

BASIS FOR JUDGES' CONSIDERATIONS IN SENTIMENTING CRIMINAL SENTENCES BELOW THE MINIMUM SPECIFICALLY IN THE CRIMINAL OFFENCE OF INDEMNITY REVIEWED FROM THE PRINCIPLE OF LEGAL CERTAINTY (Study of Decision Number 7/Pid.Sus/2021/PN Sos)

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Received : 22 February 2025

Published : 30 April 2025

Revised : 09 March 2025

DOI : <https://doi.org/10.54443/ijerlas.v5i3.2762>

Accepted : 11 March 2025

Link Publish : <https://radjapublika.com/index.php/IJERLAS>

Abstract

Judges play an important role in upholding the law and justice, including when imposing sentences below the special minimum limit in cases of child molestation. Although this step is intended to realize substantive justice, its implementation can create a legal dilemma because it risks reducing legal certainty and causing inconsistency in decisions. Therefore, a more in-depth study is needed to find common ground between justice and legal certainty in judicial practice. This study aims to examine the basis for judges' considerations in imposing sentences below the special minimum limit in cases of child molestation from the perspective of the principle of legal certainty. In addition, this study also evaluates the legal impact of this practice on the criminal justice system and guarantees of legal protection for victims. The methodology used is a normative legal approach, with a review of regulations and case studies. Data sources include primary legal materials (statutory regulations), secondary legal materials (academic literature), and tertiary legal materials (legal dictionaries). The analysis was carried out through an extensive interpretation method to assess the application of the principle of legal certainty and the judge's freedom of decision-making. The research findings reveal that judges consider both legal and non-legal factors in imposing sentences below the special minimum. Although this step aims to harmonize justice and legal certainty, the practice still has the potential to cause disparity in decisions and legal uncertainty. In addition, the use of the Supreme Court Circular (SEMA) as a reference also raises debates regarding the supremacy of law and the consistency of the application of special minimum sentences.

Keywords: *judge; special minimum sentence; indecent acts*

INTRODUCTION

Indonesia, as a constitutional state, emphasizes that every state policy and regulation must be designed and implemented in accordance with applicable provisions. In the context of law enforcement, the state is given the authority to impose criminal sanctions on individuals or groups who violate applicable legal rules. The implementation of this authority is mandated to judges, who are one of the central actors in the justice system.

The special minimum sentence system in Indonesian law gives the impression of limitations on the freedom of judges in deciding a case, although in principle judges have independent authority and cannot be influenced by outside parties. This freedom includes determining or imposing criminal sanctions based on careful legal assessments and in accordance with the facts revealed in court. In addition, judges also have the authority to determine the severity of the sentence imposed, while still considering the objectives of punishment, such as providing a deterrent effect, protecting the interests of victims, and creating a positive impact on society. In carrying out this task, judges are required to maintain a balance between freedom in deciding cases and the obligation to comply with applicable legal rules, so that substantive justice can be realized in every decision.

In the context of the regulation of special minimum criminal threats that have been stated in the Child Protection Law, one of the relevant provisions can be found in Article 82 paragraph (1). This article expressly stipulates that any individual who violates the provisions as referred to in Article 76E will be subject to a minimum of 5 (five) years and a maximum of 15 (fifteen) years in prison, and may be subject to a maximum fine of Rp. 5,000,000,000.00 (five billion rupiah). The provisions of Article 76E itself stipulate a comprehensive prohibition against acts of violence or threats of violence, coercion, fraud, spreading lies, or attempts to persuade children to

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commit or allow indecent acts to occur. This provision aims to provide maximum legal protection to children as one of the parties vulnerable to various forms of exploitation and violence, while also reflecting the state's commitment to creating a safe and conducive environment for children's growth and development. Based on initial observations, there have been several cases where judges have decided not to fully follow the provisions of the special minimum criminal threat as stipulated in Article 82 paragraph (1) of the Child Protection Law. One example is the decision of the Soasio District Court with case number 7/Pid.Sus/2021/PN Sos. In this case, the judge used his authority to set aside the provisions of the special minimum criminal penalty by considering various factors, including the circumstances of the Defendant, the facts revealed at trial, and the sense of justice felt in the context of the case.

In the decision, the Panel of Judges should be considered to have violated the provisions of the law because they sentenced the Defendant to 3 (three) years and 6 (six) months in prison. This decision is contrary to Article 82 Paragraph (1) of the Law in conjunction with Article 76E of the Child Protection Law. This article stipulates a special minimum criminal threat of 5 (five) years in prison. In its considerations, the Panel of Judges referred to SEMA No. 1 of 2017 concerning the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2017. In the SEMA, especially in the Criminal Chamber Formulation section Number 5, guidelines are given to judges regarding the imposition of minimum criminal sentences on perpetrators of crimes involving children and adults with child victims. If the perpetrator is a minor, then the provisions on the minimum criminal threat (Article 79 Paragraph (3) of Law No. 11 of 2012) do not apply.

The criminal provisions as stipulated in Article 82 Paragraph (1) Jo. Article 76E of the Child Protection Law explicitly stipulate a special minimum criminal threat that must be carried out. However, in practice, there are a number of regulations that are specifically designed as guidelines for judges in handling child protection cases. One of the guidelines often used by the Panel of Judges is the Supreme Court Circular (SEMA) Number 1 of 2017. The Supreme Court Circular (SEMA) can basically be categorized as a form of policy regulation (*beleidsregel*). According to Bagir Manan, a policy regulation is a regulation that is made without a formal basis of authority from statutory regulations, delegation, or legislative mandate, but remains valid based on the authority of *Freies Ermessen*.

The Supreme Court Circular (SEMA) is a regulation that serves as a guideline or manual for the implementation of operational tasks in government and the judiciary. Hierarchically, SEMA does not have the authority to change, deviate from, or replace provisions that have been regulated in laws and regulations. As part of the operational management instrument, SEMA functions to provide direction and standards for the implementation of tasks, so that it becomes a technical guide for law enforcement and government. In the legal context, SEMA is often referred to as *pseudo-wetgeving* or *pseudo-legislation* because of its nature which is only supportive and does not have binding legal force like laws. Its role as a "shadow law" places it as an administrative guideline to bridge gaps or ambiguities in the application of applicable regulations. However, although SEMA has an important role in ensuring consistency and efficiency in the implementation of the law, its use must not violate or contradict provisions that have been expressly regulated in the law. Therefore, SEMA must be understood as a supporting instrument that helps the practical implementation of the law, not as a stand-alone legal basis or as a justification for deviating from substantive legal rules. This principle is important to maintain the supremacy of law and ensure that laws and regulations remain the main reference in the legal system in Indonesia.

Based on the description above, it can be concluded that the provisions of the legislation basically cannot be deviated from by the Supreme Court Circular (SEMA). SEMA only has a complementary function to fill the legal vacuum and cannot be used as a legal basis that is equal to the legislation in making decisions by the Panel of Judges. Therefore, it is important to examine in depth how the legal considerations used by judges in imposing a sentence below the threat of a special minimum sentence, especially in child protection cases when the defendant is an adult. This study is relevant to examine the application of the principle of judicial independence in the context of law enforcement that remains guided by the principle of legal certainty. In addition, it is also interesting to analyze the legal implications of imposing a sentence below the threat of a special minimum sentence on the sustainability of the legal system, especially in cases of child protection with adult defendants. This study is expected to contribute to a more comprehensive understanding of the relationship between the flexibility of judicial discretion, legal certainty, and the objectives of substantive justice in law enforcement in Indonesia.

LITERATURE REVIEW

Judge's Freedom and the Principle of Legal Certainty

According to Bagir Manan (2005), judicial freedom is a key element in an independent and independent judicial system. This freedom allows judges to interpret the law contextually, including when dealing with imperative norms such as special minimum sentences. However, in practice, this principle of freedom must remain in line with

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the principle of legal certainty as stated by Satjipto Rahardjo, namely that the law must be predictable and applied consistently. This shows the tension between two fundamental principles: on the one hand, the law must be strictly adhered to to ensure legal certainty; on the other hand, judges have discretion to assess justice based on the concrete circumstances of a case.

Theory and Purpose of Criminalization

Modern punishment theory, as explained by Muladi and Barda Nawawi Arief (1984), includes repressive, preventive, and rehabilitative objectives. In this case, imposing a lighter sentence than the special minimum can be seen as a more proportional form of punishment if it is based on the social and psychological conditions of the perpetrator and the existence of reconciliation with the victim. This approach emphasizes the value of the utility and efficiency of punishment.

Supreme Court and SEMA Circular No. 1 of 2017

SEMA No. 1 of 2017 provides room for judges to impose sentences below the special minimum in certain cases, for example if there is peace between the perpetrator and the victim, or in cases where the perpetrator is not the biological parent and there is no element of violence. Although SEMA is not a source of law in the hierarchy of legislation, this document is often used as a guideline in judicial practice due to its operational nature. However, several researchers such as Ridwan HR (2011) remind that the use of SEMA must be careful so as not to deviate from substantive legal norms in the law, in order to ensure that the supremacy of law is maintained.

Previous Studies and Literature Gaps

Previous research by Astry Novi Lidarti (2023) showed the application of special sub-minimum sentences in narcotics cases, while Febriani Tri Putri Lintang (2018) discussed the judge's considerations in determining justice collaborators. Both studies do not discuss the context of violations against children specifically, especially with adult perpetrators and the provisions of special minimum sentences in the Child Protection Law. Thus, there is a gap in the legal literature regarding the legal and non-legal bases that are considered by judges in deviating from the minimum criminal provisions in child protection cases. This study is here to fill this gap by examining more deeply the judges' considerations from the perspective of the principles of legal certainty and substantive justice.

METHOD

This study uses a normative legal research method. Therefore, this study was conducted by analyzing primary legal sources such as legislation and combining them with secondary legal sources. In some cases, tertiary legal materials were also added. These legal materials are compiled, tested, and reviewed systematically. Then conclusions are drawn that answer the research questions.

This type of research was chosen considering that the judge has decided the case of protection under the threat of a special minimum sentence, although it has been regulated in a SEMA to be used as a guideline by the judge, but can the law be deviated from by the SEMA?, so then the author wants to see how the judge's considerations are in deciding the case, from what parameters the judge applies the SEMA so that he decides the case of child protection under the threat of a special minimum sentence. So that with this research, it will be normatively studied how the existing written rules are related to child protection cases, how they are implemented by seeing how the considerations made by the judges are adjusted to the theory or principles regarding the freedom of judges and legal certainty and the purpose of punishment so that in the end the answer to the problem can be found.

This research uses 2 (two) approaches, namely:

- a. The regulatory approach involves analyzing legislation and policies related to minimum criminal penalties in child protection cases, especially for judges.
- b. Case approach, namely examining how judges apply the law in child protection cases facing minimal criminal threats, based on various existing decisions.

Types and Sources of Legal Materials used are primary, secondary and tertiary legal materials. The author obtained Primary Legal Materials by inventorying relevant laws and policies. These legal materials serve as guidelines for judges in making decisions related to child protection cases involving adult defendants under the threat of special minimum sentences, namely:

- 1) Article 1 paragraph (1) of the Criminal Code;
- 2) Criminal Procedure Code;
- 3) Law Number 48 of 2009 concerning Judicial Power;

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- 4) Law Number 35 of 2014 concerning Child Protection;
- 5) Law Number 23 of 2002 concerning Child Protection;
- 6) Law Number 17 of 2016 concerning the Stipulation of Government Regulation in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection into Law;
- 7) Circular Letter of the Supreme Court Number 1 of 2017;

The author's secondary legal materials were obtained through a literature review by reviewing relevant literature in this study, especially regarding the imposition of criminal penalties under the minimum penalty specifically in child protection cases for adult defendants. Meanwhile, the author obtained tertiary legal materials through Black's Law Dictionary and the Great Dictionary of the Indonesian Language (KBBI).

After all the data is well organized, neat and in a systematic framework, the next step the author will analyze the data. This analysis process uses an extensive interpretation method, which is one of the legal interpretation methods designed to connect or bridge the application of existing legal provisions with concrete cases faced in the field. With this approach, judges who make decisions in child protection cases with adult defendants will be linked to the applicable legal rules, under the threat of a special minimum sentence. This rule provides guidance to judges in deciding cases by considering the principle of legal certainty, so that the application of the law does not violate the principles of justice that have been regulated in the criminal justice system, especially in the context of child protection.

RESULT AND DISCUSSION

A. The Judge's Consideration in Imposing a Sentence Below the Minimum, Specifically for the Crime of Indecent Acts, Reviewed from the Principle of Legal Certainty

In the process of handing down a criminal sentence, the judge considers both legal and non-legal aspects. The legal aspect is based on statutory regulations, while the non-legal aspect includes social, psychological, and humanitarian factors. In case Number 7/Pid.Sus/2021/PN Sos, the Panel of Judges stated that the Defendant Aspenas Tomo alias Pati was not proven to have fulfilled the elements in the first primary or subsidiary charge. In the primary charge based on Article 81 paragraph (1) Jo. Article 76D of the Child Protection Law, the element of violence or threat of violence cannot be proven due to the lack of valid evidence. Meanwhile, in the subsidiary charge based on Article 81 paragraph (2) Jo. Article 76D of the same Law, the element of trickery or persuasion was also not proven even though the Defendant had promised something to the victim. What was proven legally and convincingly was the second charge, namely the violation of Article 82 paragraph (1) Jo. Article 76E of the Child Protection Law which regulates indecent acts against children. Based on the *visum et repertum* and witness statements, the indecent act was proven even though the element of sexual intercourse in the first charge was not fulfilled. In addition, in considering the non-judicial aspect, the Panel of Judges issued a verdict under the special minimum criminal threat of Article 82 paragraph (1) by considering certain factors. This reflects the freedom of the Judge in adjusting the verdict to the child protection case.

According to the author, some of these considerations are as follows:

1. The first element of the charge (primary and subsidiary) was not proven.

The Panel of Judges stated that the first charge, both primary and subsidiary based on Article 81 paragraph (1) and (2) of the Child Protection Law, was not proven legally and convincingly. The evidence, including the *visum et repertum*, was not strong enough to prove the element of sexual intercourse, even though there was a tear in the victim's hymen. Because the evidence submitted did not fulfill the elements of a criminal act in Article 81, the Panel of Judges decided that this charge was inadmissible. On the contrary, the Defendant was proven to have violated Article 82 paragraph (1) regarding indecent acts against children. The Panel of Judges sentenced based on the second charge by considering valid evidence in accordance with Articles 183 and 184 of the Criminal Procedure Code, which require a minimum of two strong pieces of evidence. Because the charges submitted were cumulative, the sentence imposed was lower than the criminal threat in the first charge. This decision reflects the application of the principles of legality and strong evidence in the trial process.

2. There is no element of violence or coercion.

The Panel of Judges in case number 7/Pid.Sus/2021/PN Sos considered that the Defendant's actions were not accompanied by elements of violence or threats of violence, but only persuasion. This is an important factor in assessing the level of the Defendant's guilt, because in criminal law, the existence of an element of violence is often the basis for imposing a heavier sentence. From considerations of the principles of justice and proportionality, the Panel of Judges considered that the minimum sentence of 5 years in accordance with Article 82 paragraph (1) of the Child Protection Law was too heavy in this case. Therefore, the Panel of Judges sentenced him to 3 years and 6

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months in prison, under the threat of a special minimum sentence. This decision reflects the judge's freedom to interpret the law in order to achieve substantive justice, and emphasizes that each case must be assessed based on its specific facts and conditions.

3. Consider extenuating circumstances.

The Panel of Judges considered that the Defendant had no previous criminal history, indicating that the crime committed was incidental, not a recurring pattern. The principle of rehabilitation in criminal law allows Defendants who have never been convicted to receive a lighter sentence so that they can reintegrate into society. In addition, the existence of a peace agreement between the Defendant and the victim's family, including the payment of IDR 100 million and the involvement of the Village Head, was used as a mitigating factor because it reflects the Defendant's good faith to take responsibility. This approach emphasizes a more humane solution and is oriented towards victim recovery and improving social relations. However, the use of peace as a mitigating factor raises discussions about legal certainty and the deterrent effect in criminal law. While this reflects the flexibility of judges in achieving substantive justice, it is important to ensure that it does not weaken legal protection for child victims and the effectiveness of special minimum criminal penalties.

4. Use of Supreme Court Circular Letters (SEMA).

In decision number 7/Pid.Sus/2021/PN Sos, the Panel of Judges decided the case by considering the use of SEMA Number 1 of 2017 which is one of the important guidelines in imposing sentences below the special minimum criminal threat for child protection cases. based on the SEMA, there are 2 requirements to be able to impose a sentence below the special minimum, namely the first is the existence of peace and harmony in the relationship between the perpetrator/the perpetrator's family and the victim/the victim's family; then the second requirement is to require comprehensive legal considerations, including in the legal, philosophical, sociological, educational, preventive, corrective and repressive aspects.

a. Peace and harmony of relations;

The Panel of Judges considered the peace through the payment of Rp100 million by the Defendant as a form of good faith to be responsible and restore the victim. However, the Author considers this peace to be more formal and does not fully resolve the social and psychological relationship between the victim and the Defendant. The Author is of the opinion that the Panel of Judges has not fully explored the aspect of harmonization of the relationship in accordance with SEMA Number 1 of 2017, which should include more than just a financial agreement, but also ensure that there is no trauma or injustice left on the victim. A more in-depth approach is needed so that the victim truly feels restored.

b. Comprehensive legal considerations;

The Panel of Judges in its decision considered the legal and sociological aspects, such as the fulfillment of the elements of the crime and the fact that the Defendant has young children. However, the Author observed that the Panel of Judges did not fully explore the educational, preventive, and corrective aspects in sentencing, which should be an important part according to SEMA Number 1 of 2017. The educational, preventive, and corrective aspects aim to provide lessons, prevent perpetrators and others from repeating their actions, and improve the Defendant so that they can return to society. The Author assessed that the lack of consideration of these aspects made the decision not fully comprehensive. Although SEMA has been applied in determining sentences under the minimum criminal threat, the aspects of harmonization of relationships and educational, preventive, and corrective considerations have not been explained in detail. This shows the freedom of judges in applying the law, but also shows room for improvement so that future decisions better reflect justice and normative principles.

5. Insufficient evidence to show sexual intercourse. In this case, the Panel of Judges considered that the evidence submitted by the Public Prosecutor was insufficient to support the first charge related to the crime of sexual intercourse according to Article 81 paragraph (1) and (2) of the Child Protection Law, because the witness's testimony and the visum et repertum were not strong enough. The results of the visum which showed damage to the victim's hymen could not directly prove that the Defendant did it. As a result, only the second charge related to indecent acts based on Article 82 paragraph (1) could be proven. The author considers that this decision reflects the freedom of the judge, but there is a lack of comprehensive consideration regarding the reduction of the sentence under the threat of a special minimum sentence, considering that the second charge still has a minimum threat. The author is of the opinion that the Panel of Judges emphasizes legal flexibility to achieve justice without sufficiently considering legal certainty. In the criminal law evidence system, inadequate evidence can indeed be a reason not to prove certain charges. However, this does not immediately eliminate the judge's obligation to apply the normative provisions of the proven charges. Although the Panel of Judges decided based on what could be proven in court, the author

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believes that adjusting the sentence under the special minimum threat requires deeper consideration, both from the perspective of justice and legal certainty. The Panel of Judges should explain in more detail how the decision still supports legal protection for children without sacrificing consistency in the future justice system.

6. The freedom of judges to achieve material justice. In the decision of this case, the Panel of Judges used the principle of the freedom of judges to adjust the sentence to the facts revealed in the trial, by deciding on a sentence under the threat of a special minimum sentence. The prison sentence of 3 years and 6 months was imposed because the Panel of Judges considered that the application of a minimum sentence of 5 years was too severe, considering mitigating factors such as peace, the absence of evidence of sexual intercourse, and the lack of evidence of violence. The author is of the opinion that the Panel of Judges prioritized justice over legal certainty, although this decision reflects a conflict between the freedom of judges and legal certainty. From the perspective of legal certainty, the application of the threat of a special minimum sentence in Article 82 paragraph (1) Jo. Article 76E of the Child Protection Law should be implemented normatively to provide maximum protection to children and create a deterrent effect for perpetrators. The author is of the opinion that the Panel of Judges should consider that deviating from these provisions could create a precedent that is detrimental to the consistency of criminal sentencing in the future. Although the Panel of Judges applies the principle of judicial independence to create justice, this freedom must be used carefully so as not to sacrifice legal certainty, which is the main foundation of the Indonesian criminal law system which adheres to the Continental European legal system (Iqbal, 2022). The author assesses that the Panel of Judges' decisions tend to emphasize flexibility without providing sufficient justification or consideration regarding their impact on legal certainty. Ideally, the Panel of Judges should provide a more in-depth analysis of the balance between the principles of justice and legal certainty even though they use their judicial independence.

a. Balance between the principles of justice and legal certainty

The Panel of Judges in Decision Number 7/Pid.Sus/2021/PN Sos attempted to balance the principles of justice and legal certainty by using the freedom of its judges. The Panel of Judges considered the facts of the trial and decided only based on the second charge, namely the crime of indecent acts according to Article 82 Paragraph (1), because the first charge related to sexual intercourse could not be proven. Although Article 82 Paragraph (1) regulates a minimum criminal threat of 5 years to protect children, the Panel of Judges considered mitigating factors such as the absence of violence or coercion, and the existence of peace between the Defendant and the victim. The sentence imposed was 3 years and 6 months in prison, which reflects an effort to balance law enforcement with the facts of the case.

The author assesses that the Panel of Judges in this decision has used the judge's freedom responsibly, balancing justice and legal certainty. The judge considered the peace between the Defendant and the victim, where the Defendant provided compensation of Rp100,000,000.00. Although this peace does not eliminate legal responsibility, it is the basis for giving a lighter sentence. The Panel of Judges maintains the principle of legal certainty by imposing a sentence of 3 years and 6 months, which although under the threat of a special minimum sentence, is considered more appropriate to the conditions of the case. Thus, this decision reflects an effort to maintain a balance between justice for all parties and legal protection for children as victims.

The author assesses that the decision of the Panel of Judges in case Number 7/Pid.Sus/2021/PN Sos reflects the use of responsible judicial freedom. The judge does not only focus on legal certainty by applying a special minimum criminal threat, but rather prioritizes justice based on the facts of the case, such as reconciliation between the parties and the failure to prove the element of sexual intercourse. Although imposing a sentence below the special minimum criminal threat, the Panel of Judges refers to SEMA Number 1 of 2017 as a normative guideline, which provides legitimacy to the decision. Thus, this decision reflects the application of mature law within the applicable legal corridor.

b. Conformity between the Judge's Decision and the Purpose and Theory of Punishment

In decision Number 7/Pid.Sus/2021/PN Sos, the Author sees that the Panel of Judges shows an effort to integrate various relevant sentencing objectives in this case, the decision to impose a sentence below the special minimum threat as stipulated in Article 82 paragraph (1) of the Child Protection Law seems to be based on broader considerations than just retributive punishment. The Panel of Judges seems to adopt an approach that prioritizes restorative, reintegrative and educational sentencing objectives which the Author will describe as follows:

1. Restorative Goals;

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The purpose of restorative punishment is oriented towards restoring the relationship between the perpetrator, the victim and the affected community. In its decision, the Panel of Judges considered the reconciliation between the Defendant and the victim as a mitigating factor. The consideration of reconciliation between the Defendant and the victim as a mitigating factor, which reflects the moral responsibility of the Defendant to repair the consequences of the crime. The provision of cash of Rp100,000,000.00 by the Defendant to the victim is considered a form of commitment to restore the situation, although it is material, this step has symbolic value as an apology and an effort to improve. This consideration shows that the Panel of Judges does not only focus on the retributive aspect, but also seeks to achieve restoration of the relationship between the perpetrator and the victim, in line with the purpose of restorative punishment.

2. Reintegrative goals;

The reintegrative goal in sentencing aims to return the perpetrator to society as a better and more productive individual. In this decision, the Panel of Judges considered that the Defendant had never been convicted before. So the Author argues, This shows that the Panel of Judges sees the Defendant as an individual who has the potential to be rehabilitated and return to being a useful and productive member of society. This shows that the Panel of Judges sees the Defendant's potential to be rehabilitated and return to being a productive member of society. Sentencing in reintegrative theory does not only focus on punishment, but also provides an opportunity for the perpetrator to improve themselves. So, by imposing a lighter sentence than the special minimum sentence, the Panel of Judges provides space for the Defendant to rehabilitate himself, while still being held accountable for his actions. This approach reflects the purpose of sentencing to rebuild the perpetrator as a better individual.

3. Educational purposes;

The educational purpose of punishment aims to provide a lesson to the Defendant so that he understands his mistakes and does not repeat his actions in the future. The Panel of Judges in Decision Number 7/Pid.Sus/2021/PN Sos, according to the Author, reflects the educational purpose of punishment by imposing a lighter sentence than the special minimum criminal threat. Even though there was peace between the Defendant and the victim, the Defendant was still sentenced to 3 years and 6 months in prison. This punishment aims to provide a lesson to the Defendant so that he does not repeat his actions, by providing time for reflection. In addition, this decision also conveys a moral message that criminal acts against children are serious violations that cannot be tolerated, and the perpetrator must be responsible for his actions, providing a warning to the public about the legal consequences of criminal acts against children.

Regarding the theory of punishment that can be analyzed in this decision. Based on the Author's analysis of decision Number 7/Pid.Sus/2021/PN Sos, the Panel of Judges appears to use several theories of punishment to support its decision, namely:

1. Restoration Theory;

Restoration Theory, states that punishment must involve all parties involved in the crime, including the perpetrator, victim and community. The main purpose of punishment is to restore the relationship between the perpetrator, victim and community and repair the damage caused by the crime. The Panel of Judges in decision Number 7/Pid.Sus/2021/PN Sos, according to the Author, has applied the restoration theory by considering peace between the Defendant and the victim. This consideration includes a cash payment of IDR 100,000,000.00 witnessed by the Village Head, indicating that the Panel of Judges does not only focus on the formal aspects of peace, but also on efforts to repair social relations that have been disrupted by the crime. Based on community involvement through the Village Head, the Panel of Judges reflects the principle of the restoration theory that punishment must involve all parties: perpetrators, victims, and community. This approach emphasizes that punishment is not only to punish, but also to restore damaged relationships and strengthen social ties.

2. Reintegration Theory;

Reintegration Theory states that the purpose of punishment is to reintegrate the perpetrator of the crime into society. Punishment does not only provide punishment, but also provides an opportunity for the perpetrator of the crime to improve themselves and become a productive member of society. The Panel of Judges in Decision Number 7/Pid.Sus/2021/PN Sos has applied the reintegration theory by imposing a lighter sentence than the special minimum sentence, namely 3 years and 6 months in prison. The judge's consideration of the Defendant's history of never having been convicted before shows that the Defendant has the potential to improve himself and reintegrate into society. By giving a lighter sentence, the Panel of Judges provides space for the Defendant to be accountable for his actions and return to being a productive member of society.

This decision reflects a balance between justice for the victim, who has received compensation and peace, and justice for the Defendant, who is still punished but with proportional sanctions. The Panel of Judges referred to

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the Supreme Court Circular (SEMA) Number 1 of 2017 to adjust the decision to the specific factors in this case, avoiding excessive punishment. The author supports this decision, because in addition to reflecting justice for both parties, it also reflects the restorative, reintegrative, and educational functions in sentencing.

B. Legal Implications of Imposing Sub-Minimum Sentences Specifically in Child Molestation Crimes.

a. Comparison of verdicts in Child Molestation cases

The special minimum sentence in the Child Protection Law aims to provide legal certainty and a deterrent effect for perpetrators of child molestation, by setting a penalty limit that must not be violated by the judge. The implementation of this provision is expected to provide firm and fair sanctions in accordance with the child's right to live, grow, develop, and be protected from violence. However, court practice shows inconsistency in its application, both due to subjective factors of the judge and the existence of regulations that give judges the freedom to determine the sentence.

An example that is in accordance with the application of a special minimum sentence can be found in Decision Number 117/Pid.Sus/2022/PN Tnr, where the defendant was sentenced in accordance with the minimum provisions of the Child Protection Law. On the other hand, in Decision Number 7/Pid.Sus/2021/PN Sos, the defendant's sentence was lighter even though he was proven to have committed a similar crime. This is due to the judge's consideration of mitigating factors and the use of Supreme Court Circular (SEMA) No. 1 of 2017, which allows for a reduction in sentences in certain circumstances.

The disparity in sentencing is clearly visible in Decision Number 446/Pid.Sus/2021/PN Bls, where the defendant was only sentenced to 4 months in prison even though he was proven to have committed the crime of "persuading a child to commit an indecent act" according to Article 82 paragraph (1) of the Child Protection Law. This sentence is much lighter than the previous decision, showing inconsistency in sentencing and potentially reducing legal certainty. The author assesses the difference in judges' interpretation of the defendant's mitigating factors, such as cooperative attitudes and socio-economic conditions, as the cause of this disparity. Although this consideration aims to create justice, excessive use of judicial freedom can lead to legal uncertainty, which has the potential to create inequality in sentencing in similar cases in various regions.

The author identifies the use of Supreme Court Circular (SEMA) No. 1 of 2017 as one of the factors causing differences in court decisions, where SEMA provides room for judges to impose sentences below the special minimum stipulated in the law. However, because SEMA has a lower position in the regulatory hierarchy, its use can undermine the principle of legal certainty. Inconsistency in sentencing, as seen in several decisions, can reduce public trust in the judicial institution and create the perception that law enforcement does not have clear standards. Deviations in the application of special minimum sentences have the potential to cause legal uncertainty, even though the aim is to achieve justice. It is recommended that special minimum sentences be applied consistently throughout Indonesia to maintain legal certainty and public trust in the justice system.

Thus, regarding these three decisions, the Author argues that this shows that although the law has set a minimum limit for punishment in cases of child molestation, there are differences in the implementation of the law carried out by the panel of judges in various district courts. In several cases, judges used the Supreme Court Circular (SEMA) No. 1 of 2017 as a basis for consideration to impose a lighter sentence than the special minimum criminal provisions stipulated in the law. The existence of deviations in the application of this special minimum criminal sentence results in significant differences in the imposition of sentences on similar cases, thus creating legal uncertainty in society.

b. Implications for legal certainty

Legal certainty is a basic principle in the justice system that aims to maintain stability and provide protection for all parties. In cases of child molestation, the specific minimum sentence in the Child Protection Law is intended to ensure proportional sanctions. However, practice in the field shows deviations, such as in Decision Number 7/Pid.Sus/2021/PN Sos, where the defendant was sentenced to 3 years and 6 months in prison even though the provisions of the law stipulate a minimum sentence of 5 years in prison. This deviation creates legal uncertainty and can undermine clear sentencing standards, opening up space for other deviations in similar decisions.

One of the main impacts of the deviation from the special minimum sentence is the emergence of precedents, where decisions that impose sentences below the minimum limit can be used as references by other judges in handling more or less the same cases. If a court can impose a lighter sentence on the grounds of judicial independence or other mitigating factors that are not explicitly regulated in the law, then the established sentencing standards can lose their effectiveness. This has the potential to open up opportunities for other lighter decisions in the future, which ultimately weakens the principle of legal certainty in the criminal justice system.

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In criminal law, there are the principles of *lex scripta*, *lex certa*, and *lex stricta*. *Lex scripta* means that the criminal law must be written. *Lex certa* means that the formulation of the criminal offense must be clear. *Lex stricta* means that the formulation of the crime must be interpreted firmly without any analogy. These three principles emphasize that the law must be clear, firm, and written so as not to give rise to interpretations that can lead to legal uncertainty. However, the deviation in Decision Number 7/Pid.Sus/2021/PN Sos actually shows that the application of criminal law can still be interpreted subjectively by judges, thus opening up space for inconsistent decisions. If this practice continues to occur, it can lead to inconsistency in the application of the law, which can ultimately weaken legal certainty as described by the Author above.

Deviations from special minimum sentences can reduce public trust in the criminal justice system, especially in cases of crimes against vulnerable children. Disparities in sentencing can make people feel that the legal system is unfair and does not provide maximum protection for victims. Inconsistencies in the application of minimum sentences can create injustice, with perpetrators receiving lighter sentences simply because of differences in how judges interpret the law. However, justice in the criminal justice system is not always synonymous with rigid legal certainty. Judges still need to have the authority to adjust sentences to the conditions of each case, as long as there is a clear legal basis and comprehensive considerations. Deviations, such as those that occurred in Decision Number 7/Pid.Sus/2021/PN Sos, do not always constitute injustice if the basis for the considerations is reasonable and oriented towards justice.

Judges have the authority to interpret the law in order to achieve justice, and if necessary, can impose a sentence below the special minimum with comprehensive consideration. Decisions that deviate from the provisions of the special minimum sentence can be accepted if the legal basis and the judge's considerations are strong enough and can be accounted for. However, if the basis of consideration only relies on subjective factors without a clear legal basis, this deviation can damage legal certainty and create a bad precedent. Therefore, although this deviation may be justified under certain conditions, a strict procedural mechanism is needed to ensure that any decision that deviates has strong reasons and is not solely based on the judge's subjective authority.

Based on what the Author has conveyed above, it can be concluded that Decision Number 7/Pid.Sus/2021/PN Sos does have implications for legal certainty, but deviations from special minimum sentences do not always have to be considered wrong as long as there is a strong basis and comprehensive consideration. Therefore, there needs to be a balance between legal certainty and justice, so that the justice system can function more effectively in providing protection to the community, without eliminating the flexibility needed in the application of the law in the field which of course varies in each case.

c. Potential Differences in Decisions With the Same Characteristics

Consistency of decisions in the criminal justice system is essential to ensure legal certainty and justice. However, differences in decisions in similar cases, especially those involving crimes against children, often occur and raise questions about the sentencing standards used by judges. The specific minimum criminal provisions in the Child Protection Law are designed to provide maximum protection for victims, but their application is often inconsistent. Judges are faced with a dilemma between applying the normative provisions of the law and considering the specific factors in each case. Although the freedom of judges to assess mitigating or aggravating circumstances of the accused is part of the principle of judicial independence, this must remain in line with legal certainty.

Differences in verdicts in criminal cases, such as child molestation, can occur due to various factors, including differences in judges' interpretation of the elements of the crime. Although the law clearly regulates the elements, judges can interpret terms such as "persuading" or "deceiving" differently, which affects the severity of the sentence. In addition, the use of non-legal considerations, such as the defendant's psychological condition or the views of the community, can also affect the verdict. If these considerations are used excessively without a strong legal basis, it can lead to disparities in law enforcement. Differences in views between the first instance and appellate courts are also the cause of differences in verdicts, which can confuse the public and reduce public trust in the justice system.

In this case, the use of guidelines such as the Supreme Court Circular (SEMA) is intended to provide direction for judges in making decisions, but can cause polemics when used to impose sentences below the specific minimum provisions that have been set. Although SEMA provides discretion for judges, its inappropriate use can lead to inconsistencies in the application of the law. To minimize differences in decisions, more comprehensive and binding sentencing guidelines are needed, which include criminal limitations and how to consider non-judicial factors without ignoring legal certainty. Consistency of decisions is very important in cases of crimes against children to ensure maximum protection for victims and maintain legal certainty in society.

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Differences in decisions in cases with similar characteristics can undermine public confidence in the legal system, especially if the sentences imposed do not reflect justice. To avoid inconsistencies, it is recommended that the Supreme Court issue strict guidelines on the application of special minimum sentences, especially in cases of child molestation, and regulate the use of non-judicial considerations. In addition, regular training for judges is important to ensure a common understanding of the regulations, maintaining consistency in decisions. Internal supervision of judicial institutions also needs to be strengthened to prevent abuse of judicial independence. Prosecutors and legal counsel must be proactive in ensuring justice for victims and defendants. Although judicial independence is important, its application must be balanced between legal certainty and substantial justice. Deviations that are not supported by strong legal reasons will only create uncertainty and reduce the effectiveness of the judiciary.

Ultimately, the main goal of the criminal justice system is to uphold justice that is not only felt by the accused, but also by the victims and the wider community. Therefore, consistency in decisions must be a priority. Each case does have its own uniqueness, but for cases that have the same characteristics, it is better to give decisions that are not too different. So that in this way, the law can function as a true instrument of justice.

CONCLUSION

Based on the results of the research and analysis that have been conducted, it can be concluded that the basis for the judge's consideration in imposing a sentence below the special minimum in cases of child molestation is based on legal and non-legal aspects. The legal aspect includes the fulfillment of the elements of the article charged, proof through valid evidence, and compliance with applicable laws and regulations. Meanwhile, the non-legal aspect considers mitigating factors such as the age of the defendant, the existence of peace between the victim and the defendant, the defendant's cooperative attitude during the trial, and the social impact of the verdict handed down. In this case, the judge has discretion to adjust the verdict so that it still reflects the balance between legal certainty and substantive justice.

However, the application of sentences below the special minimum can create a conflict between the principles of legal certainty and substantive justice. Legal certainty requires the application of strict and consistent rules in accordance with the provisions of the law, while substantive justice requires judges to consider the special conditions in each case. As a result, differences in the application of special minimum sentences can lead to disparities in decisions that have the potential to create legal uncertainty in society. In addition, the use of the Supreme Court Circular (SEMA) No. 1 of 2017 as the basis for judges' considerations in imposing sentences below the special minimum has given rise to legal debate. Although SEMA provides guidance in judicial practice, its excessive use can weaken the supremacy of law and disrupt consistency in the application of special minimum sentence rules.

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