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**Panel Paper****“Punishment, in fact, did not resolve the problem”: Judicial perspectives on the sentencing of minor drug offenders in Indonesia***Cecep Mustafa***Abstract:**

The purpose of this study is to explore judicial perspectives on the sentencing of minor drug offenders. In order to understand the perspectives of the judiciary, it is important, as the focus of this study is Indonesia, to explore these perspectives against the social conditions in which they are located (Hutton, 2006). The methodological design draws upon qualitative methods in order to undertake micro and meso levels of analysis. Judges perceive drug offences as a global concern and as serious. Judges feel constrained in their sentencing by prosecutors' indictments, appellate procedure, medical assessments, and the availability of treatment facilities. Rehabilitation for minor drug offenders was seen as being in the interest of judges and of society.

**Keywords:**

Inequality; sentencing; judges; perspectives; minor drug offenders

**Introduction**

There is growing evidence concerning judicial perspectives in relation to sentencing. Understanding the perspectives of the judiciary is important for theoretical reasons. Central theoretical questions are whether or not sentencing is a social practice that is rooted in the context of punishment and society and whether or not judicial perspectives interact with sentencing (Gibson, 1983; Holmes, 2009; Hutton, 2006; Myers and Talarico,

1987). Understanding these social practices of sentencing is crucial, also, in filling the gap in the literature on sentencing minor drug offenders (Ward, 2013).

The research which forms the basis for this paper offers an insight into contemporary courts and sentencing practices in Indonesia (Vanhamme and Beyens, 2007), which can shed light on both the challenges and opportunities to reform these practices (Ashworth, 2010). In order to understand sentencing practices, it is important, as the focus of this study is on the case of Indonesia, to explore judicial perspectives under the social conditions where they operate (Hutton, 2006). Research into judicial attitudes and perceptions of sentencing is rare, and there are difficulties with permission and access which discourage potential investigators. Because of this, there are virtually no precedents for this type of research. A similar study of sentencing in the Crown Court in the UK was attempted in the early 1980s, but permission was refused to continue beyond the pilot study (Ashworth et al., 1984).

What judges think about sentencing, and how they approach the task, can be described as a gap in sentencing research. The judge holds a central role in the sentencing process because of the international system of judicial discretion, and it is because of this limited discretion that it is important to know how judges come to their decisions. This paper focuses on Indonesian judges' perceptions on sentencing minor drug offenders. In order to understand the issues surrounding this process, it is necessary to review the context which has led to the provision of drug sentencing in the first place.

Indonesian prisons have long struggled with problems associated with drug use. The prison population grew 85% between 2011 and 2013 (The Indonesian Prison Service (IPS), 2013). The growth of the prison population was largely related to the prosecution of drug offenders. According to the 2013 IPS report, approximately 93% of prisoners across the country have a history of drug involvement, including 45% for drug use, and 48% for selling drugs (IPS, 2013). The large proportion of drug users in prison reflects the practices of targeting and lengthy imprisoning of drug users which has had an impact on the increasingly crowded prison occupancy rate (Mulyadi, 2012: 216; Anang, 2014).

Recent changes in legislation have meant that the legal sanction, imposed for serious drug offences including drug trafficking, will be longer terms (the period of imprisonment under Narcotic Law 35/2009 is one third longer than under Narcotic Law 22/1997) of

imprisonment up to the death penalty. With regard to minor drug offences including drug possession and drug use, the Narcotics Law (Law 35/2009, Rule 127) enables a choice to be made between less serious drug offenders being either punished by imprisonment or sent for treatment.

In 2014, there was an increased recognition of how the drug war had led to the imprisonment of too many convicted drug offenders. It was in this particular context that Regulation number 01/2014 was made to allow more judicial discretion. At the same time, the regulation offers more discretion for Indonesian judges to develop alternative sanctions through which offenders, who are found guilty and convicted of drug possession, control, and use of drugs for personal supply, are not given custodial sentences, but are instead sentenced to treatment (Anang, 2014). In short, changes in the penal field and particularly the increasing number of drug users in the penal system shaped suitable conditions for the use of sentencing for rehabilitation.

This study presents findings based on primary research on the perceptions of Indonesian judges in relation to sentencing minor drug offenders, and investigated the following research questions:

- a. What are the judicial perspectives on sentencing of minor drug offenders in Indonesia?
- b. What factors, according to judges, influence them when sentencing minor drug offenders in Indonesian courts?
- c. What are the Indonesian court judges' stated aims when sentencing minor drug offenders?

My interview-based research involved Indonesian judges as participants. This was because I had practiced and worked not only in that jurisdiction since early 2004 but also because Indonesia's adopted model of bifurcated approaches to drug offences had not been studied previously. I was fortunate in having personal contact with some of the judges and this facilitated access to them. This paper provides some thoughts, largely in their own words, on the issues judges face in their interaction with the sentencing process. In this paper, I discuss the rehabilitation of drug users since this is the matter on which the judges had the strongest views. I will argue that Indonesian sentencing of minor drug offenders reflects structural inequality. Therefore, addressing structural

inequalities could be a fairer response and, ultimately, would contribute to the very meaning of justice.

### **Inequality and sentencing for drug offences**

History repeats itself as those from lower classes were sentenced severely, while those from higher/ruling classes often went unsanctioned in relation to minor drug offences (Chambliss, 1975; Melossi, 2008; Quinney, 1974; Rusche and Kirchheimer, 2003). Critical research has examined class and racial prejudices in the criminalisation of black and lower class drug offenders (Buchanan, 2015; Lassiter, 2015; Nadelmann, 2004; Provine, 2011), mass imprisonment of minor drug offences (Pettit and Western, 2004; Shiner, 2015) and disparities in drug sentencing (Chen and Nomura, 2015; Nunn, 2002; Spohn, 2015). Offenders who could not afford to pay for voluntary drug treatment programmes were more likely to be perceived by judges as being less suitable for rehabilitation (Ulmer, 1997). A recent study of the judiciary in Slovenia indicated the sentencing law is set up to disproportionately punish drug consumers (Kopenic, 2015).

Moral panic about drug use and the demonisation of drug use among minorities in English-speaking countries is associated often with poorer classes and racial minorities. Garland (2001) notes that in the United States (US), the mass imprisonment of people of colour and immigrants for drug offences can be interpreted as an attempt to segregate members of the lower class population from members of the middle class population. Lower class citizens were imprisoned punitively for longer periods while middle class citizens remained hidden from the criminal justice system. In the US, sentencing guidelines about drug offences appear to be attributable to class discrimination and the punishment tends to be disproportional in the case of lower class citizens.

### **The challenges to providing drug treatment**

Buchanan (2006) discusses the challenges facing the provision of drug treatment. One major challenge is the difficulty in addressing social inequalities, such as discrimination, inequality and childhood trauma, which often became risk factors for drug dependency. He argues that a combination of drug treatment programmes and sanctions might affect drug-dependent behaviour. According to Stevens (2008), drug treatment services should

include a range of people, such as young people, parents of users, and sex workers who use drugs and suffer serious consequences for themselves, their children and their families. There are some challenges in providing drug treatment implementation: the difficulties for women seeking locally-based community treatment; the gaps in service delivery capability; lack of communication between providers; lack of providers' philosophy causing community confusion; and lack of coordination between providers would appear to be obstacles (Sacks et al., 1999)

Stevens (2008) defines successful treatment as being where participants report a positive experience of treatment, where staff are available when needed and motivate clients/service users to change, and where service providers understand the various obstacles that hinder the daily participation in treatment, including: malnourishment due to lack of income, illness due to being medically untreated, and homelessness. Thus, problematic drug users need someone who really helps them through their difficulties and removes obstacles to participation.

## **Methodology**

A total of 31 participants were interviewed. Out of these 31, 27 participants came from the district court in Urban and Rural jurisdiction (17 in Urban Court and 11 in Rural Court) and three were Supreme Court Judges (I am using these names to protect the identity of the actual courts in my study). This includes judges relocated to another jurisdiction but still willing to participate. Of the 31 participants, 9 were female and 22 were male. I interviewed each participant individually. The interviews were arranged in advance and each lasted between 27 and 97 minutes. In exploring Indonesian judicial perceptions about influences on their sentencing practice, this study provides original data about the ways in which issues such as societal pressure, time constraints, lack of resources for treatment, and persistent offending enter the judges' deliberations. In order to minimise bias, I inserted a statement at the beginning of the interview schedules asking judges who had had contact with me previously to avoid assuming that I knew certain things about issues or aspects. They were asked to approach my questions as though I knew nothing at all. I piloted the interview topic guide with one judge to ensure clarity and understanding of the language and concepts. Then, I used the feedback from the pilot

study to make some adjustments.

For this study, court hearings were observed every two weeks per court (n=8), including observation of sentencing for drug offences. A basic observation checklist was used to note judges' interactions with offenders during the sentencing hearing. This included observable interactions such as:

- Direct dialogue between judges and offenders being sentenced
- Judges' attention to speeches in mitigation and how judges appeared to respond to the offender

The study was approved by the University of Stirling Ethics Committee and was funded by the Indonesian Endowment Fund for Education (LPDP).

Each of the interviews was recorded and subsequently carefully transcribed in full. The transcripts were then thematically coded and translated into English. Efforts to protect confidentiality of the information included the secure storage of original audio file and paperwork, and the protection of electronically stored transcripts with passwords. An anonymous version of each transcript was prepared, with all identifying information removed. Careful data management procedures are central to ensuring reliability in qualitative studies. I linked the results of the field observations to the results of the interviews and gathered them together. My notes from the initial observations were written in a notebook and the notes of my observations included in-depth description of the judges' approach to sentencing (Ashworth et al., 1984; Tait, 2002).

## **Recent perspectives on sentencing for drug offences in Indonesia**

### **Inequality**

Inequality in sentencing is part of a wider historical discussion about law as a means of controlling the lower classes. Interviews with judges in this study found that the post-2009 Indonesian drugs law can be interpreted as targeting people who are of lower social class. Most of the people charged with breaking this drugs law are from underprivileged/poorer backgrounds and it seems that the criminal justice system targets people who are more likely to experience poverty. During the pre-reformation era, drug use was considered to be a 'trend'. By contrast, during the reformation era, drug

consumption was seen as a crime. (The term 'reformation' refers to the end of New Order Era during Suharto's regime. Drug Law 39/1997 was born after the reformation era. After the reformation era, the provisions of drug sentencing were set under minimum sentencing.)

In 2008 when the former drug law was in use, [there were larger numbers of drug use however there was a lower number of people sentenced] [...]. At that time narcotics was considered a 'trend'. For example, the elite classes who hang out through the street at the uphill would often take ecstasy on a Sunday evening. The people who resided downside deemed this the lifestyle and drug consumption of choice of the elite classes. Nowadays, drug consumption is seen as a crime, and the average person accused/charged with drug consumption is from an underprivileged/poorer background. (Judge 5)

Judges 5's concerns related to the discriminatory effects that the war on drugs had on lower class citizens. The participating judges frequently explained that the majority of the people being charged with breaking new drugs law were from lower social backgrounds. It seems that the current criminal justice system is targeting lower class people. The following extract indicates this point: 'So far, as I observed during the court, the offender I sentenced is not a middle-class person, therefore, actually, are rarely from the middle class' (Judge 8). The interviews with the participating judges indicated that drug taking was connected with the impact of poverty. Judge 8's assertion drew attention to the fact that poverty influenced a person's choice to sell drugs and gave him/her free drugs to use. In understanding the causal relationship between poverty and drug taking, Judge 14 suggested the following connections:

In Urban, unemployment becomes an issue; this is the reason why people want to sell drugs because they receive commission not only for selling drugs but, also, receive free drugs to use.

The context of the urban jurisdiction as a place of tourism was considered by the participating Urban Judges to contribute to drug related offences.

Concerning the connection between drug taking and the lower class, the participants noted three different explanations for why lower class citizens had the potential to

engage in minor drug offences. Firstly, lower class citizens were inclined to be involved in the drug culture. This is reflected in the following statement from a participating Rural Judge.

There is person B who was persuaded initially to use drugs and, then, was forced to distribute them. When he had no capital to buy drugs, and was living in a drugs culture and needing money for survival, then, he might do dual activities of both selling as well as using drugs for commission. (Judge 19)

The participating Rural Judges considered the offender's social circumstances to be a factor influencing minor drug offences. In a similar vein, the participating Urban Judges considered that unemployment influenced minor drug offences. Both sets of judges described how unemployment led to minor drug offences. For Urban Court Judges, unemployment in the Rural jurisdiction led to minor drug offences. For Rural Court Judges, lower class workers had the dual activities of both selling as well as using drugs for survival. Other participants claimed that the link between lower class citizens and minor drug offences was because lower class citizens used drugs to enable them to keep working hard.

I ask the offenders: 'why do you use *Shabu* [methamphetamine]?' 90% of them, who come from the lower class replied: "the first is to make body stronger", this is the dominant perception among drug offenders. 10% of them, who come from the middle class, replied that 'drugs are perceived as a way of life'. (Judge 28)

This significant proportion of lower class citizens indicated discrimination. Moreover, the interviews with the participating judges across the two jurisdictions showed that the class structure contributed to drug related offences:

... drugs seem to have become the disease, sometimes, they were not aware of the effects and they continue to use them. These circumstances make me sympathetic, due to their doing everything to get drugs. They will sell everything available including stealing. (Judge 27)



... once the person is addicted to drugs, he/she could do collective purchasing or other ways such as stealing. This is the reason why, despite his job being only a driver, he/she can do *Shabu*. (Judge 8)

The causal relationship between being poor and drug offences echoed other recent studies. These studies suggested that lower class citizens were at risk of being arrested because they tended to be involved in other offences in order to feed their need for drugs; this led them to become a target of criminal justice. During the researcher's observations, the participating Urban Judges showed that they challenged the offender's choice of spending money.

Judge panel: ...It would have been the same value of money to buy fish but too much fish makes you sleepy, and I heard that using *Shabu* makes you awake all day, right?

Offender: Right;

Judge panel: What is your job?

Offender: I sell groceries;

Judge panel: So *Shabu* makes you stronger for lifting groceries?

Offender: Yes.

The majority of the people being charged with breaking this new drugs law are from lower social backgrounds and it seems that the current Indonesian criminal justice system is targeting lower class citizens. The following extract indicates this point:

... at the moment, those who are being arrested are mostly '*tanggung*' (low level offence), while the drug dealers remain hidden, and their cases will finish with the police. By contrast, those, who use '*selinting*' one smoke, or those who are found using drugs, although the quantity of drugs is only zero point zero, their cases will be brought to the court. (Judge 12)

While the participating district judges mentioned how 'class' often decided whether minor drug offenders ought to be punished or treated, the participating lower court judges noted that the class structure directly influenced judges' sentencing experiences in two different ways. Firstly, the majority of participants suggested that most lower-class citizens failed to receive treatment. The following statement from an Urban Court Judge

indicates this point:

They [drugs] have a dual role, for example, the price of drugs is *Rp50,000.00* (around £2.00), the person will receive commission both from the seller and from the buyer and will be allowed to have the sample of drugs for his own use. (Judge 14)

Here, the Urban Court Judge asserted that drug users were characterised as lacking stable employment, leading them to use drugs. It seemed, also, that the judge recognised clearly that these drug users were lower class citizens. This suggested that being poor was behind the failure to escape from the drug culture.

The second impact of class structure on sentencing was seen by three participants as a relational process which affected sentencing. More specifically, it was apparent that the Supreme Court's response to this topic echoed the judicial concern about lower class citizens experiencing suffering from imprisonment.

It was agreed that the assessment is required for rehabilitation. So we rely on the medical assessment about the level of addiction to drugs. If the requirement of assessment is not met, even though the offender is a drug user, they will not receive rehabilitation. This raises concerns about those offenders who are unable to receive rehabilitation and will end up in prison. (Judge 30)

These comments indicate explicitly that offenders who are unable to meet the requirements of rehabilitation end up in prison. In contrast, middle class drug users were hidden from the criminal justice system.

## **The challenges to providing drug treatment**

### **The issue of resources**

Part of the difficulty of sentencing seemed to stem from the fact that the court had not met the majority of drug users' need for support. In explaining why this was the case, all of the participating judges referred to the lack of funding to pay for transport and treatment; this made it difficult for drug users to receive treatment.

Part of the constraints on sentencing minor drug offenders seemed to be attributable to

the lack of treatment facilities. The interviews with the participating Rural Court Judges indicated their concerns that treatment facilities were available only in the capital city and not in all districts. The following extract illustrates this point: 'due to treatment facilities being available only in the capital city and not in all districts, this has caused the prisons to be overcrowded' (Judge 25). The participating Rural Court Judges frequently stated their concerns about the lack of support available for drug users. The following extract illustrates this point:

Sometimes we face a dilemma in sentencing those drug users.... Each time we ordered the prosecutor to help to facilitate a medical assessment. Due to having no funds, the prosecutor found it difficult to do an assessment and, then, it becomes a barrier. This has resulted in the offenders being charged differently than they should be. This has put the offender in a disadvantageous situation. (Judge 27)

The prosecutor not doing an assessment of the offender often resulted in offenders being charged differently than ought to have been the case and led the judges not to sentence offenders into rehabilitation. Consequently, the Rural Court Judges considered that the lack of assessment of the offenders led to a negative effect on sentencing.

This understanding was reflected, also, in the participating Urban Court Judges' response to this topic. The participating Urban Court Judges were aware that such lower courts had no facilities for rehabilitation and that this hindered the judges in sentencing offenders to rehabilitation. The following extract illustrates this point:

We remind the Supreme Court judges that 'at such lower court, there are no facilities for rehabilitation', the Supreme Court judges then did not sentence offenders into rehabilitation. (Judge 2)

Judge 2 was aware that the lack of treatment facilities was part of the difficulty in sentencing offenders to rehabilitation.

### **The impact of law enforcement**

Another part of the difficulty in sentencing seemed to stem from the extent of the prosecutor's influence on the case. Judges felt constrained by prosecutors' indictments:

'Our sentences depend greatly on the initial indictment' (Judge 7). Others were concerned that sentencing below the minimum often resulted in an appeal by the prosecutor.

I am so upset when there is such a case where the offender could be charged under rule 127 due to the smaller quantity of drugs but the offender is not charged under rule 127. By contrast, when the quantity of evidence is larger, the offender is charged under rule 127... (Judge 23)

The researcher's Rural Court observations revealed that the prosecutor consulted with the panel of judges. This indicated the prosecutor's influence on the final decisions in such matter.

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

Judge Panel: Okay, the session continues [front stage sentencing], we decide to discount the sentencing from 5 to 4 years that is the minimum.

How do you feel?

Offender: [Cried].

The above quote highlights Judge 23's concern that, for smaller quantities of drugs, the prosecutor often prosecuted severely while, for larger quantities of drugs, the prosecutor often prosecuted leniently. It is apparent that the Supreme Court's response to this topic echoed the given explanation about the initial indictment being a constraint to sentencing.

We hardly understand what has happened behind the prosecutorial indictment... it was found after the court hearing that the offender was convicted as a drug user; however, rule 127 on drug users was not part of the indictment. Therefore, this was a problem if we applied the law strictly and the evidence showed that the offender was a drug user, while the rule on using drugs was not indicted. (Judge 30)

This finding suggests that the contradictions between the filed indictments and the factual evidence revealed in court had a negative impact on sentencing. The following extract shows that judges often felt constrained by appellate procedure when they sentenced below the minimum term:

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

Judge 5 explained that the prosecutorial appeal often caused unintended consequences which would make matters more difficult for the offender. In doing so, the appellate procedure was seen as having a negative impact on the offender.

### **Rehabilitation**

There was wide acceptance of rehabilitation as a sentencing purpose amongst the judges, particularly for young drug users and first offenders. See for example these two comments:

This [rehabilitation] aim would be better than imprisoning them because, once they are involved with other drug dealers and drug users inside the prison, this will have a negative impact on their mental health. (Judge 17)

The fact is that we must be honest, in Rural, also generally in other places. Punishment, in fact, did not resolve the problem. We see, after the drug user enters prison, they will then be more acute. (Judge 26)

Not unreasonably, rehabilitation was seen as suitable rather than imprisonment. But rehabilitation was also seen as being in the interest of society as a whole:

Those offenders, whose families become victims of drug taking, expect rehab.... This is perhaps in line with the society's expectation that the treatment facilities need to be adequate. (Judge 27)

Several other judges (including one who said that prison doesn't rehabilitate) also said that it could, in certain circumstances, have a rehabilitative effect. What they are probably referring to here however is individual deterrence.

I think the function of prison is basically as a correction institution, this applies to all cases. So actually, so long as the offender in the detention centre can be healed, then no need to put them into prison. (Judge 19)

I heard from the offender's sister-in-law, who worked in my house and I saw myself that the offender had changed after his sentence. Previously, the offender sold and used drugs; now, after release from prison, he no longer does drugs. (Judge 22)

The participating Supreme Court Judges emphasised that the policy to stop punishment would require police and the National Narcotics Agency (BNN) practices on the ground to change. This is because, at the investigation phase, the decision to divert drug users is in the hands of the police and the BNN.

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

The above excerpt highlights the Supreme Court Judge's expectation that the initiative for diversion would start from the bottom at the investigation phase. In doing so, the police's willingness to change their practice at the beginning would have an impact on the rehabilitation of minor drug offenders.

## **Discussion**

The findings resonate with the notion that the impact of class poverty on drug taking can be measured and understood as a relational process that determines minor drug offences. Therefore, it can be argued that drug taking in Indonesia reflects the economic inequality in wider social structures, as suggested by Carlen (1994) in relation to the reality of the society which itself is unjust. Overall, the structural issues attached to drug use would appear to represent a departure from contemporary drug treatment research, which has advocated the need for drug users' access to stable employment (Buchanan, 2006).

Moreover, bearing in mind that most people brought into the court were low class citizens, the participants asserted that the link between lower class citizens and targeting drugs concurred with the notion of the war on drugs and that the criminal justice system tended to target drug users who were lower class citizens (Nadelman, 2004).

This suggests that 'class' often decided whether minor drug offenders ought to be punished or treated. The participating lower court judges noted that the class structure had a direct influence on the sentencing in two different ways. Firstly, most lower-class drug users failed to receive treatment. Secondly, the war on drugs had been targeting lower class citizens and was discriminatory. This is due to the fact that the majority of the people being charged with the breaking of the post-2009 drugs law were from lower social backgrounds. In contrast, middle class drug users escaped the criminal justice system and were not the target of its sanctions.

This qualitative study suggests, also, that part of the difficulty in making use of treatment provisions stems from the fact that judges feel constrained by prosecutors' indictments, appellate procedure, medical assessments, and the availability of treatment facilities. Nevertheless, rehabilitation for minor drug offenders was seen by judges as having both the potential to facilitate offender recovery and to reduce the courts' caseload.

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