

## THE PERCEPTIONS OF INDONESIAN JUDGES IN SENTENCING MINOR DRUG OFFENDERS: CHALLENGES AND OPPORTUNITIES

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### Abstract

This paper presents the perceptions of Indonesian Judges in sentencing minor drug offenders. The judge holds a central role in the sentencing process, and because of the judicial discretion they can use it is essential to understand how judges come to their sentencing decisions. To develop an understanding of how judges perceive their actions in decision-making and sentencing of drug users, a total of 31 participants were interviewed. The data demonstrated that the majority of minor drug offenders are from poorer backgrounds. Poverty was found to lead people to the drug culture. Moreover, lack of understanding of the harm caused by taking drugs and living under drug prohibition were considered as contributing factors to people involved in minor drug offences. Thus, minor drug offenders are considered by judges as victims of their circumstances. Within structural inequality, the imposition of harsh sentencing to minor drug offenders who suffer from socio-economic problems raises issues surrounding justice. Within the current legal structure of Indonesian courts, which are primarily retributive and have drug prohibitionist policies, the majority of participating judges consider drug sentencing as reflecting those prohibitionist policies. However, a substantial minority of participating judges interpreted the form of the sentence within available limits. These findings will contribute to the sociological understanding of the context in which judicial culture shaped the formation of the judiciary as a group and the impact of Islamic culture on the participating judge's positive preference for rehabilitative problem-solving in the Indonesian context.

*Makalah ini menyajikan persepsi para Hakim Indonesia dalam menghukum pelaku pengguna narkoba. Hakim memegang peran sentral dalam proses hukuman,*

dan karena kebijaksanaan yang dimiliki oleh hakim, adalah penting untuk memahami bagaimana hakim sampai pada putusan penjatuhan hukuman. Untuk mengembangkan pemahaman tentang bagaimana hakim mempertimbangkan dalam putusan kepada terdakwa pengguna narkoba, total 31 peserta diwawancara. Data menunjukkan bahwa mayoritas pengguna narkoba minor berasal dari latar belakang yang kurang beruntung. Kemiskinan ditemukan mendorong orang ke jaringan narkoba. Selain itu, kurangnya pemahaman tentang dampak kerusakan yang disebabkan oleh penggunaan narkoba dan hidup di bawah rezim pelarangan terhadap narkoba dianggap sebagai faktor yang berkontribusi bagi orang yang terlibat dalam perkara penggunaan narkoba. Dengan demikian, pengguna narkoba dipertimbangkan oleh hakim sebagai korban dari keadaan mereka. Dalam ketidaksetaraan struktural, penjatuhan hukuman yang tinggi kepada pengguna narkoba yang mengalami permasalahan sosial-ekonomi menimbulkan masalah seputar keadilan. Dalam struktur hukum pengadilan Indonesia saat ini, yang terutama bersifat retributif dan memiliki kebijakan pelarangan narkoba, mayoritas hakim yang berpartisipasi dalam penelitian menganggap hukuman narkoba sebagai cerminan kebijakan pelarangan tersebut. Namun, sebagian besar hakim yang berpartisipasi menafsirkan bentuk penjatuhan hukuman dalam batas yang diatur dalam undang-undang. Temuan-temuan ini akan berkontribusi pada pemahaman socio-legal dari konteks di mana budaya peradilan membentuk aparat peradilan sebagai sebuah kelompok dan dampak budaya Islam yang berpengaruh pada preferensi positif hakim yang mendukung putusan secara rehabilitasi dalam konteks Indonesia.

**Keywords:** Judicial Culture, The Formation of the Judiciary, Islamic Culture, Rehabilitative Problem-solving, Indonesian Context

## Introduction

Numerous studies on sentencing have explored the broader structure of audience on sentencing, including the political determinant,<sup>1</sup> the public determinant.<sup>2</sup> These studies are important in

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<sup>1</sup> Thomas F. Babor, Jonathan P. Caulkins, Griffith Edwards, Benedikt Fischer, David R. Foxcroft, Keith Humphreys, Isidore S. Obot, Jürgen Rehm, Peter Reuter, Robin Room, Ingeborg Rossow, John Strang, *Drug policy and the public good* (Oxford: Oxford University Press, 2010).

<sup>2</sup> Jacqueline Tombs, “A unique punishment: sentencing and the prison population in Scotland”, *Edinburgh: Scottish Consortium on Crime & Criminal Justice*, 2004, available on: <http://www.scccj.org.uk/wp-content/uploads/2011/08/A-Unique-Punishment.pdf>, accessed 25 February 2015.

exploring the underlying legitimacy that underlies sentencing. Legitimacy is defined in this research as the extent to which agencies appear to reflect others' expectations within legitimised performance<sup>3</sup>. Within the sphere of politics, Babor (2010) focus on the importance of sentencing that would reflect the judicial accountability to the state. In terms of political accountability, there is a direct accountability mechanism in term of how the judges choose to interpret what justice is, in this way that they are doing is a political job, acting in the political arena, and not just acting in a judicial role. For example, in the United Kingdom, judges are appointed by the state, and for that reason the judicial interpretation of justice there is part of their direct accountability to the state<sup>4</sup>. In terms of public accountability, Ulmer (2008) focus on the importance of sentencing that would reflect a direct accountability mechanism to the community. For example, in the United States, the judge is democratically elected by the community, and because of that the judicial interpretation of justice presented their direct accountability to the community.<sup>5</sup>

This acknowledges the way, within Western culture, that judges are doing a political job through interpreting justice. It is also noteworthy that since early 2013 there is one study exploring the perspectives of the judiciaries in Asian countries, mainly in its relationship between Buddhist community and sentencing in Thailand<sup>6</sup>. However, it is noteworthy that the extent in which the judges' interpretation of justice appears to reflect their accountability to the broader structure of audience (i.e. the sphere of politics, the public and the religious communities) related to issues of drug use remains unexplored. It is this relationship between the Islamic community and Indonesian judges'

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<sup>3</sup> Erving Goffman, *The presentation of self in everyday life* (Garden City, NY: Anchor, 1959).

<sup>4</sup> Ronald Helms, "Modeling the politics of punishment: A conceptual and empirical analysis of 'law in action' in criminal sentencing", *Journal of Criminal Justice*, vol. 37, no. 1 (2009), p. 10.

<sup>5</sup> Jeffery T. Ulmer, Christopher Bader, and Martha Gault, "Do moral communities play a role in criminal sentencing? Evidence from Pennsylvania", *The Sociological Quarterly*, vol. 49, no. 4 (2008), p. 737.

<sup>6</sup> Supakit Yampracha, "Understanding Thai sentencing culture", Doctoral Dissertation, University of Strathclyde, 2013, available on <https://ethos.bl.uk/OrderDetails.do?did=1&uin=uk.bl.ethos.694578>, accessed 27 January 2017.

accountability when sentencing that I will consider further in this paper. One should bear in mind that in Indonesia, the judges are appointed by the state and Indonesia has Muslim majority in the country. The study which forms the basis for this paper also offers an insight into contemporary courts and sentencing practices in Indonesia,<sup>7</sup> which can shed light on both the challenges and opportunities to reform these practices.<sup>8</sup>

## Context for the Study

The purpose of this section is to present the context to the study. This section will consider the judicial process in Indonesia (investigation, prosecution, and judicial interpretation of the facts). In term of investigation, the influence of the police who set up the case needs to be considered. Previous study indicated that the influence of policing practices that determine the judicial interpretation of justice can be considered challenging. For example, in the post-2009 era following the ‘war on drugs’, Judge Mulyadi was concerned about the policing practices<sup>9</sup>. Those drug users who were undergoing rehabilitation (not based on the judge’s sentencing) could be charged criminally on past drug history and can be prosecuted. Mulyadi’s concern was that the drug users would be in a state of constant worry because once they have completed their residential rehabilitation, and go outside, they can be considered easily be targeted by the police and arrested. The influence of these policing practices in relation to drug users can be considered as important in shaping the judicial interpretation of justice in the court sentencing. To understand the influence of policing practices that determine the judicial interpretation of justice requires us to go into some details.

In term of prosecution, the influence of the prosecutor presenting evidence needs to be considered. The presentation of evidence used by the Indonesian criminal justice system, is similar to the adversarial

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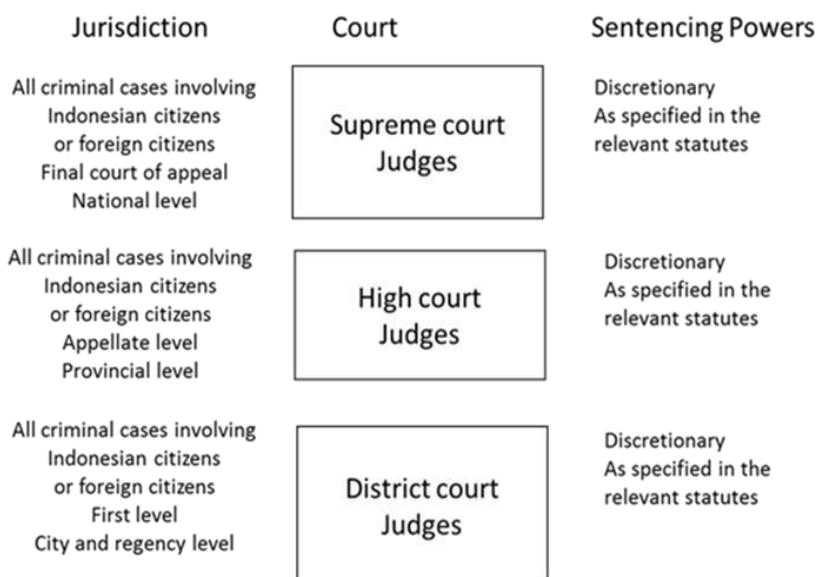
<sup>7</sup> Françoise Vanhamme and Kristel Beyensm, “La recherche en sentencing: un survol contextualisé”, *Déviance et société*, vol. 31, no. 2 (2007), p. 199

<sup>8</sup> Andrew Ashworth, *Sentencing and criminal justice* (Cambridge: Cambridge University Press, 2010).

<sup>9</sup> Mulyadi, “Punishment against traffickers and drug users: research on principles, theory, and practice norms application in sampled Courts”, *Research Centre for the Indonesian Supreme Court*, (2012), p.147.

system.<sup>10</sup> The prosecutors are required to present evidence. The panel of Judges then examines the evidence presented by the prosecutor. Consultation is based on the facts that have been proven and the indictment. To understand the judicial interpretation of the facts and the relevant indictment requires us to go into some details.

In term of the judicial interpretation of the facts and the relevant law, these lie with panel of three Judges. The way in which the judge interprets these facts and relevant laws is the central issue that I will reflect upon. Regarding the appeal procedure, once the panel reaches agreement, the sentencing is made, and the defendant is informed about his/her right to appeal. The challenges concerning the appeal procedures should be taken into consideration. In Indonesia, the appeal procedures are arranged at three levels of criminal courts (Figure 1). The District Court starts the appeal process. These appeal procedures are arranged hierarchically up to the High Court and the Supreme Court.



**Figure 1.** The structure of criminal courts in Indonesia.

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<sup>10</sup> ASEAN Law Association, *Indonesian Legal System*, ASEAN Law Association, 2010, Available on <http://www.aseanlawassociation.org/legal-indonesia.html>, accessed 27 January 2015.

Figure 1 above illustrates that all criminal cases (including minor drug offenders) will be sentenced first at the district court. If the prosecutor or the offender appeal the case, the sentence is continued to the High Court as the first court of appeal and, lastly, to the Supreme Court as the final court of appeal. This appeal procedure creates tension between expediting the case versus pursuing justice. The way in which the appeal procedure enters into judges' deliberations is one of the influential factors that I will reflect upon.

## **Research Methods**

This paper examines key causal factors which the judges perceive to influence their sentencing decisions. Hutton (2006) has argued that, to pursue justice, one need to know what key factors contribute to judges' sentencing. Without considering the circumstantial factors which influence sentencing, there can be no justice.<sup>11</sup> Therefore, it is necessary to acknowledge the different factors that were taken into consideration when sentencing. To develop an understanding of what factors, do judges disclose that influence them when sentencing minor drug offenders in Indonesian courts, a total of 31 participants were interviewed. Regarding research ethics, I obtained ethical approval from the University of Stirling Ethics Committee.

## **Results**

### ***Judicial Culture***

The judicial culture was often the constraining factor on sentencing. The interviews revealed that the majority of the participants in sampled Courts showed their concerns about being subjected to Higher Court inspection. They were concerned that after being questioned by the superior (i.e. the Higher Court), they are blamed for either dismissal, downward departure from minimum sentencing or sentencing to rehabilitation. As Judge 11 pointed out:

I have been inspected although the inspector said: "you will be okay if you truly believe in your sentencing and are led by your heart; if you are confident that your opinion is right, there is no need to

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<sup>11</sup> Neil Hutton, "Sentencing as a social practice", in *Perspectives on punishment: the contours of control*, ed. by Sarah Armstrong and Lesley McAra, Oxford: Oxford University Press, 2006, p.155.

worry, you just calm down!” No, never! There is no peace of mind after being inspected! It is always we who get the blame. (Judge 11)

The above excerpt illustrates Judge 11's concerns of being discredited by scrutiny from their superiors. The majority of the participants in Rural Court convey their concern regarding lack of encouragement. Judge 25 believes that “at the moment, we cannot simply break the rules because our hands and feet are tied by the rules”... The majority of the participants in sampled Courts continued to express anxiety over their sentencing being overturned by the Higher Court, and the judges' supervisors led them to fear that their sentences would be void.

Sometimes the judge's heart called for dismissal, but they were constrained by their own fear. “I am afraid that my sentencing will result in being examined by the Higher Court, as well as the judge's supervisor” All of it is very time consuming. Therefore, it would be better if the case were being handled by the Supreme Court to decide the matter. Quite a lot of judges have this fear. (Judge 2)

From the above excerpts, the Court judges' anxieties, due to the perceived pressures from their superiors can be seen about either their sentences being dismissed or being below the standard minimum sentence. Furthermore, the majority of the participants in sampled Courts saw such dismissals as a dilemma since it was less likely that the prosecutor would set the charge below the standard minimum. As Judge 11 stated, “It is a dilemma! It is automatic that the prosecutor never sets the charge below the standard minimum and, therefore, what should we do?” (Judge 11). It is identified that the Court's responses to this topic about the influence of judicial culture echo their explanation about judges who are either granting a dismissal or sentencing below the standard minimum being at risk of being discredited. The Court expects that the judges ought to comply with the prescribed standard minimum sentences. The following extract illustrates this point: “...if a judge gives sentencing which is above the prescribed limit of the law, the Supreme Court will dismiss this judge because this would be regarded as unprofessional” (Judge 29). This excerpt indicates that the Court

discourages those judges who depart from the minimum sentencing, prescribed limits of the law, which are set to provide some protection for the individual. It is this discouragement that leads the majority of the participants into a sense of insecurity and, consequently, into becoming defensive about this most public aspect of the judicial role. As Judge 11, for example, mentioned:

...if one of the parties did not accept our sentencing and this was known to the public and reported to our supervisory department, what should we do? We will undoubtedly be under examination; it is inevitable that we cannot escape from being examined, what we are going to do? (Judge 11)

The above excerpt from Judge 11 indicates that the absence of the practice of respecting junior judges' sentencing, combined with inspectors' failure to encourage Lower Court judges to exercise judicial discretion, has affected their capability to solve difficult problems. The majority of the participants explained that, sometimes, their confusion was because of the pressure from both the Court and the inspectorate in inspecting such controversial sentences. This inspectorate is a very different context to the European Judiciary who are not subject to such surveillance or control. Although sentences have some independence elsewhere they remain open to challenge and subject to monitoring. The majority of the participants also claim that the existing accountability system motivates them to follow the standard minimum sentencing. The issue is inspection, which discourages the judges from exercising discretion in sentencing. The inspectorate for the judiciary apparently put pressure on panel judges to adhere to the minimum sentencing of the law. An example of some of the comments – according to Judge 11 – that the inspectors might use such as “Are you able to read?” implies that Lower Court judges (inspected) are expected to conform to legal stipulations. These inspectors' comments put pressure on the inspected and were perceived as being intended to discourage judicial confidence in their sentencing. The following extract illustrates this point:

There is no leading argument, who can we depend on? [The inspector] ...It is said: “If your judgement is okay, then no need to worry, please be confident in considering such factors in your

sentencing?" However, this depends on them being like-minded with us. But what happens if the inspector is more senior than us and said: "Are you able to read?" in this situation, what should we do? This inspector's comments are the reason some of our fellow judges did not want to take any risk and said, "Just follow whatever the law determined!" (Judge 11)

The above excerpt highlights the perceived pressure from the inspectorate to adhere to the minimum sentencing of the law. This pressure led the majority of the participants to become followers of the law.

In the end, among the judges, there were two opinions. On the one hand, there were those who were confident in downward departing from the standard minimum sentencing based on several considerations and, on the other hand, there were also those who said: "never mind, rather than getting troubled, better just follow the minimum sentencing" Finally, we become the echoer of the laws because, although we want to dissent according to the facts on the ground, not everyone necessarily accepts those facts as actual facts!". (Judge 11)

As shown above, Judge 11 mentioned that the judges' choice to simply implement the laws was associated with the lack of appreciation from the inspectorate of the way in which the judges exercise their discretion to depart from the standard minimum sentencing. Findings from this paper suggest that 'justice' is conditional.

Another factor that challenges the pursuit of justice seems to stem from interference. The participating Court judges demonstrate the variation in responding to the interference. Judge 2 for example, stated, "Some judges allow interference and some judges will not allow interference..." (Judge2). Another factor that challenges the pursuit of justice seems to stem from competing personal interests of the panel members. Judge 9 for example, suggested being tolerant to avoid conflict in the panels. As Judge 9 outlined:

My effort to influence panel judges would be on a collision course once with the personal interests of the panel members... In that

situation... our duty is done once we share our beliefs (*ijtihad*) "... if you are happy with these beliefs then that's great, if not, then it is still okay". (Judge 9)

As shown above, Judge 9 emphasised the value of tolerance to ensure panel solidarity when the conflict of interest among panel judges occurs. It is apparent that the Court's response to interference echoes the explanation given below:

I prefer to take an amicable approach to this relationship since, as the judge, I appreciate the thoughts of other fellow judges. I am still considering enforcing the rule of law. From the legal perspectives, if possible, the period of rehabilitation will be counted as part of the period of sentencing. (Judge 31)

The above extract is illustrative of how the judges would be required to reconcile the competing interests between applying the principle of legality (i.e. following the standard minimum sentencing) and applying the principle of beneficiary (i.e. sentencing that is supportive to minor drug offenders). In such conditions where it is not feasible for minor drug offenders to receive rehabilitation/treatment inside the prison, the substantial minority of the participants (i.e. 4 from 31) try to enable those minor drug offenders to receive treatment outside of prison. The length of rehabilitative period counts towards the length of the sentence to be served.<sup>12</sup> Judge 9's and Judge 31's explanation demonstrated the influence of competing interests within the judiciary which add challenges to the pursuit of justice. Another factor that constrains the pursuit of justice seems to stem from structural issues, which will be explained in the following section.

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<sup>12</sup> If the penalty imposed is in the form of rehabilitation, the time spent in drug rehabilitation is deducted from the overall period of the prison sentence (Law 35/2009, Article 103 (2)).

## ***Structural Factors***

### ***1. The influence of politics***

The apparent political desire to put pressure on the war on drugs agenda creates tension between serving the political agenda and pursuing justice. It is apparent that the judicial concern about the recent National Anti-Narcotics Agency of the Republic of Indonesia (BNN) head's statement, which declared a 'war on drugs', came about as the Court's response to the war on drugs.

Mr. X [new BNN head] replied: "make an island, guarded by a crocodile, those offenders, who want to jump, will be caught by the crocodiles there"... However, I think it's not as easy as that! If the person is released only there [island] without any support, which would be killing people, torturing people, that's the punishment again... Indeed, this has become a national problem. (Judge 30)

As can be seen from the statement above, the participating Court judge is concerned about the punitive atmosphere of the war on drugs that apparently put pressure on the judges to punish minor drug offenders. This punitive atmosphere may put pressure on the discretion of the participating judges. The Court's response to the influence of non-popular politics echoed the judicial concern.

...the offenders need shelters; they should not be merely released alone into the jungle. They are, also, humans, not tigers! We should not do that! Indeed, this has become ...a legal issue which we should respond to. It is not possible that we convict everyone. (Judge 30)

It is clear from the above extract that the participating Court judges perceive it to be impossible either to convict every drug offender or to release the drug offender without support as this can raise civil rights and humanitarian concerns. The next extract draws attention to the challenges in sentencing those who are using drugs to prison due to overcapacity:

If we arrest these drug misusers repeatedly, this will result in the prison capacity being full of those people who are sick and not with those people who have done evil. 'Doing evil' is those people who

sell and distribute narcotics with the intention of doing evil. (Judge 6)

There also seems to be confusion within the criminal justice office (including the police, the BNN, the prosecutor, and the judges) as to what the presumed response should be when responding to drug use. For example, Judge 6 was concerned about the unjustified action of arresting, prosecuting and imprisoning those people who were considered by Judge 6 as having done no evil (i.e. drug users). On first being asked this question about the influence of political desire to put pressure on the war on drugs agenda, Judge 9 also considered that there is no benefit in harsh sentencing under the regime's 'war on drugs' as can be seen below:

What is the beneficial aspect of the legal process? There are no benefits to the state, the offender, and the society. So far, we depend still on the rhetoric of "war on drugs" but what are the benefits anyway? I am quite puzzled about this. Do we consciously know what we are doing so far? Why are drugs so important? Why is it that drugs should especially be regulated, and be treated specially; I saw no benefit of it! (Judge 9)

Harsh sentencing under the regime's 'war on drugs' is viewed as having a negative impact on justice, as stated by Judge 18, "... Too long in detention causes a negative effect, due to the offender mingling with the drug traffickers who are serious drug offenders..." (Judge 18). On first being asked about the influence of non-popular politics on sentencing, Judge 18 considered that, after the drug user entered prison, their conditions would be more severe. In sampled Courts, when considering the negative effects of imprisonment, Judge 5 illustrated that the offenders are experiencing the disadvantage of sentencing under the regime's 'war on drugs'. Judge 5 explained that when the offenders who have an issue with drug use spent seven months in prison, they would suffer almost a near-death experience: "I saw that for those people with issues of drug use, a prison sentence is not effective because, when I saw the condition of my brother during his six to seven months in prison, he was almost near death" (Judge 5). The

disadvantage of sentencing under the regimes ‘war on drugs’ can be seen from the three different extracts presented below: “Judge 6 Panel: Also, the judges argued that the sanction of imprisonment would have a negative impact on the offenders because they were victims of drug trafficking.” (Extracted from court hearing Observation Notes, Judge 19 Panel).

“It will have a negative effect on the offender inside the prison. This negative effect is because, inside the prison, those offenders will meet other prisoners who have trafficked drugs” (Judge 6).

“I also had personal experience relating to my family... At that time, the prison in South had no treatment facilities and had overcapacity. However, my brother survived there for seven months” (Judge 5).

From the excerpts presented in this section, it can be concluded that imprisonment for drug users is perceived as a disadvantage. Some reported the disadvantage for the offender, the State and broader society of sentencing minor drug offenders to imprisonment. For example, Judge 9 remarked, “Regarding social justice, I am still skeptical about the benefit of the legal process of investigation and sentencing...there is no benefit for the state, for the offender, and for society” (Judge 9). Regarding the ineffectiveness of imprisonment for the offenders, Judge 24 stated:

Sentencing is not necessarily sufficient because some of them are caught in the prison itself. Some of them sneak drugs into prison, and this is what happened in the rural jurisdiction. Some of them join drug syndicates inside the prison, and somehow there is no deterrent effect. Some of them can still control the drug market inside the prison... Indeed, dealing with narcotics is difficult. (Judge 24, Rural)

Judge 24’s and Judge 9’s explanation demonstrated the disadvantage of imprisoning minor drug offenders within the current context in Indonesian courts, which are primarily channels for deploying drug prohibitionist policies.

## **2. The influence of Law Enforcement**

The way in which the police set up the case influences the judicial interpretation of the factors of the case. These can be seen in the police's selective targeting of individuals from the more impoverished backgrounds for policing. In this paper, a substantial minority of the participants (i.e. 5 from 31) are concerned about the selective targeting. This selective targeting is summarised by Judge 27 who reveals the following reasons for his concerns: 'There is a need for credibility during the process of investigation, prosecution, and court hearing; this means that the police investigation should not selectively target' (Judge 27). From their statement, Judge 27 seemed to be concerned that the tendency of the police to be selective in setting up drugs cases raised an issue of credibility during the process of investigation. This selective targeting suggests that the justice we see is conditional - one that depends on the police who set up the case. The issue of selective targeting led to the participants making extra efforts in sampled Courts to interpret the facts of the case. This judicial interpretation is clear in the way the participating judges attempted to redefine who could become a witness in a drugs case. The way in which the police acted as witnesses was interpreted by the substantial minority of the participants as a constraint on sentencing. This interpretation was because the police often made contradictory statements. Consider, for example, Judge 9's comment:

...both the police officers, who become witnesses at court, made contradictory statements... those contradictory testimonies made me realise that in drug cases... the police's role should be as the investigator, not as the witness... it was found that there was an alibi... On that basis, I dismissed the case against the offender, and the Supreme Court approved my sentencing... (Judge 9)

The way in which the law enforcement set up the case influences the rehabilitation of minor drug offenders. This influence is because, at the beginning of the investigation phase, the sentencing to divert drug users into rehabilitation is in the hands of the police. Consider, for example, Judge 30's expectation:

It seems possible if a drug user is diverted at the beginning... the drug user then will no longer enter the court... From our point of view, it would be good if drug users could be rehabilitated and not punished... because inevitably, it helps us as well. (Judge 30)

The above excerpt highlights the Judge's expectation that the initiative for diversion into rehabilitation should start from the bottom at the investigation phase. In doing so, police willingness to change their practice at the beginning of the investigation phase would have an impact on the rehabilitation of minor drug offenders. Moreover, the interviews with the participating Court judges indicated an interpretation of the facts and they did not hesitate to decide on dismissal with the majority of cases. Although the police can set up the case, they are not the ones who decide the sentencing, and therefore the sentencing outcome might be different. As Judge 9, for example, mentioned:

...the offender was... travelling to the party with her boyfriend... When the police stopped them, it was found later that the thing in the woman's hands was Ecstasy". Then, the woman was processed and brought to the court... I thought the element of "informed about the possession of Ecstasy" is nullified. The offender was viewed by the judges as not holding criminal responsibility due to the very short timescale and it is happening in the dark, the offender was not aware that the property handed to her by her partner was drugs. Therefore, at that time, I dismissed the case against the woman... The Supreme Court approved my sentencing as well. (Judge 9)

The excerpt above highlights the substantial minority of the participants in (i.e. 2 from 17) who made a dismissal of the case against the woman. The diversionary powers held by the police enabled them to regard the woman's circumstances in relation to the short period of time in which she was handed the drugs in a very dark environment. Due to the lack of light, the woman was not aware that the property handed to her by her partner was drugs. From this point of view, the police could simply have cautioned the woman without prosecution. In

this circumstance, Judge 9 carefully considered the woman's circumstances and decided she could not be penalised. Moreover, the interviews with the participating Court Judges indicated that the judges themselves could also interpret the fact of the case. As Judge 8, for example, mentioned:

The content of the case file did not affect us but, as initial reference, for drafting the type of sentence. After reading the case file, we will check the assessment", the evidence of daily drug usage and so on and we will read also the transcript of expert witnesses. These will become a reference, about what the case looks like. In addition to witness testimony, we will observe at the court hearing. (Judge 8)

The excerpt from the interview with Judge 8 highlights the judicial interpretation of the facts of the case through considering multiple perspectives (i.e. from reviewing different reports, evidence and judicial observation) before arriving at sentencing. However, judicial interpretation of the facts of the case becomes a challenge because the police are often in their assessment of issues of drug use. This selective assessment led to the substantial minority of the participants (i.e. 6 from 31) making extra efforts in sampled Courts to establish the facts of the case, as Judge 28 revealed:

In practice, only a few of the assessments were carried out. Nine of ten drug cases were not accompanied by urine testing. These absences of assessment have caused challenges to the judge, particularly; in distinguishing between the victim and the perpetrator... the judge should make an extra effort in sampled Courts to find the actual facts. (Judge 28)

The above excerpt highlights Judge 28 making extra efforts in sampled Courts to establish the facts of the case and to distinguish between those offenders who become the victim of their circumstances and the actual perpetrator. The Court's response to this topic about the impact of the police setting up the case echoes the given explanation about the police officers' reluctance to check the detainee's urine. As Judge 31, for example, mentioned:

The fact is that we need to check whether the urine is positive [for indication of drug use]. In my opinion, we could consider the offenders not only being arrested through use but, also, after the offenders recently having finished using it. Usually, the police officer would be reluctant to check the offenders' urine. That is the reality of policing! (Judge 31)

The above excerpt highlights Judge 31's concern about the challenge to establish the facts of the case due to the fact that the police officers failed to check the detainee's urine. Another factor that challenges the pursuit of justice seems to stem from the prosecutor's presentation of evidence. In the following excerpt, two Court judges express their concern about the discriminatory practices of the prosecutor:

I am so upset when there are such cases where the offender could be charged under Rule 127 due to the smaller quantity of drugs, but the offender is not charged [by the prosecutor] under Rule 127. By contrast, when the quantity of evidence of daily drug usage is larger, the offender is charged [by the prosecutor] under Rule 127. (Judge 23)

Sometimes, we do not understand, the offender is often charged [by the prosecutor] for possessing and storing drugs; this charge carries a minimum sentence of five years. Usually the offenders will be charged [by the prosecutor] for at least seven years' imprisonment. (Judge 27)

The above excerpts highlight the substantial minority of the participants' concern that, for smaller quantities of drugs, the prosecutor is often accused severely while, for larger quantities of drugs, the prosecutor is often accused leniently. This was within such conditions where the boundary between 'possessing with an intention to sell/selling' and 'using' are blurred. It was not clear whether the criteria are based on the quantity of the drug or on the role of the offender. In these situations, the prosecutorial presentation of evidence is often challenging as it found after the court hearing that the offenders

were charged differently than they ought to have been. As a result, the discriminatory practices of the prosecutor add challenges to the pursuit of justice. My observations at a Court hearing revealed that the prosecutor consults with the participants. This indicates the prosecutor's influence on the final sentencing in such matters.

Judge 20 Panel: ...We take a break now! ...

[...] [After the court session was cut short, inside the courtroom, the prosecutor stood up from his chair and walked near to the bench where Judge 20 (Panel) was sitting down. The prosecutor then started talking to the head of panel judges, and the head of the panel judge nodded his head as he was listening to what the prosecutor said, and the head of the panel judges started to talk back to the prosecutor, and the prosecutor was nodding his head and returned to his chair. Next, the head of the panel judge looked right and spoke to his younger member panel. The head of the panel judges asked for confirmation about the final sentencing. Then the younger member panel nodded his head, and then the head of the panel judge looked left and spoke to his older member panel as he was asking for confirmation of the final sentencing. The older member panel also nodded his head, and then the judges looked straight at the offenders, indicating that the final sentencing had been made and the session would be continued] [...]

Judge 20 Panel: Okay, the session continues [front stage sentencing], we decide to discount the sentencing from five to four years that is the minimum. How do you feel?

Offender: [Cried] (Extract from court hearing Observation Notes, Judge 20 Panel)

As shown above, Judge 20 (Panel) cut short the court session to allow the prosecutor to consult with the participants. The prosecutor gave his input on the acceptable length of the prison sentence within the standard range of minimum sentencing. Here, the prosecutor's view on the final sentencing permeated the orchestration of this court drama. Recall in this section how judges are notified that the prosecutor is more

likely to appeal if the judges sentence below the standard minimum. Judge 20 (Panel) responded to the prosecutor's input as though he would change his mind. This finding suggests that even the imposition of a sanction is viewed as part of the negotiation. In other words, both the discriminatory practices of the prosecutor and the imposition of a sanction add challenges to the pursuit of justice. It is apparent that the Court's response to this topic about the influence of prosecutorial indictment echoes the explained challenges to the pursuit of justice:

We hardly understand what has happened behind the prosecutorial indictment... the prosecutor indscts the offenders differently from the facts found in the court. The prosecutor indscts the offender under the provision of drug possession. Later when at the court hearing, the offender does not fit with the criteria of possessing drugs but fits the criteria of using drugs; however, the prosecutor did not indict the offender under the provision of drug use. Therefore, this was a challenging decision for us. It has not been possible for us to follow the prosecutorial indictment. (Judge 30)

This finding suggests that the contradictions between the filed indictments and the factual evidence of daily drug usage revealed in sampled Courts have intensified the judge's task in sentencing. The following extract shows that one judge felt challenged by the appellate procedure when they sentenced below the standard minimum term:

I am aware that, if the offender is sentenced below the minimum, it will undoubtedly be appealed. Also, it will cause unexpected consequences which would cause more issues for the offenders. These practices have become a habit. It happened often. (Judge 5)

The above excerpt highlights Judge 5's concern about how the prosecutorial appeal often becomes a challenge. Once the case is appealed, the Higher Court is likely to extend the periods of remand, which may take ninety days. Once convicted, the length of extension for the remand counts towards the length of the sentence to be served. As a result of this remand extension, the sentencing of minor drug offenders at the Higher Court is likely to be for more extended periods of imprisonment than sentencing at the Lower Court. Thus, the

appellate procedure is having a negative impact on justice. However, not all the participant judges share this perception. A number of participants did not consider the appellate procedure as challenges. Consider, for example, Judge 6's comment: "Following the court hearing at which I gave the sentence, it was evident that neither the prosecutor nor the offenders appealed. Therefore, there was no appeal procedure" (Judge 6). Another participant considers challenging the prosecutor:

I challenged the prosecutor, also, to appeal because I wanted to know whether my sentencing was right [whether or not the Higher Court approves his consideration about the facts of the case and circumstantial factors which influence sentencing] [...]. The prosecutor apparently accepted the sentencing, and the offender was also happy to receive a lighter sentence. Therefore, the case became final and the sentence binding. (Judge 11)

The above excerpts highlight Judge 6 and Judge 11's experiences of challenging the prosecutor when deciding on a lenient sentence. While pursuing justice still requires judicial interpretation of justice, there is an explicit expectation from the substantial minority of the participants that judges seek to apply not the letter of the law but a moral basis for sentencing. It is apparent that the Court's response to this topic about the influence of law and law enforcement on drug sentencing echoed the Lower Court judge's consideration of the circumstantial aspect when sentencing:

We should consider not only the wording of the rule but, also, the context. We should see not only what is written under the law but, also, the spirit behind it. I have practised these policies as well because narcotic cases are most dominant... (Judge 30)

The above excerpt highlights the judge's expectations that Lower Court judges consider the essence of the law to make it just. As a result of this, the substantial minority of the participants are seen to be considering the context of how the cases are set up, which has been their source of knowledge.

### ***3. The Influence of Public Opinion and Media***

Another factor that complicates the pursuit of justice seems to stem from public opinion and the media's portrayal of sentencing minor drug offenders. Despite judges not being elected by the community, a number of the participants (i.e. 9 from 31) explain that, sometimes, they consider the public opinion on sentencing. The following extract illustrates this point:

If the sentencing is that the offender should be convicted, then the public opinion should be of no influence. However, if the sentencing is non-conviction, then the public opinion could influence... However, public opinion is not the ultimate point of reference, it is only one ingredient, it's become seasoning, and it becomes the salt part. (Judge 9)

The above excerpt highlights the community's understanding that the accused person was innocent, and this was why they asked the judges to set the offender free. These members of the community knew about the alibi and understood that the person was innocent. The substantial minority of the participants were aware that the community wanted the offender to be free and considered that there was an alibi. In this situation, the judges accepted these public opinions, and this led to the accused person not being convicted. Therefore, it could be considered that the role of public opinion acts as an "add in" to non-conviction. In sampled Courts, the substantial minority of the participants (i.e. 2 from 11) indicated that public expectation was considered to ensure that the sentencing met the society's expectation: "If we believe that the offender is purely a drug user, then we will sentence them as a drug user. This is what society expects, hopefully, our sentence will help" (Judge 27). As shown, once the judicial beliefs met societal expectation, Judge 27 would hope that their sentence would help the drug user. Therefore, public expectation is a source of knowledge that adds value to the justification on sentencing.

## Discussion

Legal scholars argue that the law has morality built into it and the law is an expression of political agreement on what is right and wrong.<sup>13</sup> The findings presented in paper indicated that this was not necessarily the case for the judiciary in Indonesia, where a substantial minority of participating judges were likely to interpret the law without the discretion as lacking morality built into the law. The legal definition of selling and using appeared to be blurred. This blurred definition led the substantial minority of participating judges to interpret the facts and the relevant law. In considering whether the act of interpreting the law would achieve broader social justice, it partly depends on the apparent political atmosphere that underpins drug policy. The findings presented in this paper indicated that as long as a punitive atmosphere remains the predominant value that underpins drug policy, the prevalence of punitive sentencing practice is likely to remain. For example, people who are merely possessing drugs and could not be penalised under decriminalisation policies,<sup>14</sup> were hence more likely to be penalised under criminalisation policies, as presented in this paper. The judicial interpretation of justice also partly depends on the influence of law enforcement practices<sup>15</sup>.

The overall impact of law enforcement practices (i.e. policing and prosecutorial practices) are presented in section Result, where the police appeared to be selective on targeting minor drug offenders who came from poorer backgrounds. The evidence for this selective targeting is

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<sup>13</sup> H. L. A. Hart, J. Raz, L. Green, and P. A. Bulloch, *The concept of law*. 3rd ed. (Oxford: Oxford University Press, 2012).

<sup>14</sup> A. Stevens, Berto, D., Frick, U., Hunt, N., Kerschl, V., McSweeney, T., Oeufray, K., Puppo, I., Santa Maria, A., Schaaf, S., Trinkl, B., Uchtenhagen, A., and Werdenich, W., “The relationship between legal status, perceived pressure and motivation in treatment for drug dependence: results from a European study of Quasi-Compulsory Treatment”, *European Addiction Research*, vol. 12, no. 4 (2006), p. 197; See also Jenni Ward, “Punishing drug possession in the magistrates’ courts: time for a rethink”, *European Journal on Criminal Policy and Research*, vol. 19, no. 4 (2013), p. 289.

<sup>15</sup> Andrew Ashworth, *Sentencing and criminal justice* (Cambridge: Cambridge University Press, 2010); See also Andrew Ashworth, “European sentencing traditions: accepting divergence or aiming for convergence?”, in *Sentencing and society: international perspectives*, ed. by C. Tata and N. Hutton, Farnham: Ashgate Publishing, 2002, p. 219.

that individuals from the more impoverished backgrounds are more often investigated than individuals from the more affluent backgrounds. This selective targeting is often challenging as it found after the court hearing that the police set up undercover buying, arrested the buyer, and released the seller (i.e. the undercover police). This selective targeting led to a substantial minority of participating judges reinterpreting the facts of the case and to distinguish between the victim of circumstances and the perpetrator. This selective targeting also affected the selective presentation of evidence in the courtroom. The prosecutorial presentation of evidence is often challenging as it found after the court hearing that the offenders were charged differently than they ought to have been. For example, for smaller quantities of drugs, the accused is often prosecuted severely while, for more significant quantities of drugs, the accused is often prosecuted leniently. The contradictions between the filed indictments and the factual evidence of daily drug usage revealed in sampled Courts have increased the task load of the substantial minority of the participants in interpreting the facts and the relevant law. To consider whether the act of interpreting the facts and the relevant law would achieve broader social justice, partly depends on public and the media.

In such conditions where the substantial minority of participating judges received public trust and confidence, public expectation and the media's portrayal often decide whether minor drug offenders should be imprisoned or facilitated to rehabilitative support. The term "the public" used here refers to the offenders, the offender's family, the visitors inside the courtrooms, the community protests, the anonymous informant when the judge meets people in the community, and the Sunni Islamic community. The public expectation regarding rehabilitative support to minor drug offenders apparently facilitated the emergent rehabilitative model. The public expectation is considered by substantial minority of participating judges as a source of knowledge that adds value to the justification on rehabilitative support.<sup>16</sup>

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<sup>16</sup> Cecep Mustafa, "Punishment, in fact, did not resolve the problem": Judicial perspectives on the sentencing of minor drug offenders, In *Papers from the British Criminology Conference*, vol. 16, pp. 93-110. British Society of Criminology, 2016.

## Concluding Remarks

In considering whether the act of interpreting the law would achieve broader social justice, it partly depends on political influence on the process. Babor (2010) noted the influence of the law and politics on drug sentencing. Non-popular politics has potentially put pressure on the criminalisation of drug use. Some nations treat drugs primarily as a problem for law enforcement and policy makers and give great prominence to efforts to criminalise drug use (including in the USA).<sup>17</sup> Similarly, this seems to be the case in Indonesia because the law enforcement perspectives dominate Indonesia's drug policy-making. The imposition of the sanction is made conditional depending on the strength of the values that underpin drugs policy. Within the current context in Indonesian courts, political pressure is a challenging factor that limits the judges' capacity to exercise discretion. Within this limited discretion, the majority of participating judges consider following the standard minimum sentencing as reflecting those political pressures. From a different perspective, the substantial minority of participating judges consider departing from the standard minimum sentencing as reflecting their resistance to political pressure. In doing so, there is an element of resistance. In terms of the international literature, much of this judicial resistance comes through the literature of other national jurisdictions. For example, in an American study, although the law appeared to be disproportionately harsh for drug offences, the law is not the only source that determines sentencing outcomes, and therefore the judicial rejection of disproportionately harsh sentencing is a form of resistance<sup>18</sup>. Within the current context in Indonesian courts, which are primarily retributive and coupled with strong drug prohibitionist policies, I present the case that problem-solving and justice that was influenced by Islamic culture go together very well, that actually Islamic more sympathetic, rather than the central government more punitive, the ways in which the Indonesian judge use that Islamic culture to

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<sup>17</sup> Thomas F. Babor, Jonathan P. Caulkins, Griffith Edwards, Benedikt Fischer, David R. Foxcroft, Keith Humphreys, Isidore S. Obot, Jürgen Rehm, Peter Reuter, Robin Room, Ingeborg Rossow, John Strang, *Drug policy and the public good* (Oxford: Oxford University Press, 2010).

<sup>18</sup> Nadelmann, Ethan A., "Criminologists and punitive drug prohibition: To serve or to challenge?", *Criminology & Public Policy*, vol. 3, no. 3 (2004), p. 441.

support the sentencing to rehabilitation. And that this makes this study significant and highly original in the field of judicial sentencing generally and in relation to minor drug offenders specifically.

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