

## Juridical basis of judges' decisions under particular minimum crimes in narcotics criminal cases

Fihi A Baswara<sup>1</sup>, Supanto<sup>2</sup>, Sulistiyanta<sup>3</sup>

<sup>1</sup> Master of Law Student, Faculty of Law, Sebelas Maret University of Indonesia

<sup>2,3</sup> Lecturer, Faculty of Law, Sebelas Maret University of Indonesia

### Abstract

This research aims to find an answer whether a judge can interrupt a narcotic criminal offence under the special minimum criminal limit stipulated in Law No. 35 year 2009 on narcotics. To answer these problems, the research method used is the doctrinal research method. This type of research uses normative legal research that is legal research conducted based on laws and regulations and library materials or what is known as secondary material. The juridical policy of the judge decides that criminal under special criminal offence is contained in article 5 paragraph (1) of Law No. 48 year 2009 on judicial power stating that judges and constitutional judges must dig, follow and understand the legal values and sense of justice that live in society. This provision is intended to make the judgment of judges in accordance with the law and the sense of justice in society so that the substantive justice is achieved. Judges are required to be more creative in making the verdict so that it is not only normative to the law that sometimes does not give a sense of justice for the community but also must dig the values of justice that live in society. In dropping a criminal, the judge other than guidance to the legislation also given the freedom to determine a fair punishment based on the measure of justice according to conscience. The concept of fairness in progressive law is how it can create substantive justice and not just procedural justice. For the progressive law, it is not illegal for a judge to be able to misrule the law if justice can be obtained by distorting the law.

**Keywords:** judges' decisions, minimum crimes, narcotics

### 1. Introduction

It is already knowledge that the legal system in Indonesia today is a legal system that believes in legal positivism which means that in law enforcement it always refers to the context of the written rules contained in the text of the legislation. This written regulation is applied without the need to be fair or not. According to Satjipto Raharjo that law appears in the form of laws and legislation and if dealing with the law it will deal with laws and legislation<sup>[1]</sup>. The teachings of rigid positivism (closed logical system) and recognize written law as the main source to ensure legal certainty. Even in criminal cases in examining and deciding cases, judges are prohibited from using *argumentum per analogium* because it is contrary to the principle of legality. This prohibition is in Article 1 Paragraph (1) of the Indonesian Criminal Code. In criminal proceedings, judges are also bound by procedural law, namely the Criminal Procedure Code.

In deciding a criminal case, the judge refers to the material law contained in the Criminal Code Act or other special laws outside the Criminal Law Code and also formal law contained in the Criminal Procedure Code and the Laws other special laws that contain specificity of procedural law related to specific criminal acts. Eddy O.S Hiarij who became an expert in the disputes over the results of the presidential election on June 21, 2019 at the Constitutional Court stated that procedural law is a law which more or less would negate material truth. In Article 2 of the Criminal Procedure Code it is also mentioned that this law applies to the implementation of judicial procedures within the scope

of the general court at all levels of justice. So that the law of this procedure which cannot be carelessly bypassed.

In the paradigm of legal positivism, the law and the entire legislation is thought to be something that contains the law in full so that the task of the judge is only to apply the provisions contained in the formulation of the law mechanically and linearly to solve problems in society<sup>[2]</sup>. However, the classical legal positivism paradigm that places judges as (prisoners) of the law does not provide an opportunity for the court to become an institution that can encourage the development of society. In the reform era, we cannot say that the decisions of judges have contributed greatly to the change in Indonesian society. Even the judges are still active in using positivistic thinking methods that are commonly used to handle legal issues in a stable society<sup>[3]</sup>. Judicial power is regulated in Article 24 Paragraph (1) of the 1945 Constitution which states that judicial power is exercised by a Supreme Court and other judicial institutions according to the law. The 1945 Constitution is a *staatsfundamentalnorm* which will then be manifested in the laws under it. Further regulation regarding judicial power is regulated by Law Number 48 of 2009 concerning Judicial Power. The definition of a judge contained in Law Number 48 of 2009 concerning Judicial Power is a judge in the Supreme Court and a judge in the judiciary below them in the general court environment, the religious court

<sup>1</sup> <http://www.pn-palopo.go.id/index.php/berita/artikel/184-paradigma-hukum-progresif>, Accessed on 10-12-2019.

<sup>2</sup> M.D.A. Freeman, Llyods's, *Introduction to Jurisprudence*, London: Sweet & Maxwell, 2001, p. 1384 -1386. See, Neil MacCormick, *Rhetoric and Rule of Law Theory of Legal Reasoning*, Oxford University Press, p. 256. See, Widodo Dwi Putro, *Philosophical Critical Review of the Legal Positism Paradigm*, Dissertation, Postgraduate, University of Indonesia, 2011, p. 1.

<sup>3</sup> *Ibid.*, P. 1

environment, the military court environment, the state administrative court environment, and judges in special courts within the judicial environment <sup>[4]</sup>. In this study the author will discuss judges under the general court environment in the criminal field.

In the development of law in Indonesia, a legal paradigm emerges that wants a change of mindset, especially the mindset of law enforcers in order to enforce the law, not always referring to the text in the legislation, but what is expected is a breakthrough in other ways of thinking. The hope of some people who want a change in the way of thinking of law enforcers seems to have been heard by several law enforcers who dare to break through the provisions of the laws and regulations that have been unjust, especially for the *proletariat* (commoners) which is termed progressive law <sup>[5]</sup>.

The thing that should be observed is the inclusion of special minimum and maximum criminal penalties in special laws such as in Law Number 35 Year 2009 concerning Narcotics. Specific minimum criminal provisions in turn have the potential to cause juridical problems when applying these specific minimum criminal provisions. At least, when the judges adjudicate the case in question he was confronted with facts that could relieve the defendant. Judges in making decisions will think to decide as fairly as possible, but in certain cases the specific minimum criminal will be contrary to the sense of justice that judges deserve to be imposed on a case. On the other hand the judge is bound by the law which normatively has formulated a special minimum provision; this could be a dilemma to the judge.

In Law Number 35 Year 2009 concerning Narcotics which is express verbis, the specific minimum criminal provisions are affirmed, but with certain legal arguments, the specific minimum criminal law can be intruded by the judge, or in other words there is a distortion regarding the specific minimum criminal provisions that have been normatively regulated in the law. At the implementation level, there are judges who impose imprisonment and criminal fines below the specific minimum criminal threat limit with legal reasoning owned by the judges. This then raises juridical problems where there is a clash of principles between giving priority to legal objectives in terms of legal certainty, or must prioritizing legal objectives in terms of justice and benefit <sup>[6]</sup>.

For example in narcotics crime cases, judges break through the specific minimum criminal provisions stipulated in Law Number 35 of 2009 concerning Narcotics, that is, case No. 196 / Pid.Sus / 2018 / Pn / Krg with the convicted Heru Setiyoko (30 years). Heru Setiyoko was prosecuted by the Karanganyar District Attorney for having committed a crime without rights or against the law of owning, storing, controlling, or providing Narcotics Group I not plants as stated in Article 112 paragraph (1) of Law Number 35 Year 2009 concerning Narcotics with a criminal imprisonment for a minimum of 4 (four) years and a maximum of 12 (twelve) years and a fine of at least Rp. 800,000,000.00 (eight hundred million rupiah) and a maximum of Rp.

8,000,000,000.00 (eight billion rupiah)".

The Public Prosecutor demanded the defendant, Heru Setiyoko, be sentenced to prison for 4 (four) years and 6 (six) months and a fine of Rp. 1,000,000,000.00 (one billion rupiah) subsidiar 3 (three) months in prison <sup>[7]</sup>. In the Decision of the Karanganyar District Court, the Panel of Judges ruled the defendant with a prison sentence of 2 (two) years minus the detention period that had been served by the defendant. The Karanganyar District Court's verdict certainly clashes with the specific minimum crime regulated in Law Number 35 of 2009 concerning Narcotics. The Case of Heru Setiyoko is one example of a case that received a decision under a special minimum threshold and there are many more examples of cases that get a judge's decision below a specific minimum limit determined by law.

Based on the background and the problem, the writer is interested in discussing further about the problem, namely how is the juridical basis of the judge's judgment impose a criminal decision below the specific minimum determined by Law Number 35 Year 2009 concerning Narcotics? And how is the view of progressive legal theory towards criminal decisions under specific minimum criminal limits determined by Law Number 35 of 2009 concerning Narcotics?

## 2. Legal Research

This type of research uses normative legal research, a legal research conducted based on laws and regulations and library materials, known as secondary materials. Related to this type of research, the approach used is the law approach and conceptual approach <sup>[8]</sup>. This approach is carried out by reviewing Law Number 48 Year 2009 concerning Judicial Power and Law Number 35 Year 2009 concerning Narcotics, which is related to the problem that is currently happening discussed in this study.

## 3. Discussion and research result

### Juridical Rationale for Judges Dropping Criminal Decisions under Special Minimum Limits Determined by Law Number 35 Year 2009 concerning Narcotics.

Efforts to prevent and eradicate narcotics abuse and narcotics illicit trafficking have been attempted in Indonesia since 1976 through Law Number 9 of 1976 concerning Narcotics. Before Law Number 9 of 1976 regarding Narcotics was born there was no known term "narcotics" because the previous regulation was *Verdovende Middelen Ordonantie* (Staatblad 1929 Number 278 jo Number 536) did not use the term narcotics but in this regulation it was known as "drug ordinance anesthesia" <sup>[9]</sup>. Then after the issuance of the Decree of the Minister of Health on May 26, 1970 Number 2882 / Dit.Jen / SK / 1970 the term "drugs" was replaced with "narcotics". Then in 1997 the regulation on narcotics was changed through Law Number 22 of 1997 concerning Narcotics and the latest change occurred in 2009 through Law Number 35 Year 2009 concerning Narcotics.

The interesting thing in Law No. 35 of 2009 concerning Narcotics is the recognition of criminal threats (*strafmaat*) in the form of prison and minimum and maximum fines.

<sup>4</sup>See, Article 1 Item 5 of Law Number 48 Year 2009 concerning Judicial Power.

<sup>5</sup> <http://www.pn-palopo.go.id/index.php/berita/artikel/184-paradigma-hukum-progresif>, Accessed on 10-12-2019.

<sup>6</sup> Anshar, 2018, *Infra Petita of Court Decision of Corruption Crimes that Breaks the Minimum Criminal Provisions*, Judicial Journal Vol. 11 No. 2, P. 153.

<sup>7</sup> see, Article 112 Paragraph (1) of Law Number 35 Year 2009 concerning Narcotics

<sup>8</sup> Peter Mahmud Marzuki, 2014. *Legal Research of Revised Edition*, Kencana Prenada Media Group, Jakarta, P. 93-95.

<sup>9</sup> Andi Hamzah dan RM Surachman, 1994, *Nraceutica & Psikotropica Crime*, Jakarta: Sinar Grafika, P. 13

Criminal enforcement system like this aims to give a deterrent effect to the offender and so that the offender does not get a very mild verdict from the judge because of the nature of the narcotics crime which is very damaging to the state, society and to the individual offender. Judges are free to choose a criminal from the minimum limit to the maximum limit in accordance with the evidence that can burden and ease the defendant's sentence.

The minimum criminal provisions like this that often occur are when the judge decides not to reach the minimum standard provisions. This is often the case where controversies occur between the consideration of the ratio of judges to justice and legal certainty. Even though the provisions of sanctions in the special criminal law have been confirmed, there are provisions for maximum and minimum standards which then become a guideline, the judge's guidelines in deciding cases<sup>[10]</sup>.

Criminal law was originally intended as retaliation or raid for the wrongdoers, the protection of the public against those who commit acts that endanger the community and for the coaching and care of the perpetrators, and then there is a development of sanctions in the field of criminal law in the form of action. This shows that sanctions in criminal law are increasingly humane. Furthermore, in the process of providing a crime, the role of judge is very important. He concretizes criminal sanctions contained in a regulation by imposing penalties for certain people in certain cases<sup>[11]</sup>.

Judges are required not only to act as the "mouth of the law" but also as the "mouth of justice" which voices a feeling of justice that lives in the midst of society. Article 5 paragraph (1) of Law Number 48 Year 2009 concerning Judicial Power explains: "Judges and Constitutional Justices are obliged to explore, follow and understand the legal values and a sense of justice that lives in the community." Judges in understanding the law must follow, understand and make the basis in their decisions to be in accordance with a sense of justice that lives in society<sup>[12]</sup>.

Sudikno Martokusumo said that judges when deciding on a case in a matter of appeal were always faced with 3 (three) principles, namely the principle of legal certainty, the principle of justice, and the principle of expediency. All three principles must be carried out in a compromise, that is to apply all three in a balanced or proportional manner<sup>[13]</sup>.

Furthermore, Gustav Radbruch, a legal expert from Germany, proposed a theory about the basic values or objectives of the law, which included: (*Gerechtigkeit*), legal certainty (*Rechtssicherheit*), and expediency (*Zweckmäßigkeit*). Based on Gustav Radbruch's basic legal theory, the judge in giving a judgment in a court of law has the duty to find the right law. It is not enough to just look for it in the law because it is possible that the law does not regulate clearly and completely so that the judge must be

prepared to explore the values of justice in society<sup>[14]</sup>. Judges' decisions must reflect fairness. In fact, it is difficult to find the concept of a decision that contains justice for litigants, because the decisions given by judges are not necessarily fair for litigants. Judges have the duty to uphold justice. This can be seen when taking the verdict of the judge saying "for the sake of justice based on almighty divinity"<sup>[15]</sup>. And the other element is that the judge's decision must reflect its usefulness, whereas the judge does not only apply the law merely textually and also justice, but the judge's decision leads to the benefit of the litigants<sup>[16]</sup>.

Returning to the basis of a specific minimum criminal decision handed down by a judge. The Indonesian judicial power system based on Article 5 Paragraph (1) of Law Number 48 Year 2009 concerning Judicial Power states that "judges and constitutional judges must explore, follow and understand the legal values and a sense of justice that lives in society"<sup>[17]</sup>. In its explanation, this provision is intended so that judges' decisions are in accordance with the law and sense of justice in the community (living law) so that substantive justice is achieved. This article becomes the basis for judges to seek substantive justice and not just procedural justice so that judges understand the sense of justice that lives in society. So that judges are required to be more creative in making decisions so that they are not only fixed normatively to the law, which sometimes does not provide a sense of justice for the community but must also explore the values of justice that live in society.

According to Romli Atmasasmita, the sentence contained in Article 5 Paragraph (1) of Law Number 48 Year 2009 concerning Judicial Power contains philosophical, sociological, teleological and juridical aspects. Philosophical aspects mean that the function and role of the judge who is desired by the law is "*legislator's judge*". The sociological aspect implies that judges must be sensitive and responsive to the values of justice that develop in society. The teleological aspect means that the judge must also understand the purpose of establishing legislation and the general purpose of the law, namely maintaining order, certainty and fairness as well as benefits in a systematic set which should be reflected in the meaning of court decisions. While the juridical aspect means that the basis of the judge's decision still refers to the written law. These four aspects need to be understood in examining and deciding a case by a judge<sup>[18]</sup>.

Court decisions must be in accordance with the fundamental objectives of a court decision. The purposes of a true court decision are<sup>[19]</sup>

- a. Must do an authoritative solution, which means providing a way out of the legal problems faced by the parties (plaintiffs and defendants, public prosecutors and defendants).
- b. It must contain efficiency, which is fast, simple, low

<sup>10</sup> Oheo K. Haris, 2017, *Juridical Study Of The Application Of Criminal Sanctions Under Particular Drink In Particular Criminal Cases*, Journal of Ius Constituendum, Vol. 2 No. 2, P. 242.

<sup>11</sup> Endi Ronaldi et al, 2019, *Implications of Judges' Decisions in Determining Sanctions Under Minimum Crimes to Narcotics Crimes*, Syiah Kuala Law Journal, Vol. 3 No. 1, P. 132.

<sup>12</sup> Hartanto, 2016, *Legal Inventions in Criminal Justice and Civil Law Courts*, Journal of Positum Law, Vol. 1 No. 1, P. 52.

<sup>13</sup> Sudikno Mertokusumo and A. Pitlo, 1993, *Chapters About Legal Inventions*, Jakarta: Citra Aditya Bakti, P. 10.

<sup>14</sup> Fence M. Wantu, 2012, *Realizing Certainty, Justice and Utilization in Judges' Decisions in Civil Court*, Journal of Legal Dynamics, Vol. 12 No.3, P. 483.

<sup>15</sup> *Ibid.*, P. 484.

<sup>16</sup> *Ibid.* P. 485.

<sup>17</sup> Arfin & Leonarda Sambas. K, (2016), *Classical and Contemporary Legal Theories*, Ghalia Indonesia, Bogor, P. 38.

<sup>18</sup> Romli Atmasasmita, (2012), *Integrative Legal Theory*, Genta Publishing, Yogyakarta, P. 39

<sup>19</sup> Firman Floranta Adonara (2015) *Principle of Freedom of Judges in Deciding Cases as a Constitutional Mandate*, *Constitutional Journal*, Vol. 12 No. 2, P. 231.

- cost, because delayed justice is injustice
- c. Must be in accordance with the purpose of the law which is the basis of the decision
  - d. Contains aspects of stability, namely social order and public order.
  - e. There must be fairness which is to provide equal opportunity for litigants

Based on the purpose of the court's decision above, it can be seen that one of the objectives of the judge's decision is to provide a solution or a solution to the legal problems of the parties. This objective can mean the existence of justice for both parties, although it is impossible to give justice to each party, but at least the judge's decision must approach the sense of justice for the litigants.

Judges have the freedom to decide on all decisions without interference from other parties. A judge, who is very free, does not take sides in carrying out the task of deciding a case in the court (within the exercise of the judicial function). Freedom of judges is an important authority inherent in individual judges where the judge functions as the application of the text of the law into concrete events, not just sustained, but also provides an appropriate interpretation of the law in order to straighten out concrete legal events so that the Judge can freely give an assessment and interpretation of the law <sup>[20]</sup>. The judge must have complete independence and freedom in passing the verdict; he is free to determine his belief based on the evidence presented before the trial, outside the framework there must be no matters that can affect him in passing the verdict <sup>[21]</sup>.

In imposing a crime, judges are not only guided by the laws and regulations, they are also given the freedom to determine a fair sentence based on a measure of justice according to conscience. The measure of punishment is not the result of a juridical analysis, because the juridical analysis in the legal consideration process will stop when determining whether a person is guilty or not, whereas when a defendant has been proven guilty, criminal conviction will be carried out based on the judge's conscience according to the value of justice he believes <sup>[22]</sup>.

Through his freedom a judge will use objective considerations to decide community demands on the basis of demands for justice. It is clear to a judge that the decision taken must meet the demands and expectations of others, which means the objectivity of the judge becomes the control over the decision to be made <sup>[23]</sup>.

### **Progressive Legal Theory Looks at Criminal Decisions under the Specific Minimum Criminal Limits Determined by Law Number 35 Year 2009 concerning Narcotics**

The true purpose of the law is to realize justice, certainty and expediency. These three things as legal principles are basic and abstract thoughts which form the basis or background in the formation of a law, including court decisions. In its implementation, law enforcers, in this case

the police, prosecutors, and courts, tend to only juxtapose legal facts against the rules that apply to promote the principle of legal certainty. As a result, often the goal of realizing justice in the true sense (material justice) is neglected <sup>[24]</sup>.

In the legal system anywhere in the world, justice has always been the object of hunting, especially through its judiciary. Justice is fundamental to the operation of a legal system. The legal system is actually a structure or completeness to achieve the concept of justice that has been mutually agreed upon <sup>[25]</sup>.

Formulating the concept of justice in progressive law is how to create substantive justice and not procedural justice. As a result of modern law that gives great attention to aspects of the procedure, the law in Indonesia is faced with two major choices between the courts that emphasize procedure or substance. Progressive justice is not justice that emphasizes procedure but substantive justice <sup>[26]</sup>.

Progressive law can be seen as a concept that is looking for identity that departs from empirical reality about the operation of law in society. Dissatisfaction and concern for the operation of the law and law enforcement, the understanding of progressive law was born. Progressive law and progressive legal science cannot be called a distinct type and a finite scheme, but are flowing ideas that do not want to be trapped in the status quo so they are stagnant <sup>[27]</sup>. Progressive law always wants to be loyal to the great principle of law, namely "the law for humans" not the other way around. In order to make substantive justice the core of the court which is carried out in Indonesia, The Supreme Court plays a very important role. As the culmination of a judicial institution, it has the power to encourage courts and judges in this country to bring about progressive justice <sup>[28]</sup>.

According to progressive law, the law must be honest with itself, that it exists not for itself, but for the sake of something greater namely justice and human happiness. That way the law must open itself to various aspects that exist outside of it, even if in reality justice and human happiness are actually present in the reality that lives in society <sup>[29]</sup>. According to Satjipto Raharjo the law cannot run before recording the social reality around it. This assumption is built on the choice that law is not autonomous, it is not a textual but a contextual one <sup>[30]</sup>. Progressive law abandons routine logic to make paradigmatic jumps in interpreting laws. The way of thinking that jumps sometimes must leave the positive law for a moment for the purpose of justice. The liberation paradigm guides a progressive subject to be dialectical, creative and unconventional <sup>[31]</sup>.

According to Satjipto Raharjo, the basic assumption of progressive law is "law for humans" rather than vice versa, in this regard the law does not exist for itself, but for something broader and bigger. So every time there is a problem in and with the law, the law must be reviewed, not

<sup>20</sup> Ery Setyanegara, *Freedom of Judges to Decide a Case in the Context of Pancasila*, *Journal of Law and Development*, Vol. 43 No. 4, P. 435.

<sup>21</sup> Vivi Ariyanti, 2019, *Freedom of Judges and Legal Certainty in Handling Criminal Cases, the Court*: *Journal of Legal Studies*, Vol. 4 No. 2, P. 164.

<sup>22</sup> D.Y. Witanto and A.P. Negara Kutawaringin, 2013, *Judge Discretion: An Instrument of Upholding Substantive Justice in Criminal Matters*, Bandung: Alfabeta, P. 128.

<sup>23</sup> Ahmad Kamil, 2012, *Philosophy of Freedom of Judges*, Jakarta: Prenada Media Group, P. 171.

<sup>24</sup> Muh. Ridha Hakim, *Implementation of Rechtsvinding Characteristics of Progressive Law*, *Journal of Law and Justice*, Vol. 5 No. 2, 2016, P. 228

<sup>25</sup> *Ibid.*, P. 232.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> Dey Ravena, *Progressive Legal Concept Discourse in Indonesian Law Enforcement*, *Journal of Legal Insights*, Vol. 23 No. 2, 2010, P. 156.

<sup>29</sup> *Ibid.*, P. 32.

<sup>30</sup> *Ibid.*, P. 37.

<sup>31</sup> *Ibid.*, P. 47.

people forced to be included in the legal system<sup>[32]</sup>. Therefore, in progressive legal thinking, as long as the written law (the law) is not able to bring benefits and justice to the community, then law enforcement can violate the law. Because for law enforcement, especially judges who are progressive-minded do not always assess the law as the only way to realize justice for the community. For them, the law is not always fair<sup>[33]</sup>.

Likewise, the special minimum criminal provisions stipulated in Law Number 35 Year 2009 concerning Narcotics, refer to the basic ideas of progressive law previously discussed that the special minimum criminal sentence may not be followed by the judge if the judge considers the decision to be it provides more justice and benefits compared to the specific minimum penalties contained in the law which refers more to legal certainty. Specific minimum penalties do not always provide justice for victims and perpetrators so judges are required to explore decisions that prioritize substantive justice.

Many decisions of criminal cases that get decisions under the minimum criminal provisions contained in the law. This then raises a question that is often a debate among practitioners and academics, namely in relation to the principle of freedom of judges, may the judge decide on a criminal case by overriding the provisions of the law and determining his own fair law according to the size of the judge who tries it. Maybe for the followers of the legal positivism, they will firmly oppose it because it understands that the law is limited to written regulations, in this case the law, and judges must not get out of the provisions outlined by the law<sup>[34]</sup>.

However, it is different if the problem is studied based on the understanding of progressive law as initiated by Satjipto Rahardjo, that law should follow the development of the times, with all the principles in it based on the spirit of following the times that the idea of legal progressiveness is built. For followers of understanding progressive law it is not forbidden for judges to deviate the law if justice can be obtained by deviating the law. The progressive legal thinking sees this legal phenomenon more as a reality, meaning that the law is not something that is very perfect and will definitely bring justice if it is applied as such, but Satjipto Rahardjo's thought focuses on the fact that the law is for humans not humans for law instead<sup>[35]</sup>.

In Article 5 Paragraph (1) of Law Number 48 Year 2009 concerning Judicial Power, judges are required to explore, follow and understand the legal values and a sense of justice that lives in the community<sup>[36]</sup>. If you understand Article 5 Paragraph (1) of Law Number 48 Year 2009 concerning Judicial Power, the judge is required to explore substantive justice and not just procedural justice so that it is expected that the emergence of progressive judges in making a decision not only refers to the law (i.e. procedural justice) but also must be able to explore substantive justice that is justice that lives and grows in the community (living law)

that existed long before the written law came into force in Indonesia so that triggering visionary judges with a progressive view as stated in the progressive legal theory by Satjipto Raharjo.

If a judge's decision refers to the progressive legal ideas above, it can be concluded that the judge in making a decision prioritizes substantive justice so that a judge's decision that is below the specific minimum criminal limit is called a progressive decision because the judge has explored the values of living legal justice in the community and not only seek justice through the articles contained in the law which prioritizes mere legal certainty but must also prioritize justice and benefit.

#### 4. Conclusion

The juridical basis of judges in deciding crimes under a special minimal criminal is contained in Article 5 Paragraph (1) of Law Number 48 Year 2009 concerning Judicial Power which states that "judges and constitutional judges must explore, follow and understand the legal values and a sense of justice that is live in society". In its explanation this provision is intended so that the judge's decision is in accordance with the law and a sense of justice in society with the aim of achieving substantive justice. Judges are required not only to act as the mouth of the law but also as the mouth of justice. Judges are demanded to be more creative in making decisions so that they are not only fixed normatively to the law, which sometimes does not provide a sense of justice for the community but must also explore the values of justice that live in the community. In imposing a crime, judges are not only guided by the laws and regulations, they are also given the freedom to determine a fair sentence based on a measure of justice according to conscience.

the concept of justice in progressive law is how to create substantive justice and not just procedural justice. Progressive law always wants to be loyal to the principle of law, namely the law for humans rather than vice versa, so every time there is a problem in and with the law, the law must be reviewed instead humans are forced to be included in the legal system. In progressive legal thinking, as long as the written law (the law) is not able to bring benefits and justice to the community, then law enforcement can violate the law. For law enforcers, especially judges who are progressive-minded do not always assess the law as the only way to bring justice to society. For them, the law is not always fair. The specific minimum penalty may not be followed by the judge if the judge considers the decision to be given more justice and benefit compared to the specific minimum criminal contained in the law which refers more to legal certainty. For followers of understanding progressive law it is not forbidden for judges to deviate the law if justice can be obtained by deviating the law.

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<sup>32</sup> Romli Atmasasmita, (2012), *Integrative Legal Theory*, Genta Publishing, Yogyakarta, P. 89

<sup>33</sup> H.A Malthuf & Ismail Marzuki, *Progressive Law Enforcement: Efforts to Achieve Substantive Justice*, Hakam Vol. 1 No. 2, 2017, P. 250.

<sup>34</sup> Ery Setyanegara, *Op.Cit.*, P. 165.

<sup>35</sup> Satjipto Rahardjo, 2006, *Dissecting Progressive Law*, Jakarta: Kompas Publisher, P. 4.

<sup>36</sup> Article 5 of Law Number 48 of 2009 concerning Judicial Power: Judges and Constitutional Justices are obliged to explore, follow, and understand the legal values and sense of justice that lives in society.

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