

## Formulation of Disparity of Punishment in Drug Abuse Cases

Muhammad Shidqi Adlian Wasim<sup>1)</sup> & Andri Winjaya Laksana<sup>2)</sup>

<sup>1)</sup> Faculty of Law, Universitas Islam Sultan Agung (UNISSULA), Semarang, E-mail: [Shidqim59@gmail.com](mailto:Shidqim59@gmail.com)

<sup>2)</sup> Faculty of Law, Universitas Islam Sultan Agung (UNISSULA), Semarang, E-mail: [andri@unissula.ac.id](mailto:andri@unissula.ac.id)

**Abstract.** *Disparity in punishment is the imposition of unequal punishments for the same crime or for crimes whose dangerous nature can be compared without a clear justification. In practice, judges' decisions in juvenile criminal cases result in disparity in punishment. Therefore, the issue of sentencing is not only important for judges and the judicial process, but also for the legal process as a whole, especially in terms of law enforcement. Where in this case it gives rise to different criminal sanctions between children who commit the crime. Disparity in decisions cannot be separated from the judge's discretion in imposing sentences in a criminal case. In this study, the author will examine narcotics cases in decisions Number 101 / Pid.Sus / 2022PN Smn and Number 68 / Pid.Sus / 2020 / PN Smn. The author will discuss what factors can cause disparity in punishment, then the basis for the judge's considerations and also the last is the obstacles for a judge in deciding a case. The approach that will be used is a Juridical Sociological approach. The sources and types of data in this study are primary data obtained from field studies with interviews. And secondary data obtained from literature studies. The results of this study indicate that disparities in sentencing occur due to various things that make the decisions of the panel of judges different from one decision to another in the same case.*

**Keywords:** *Criminalization; Disparity; Narcotics.*

### 1. Introduction

Indonesia is a country with a large population, a very wide variety of cultures in each region. Besides that, Indonesia is also a country of law. Law in Indonesia was created for justice, benefit, comfort and tranquility for the people in it.

Indonesia is a country that was born in the 20th century, the country adopted the concept of a state of law which in this case is in accordance with the principles of constitutionalism. This agreement has been established by the Indonesian people since the 1945 Constitution as the state constitution. Then this agreement is what

in its development transformed into a common hope that can also be called a state philosophy or *staatsidee* (state ideals) which function as a *filsafatsche grondslag* (philosophical foundation) and common platforms or *kalimatun sawa* among fellow citizens living in Indonesia in the context of state life.<sup>1</sup> Along with the rapid development of the era at this time, it triggers people to live in accordance with existing conditions. There are those who live according to norms and those who do not. However, this time what we are highlighting is the behavior of people who do not comply with norms, especially regarding the dangers when people are already familiar with narcotics. People who do not live according to norms can be categorized as people who break the law. When a violation of the law occurs, there must be a term for law enforcement, both of which are an inseparable unity. Wherever the place is, law enforcement should not look at the status and position of the perpetrators of the crime, especially in Indonesia where all citizens have the same rights and position in the eyes of the law. Given that all Indonesian citizens have the same rights and position in the eyes of the law, as stated in Article 27 of the 1945 Constitution, the contents of which are:

"Every citizen has equal standing before the law and government and is obliged to uphold the law and government without exception."<sup>2</sup>

Indonesia is a country of law based on Pancasila and the 1945 Constitution of the Republic of Indonesia, this means that all actions of its citizens must be in accordance with the norms and provisions that have been regulated by the state. This is implied in Paragraph IV of the opening of the 1945 Constitution of the Republic of Indonesia which reads:

"All the Indonesian people and all the Indonesian blood and to advance public welfare. - to educate the nation's life and participate in implementing world order based on freedom, eternal peace and social justice"<sup>3</sup>

Based on existing laws, the State of Indonesia strives to prevent the abuse and distribution of narcotics. In this case, the distribution of narcotics has become a serious problem that must arouse public attention because it is a trigger for the destruction of the system of life order in society, including the values and future of the younger generation. Drug trafficking in Indonesia is very disturbing. Drug users are increasing because of the ease of obtaining these dangerous substances. If this dangerous substance is tasted, it causes addiction to all parties who try it regardless of gender and age, even the highest risk of the dangers of consuming this illegal substance is that it can lead to death. Although there are several types

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<sup>1</sup>Jimly Asshiddiqie, *The Indonesian Constitution and Constitutionalism*, (Jakarta: Sinar Grafika, 2010), p. 22.

<sup>2</sup>Article 27 of the 1945 Constitution of the Republic of Indonesia.

<sup>3</sup>Paragraph IV of the Preamble to the 1945 Constitution concerning the Objectives of the Indonesian State

of substances that are allowed to be used for medical purposes, they still have to get strict supervision from the authorities in this case, namely doctors.

In Indonesia, cases of drug abuse, especially among teenagers, are increasing. Young people who are addicted to drugs are vulnerable to being long-term users because they are still young and have a long time.

*World Drug Reports* 2018 published by the United Nations Office on Drugs and Crime (UNODC), stated that as many as 275 million people in the world or 5.6% of the world's population (aged 15-64 years) have consumed drugs. Meanwhile in Indonesia, the National Narcotics Agency as the focal point in the field of Prevention and Eradication of Drug Abuse and Illicit Trafficking (P4GN) collected data on drug abuse figures in 2017 of 3,376,115 people in the age range of 10-59 years.<sup>4</sup>The National Narcotics Agency (BNN) in collaboration with the Health Research Center of the University of Indonesia conducted a routine survey of drug abusers, in this case targeting school and university students in 2006, 2009, and 2011. The survey was conducted to identify drug use trends each year. A total of 38,663 students in 607 schools/campuses were involved. The survey was conducted in various urban and rural areas in selected provinces including NAD, North Sumatra, Riau Islands, Jambi, South Sumatra, DKI Jakarta, West Java, Central Java, East Java, West Kalimantan, Central Kalimantan, South Sulawesi, North Sulawesi, NTT, Bali, West Papua. The survey results show that the rate of abuse is more dominant in men than women, and the older the respondents, the higher the rate of drug abuse.<sup>5</sup>The circulation of addictive narcotics is very difficult to stop. Especially those who abuse narcotics, they do not look at race, age, religion and even gender. If they have been proven to use Class 1 narcotics, then they should be caught in a criminal case as has been in force in Article 127 paragraph 1 of the Narcotics Law, the contents of which state that anyone who has violated the Article or anyone who is proven to use narcotics must be punished.<sup>6</sup>In narcotics there are several types of categories regulated in Article 6 of Law Number 35 of 2009 concerning Narcotics. Every abuse of narcotics:

- 1) Class I narcotics for personal use are punishable by a maximum prison sentence of 4 (four) years;
- 2) Class II narcotics for personal use are punishable by a maximum prison sentence of 2 (two) years.
- 3) Class III narcotics for personal use are punishable by a maximum of 1 (one)

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<sup>4</sup><https://bnn.go.id/penggunaan-narkotika-kalangan-remaja-meningkat/> about "narcotics development", accessed on August 16, 2024

<sup>5</sup>The center for health research university of Indonesia, "national survey of the development of drug abuse and illicit trafficking in student groups", accessed from <https://chr.ui.ac.id/archives/7637>, accessed on August 17, 2024

<sup>6</sup>Article 127 point 1 of Law No. 35 of 2009 concerning narcotics

year in prison.<sup>7</sup>

As an effort to move towards a democratic country that complies with the laws in force in a country, the people of Indonesia in this case need the role of state apparatus in efforts to realize fair, orderly and prosperous law enforcement "such conditions are an effort to increase certainty, awareness, order, and welfare in the context of organizing a state that is increasingly orderly and regular."<sup>8</sup>

Indonesia, which is a democratic country and also a country of law, contains criminal law, the contents of which are written rules that have been compiled, created and enacted in order to be implemented in real life in society as positive law, and will be effective and can be felt to achieve justice and legal certainty if its implementation is in accordance with what is intended by the creators of the Law regarding what has been stated in these sentences.<sup>9</sup>

The task of a judge in issuing a criminal verdict has the freedom that must be in accordance with the 1945 Constitution, also when a judge makes a decision, they are required to be accountable for the decision to God Almighty in this case ALLAH SWT. The behavior of a judge in a court process is one of the main benchmarks for seeing the success or failure of the law enforcement process, which is manifested in its decision. so that in this case it can be a barometer of whether or not the law and the Law are upheld. However, in practice, the principles of justice are not always consistently applied and implemented so that in this case it causes a gap in the decisions against perpetrators of criminal acts.

In this article, law enforcers are limited to judges only. A law enforcer, as with other members of society, usually has several positions and roles at once. Thus, it is not impossible that between various positions and roles there will be conflict (status conflict and conflict of roles).<sup>10</sup>

The issue of role is considered important, because the discussion on law enforcement is actually more focused on discretion. The role that should be from certain law enforcement circles has been formulated in Law No. 4 of 2004 on Judicial Power.<sup>11</sup>

The ideal role can be seen in Article 1 of Law Number 4 of 2004, the contents of which are: "Judicial Power is the power of an independent State to administer justice in order to uphold law and justice based on Pancasila, for the sake of the

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<sup>7</sup>Article 127 point 1 of Law No. 35 of 2009 concerning narcotics

<sup>8</sup>Fence M. Wantu, *Idee Des Recht Legal Certainty, Justice and Benefit (Implementation in the Civil Court Process)*, Pustaka Pelajar, Jogja, 2011, p. 1-2.

<sup>9</sup>Adami Chazawi, *Criminal Law Lessons*, Publisher: PT. RajaGrafindo Persada, Jakarta, p. 3.

<sup>10</sup>Soerjono Soekanto, *Factors Influencing Law Enforcement*, (Jakarta: PT Raja Grafindo Persada, 2004), p. 19.

<sup>11</sup>Soerjono Soekanto, *Op.Cit*, p. 21

implementation of the Constitutional State of the Republic of Indonesia."

Apart from its ideal role, the judiciary has an appropriate role. This role can be seen in Law Number 4 of 2004 as follows:

1) Article 2 paragraph (1) which states: "The implementation of judicial power as referred to in Article 1 is delegated to judicial bodies and determined by law, with the main task of receiving, examining, trying and resolving every case submitted to it."

2) Article 4 paragraph (2) contains: "Trial proceedings are carried out simply, quickly and at low cost."

3) Article 5, the contents of which are as follows:

a. The court judges according to the law and does not discriminate against people.

b. The court assists those seeking justice and tries to overcome all obstacles and barriers to achieve simple, fast and low-cost justice.

4) Article 16 paragraph (1): "The court may not refuse to examine, try and decide a case submitted on the pretext that the law does not exist or is unclear, but is obliged to examine and try it."

5) Article 25 (1): "All court decisions, in addition to containing the reasons and basis for the decision, also contain certain articles of the relevant statutory regulations or unwritten legal sources which are used as the basis for the trial."

6) Article 28 paragraph (1): "Judges are obliged to explore, follow and understand the legal values and sense of justice that exist in society."

The supporting facilities factor for law enforcement is very necessary. Without certain facilities or means, it is impossible for law enforcement to run smoothly. These facilities or means include educated and skilled human resources, good organization, adequate equipment, sufficient finances, etc.<sup>12</sup>

The means and facilities for drug addiction rehabilitation are often inadequate, even though every day many victims fall without any treatment efforts.<sup>13</sup>

The role of the community according to its obligations is required to join together with the government in preventing drug abuse. For example, reporting to law enforcement if they know of drug abuse. The role of the community is very much needed to reveal cases of drug crimes. But in reality, the community does not

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<sup>12</sup>Rusli Muhammad, *Portrait of the Indonesian Court Institution*, (Jakarta: PT Raja Grafindo Persada, 2006), p. 81.

<sup>13</sup>Siswanto Sunarso, *Op.Cit*, p. 9.

report enough because of their own security issues and the lack of guarantees for the reporter.<sup>14</sup>Moreover, perpetrators of drug crimes have a very neat network and often use violence.

In addition to the role of the community, law enforcement officers included in the criminal justice system, namely: the police, prosecutors, judicial institutions to correctional institutions including lawyers must really work honestly and professionally for the sake of upholding the law. Specifically in this article the author wants to highlight the performance of judges in passing sentences against perpetrators of drug abuse crimes. Judges as part of the judicial institution play a very important role in upholding the supremacy of law. Not only that, judges are also considered as God's representatives in the world for people who want to seek truth and justice.

In the explanation of Law Number 4 of 2004 concerning Judicial Power, it is stated that the freedom of judges in exercising their judicial authority is not absolute. Because the judge's duty is to uphold the law and justice based on Pancasila by interpreting and seeking the foundations and principles that are the basis for it, through the cases presented to him so that his decision reflects a sense of justice.

But in reality, the decisions made by judges often invite controversy. It is not uncommon for one perpetrator of a crime to be given a heavy sentence while another perpetrator of a crime is given a light sentence or even acquitted, even though the articles violated are the same.

According to the Criminal Procedure Code, a judge is a state judicial official who is authorized by law to adjudicate. The judge in the trial process is positioned as a leader. This position gives the right to regulate the course of the trial and take action when there is disorder in the trial. For the purposes of the decision, the judge has the right and must collect information from all parties, especially from witnesses and defendants, including their legal counsel. A judge who is positioned as a leader in the trial process in an effort to apply the law for the sake of justice must be aware of his responsibility so that when he acts and acts, it is not just a matter of passing a verdict, but also that all his actions are always directed towards realizing justice based on the Almighty God. This is what the judge must realize in the trial which is also a realization of his responsibility.

The increasing drug abuse from year to year is inseparable from the lightness of the verdicts handed down by judges. In this regard, it would be good for the author to describe several examples of drug cases decided by the District Court which are the subject of the author's research.

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<sup>14</sup>Ibid. p. 158

Table Examples of Drug Cases Decided by the West Jakarta District Court from 2015				
No.	Case No.	Articles violated	Criminal	
			Prison	Fine
1.	330/Pid.Sus/2015/PN.JKT.BRT	Article 127 paragraph (1) letter a of the Law No. 35 of 2009 concerning Narcotics	Rehabilitation	
2.	1413/Pid.Sus/2014/PN.JKT.BRT	Article 127 paragraph (1) letter a of the Law No. 35 of 2009 concerning Narcotics	1 (one) year and 2 (six) months imprisonment	
3.	1849/ Pid.Sus/2014/PN.JKT.BAR	Article 127 paragraph (1) letter a Law no. 35 of 2009 concerning Narcotics	Rehabilitation	
4.	976/ Pid.Sus/2015/PN.JKT.BAR	Article 127 paragraph (1) letter a of the Law No. 35 of 2009 concerning Narcotics	Rehabilitation	

Source: West Jakarta District Court

From the table of case examples above, it can be seen that there are differences or disparities in criminal law, namely differences in punishment or criminal sanctions imposed by the judge on perpetrators of narcotics crimes between one and another using the same article as the basis, differences in evidence that are not so striking, and there are also criminal sanctions imposed the same but with evidence that is much different in number. In fact, as stated above, judges in making decisions should pay attention to 3 (three) important elements, namely: justice, legal certainty and benefit.

## 2. Research methods

At the time this research was conducted, it was seen that the research used had a descriptive analysis nature. Descriptive research is research to provide data that is as accurate as possible about humans, conditions or certain symptoms. It means systematically, factually and accurately regarding facts and phenomena at present or in the past of a particular area. The researcher used descriptive analysis research specifications, namely to focus on applicable laws and regulations related to theories and implementation of positive law or laws in force at present, especially concerning the problem of criminalization of perpetrators of narcotics crimes.

### 3. Results and Discussion

#### 3.1. Basic Considerations of the Public Prosecutor in Handing Down Decisions that Cause Disparities in the Sentencing of Narcotics Crime Offenders.

A criminal act is an act that is prohibited by statutory regulations, which is accompanied by the threat (sanction) of several forms of punishment.<sup>15</sup> against anyone who violates the rules. So what society actually feels is a violation of justice, for example: murder, drug use. Such crimes are called "crimes" (*mala perse*). The application of criminal sanctions or sanctions in criminal law is a suffering that must be accepted as compensation for the actions of perpetrators of criminal acts that harm victims and society. The purpose of criminal law is to improve the welfare of society. Therefore, the identification and application of sanctions must be considered seriously.

"In deciding a case, the panel of judges will make legal considerations. Where a decision must reflect a sense of justice, legal certainty and benefit. When deciding a case, sometimes a judge can make the same decision as the public prosecutor's demands if the defendant is demanded by the public prosecutor to go to prison, the judge can also decide with the same decision, namely to go to prison, but the judge's decision can also be different from the public prosecutor's demands where when the public prosecutor demands that the defendant must be imprisoned, but the results of the panel of judges' deliberations decide that the defendant can be rehabilitated with various reasons for the judge, for example, it turns out that the defendant has an assessment result carried out by an authorized official during the examination at the investigation level that the defendant has only used narcotics once and knows that the defendant is a drug abuser who is dependent or not. This shows that the facts in the trial greatly influence the results of the decision."<sup>16</sup> The law applies to everyone and at any level equally (equality before the law) so that the law will be the commander of all other aspects.<sup>17</sup> Law enforcement that is highly desired by the community to be truly just and not discriminate against anyone, because for a long time the community has felt that injustice often occurs in law enforcement.

#### 3.2. Obstacles for a Judge in Deciding on a Case, Causing Disparities in Sentencing.

Judges are often faced with two difficult choices, meaning that when justice and legal certainty cannot be combined into one conclusion. The two principles should ideally be tied into one decision, but to combine justice with legal certainty is actually not easy. Because sometimes justice and legal certainty are in different

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<sup>15</sup>Muljanto, 2012, *Principles of Criminal Law*, Jakarta, Bumi Aksara, p.55

<sup>16</sup>Results of the interview with Mrs. Ria Helpina as Judge of the Sleman District Court at 09:00 WIB on Wednesday, August 5, 2024

<sup>17</sup>Siti Soetami, *Introduction to Indonesian Legal System*, (Bandung: Revika Aditama, 2007), p. 62



places, if we want to approach that place where justice is, we will be far from legal certainty, and vice versa. In this case, the judge is forced to make a choice by sacrificing one for the other to stand.

"Judges in carrying out their duties resolve a case, especially narcotics criminal cases with various considerations from the panel of judges where there are various sociological elements in it such as mitigating and aggravating factors. Perpetrators of class I narcotics abuse often find that to resolve a case requires a long time, it can be 145 to months or even years depending on the level of difficulty. The obstacles that occur in deciding the case from the two decisions above are the judges following the demands of the public prosecutor where in case number 101 the prosecutor demands that the defendant must be imprisoned and the judge follows it and the second in case No. 68 the public prosecutor demands that the defendant be rehabilitated for 6 months and the decision is also rehabilitated for 6 months, which should be in handing down a narcotics case, the judge must follow SEMA 04 of 2010 where when the evidence is below 1 gram then the defendant can be rehabilitated, then there are other obstacles in narcotics cases that can cause disparities to arise, namely the difference in the Panel of Judges where each judge has their own beliefs"<sup>18</sup>

### **3.3. How to Formulate Judges' Considerations in Handing Down Decisions Against Narcotics Crime Offenders in the Future.**

The existence of disparity in decisions that has arisen since long ago, both within one judicial environment or with other courts, makes this disparity an interesting discussion for several parties. The Deputy Chief Justice of the Supreme Court for Judicial Affairs said that the issue of disparity in decisions has been a topic of discussion by law enforcers for a long time, because seeing the consequences that arise due to this disparity, it is feared that it will lose public trust.

Criminal disparities cannot be simply eliminated. This is related to law enforcement, where in this case what is meant is the judge. Behind the very heavy duties of a judge, a judge is still a human being who has psychological rights, namely to be afraid, brave, honest, wrong, and others. Judges are also actually related to those closest to them, their families, their environment, and their education, so we need to realize that there is no identical model of a judge.

If legally we can say that throughout Indonesia there is only one model of judge, as stated in the legal regulations, however in terms of legal sociology, there is more than one judge or more than one type of judge in Indonesia.

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<sup>18</sup>Results of the interview with Mrs. Ria Helpina as Judge of the Sleman District Court at 09:00 WIB on Thursday, August 8, 2024

Therefore, at this point we can see the judge not only as a legal bureaucrat, but also as a human being, consisting of various variables that can be attached to a judge, such as age, social background, race or ethnicity, religion, education, experience, all of which have the opportunity to help determine how a judge tends to decide and thus give birth to various types of judges. Therefore, disparities will always exist but we can minimize the differences by making the following formulation.

#### **4. Conclusion**

In deciding a narcotics case, especially talking about the obstacles of judges, there are several obstacles, including the factor of judicial power in deciding a case, then the factor of testimony from witnesses that is convoluted can also be an obstacle for a judge, in deciding a narcotics case the defendant can show the results of the assessment submitted by the police to the panel of judges which in the results of the assessment allows the defendant to be rehabilitated which is also one of the obstacles for a judge. By creating sentencing guidelines, it is also hoped that in the future judges will be able to implement transparency and consistency when deciding a case and issuing a verdict. In the Criminal Code or Criminal Procedure Code or related laws and regulations used in Indonesia so far, there has been no explicit guidance or reference for judges. The laws and regulations available and that can be used by judges in making considerations and giving criminal decisions to defendants, so far are guidelines for giving laws with maximum and minimum limits only. These sentencing guidelines are basic provisions that are made firmly or explicitly in the sentencing system so that they can become part of a criminal law regulation. The existence of these sentencing guidelines will make it easier for judges to determine the criminal sanctions that will be imposed by looking at the facts revealed in court. Where the sentencing guidelines contain things that are objective and related to the defendant or perpetrator of the crime.