforcers, especially judges, sentencing guidelines as "guidelines of sentencing" are used to guide the imposition of fair decisions for all parties. In "Decision Number: 49/Pid.Sus/2022/PN Kot, the criteria considered by the judge in imposing a sentence below the certain minimum is based on SEMA No. 03 of 2015 which states that if the Public Prosecutor charges with Article 111 or Article 112 of the Narcotics Law. Still, the defendant is only a user (user) and the number is relatively small, the judge can deviate from the special minimum criminal provisions."

---

The amount is relatively small, referring to SEMA No. 04/2010, namely metamphetamine (shabu) group 1 gram, MDMA (ecstasy) group 4 grams (8 grains), heroin group 1.8 grams, cocaine group 1.8 grams, cannabis group 5 grams, coca leaves 5 grams, mescaline 5 grams, psilocybin group 3 grams, LSD group 2 grams, PCP group 3 grams, fentanyl group 1 gram, methadone group 0.5 grams, morphine group 1.8 grams, pethidine group 0.96 grams, codeine group 72 grams, bufrenorfin group 32 mg.

SEMA should not be able to deviate from the special minimum criminal provisions in the Narcotics Law. SEMA does not have the power to regulate like a law, and SEMA only contains technical guidelines for Judges. The establishment of SEMA is based on the principle of "free ernen (freedom of action)," which is only a sectoral policy, in this case, the Supreme Court, to fill the legal vacuum and solutions to various weaknesses in the application of existing regulations. Therefore, conceptually SEMA cannot be used to deviate from the provisions of the law.¹³

The judge's task is to impose a sentence and create an "as fair as possible" decision. If proven legally and convincingly guilty, the criminal sanction must be proportional or balanced between the act and the punishment. However, deviation from the special minimum criminal provisions is part of the Judge's independence in finding the law.¹⁴

Criminal action of juridical analysis because juridical analysis of law, the deliberative process, stops when deciding guilt. Maroni states, "Judges must adhere to the applicable sentencing standards, but they have the discretion to decide on a fair sentence based on their conscience and fairness from the defendant's, not the result after the defendant's guilt is established, the sentence will be decided based on the judge's conscience and the justice they believe in".¹⁵

Furthermore, Harifin A. Tumpa argued that "judges are required to enforce the law including the minimum criminal provisions, although this is not a rigid and non-binding rule for judges. Of course, a judge is not only the spokesperson of the law, but must also consider the social sense of justice".¹⁶

In the context of "Kota Agung District Court Decision Number: 49/Pid.Sus/2022/PN Kot", the punishment under the special minimum imposed by the Judge is in line with the role of the Judge based on progressive law. Based on progressive law, the judge is not only shackled by the formulation of the article, but the judge must also rely on his belief based on the facts of the trial. According to Chairul Huda, the judge must impose a sentence between the minimum and maximum sentences. However, the court can ignore it if the minimum sentence is too severe. Therefore, the judge must prioritize the justice that exists in society in his judgment.¹⁷

---

¹⁵ Hasil Wawancara Dengan Maroni Selaku Akademisi Hukum Pidana Fakultas Hukum Universitas Lampung, 28 Desember 2022.
2. The judges' Consideration in Imposing Punishment under Special Minimum in Review of the Principle of Legal Certainty

One important aspect in realizing a fair judge's decision (ex aequo et bono) and legal certainty is the judge's legal reasoning. Then in addition, the Judge's consideration must be made carefully and thoroughly in order to provide benefits to the parties and society. If the judge's consideration is not made properly, then the decision will potentially be canceled by a higher court.18

Judges' considerations in deciding cases need to be based on relevant theories and research results between theory and practice. Through their decisions, judges are instruments of law enforcement to achieve legal certainty.19 The modus operandi, the impact caused, the attitude of the defendant in court and peace with the victim are some of the aspects that need to be considered by the judge in deciding the case.20 If the defendant is proven to be a user during the trial, but "Article 127 of the Narcotics Law" is not charged, the judge decides on a sentence below the certain minimum.

Generally, judges decide on punishment below the minimum specified in narcotics cases; in their consideration, the Judge stated that "The Public Prosecutor only charged the Defendant with Article 112 of the Narcotics Law but did not charge him with Article 127 paragraph (1) letter an of the Narcotics Law even though it was proven at trial that the Defendant was a drug user so he should have been charged with 'Article 127 paragraph (1) letter an of the Narcotics Law'."

As in the "Decision of the Panel of Judges of the Kota Agung District Court Number: 49/Pid.Sus/2022/PN Kot, the Judge imposed a sentence below the certain minimum because, based on the legal facts revealed in the trial, the defendant was proven to be only a drug abuser, not a dealer, this is included in Article 127 paragraph (1) of Law Number Narcotics, so it is reasonable for the Panel of Judges to impose a sentence on the defendant by deviating from the minimum criminal provisions in the indictment of the Public Prosecutor.".

If seen further, the decision has legal certainty because in its consideration the Judge has accommodated the provisions of the Narcotics Law coupled with the provisions of "SEMA No. 3 of 2015 jo. SEMA No. 1 of 2017 jo. SEMA No. 3 of 2018". Based on his freedom and the legal facts, although the Public Prosecutor did not charge the defendant with "Article 127 paragraph (1) letter an of the Narcotics Law", the Judge deviated from the special minimum penalty provisions.

A judge's decision imposes a sentence below the certain minimum based on the applicable provisions in his decision; then, juridically, the decision has legal certainty. In this regard, Maroni argues that "The judge in imposing a sentence below the special minimum in the case of a criminal offense of narcotics abuse has legal certainty because the judge concerned has carried out the mandate of Article 5 of the Judicial Power Law, namely that judges are obliged to seek, explore and study legal values in society through legal discovery. As per the legal facts of the trial, the defendant did not commit narcotics trafficking but was only a user".21

Maroni's opinion is in line with Zakky Ikhsan Samad's statement, that "juridically, the Decision of the Panel of Judges of the Kota Agung District Court Number: 49/Pid.Sus/2022/PN Kot which imposes a sentence below the special minimum has legal certainty. Because the judge decided based on the Narcotics Law and SEMA. In general, if there are factual indications

---

21 Hasil Wawancara Dengan Maroni Selaku Akademisi Hukum Pidana Fakultas Hukum Universitas Lampung, 28 Desember 2022.
of narcotics abuse but at the time of arrest the perpetrator has a negative urine result, it means that he has not used the drug. Therefore, in SEMA No. 4/2010 and SEMA No. 3/2011, the draft of reasonableness can be categorized as appropriate as a user is regulated. These SEMA are internally binding for judges and designed to address court problems from the first instance to the cassation level. Although judges are not obliged to follow SEMA, they tend to follow it because SEMA is an agreement so that there is a common understanding so that there is no disparity in decisions”.  

The imposition of punishment under a certain minimum as stated in the decision of Kota Agung District Court Number: 49/Pid.Sus/2022/PN Kot, according to Maroni, can have a deterrent effect considering that the defendant who is sentenced under a certain minimum is considered by the judge to be a good person and deserves the law (the decision is selective). In addition, according to Maroni, the punishment under a certain minimum will not encourage people to dare to commit criminal acts of narcotics abuse with the assumption that if caught, they can be sentenced to a light punishment. Not all defendants will be sentenced under a certain minimum depending on the case. Zakky Ikhsan Samad agrees with Maroni that a verdict below a certain minimum will not encourage people to dare to commit criminal acts of drug abuse, because it is still by the charges and there is still a fine.

Based on the research results, in the author's view, the decision to impose a sentence below the special minimum in narcotics criminal cases has legal certainty. In his decision, the judge considered the juridically relevant facts of the trial from the examination of investigators and public prosecutors. Juridically, the consideration of the Panel of Judges is based on the provisions of the Narcotics Law coupled with the provisions in the Judicial Power Law, SEMA Number 3 of 2015 jo. SEMA Number 1 of 2017 jo. SEMA Number 3 of 2018”. From the sociological aspect, in their considerations the judges have paid attention to the legal values in society, which in this case assesses narcotics abuse as a disturbing act. So even though it is not by the indictment, the Panel of Judges still punishes the defendant even though the sentence imposed is below the certain minimum.

The philosophical aspect was also the consideration of the judge who imposed a sentence below the certain minimum against the perpetrators of narcotics abuse. In his consideration, the judge stated that "the purpose of punishment is not merely to punish the criminal act committed by the defendant, but also has educational value, namely as a learning instrument for the defendant, so that he can improve his attitude and actions in the future. In addition, punishment is also a medium for legal learning for the wider community so that members of the community are expected not to commit such criminal acts later”.

Of the three aspects of the judge's consideration, namely juridical, sociological and philosophical aspects, the most dominant aspect in the imposition of punishment below the minimum is the philosophical aspect because it relates to the basic principles of the purpose of punishment. The position of the three aspects according to Zakky Ikhsan Samad is the same as a unity that must be considered. However, the main aspect is juridical, because guilt must be proven first.

Although the decision of the Kota Agung District Court Number: 49/Pid.Sus/2022/PN Kot does not harm legal certainty, in general there are still obstacles in enforcing criminal law against drug dealers in Indonesia, namely, the Narcotics Law as a penal policy has not accommodated the legal interests of the perpetrators, society and the state comprehensively. This has led to inconsistencies in the law enforcement of narcotics abusers. In addition, the

24 “Hasil Wawancara Dengan Zakky Ikhsan Samad Selaku Hakim Pada Pengadilan Negeri Kota Agung.”
complexity of the modus operandi of narcotics crimes must be accompanied by adequate legal instruments coupled with differences in perspective in understanding normative provisions. Some efforts that can be made to increase the effectiveness of prosecution of drug trafficking defendants include reformulating the substance, structure, and culture of drug abuse law enforcement. Substantially, the Narcotics Law must accommodate the complexity and sophistication of the modus operandi of drug abuse. Then there must be a common perception among law enforcers regarding the purpose of punishment to increase the effectiveness of prosecution of defendants who abuse drugs. In other words, why should a person be punished when the purpose of punishment has been achieved.

C. Conclusion

The imposition of punishment below the special minimum in narcotics crime cases is based on the consideration that "the defendant is only a narcotics abuser, the defendant consumes narcotics for himself, the urine test results are negative, the amount of narcotics used is relatively small, and there is no indication that the defendant sells, mediates in the sale, purchase, exchange, or delivery of narcotics." The judge's consideration was based on "SEMA Number 3 of 2015 jo SEMA Number 1 of 2017 jo SEMA Number 3 of 2018". However, the special minimum criminal provisions in the Narcotics Law are not appropriate if overridden by SEMA. Regarding the principle of legal certainty, the judge's reasoning in punishing the certain minimum, as stated in the "verdict of Kota Agung District Court Number: 49/Pid.Sus/2022/PN Kot" has legal certainty. Contextually, through his consideration, the judge has accommodated the provisions in the Narcotics Law, which are supported by the facts of the trial and SEMA. Therefore, although the defendant was not charged with "Article 127 paragraph (1) letter an of the Narcotics Law", based on his freedom, the judge deviated from the provisions of the special minimum penalty. Furthermore, for legal certainty, the provisions regarding judges that can deviate from the special minimum criminal provisions in narcotics cases must be regulated in the Narcotics Law. Judges must consider the charges of the Public Prosecutor.

References

A. Book
Muladi. Hak Asasi Manusia, Politik, Dan Sistem Peradilan Pidana. Semarang: Badan Penerbit

Universitas Diponegoro, 2002.


B. Journal


Nuradin, M. “Kajian Yuridis Penetapan Sanksi Di Bawah Sanksi Minimum Dalam...

