



Criminal Appointment Under Special Minimum Threat in a Narcotics Case

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Abstract. Judges in imposing sentencing decisions may not impose criminal decisions beyond the maximum criminal threat or under the minimum criminal threat, the Law on Narcotics as a *lex specialis* is of course made for a specific purpose. There is a weighting of criminal sanctions, both in the form of a special minimum and maximum special punishment. However, the concept of legal discovery used must also be applicable to the subject of discussion. Of course, the judges have the same problem regarding the conflict between the principle of legal certainty and the principle of justice in imposing a criminal under a special minimum. The approach method used in this research is normative juridical. The specification of this research is descriptive analytical. The data source used is secondary data. Secondary data is data obtained from library research consisting of primary legal materials, secondary legal materials and tertiary legal materials. Based on the results of the study, it can be concluded: (1) Criminal sanctions in Law no. 35 of 2009 concerning Narcotics, it is known that there are minimum and maximum sanctions which are in Article 111 to Article 148 of Law no. 35 of 2009 concerning Narcotics. Then the weighting of penalties in Law no. 35 of 2009 can also be seen from its nature, which is cumulative, meaning that if a person is proven to have committed a narcotic crime, he will be subject to imprisonment and a fine. (2) The Panel of Judges on the Narcotics case with register number 174/Pid.Sus/2020/PN Bkl can be seen that the Panel of Judges decides based on the theory of evidence and the theory of punishment. The judge decides according to the indictment but may deviate from the special minimum criminal provisions by making sufficient considerations. The judge imposes a sentence below the special minimum that has been determined by the Narcotics Law in principle, because the judge's main achievement is the value of justice. (3) When the judge is faced with a conflict between the principles of legal certainty and justice, the judge must be able to make a shift. This shift is intended not to highlight one of the principles, whether it is certainty or justice, but to create a balance between both.

Keywords: Criminal Imposition · Under the Special Minimum · Narcotics

1 Background

Law in the context of the state is generally a basic reference and guide in the life of the state. The law also actually provides security (order), welfare (welfare) and happiness (happiness) for the community within the scope of the rule of law.¹ Philosophically, law has objectives which are divided into 3 (three) streams, namely: utilitarianism which believes that law must be useful, legal positivism which is oriented towards the principle of legal certainty and legal predictability, and the last is natural law. Which is based on the principle of justice.²

Current legal developments have also accommodated the implementation of a special minimum criminal system (outside the Criminal Code), for example in the provisions of Law Number 35 of 2009 concerning Narcotics.³ The existence of this special minimum criminal system seems to place limits on the freedom that Judges have in making decisions, although regarding this special minimum criminal system there are no rules/guidelines in terms of its application. In fact, the determination of this punishment is specifically part of the jurisdiction of the Judge, even in this area no one can influence the will of the Judge in determining how much punishment is appropriate to be imposed on the Defendant, this is also included in the conscience of each Judge as the most appropriate area. Abstract which is very likely to be the same between one Judge and another.⁴

Narcotics crime is an extraordinary crime or extraordinary crime, so it requires extraordinary efforts to eradicate it.⁵ The transnational narcotics crime which is carried out with a constantly evolving modus operandi has caused a wide range of victims which have damaged the life of the nation and state. Narcotics abusers, most of whom are the nation's young generation (productive age group), have reached a very worrying stage, so it's not surprising that in 2015 Indonesia was declared a drug emergency.⁶ Indonesia is the third largest country in the scale of drug trafficking after Colombia and Mexico.

Judges in imposing sentencing decisions may not pass criminal decisions that exceed the maximum penalty or under the minimum penalty, because in each statutory regulation the minimum and maximum limits that can be imposed on the accused are regulated so that if the judge delivers a criminal decision exceeding the maximum limit or below minimum limit, then the judge is deemed to have exceeded the limits of his authority.

¹ Sajipto Rahardjo, *Negara Hukum yang Membahagiakan Rakyatnya*, Genta Publishing, Yogyakarta, 2008, page 94.

² Gustav Redbuch dalam Sajipto Rahardjo, *Ilmu Hukum*, CV. Rajawali, Jakarta, page 91.

³ Sepha Dwi Hananto, Anis Mashdurohatun, Penegakan Hukum Pidana Terhadap Terdakwa Pengguna Narkotika Yang Menjalani Rehabilitasi Di Polda Jateng, *Jurnal Khaira Ummah*, Vol 13, No 1 (2018), page 161–170.

⁴ Supandriyo, *Asas Kebebasan Hakim dalam Penjatuhan Pidana: Kajian komprehensif terhadap tindak pidana dengan ancaman minimum khusus*, Arti Bumi Intaran, Yogyakarta, 2019, page 18.

⁵ Andri Winjaya Laksana, Tinjauan Hukum Pidana Terhadap Pelaku Penyalahguna Narkotika Dengan Sistem Rehabilitasi, *Jurnal Pembaharuan Hukum*, Vol 2, No 1 (2015), page 74–85.

⁶ Dhian Artwitadibrata, and Akhmad Khisni, The Concept of Criminal Law for Personnel of Narcotics Abuse, *Jurnal Daulat Hukum*, Volume 3 Issue 4, 2020.

In practice at trial, it turns out that decisions are still being made from judges who hand down criminal decisions below the minimum criminal provisions under the provisions of the Narcotics Law, with the example of the case in the decision of the Bangkalan District Court Number 174/Pid.Sus/2020/PN Bkl which in the case this Judge imposed a special minimum criminal sanction because based on the legal facts revealed in the trial the defendant was proven to be only a narcotics abuser not as a dealer. Imposing a sentence on the Defendant by deviating from the minimum criminal provisions in the Public Prosecutor's indictment.⁷

When there is a criminal verdict where the punishment is under a special minimum provision, it means that it is inversely proportional to the Law on Narcotics which was previously made and the minimum sentence has been listed. Even though the rules contained therein should be in accordance with their implementation because they are intended to protect the Indonesian people from abuse of narcotics.⁸

Emphasizing the deterrent effect on perpetrators of abuse and illicit traffic of narcotics and narcotics precursors, this Law stipulates aggravation of criminal sanctions, both in the form of special minimum sentences, 20 (twenty years) imprisonment, life imprisonment and criminal dead. The criminal weighting is carried out based on the class, type, size and amount of Narcotics. Articles regarding the provisions on criminal threats in this Law are contained in Articles 111 to 148.⁹

2 Metode Penelitian

The approach used in this research is normative juridical or written law approach.¹⁰ The normative juridical approach is an approach that is carried out based on the main legal material by examining the theories, concepts, legal principles and laws and regulations related to this research. This approach is also known as the library approach, namely by studying books, laws and regulations and other documents related to this research.¹¹

3 Discussion

According to Kelsen, law is a system of norms. Norms are statements that emphasize the "should" or *das sollen* aspects, by including some rules about what to do. Norms are deliberative human products and actions. Laws that contain rules of a general nature serve as guidelines for individuals to behave in society, both in relations with fellow individuals

⁷ Putusan Nomor 174/Pid.Sus/2020/PN Bkl.

⁸ Andri Winjaya Laksana, Hartiwiningsih Hartiwiningsih, Hari Purwadi, Law Enforcement Of Drug Addict During The Covid-19 Pandemic Based On Justice, *The 3rd Legal Internasional Conference and Studies*, Vol. 3, issue 3 (2021) page 1–10.

⁹ Andri Winjaya Laksana, The Legal Position Of Islamic Boarding School (Pesantren) As A Rehabilitation Effort For Narcotics Abuse, *International Journal of Law Reconstruction*, Vol 5, issue 2 (2021).

¹⁰ Johny Ibrahim, *Teori Dan Metodologi Penelitian Hukum Normatif*, Bayumedia, Malang, 2006, page 295.

¹¹ Soerjono Soekanto, *Penelitian Hukum Normatif*, Raja Grafindo Persada, Jakarta, 2004, hal 10.

and in relations with society. These rules become limits for society in burdening or taking action against individuals. The existence of these rules and the implementation of these rules give rise to legal certainty.¹²

Legal certainty normatively is when a regulation is made and promulgated with certainty because it regulates clearly and logically. Clear in the sense of not causing doubts (multiple interpretations) and logical. It is clear in the sense that it becomes a system of norms with other norms so that they do not clash or cause a conflict of norms. Legal certainty refers to the implementation of clear, permanent, consistent and consequential laws whose implementation cannot be influenced by subjective circumstances. Certainty and justice are not just moral demands, but factually characterize law. A law that is uncertain and does not want to be fair is not just a bad law.¹³

Legal certainty is a guarantee regarding the law that contains justice. Norms that promote justice must really function as rules that are obeyed. According to Gustav Radbruch, justice and legal certainty are permanent parts of law. He argued that justice and legal certainty must be considered, legal certainty must be maintained for the security and order of a country. Finally positive law must always be obeyed. Based on the theory of legal certainty and the values to be achieved are the values of justice and happiness.¹⁴

Judges in carrying out their duties of judicial power may not be bound by anything and/or pressured by anyone, but are free to do anything. Interpreting the meaning of such freedom is called individual freedom or extensive freedom. If this judge's freedom is linked to the Decision of the Panel of Judges of the Bangkalan District Court against the Narcotics case with Number 174/Pid.Sus/2020/PN Bkl, the Judge imposes a sentence below the special minimum determined by the Narcotics Law, in principle based on the weight of the Defendant's guilt and in deciding cases Judges may not be bound by anything including special maximum and minimum criminal sanctions in Law Number 35 of 2009, because the main achievement of judges is the value of justice. In this case the judge imposed a special minimum criminal sanction because based on the legal facts revealed in the trial the defendant was proven to be only a narcotics abuser and not a dealer. Judge to impose a sentence on the Defendant by deviating from the minimum criminal provisions in the Public Prosecutor's indictment.

The Panel of Judges in the above considerations uses a systematic interpretation which is a method that must exist in every method of finding law because in systematic interpretation, law is interpreted as a system that is interrelated with one another, which means that positive law is always related and correlated with one another, not there is no single positive law that stands alone or is independent from the system that encompasses it. In analyzing the existence of values contained in the provisions of Law Number 35 of 2009 concerning Narcotics, the Panel of Judges did not only reflect or focus on the provisions contained in the Public Prosecutor's Indictment to seek vertical harmonization, but also used other provisions such as the Supreme Court Circular Letter, it is used to seek horizontal harmonization in the statutory system. Because it interprets positive

¹² Peter Mahmud Marzuki, *Op.Cit.*, 2008, page158.

¹³ Cst Kansil, Christine, S.T Kansil, Engeliën R, Palandeng dan Godlieb N Mamahit, *Kamus Istilah Hukum*, Jakarta, 2009.

¹⁴ Achmad Ali, *Op.Cit.*, 2002, page95.

law, it must be carried out holistically (thoroughly) not partially (separately) and must not deviate (misleading) or get out of the statutory system (out of the legal system).

The Panel of Judges in this decision used the legal logic popularized by Hans Kelsen. This logic states that law deals with formal form, not content (material). In this decision, the law is identified with the law (law stated on the book), so that the law is also interpreted as a mere logical product from the government which must be carried out according to formal procedures, this then gives rise to procedural justice, which is only seen from the fact that it has been fulfilled or no formal procedures.

If you look at the decision in more depth, is it oriented towards the principle of legal certainty and also the principle of justice, then this can be reflected in the judge's legal considerations. Synergy or combination of the provisions of Law Number 35 of 2009 concerning Narcotics coupled with the provisions contained in the Circular Letter of the Supreme Court Number 3 of 2015 contained in the results of the Plenary Meeting of the Supreme Court of the Republic of Indonesia in 2015 provisions of the Circular Letter of the Supreme Court Number 4 of 2010, Circular Letter of the Supreme Court Number 13 of 2017 with legal facts, the Judge with the freedom and independence he has breaks through the special minimum criminal provisions even though basically in the process of prosecuting the Public Prosecutor does not indict the Defendant with the provisions of Article 127 paragraph (1) of Law Number 35 of 2017 2009 concerning Narcotics.

Of course, in this case the Panel of Judges has reflected the values of legal certainty which can be seen that the Panel of Judges is still guided by existing legal provisions and has also prioritized justice which is reflected in its decision that according to the legal facts revealed at trial it is known that the Defendant is a narcotics abuser and not involved in the illicit drug trade. We know that the value of justice cannot be measured in terms of parameters, but in this case the author tries to examine more deeply that justice in a decision is reflected if there is a point of contact or synergy between the provisions of the law and the legal facts revealed in the trial so that it narrows to the judgment. Judge's objective. By adhering to this, the Panel of Judges bypassed the criminal provisions in Law Number 35 of 2009 concerning Narcotics and imposed sentences below a special minimum.

Judges in imposing sentences below the special minimum must be able to decipher legal facts and be able to extract values from Law Number 35 of 2009 concerning Narcotics so that in this case the Judge does not only embody legal certainty or become a mouthpiece for the Law but is able to realize justice. Justice does not appear by itself, but justice is created through the judge's consideration through the discovery of law by the judge and also the interpretation of a legal norm.

When a judge is faced with a conflict between the principle of legal certainty and justice, the judge must be able to make a shift. This shift is intended not to accentuate one of the principles, whether it is certainty or justice, but rather to create a balance between the two. The synergy of the two will be very visible from the style of law applied by the Judge in considering the Judge's decision.

In general, the researcher assesses the consideration of decisions that place theoretical legitimacy from the principle of equality (equal principle) popularized by John Rawls, so he describes the limitations on human rights known as the principle of difference (different principle). This principle aims to create a balance when there is inequality or

injustice in the political, social and economic fields, then rules must be given in such a way that they are most beneficial to the weakest (least advantaged) class of society.

Opposition and partiality towards a particular school of thought in the realm of philosophy is a necessity that cannot be avoided. Science develops because of curiosity which in turn creates a critical and apathetic attitude towards certain forms of establishment. It is with this enthusiasm to develop thinking that the wheel of science develops at a rate that is picking up the era of change.

4 Conclusion

1. Criminal sanctions in Law no. 35 of 2009 concerning Narcotics, it is known that there are minimum sanctions and maximum sanctions which are in Article 111 to Article 148 of Law no. 35 of 2009 concerning Narcotics. Then the punishment in Law No. 35 of 2009 can also be seen from its nature, which is cumulative, meaning that if someone is proven to have committed a narcotic crime, they will be subject to imprisonment and fines. With the existence of a special minimum criminal system, as contained in Law Number 35 of 2009 concerning Narcotics, it is hoped that the perpetrators of criminal acts of narcotics abuse can be subject to severe punishment, this is because every year the number of perpetrators of narcotics crimes is increasing/increasing., where one of the causes is inseparable from the lightness of the decision handed down by the judge so that the imposition of a sentence does not create a deterrent effect for the perpetrators. Even though it is very clear that narcotics have a very bad impact on their users, even narcotics crimes are very dangerous to the interests of the nation and state.
2. Broadly speaking, the description in consideration of the Panel of Judges of the Bangkalan District Court regarding the Narcotics case with register number 174/Pid.Sus/2020/PN Bkl in general and in its entirety from the decision it can be seen that the Panel of Judges made a decision based on the theory of evidence and theory of punishment. The Panel of Judges as a whole has also examined the provisions of the contents of SEMA Number 3 of 2015, namely the Judge examining and deciding cases must be based on the Public Prosecutor's indictment (Article 182 paragraph 3 and 4 of the Criminal Procedure Code). The prosecutor charged with Article 111 or Article 112 of Law no. 35 of 2009 concerning Narcotics but based on the legal facts revealed in court it is proven that Article 127 of Law no. 35 of 2009 concerning Narcotics in which this article was not charged, the defendant is proven to be a user and the number is relatively small (SEMA No. 4 of 2010) so the Judge decides according to the indictment but can deviate from the provisions of the special minimum crime by making sufficient considerations. The judge imposes a sentence below the special minimum determined by this Narcotics Law in principle based on the weight of the Defendant's guilt and in deciding a case the Judge may not be bound by anything including the special maximum and special minimum criminal sanctions in Law Number 35 of 2009, because The judge's main achievement is the value of justice. In this case the judge imposed a special minimum criminal sanction because based on the legal facts revealed in the trial the defendant was proven to be

only a narcotics abuser and not a dealer. Judge to impose a sentence on the Defendant by deviating from the minimum criminal provisions in the Public Prosecutor's indictment.

3. Judges in imposing sentences below the special minimum must be able to decipher legal facts and be able to extract values from Law Number 35 of 2009 concerning Narcotics so that in this case the Judge does not only embody legal certainty or become the mouthpiece of the Law but is able realizing justice. Justice does not appear by itself, but justice is created through the judge's consideration through the discovery of law by the judge and also the interpretation of a legal norm. When a judge is faced with a conflict between the principle of legal certainty and justice, the judge must be able to make a shift. This shift is intended not to accentuate one of the principles, whether it is certainty or justice, but rather to create a balance between the two. The synergy of the two will be very visible from the style of law applied by the Judge in considering the Judge's decision.

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