Judicial Perspectives on the Sentencing of Minor Drug Offenders in Indonesia

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Abstract

This study presents the perceptions of Indonesian Judges in sentencing minor drug offenders. The judge holds a central role in the sentencing process, and because of the judicial discretion they can use it is essential to understand how judges come to their sentencing decisions. To develop an understanding of how judges perceive their actions in decision-making and sentencing of drug users, a total of 31 participants were interviewed: 28 participants came from the District Courts in Urban and Rural jurisdictions in Indonesia (17 in Urban Court and 11 in Rural Court) and three were Supreme Court judges. The data demonstrated that the majority of minor drug offenders are from poorer backgrounds. Poverty was found to lead people to the drug culture. Moreover, lack of understanding of the harm caused by taking drugs and living under drug prohibition were considered as contributing factors to people involved in minor drug offences. Thus, minor drug offenders are considered by judges as victims of their circumstances. Within structural inequality, the imposition of harsh sentencing to minor drug offenders who suffer from socio-economic problems raises issues surrounding justice. Within the current legal structure of Indonesian courts, which are primarily retributive and have drug prohibitionist policies, the majority of participating judges consider drug sentencing as reflecting those prohibitionist policies. However, a substantial minority of participating judges interpreted the form of the sentence within available limits. These findings will contribute to the sociological understanding of the context in which judicial culture shaped the formation of the judiciary as a group and the impact of Islamic culture on the participating judge's positive preference for rehabilitative problem-solving in the Indonesian context.

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Declaration

I declare that I wrote this thesis to fulfil the requirements of the University of Stirling. Some parts of the thesis have been published in the following conference paper: Mustafa, C. (2016). “Punishment, in fact, did not resolve the problem": Judicial perspectives on the sentencing of minor drug offenders in Indonesia. *British Society of Criminology*. (16), 89–106. Available at http://www.britsoccrim.org/pbcc2016/. [Accessed 02 February 2018].

Cecep Mustafa

Terminology

The terms in this field of drug sentencing are challenging to separate from the various value stances which underpin them (Radcliffe and Stevens 2008). In a qualitative study such as this, where many people's statements and opinions are central to the body of data, the problem is compounded, since the meaning of a particular term is likely to vary from author to author. Nonetheless, I am referring the terms that I used in the thesis as follows.

1. Illegal drug

In this thesis unless stated otherwise, I use the term 'illegal drug' to describe drugs, controlled under the 2009 Indonesian Drug Act, such as cannabis and methamphetamine.

2. Drug use

For clarity and in order not to imply a judgement on the behaviour of people, the term 'drug use' is used in this thesis to describe the illegal use of drugs controlled under the Indonesian 2009 Drug Act. The term 'drug use' may appear in this thesis as part of quotations from the participants.

3. Drug sentencing

The term 'drug sentencing' is used in this thesis to refer to the decision-making of all the panel judges. Other terms related to drug use and terms used in the field of qualitative study are discussed and defined throughout this thesis, when appropriate.

Glossary

SEMA: The Supreme Court internal regulation

PERMA: The Supreme Court external regulation

BNN: The National Anti-Narcotics Agency of the Republic of Indonesia

KUHAP: The Criminal Law Procedures Code

BAPAS: The correctional officer for children

SKB: Joint Agreement of six ministries

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Introduction

The study presented in this thesis explores judicial perspectives on sentencing minor drug offenders in Indonesia. To explore these judicial perspectives, a qualitative study was conducted which involved interviews with participants who were District Court Judges and observation in two selected courts. The purpose of this section is to present an introduction to the research question, context to the study, the theoretical framework, the contribution to knowledge, and the layout of this thesis.

Research Questions

A number of studies have indicated that sentencing was a social practice contextual to the wider social structure and judicial culture (Holmes 2009; Hutton 2006; Myers and Talarico 2012). There are some international studies into judicial perceptions of sentencing (i.e. general sentencing studies) (Henham 2000; Henham 2001), and there are challenges with permission and access, which discourage potential investigators (exception includes Tombs 2004). A study into judicial attitudes on sentencing in the crown court in the UK was attempted in the early 1980s, but it was not granted permission to continue beyond the pilot study (Ashworth et al. 1984). A few studies, mainly qualitative, were found in the field of sentencing minor drug offenders (Ward 2013). Likewise, in Indonesia the perspective of Indonesian Judges concerning the sentencing of such offenders remains unexplored (Mulyadi 2012). What judges think about sentencing, and how they approach the task, can be described as a gap in the sentencing literature (Tata and Hutton 2002). Understanding the social practices of sentencing is crucial also in filling the gap in the literature on sentencing minor drug offenders (Ward 2013). The judges are in the position to decide whether or not to exercise discretion in relation to the laws as set out in legislation when sentencing. Within the scope of discretion, it is essential to know how judges arrive at their sentencing. In this study, I[1] explore the perceptions of Indonesian Judges in sentencing minor drug offenders. Hence, it is essential to explore judicial perspectives under the social conditions in which they operate, in this case in Indonesia (Hutton 2006). To explore this judicial perspective, I conducted a qualitative study that investigated two

[1] I have chosen to include myself/experience in discussing the research so have opted to use 'I' to refer to my involvement as researcher with experience as a judge.

research questions: (1) what factors, according to judges, influence them when sentencing minor drug offenders in Indonesian courts? (2) What are the Indonesian court judges' stated aims when sentencing minor drug offenders?

In the interest of clarity however, Table 1 is presents overleaf the key issues investigated in terms of questions exploring individual judicial perspectives, judicial culture, and social structure.

Table 1: Specific Research Questions

Questions concerning individual judges:
● How do you perceive sentencing of minor drug offenders? ● What are you hoping to achieve in terms of: the aim of sentencing; the treatment of minor drug offenders? ● To what extent do you feel that individual judges actively shape sentencing policies for minor drug offenders in Indonesia?
Questions relating to judicial culture:
● In your opinion, what are the existing sentencing practices for less serious drug offences? ● Do you think other judges have this view? ● In your opinion, are there any policies or practices which influence the judiciary when sentencing minor drug offenders in Indonesia? ● To what extent do you feel the judiciary actively shapes sentencing policies for minor drug offenders in Indonesia?
Questions relating to social structure:
● In what ways do political and policy issues, such as the new head of BNN who declared a new 'war on drugs,' influence the judiciary when sentencing minor drug offenders in Indonesia? ● In your opinion, in what ways do issues such as the law enforcement, the public and media, resources and persistent offending enter into the judge's deliberations? ● Do you have a view on the role that the judiciary plays within society and the policy-making process? ● Are there any aspects of sentencing minor drug offenders which you feel the court does not address at the moment? ● What do you consider should be key policies or key practical solutions towards sentencing minor drug offenders?

This interview-based study involved Indonesian judges. This study was carried out because Indonesia has adopted a bifurcated approach to drug offenses that has not been studied previously. The term ‘bifurcated' here refers to one kind of response to minor drug offenses and a different response to more serious drug offences. For example, those offences related to drug use will be sentenced more leniently than those offences related to drug trafficking. Additionally, I had worked in the district court in Indonesia since early 2004, which allowed me to gain access to the court and judges.

In this study, the factors that enter into Judges' deliberations when sentencing minor drug offenders were explored. To understand these factors, it is necessary to review the context which has led to drug sentencing in the first place. The following section provides a background to drug offences in Indonesia, including the number of people imprisoned for using illegal drugs; which drugs are most commonly used; how frequently the drugs are used; and a brief insight into the different levels of use. Then, the context of drug use and the factors that lead to problems from their use were presented. Then, the context of drug sentencing in Indonesia and the existing sentencing options available to the courts were reviewed. These reviews are considered in light of what is known currently about drug sentencing in Indonesian courts and the factors that affect its provision. These reviews are also considered in light of what is not known about drug sentencing in Indonesian courts and how this study seeks to fill some of these gaps. Lastly, the following section provides the structure of the thesis.

Context for the Study

In Indonesia, the drug problem is perceived as an issue of national security. Therefore, minor drug offences are handled by a coordinating Ministry of National Security together with law enforcement. The establishment of a coordinating ministry was a state level initiative (which had not yet been implemented at the local level). In 2001 the National narcotic agency (BNN) was formed, whose main task is demand and supply reduction. For at least three decades’ minor drug offences, have been overrepresented in

the criminal justice system, leading to prison overcapacity with not only of those possessing the small quantity of drugs but also of those using drugs, being imprisoned. For example, in the rural jurisdiction, prison overcapacity is about triple, and in the urban jurisdiction, the prison capacity is about quadruple (The Indonesian Prison Service 2013). Problem drug use in urban jurisdiction is more frequently found among the jobless and homeless (Nasir 2011). This overrepresentation of minor drug offences is a related to Indonesia's perceived drug problem, and in 2014 the newly elected president Jokowi made it a major issue for his government, as had the Yudhoyono regime in its first year. The national government has the main role in criminal law. National penalties for possessing drugs are harsh by international standards. Also, under Indonesian laws possessing drugs for personal use is perceived as an offence even if the individual is a drug addict. There is a high rate of convictions for personal possession, even for first-time offenders possessing drugs for their personal use and even for offenders who have not been involved in other offences. Law enforcement of drug possession has been a policing priority since the middle of the 20th century. Law enforcement resources are directed at arresting drug users. The majority of arrests are for drug possession at the local level, and the majority these result in imprisonment because the legal framework is to punish drug offenses. It is estimated that around two-thirds of prisoners have a drug issue. This over-representation of drug users in the prison will be discussed in chapter two.

Indonesian prisons have struggled with the growth of the prison population associated with drug use (Ministry of Justice 2013). The Indonesian Prison Service (IPS)'s report indicated that the proportion of drug users in prison grew by 85% between 2011 and 2013 (IPS 2013). The growth of the prison population was related mainly 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 imprisoning of drug users for extended periods, which has had an impact on the increasingly crowded prison occupancy rate (Mulyadi 2012; Iskandar 2014). Statistical indicators of the arrest data from the National Anti-Narcotics Agency of the Republic of Indonesia who are authorised to arrest for drug related offences indicate that in the four-year period from 2009 to 2013, the number of arrests increased by nearly 30% from 38,405

to 44,012 (BNN 2013). This escalating number of drug arrests may represent an increase in the capacity of the police to investigate drug cases. Meanwhile, the number of drug-dependent individuals undergoing drug rehabilitation at the National Anti-Narcotics Agency of the Republic of Indonesia (BNN) Treatment Unit, at Lido-Bogor, was 757 people in 2013, comprising 697 males and 60 women (BNN 2013). This may indicate that a smaller proportion of women have been able to access drug rehabilitation and/ or that fewer women experience drug problems.

Drug arrests appears to be attributable to socio-economic factors. Official statistics indicate that more than half of drug arrestees are adults aged 29-plus (BNN 2013). The consumed drug types were predominantly cannabis (64%) and methamphetamines (36%) (BNN 2012). The BNN also indicates that the proportion of recorded offences committed by women was smaller than those committed by males. In 2011, for instance, there were 3,674 recorded female drug offenders and 32,915 male drug offenders (BNN 2013). This proportion may indicate gendered arrest differences in the official statistics. The offenders' low social status may also be an influence. There are many meanings of "low social status". While the term low social status is often referred to as working class (economic term), in this thesis, the term low social status refers to offenders who have a poorer background. The widespread exposure to illegal drugs by low social status groups may mean that the initiation of dealing with drugs is associated with their poorer background. Nasir et al. (2011; 2014) study of young drug users in East Indonesia (n=30) indicates that the majority of the participating drug users who have an issue with drug use are associated with poorer neighbourhoods, with work in low paid jobs, slum areas and underground economies including dealing drugs. There is also an issue of recorded crime/ drug offenders which may impact on poorer people. The study may also mean that those from poorer backgrounds can be considered unable to provide a lawyer; to stand up for their rights at court; to provide an assessment; and hence, be unable to receive equal access to treatment.

Changes in the penal field and particularly the increasing number of drug users in the penal system created ambivalent conditions for the use of sentencing to rehabilitation. In early 2014, there was an increased recognition from the previous head of the BNN that the official war on drugs had led to the imprisonment of too many convicted drug offenders. It was in this context that Regulation number 01/2014 (SKB) about treatment

provision was made to allow for more judicial discretion[2]. This regulation (SKB) was made by the previous head of the BNN, the National Police, the General Attorney, the Ministry of Justice, the Ministry of Health and the Ministry of Social Affairs, with the acknowledgement of the Supreme Court. The current regulation (SKB) ruled that: "(1) those convicted, who become drug addicts and victims of abuse of drugs and are not related to drug dealers, are eligible to medical rehabilitation and/or social rehabilitation. This rehabilitation is carried out in prison or detention centre and/or rehabilitation institution that has been designated by the Government. (2) Those convicted, who become drug addicts and have a dual function as drug dealers, are eligible for medical rehabilitation and/or social rehabilitation in prisons or detention centre" (SKB Regulation number 01/2014). This regulation (SKB) has additional functions: to reduce the prison population and to coordinate the assessment and placement of drug offenders into treatment. 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 sentenced to prison, but sentenced to rehabilitation (Iskandar 2014).

This shift of drug policy stems from the fact that imprisoning minor drug offenders did not resolve Indonesia's drugs epidemic. Statistical indicators from the BNN illustrate that in the three-year period from 2008 to 2011, the prevalence of drug users increased by nearly 0.33% from 1.99% to 2.32% (around four million drug users[3]) (Iskandar 2014). It would be impossible to send four million people to prison since Indonesia is already experiencing an issue of overcapacity in its prisons. Moreover, the use of imprisonment in Indonesia is considered unhelpful given the lack of treatment resources and appropriate responses to 'withdrawal' symptoms in prison (UNODC 2012). The international recommendations from The World Health Organization (WHO) and The United Nations

[2] The previous limits of judicial discretion were that even though the offender was a drug user, when s/he was arrested on possessing the drug, the police will charge him/her under drug possession which carried out minimum sentencing. Once convicted of drug possession, some judges may feel that imprisonment is the only option.

[3] The statistical indicators used by the National Anti-Narcotics Agency of the Republic of Indonesia (BNN) in this thesis are not an accurate indicator but merely reflect how the BNN indicate the specific number of drug users in Indonesia.

Office on Drugs and Crime (UNODC) emphasise the importance of promoting a treatment approach to drug misuse, a focus on upholding human rights and less punishment (UNODC-WHO 2008; Schabas 2010). While the WHO and UNODC did not single out Indonesia for comment, their recommendations can be considered relevant within an Indonesian context. In short, changes in the Supreme Court acknowledgement of the SKB and the increasing number of drug users in the penal system shaped suitable conditions for the use of sentencing for rehabilitation. In mid-2014, the previous BNN head was replaced by the new BNN head who declared a new 'war on drugs'. This shift of BNN policy and the Supreme Court directive motivated me to explore the issues of justice among Indonesian Judges[4]. This context for the study were expanded in the chapter on Indonesia and the methods chapter.

The following section provides the background and context to the study with a personal account of my interest and involvement with the subject of sentencing practice. My interest in the subject stems from my previous background as a judge and PhD student. During my seven years as a district judge, I sentenced a number of less-serious drug offenders to lengthy prison terms. Before I learnt about the issue of drugs use, I tended to view offenders who used drugs in detention centres as persistent offenders and their behaviour as unacceptable. This persistent offending may aggravate the sentencing to imprisonment to the maximum. This aggravating factor was reflected in my sentencing which mostly mentioned that 'the offenders did not support government program combating illicit drugs'. I realised that my approach represented a punitive approach that sent convicted drug offenders to prison. Studying the Strathclyde Masters in Criminal Justice and Penal Change has enabled me to understand the international experience of penal innovation that is useful to my future work as a Judge. As a Masters student, I have had opportunities to participate in several conferences in Scotland, such as on Problem-Solving Courts, and to visit, for example, the Glasgow Drug Courts. The problem-solving role of the judges has led me to believe that there are more effective ways of sentencing offences. The title of my Masters' dissertation about the problem-solving role of the judge reflects my research interest, which relates to the forms of justice for minor drug offenders

[4] The study did not take place in 2017 when the apparent political desire was the execution of suspected drug related offenders, but rather was conducted in mid-2014 when the apparent political desire was to put forward the war on drugs agenda.

in practice. This interest then develops towards the importance of deeper understanding of how justice to minor drug offenders is performed in the court setting with specific relevance to sentencing, discretion and power. This thesis has evolved during my analysis based on the primary research of my PhD in the University of Stirling. Hence, the application of the concept of dramaturgy to judicial perspective in Indonesia extended my research interest. The context for the study will be expanded in the chapter on Indonesia and the methods chapter. To explore these issues, a brief introduction to the theoretical framework for the study was then discussed in this chapter.

Theoretical Framework

As a basis for the framework for my study, a concept of Goffman (1959) on dramaturgy was used to explain the dramaturgical competence of the panel judges in their attempts to show accountability to their audiences (i.e. the sphere of politics, the public, and religion). The concept of dramaturgy is drawing in this thesis, referring to the court setting which is central to my thesis and how justice is acted out/ performed in this context with specific relevance to sentencing, discretion and power. This concept of dramaturgy is considered as a useful approach to understanding how justice is presented to the judges' audiences similarly to the drama of theatre (Nolan 2002). This concept of dramaturgy was adopted because it was considered that the Indonesian court itself can be understood as theatre. The symbolic interactionism is drawing to characterise the interaction of a social group with another social group or social individual (Becker 1963). The symbolic interaction was a useful approach to understanding how the continuous interpretative process influenced shared meanings (Goffman 1959). The concept of dramaturgy was then developed in the Indonesian context and the methods chapter.

Contribution to Knowledge

This study contributes to knowledge by considering that sentencing does not happen in a vacuum, but is influenced by several factors including the law, politicians, the public, the media, and the religious community. The current structure of Indonesian courts, is primarily retributive, and drug prohibitionist, and Indonesia is a predominantly Muslim country. The substantial minority of participating judges interpreted the form of

the sentence bearing in mind the broader structure of the audience: political, public, and religious. The panel judges' interpretation is one of the essential processes of sentencing. This form of panel judges' interpretation within the existing social structure would contribute to the sociological understanding of the context in which social structure shaped the formation of the judiciary as a group, and their interpretation of justice. The study which forms the basis for this thesis also 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).

Structure of the Thesis

The first chapter discusses what is already known about drug sentencing in policy and in practice. The first chapter also discussed the theoretical framework for the study. The second chapter introduces the issue of minor drug offenses and sentencing in Indonesia. The third chapter discusses the methods used in the study; why they were chosen; and how each part of this study was carried out. Chapter three also discusses the reliability and validity of this study, and describes the ethical challenges faced during fieldwork. Chapter four presents the findings with Rural and urban Court Judges that focused on how the sentencing of minor drug offenders was perceived and experienced by those judges. Chapter five and Chapter six presents the findings of an in-depth study of the judicial account on sentencing over a three-month period, and offers an analysis into the Judges' perspectives in that court. Chapter seven discusses the implication of the findings and concludes the study. In addition, the Appendices provide concrete examples of some of the documents referred to in the thesis and gives further explanation of ethical procedures developed for the fieldwork.

Chapter 1: Sentencing for Drug Offences

In this chapter, I present the context to the central research question about judicial perceptions of the sentencing of minor drug offenders; the factors that influence sentencing; and the function/aims of sentencing. I evaluated studies relating to drug offences and responding to drug offences. I also assessed the relevant international literature. This literature review has fulfilled a number of aims for my study. It helps me to understand the different forms of justice identified in the available literature. The literature review has also helped me to explore previous studies in the field of sentencing drug offenders and to identify gaps in the literature. In this chapter, I discuss the international context of justice, the aims of sentencing, and the factors that influence sentencing. I present the usefulness of the theoretical framework of dramaturgy, the concept of rehabilitative drug sentencing as well as the application of problem-solving drug courts in structuring the finding of this study.

Different forms of justice

The study of the judiciary across the international jurisdiction need to be considered within the context of researcher coming from. An important part of the context is within the nature of the legal culture in which operate. The way in which the court operates will influence an understanding of the use of discretionary power. The aim of this review is to present the forms of justice within the context of the legal culture in which it operates. In the history of Western jurisprudence, there are three traditional forms of justice according to Duff and Garland: legal, moral, and social (Duff 2011). The first traditional form of justice is legal justice in which judges makes judgments in compliance with the law. Legal justice operates in different legal cultures, and there are at least main two legal cultures, one is common law, and the other is written law (Reinman and Zimmermann 2008). In written law cultures, such as in Indonesia, the judiciary is not allowed to create sentences. As will be explored in the Chapter on Indonesia (Chapter Two), the judiciary can be considered bound by the principle of legality, which may constraint their discretion. For example, drug offences are listed in a penal code. Therefore, the judiciary may need to follow the codified rules. In contrast, common law provides more opportunity for judges to craft their sentences, but as a result, the judiciary

may need to follow sentencing guidelines to avoid disparity. This acknowledges the way, within the common law culture, the application of the rule of law is implemented through applying the law in their sentence (Hart et al. 2012). However, it is worth noting that in written law culture, such as in Indonesia, there are also cultural differences regarding the judicial consideration about the application of the rule of law when sentencing drug offenders. This judicial consideration about the implementation of the rule of law when sentencing drug offenders in Indonesia requires further investigation.

The second form of justice is moral justice in which judges make judgments on a moral basis. In 2011, Duff noted that justice that is informed by morality might be questionable. However, Duff found a small number of studies dealing with the issue of moral justice. The moral belief of the judges may refer to the religious value reflected mainly in the Bible (for Christians) or in the Quran and its scholars' interpretation (for Muslims) or written moral principles which explicitly underpin their sentencing. Hart et al. (2012) argued that the moral responsibility of the judge is often referred to when sentencing. To determine how deserving the person is, Hart et al. (2012) stated that individual judges would go through an assessment in which they follow their moral responsibility. Compassion and empathy can be considered rooted in the religiously derived notion of moral responsibility. In some jurisdictions, such as Scotland, the moral bases of sentencing were explicitly written into sentencing guidelines (Tombs 2004). However, it is noteworthy that in other jurisdiction such as Indonesia, the Islamic understanding of the moral aspect of justice may enter judicial deliberation when sentencing. This Islamic understanding of the moral element of justice that enters judicial consideration when sentencing in Indonesia requires further investigation.

The third form of justice is social justice, which views that judges should consider the benefits that their sentencing will have on society (Duff 2011). Therefore, it is necessary to understand the presentation of social justice when sentencing minor drug offenders. The presentation of social justice in drug sentencing is a gap in the existing literature and argued to be substantial, as Duff's (2011) work indicated. There are at least two main reasons why the presentation of social justice in sentencing merits attention. Firstly, understanding the social backgrounds of the persons being judged can be considered important (Hudson 2003a; Hudson 2003b). For example, the way in which

judges attempt to understand the social backgrounds of drug-related offenders can be considered important for the judicial interpretation of justice (Nolan 2003). The study indicated that the judicial attempts to pursue social justice drives them to influence the judicial process. Secondly, disproportionate sentencing has been considered by a number of authors as these raise issues surrounding social justice. Previous studies have indicated the judicial rejection of disproportionate sentencing and discrimination as a form of resistance (Nadelman 2004). These judicial resistances are part of a broader historical discussion about the form of sentence that would achieve social justice, that is to say sentencing considerations such as, the distribution of benefits, acceptance, and equal opportunity (Duff 2011). Studies have also shown that if no resistance is carried out by judiciaries toward disproportionate sentencing of drug-related offenders, developing countries in Asian, including Indonesia, are likely to experiences a lack of social justice in this area (Nadelman 2004; Babor 2010). It is this presentation of social justice when sentencing minor drug offenders in Indonesia that I will consider further in this study. I contend that it is important to consider the beneficial aspects of sentencing for both offenders and for the wider community.

The aims of sentencing

Duff (2011) reported that across the international jurisdiction, the aims of sentencing, or what the judges are trying to achieve when sentencing drug-related offenders, is a contested topic, the debate of which falls mainly into three identified aims: retribution, incapacitation, and rehabilitation. There is a different focus behind each of these aims, and each aim is likely to incorporate different approaches. The first aim of sentencing is retributive, in which the sentencing aim is to communicate that no one profits from their wrongdoing (Murphy 2013; Von Hirsch 2003). Therefore, Judges who have retributive aims are likely to impose punishment based on the seriousness of the drug offence. The focus on retributive measures for drug offences has led to the punishment model of sentencing. However, retributive aims have been criticised as they tend to focus on the assumption that offenders have choices that would prevent them from committing offences (Murphy 2013) and ignore the offenders' circumstances (i.e. socio-economic disadvantage) which caused offences (Carlen 2013). There are at least two main reasons why retributive measures for drug offences deserve attention. Firstly, the ineffectiveness

of retributive measures for drug offences is evidenced by the UK' annual report (Matrix Knowledge Group 2008). For example, a study from England indicated that retributive measures for drug offences are ineffective in reducing reoffending (Ward 2014). Secondly, the negative impact of sentencing to imprisonment for drug offenders in some western jurisdictions, are well documented. For example, studies in the UK indicate the relationship between retributive measures for drug offences and socio-economic disadvantages that may lead to longer imprisonment (Steven 2011; Carlen 2013). Studies have also shown that if strong retributive measures are carried out, offenders in developing countries in Asian, including Indonesia, are likely to suffer from the adverse impact of imprisonment reproducing and strengthening their socio-economic problems that may in turn lead to longer imprisonment (Nasir 2011; 2014).

The second aim of sentencing is incapacitation, in which a restrictive measure is intended to disable the drug offender from further offending. In such circumstances, sentencing is imposed by predicting the likelihood of the offender's future threat to society (Wilson 2013). From this incapacity perspective, it is believed that judges are expected to make predictions about the impact of their sentencing on drug offenders' future behaviours. The focus on the predictive measure for drug offences has led to the deterrence model of sentencing. However, incapacitative justice has been criticised as it tends to focus on the predictive diagnosis of criminal danger (Morris 2002), ignores the potential inaccuracy of predictive diagnosis of the danger of criminal acts (Duff 2011), and violates the presumption of innocence (Lui 2015). Concern has been frequently expressed by the criminologist about the negative impact of sentencing on drug offenders' future behaviours. For example, studies in the UK indicates the relationship between restrictive measures for drug offences and socio-economic disadvantages may lead to longer imprisonment (Ward 2013). Nevertheless, many of these studies are in western jurisdiction. Few have explored the interplay between drug offenders' future behaviours when sentencing minor drug offender in developing countries (Ashworth 2011) and fewer still have done so in Indonesia (Mulyadi 2013).

The third aim of sentencing is rehabilitation, which is an educative process that aims to serve the good of the person punished as well as that of the community at large (Morris 2002). In the court sentencing, the judge aims to convey the message that the

offence violates society's values and, therefore, is socially unacceptable (Morris 2002). Accordingly, Judges who have rehabilitative orientations may be expected to teach a moral lesson to the drug offenders. The judges hope that the offenders will understand their (flawed) humanity, to persuade the offenders to re-embrace society and its values (Duff 2001; 2011) and 'to change their way of life' (Rex 2013). However, the rehabilitative aim has been criticised as it tends to focus on moral reconciliation (Morris 2002) and ignores the immorality and brutality of punitive drug prohibition (Gray 2001; Husak 2002; Lipp 2003; Nadelmann 2004). Additionally, those who are punished may not live in circumstances in which those values can be easily adhered to (Duff 2001). Given such criticism of the rehabilitative aims, Duff (2001) indicated that a modest aim of rehabilitation would be achievable if an improvement in offender life-styles and conduct become a measure. Within this measure, Nolan (2003) focus on the rehabilitative drug sentencing that would support offenders' recovery. Moreover, the author highlighted the importance of the 'sentencing' role of the court that would address the underlying issue that causes drug use. Since that time, the study on the sentencing of drug-related offences evolved from the traditional court into the 'Problem-solving drug court' setting (Ward 2013).

The study of the 'Problem-solving drug court' across the international jurisdiction needs to be considered within the context of criminal justice responses to drug-related offending. For example, in the UK contexts, Drug Treatment and Testing Orders (DTTO) testing were announced in 1999, were based on 'coerced treatment', and were available at national scale. DTTOs targeted drug offenders who had been convicted and were at risk of more severe custody. DTTO testing was applied for a period of 6-36 months by combining the management of court supervision, drug testing and access to treatment (Ward 2013). In England and Wales, the offender's need for treatment was addressed through the implementation of suspended sentences and community orders that could have Drug Rehabilitation Requirements (DRR) attached (Matrix Knowledge Group 2008). DRRs target low level persistent offenders (Hollingworth 2008) who are deemed suitable for the DRR as requirement of a suspended sentence or a community order (Matrix Knowledge Group 2008). In the Canadian contexts, the development of drug courts has been operated in six main towns in Canada (Ottawa, Toronto, Winnipeg, Regina,

Edmonton, and Vancouver). But, in Canada, the majority of Canada's drug courts tended to target drug-related offences non-violent offenders and those who were addicted to opiates and cocaine (Latimer et al. 2006). The offender was involved in addiction treatment provided by the Center of Addiction and Mental Health (CAMH). A guilty plea is required to enter the drug court program. The offender is coerced to participate in abstinence-based addiction treatment. Those offenders who are severely addicted to a drug tend to be at high risk of violating the treatment order. This violation of treatment orders may result in routing offenders back to the traditional court (Latimer et al. 2006; Werb et al. 2007). In the Australian contexts, the development of drug treatment courts has been the reflection of criminal justice response to drug-related offense (Passey et al. 2007). But, in Australia, the judge is involved in managing cases, encouraging solutions and supervising the harm reduction-based treatment progress of the drug-related offender (Indermaur and Roberts 2003; King et al. 2009; King 2011). These similarities and difference across jurisdictions may have an impact on the development of the problem-solving role of judges in their response to drug-related offense. However, it is noteworthy that the development of this problem-solving role judges also can be considered confusing within the current context of Indonesian courts. Ward (2013) thus recommended for better understanding of the contemporary judges when sentencing drug-related offences.

The problem-solving role of the judges is a role that has been considered by contemporary judges in drug court when sentencing drug-related offences. There are at least two key features of the problem-solving role can be identified from the literature. These features are personal interaction and continuity to "therapeutically" support drug offenders in their efforts to recover (Wexler 2008; Nolan 2009; McIvor 2009). These key features are adopted by the judges to address the underlying issue which causes drug use (Hora and Stalcup 2007; Kassebaum and Okamoto 2001). This expanded our understanding of the contemporary approach on drug sentencing and is likely to incorporate the problem-solving role of the judges. According to Nolan (2009), the term problem-solving is best viewed as an umbrella term to explain the range of intervention in which judges and offenders are seen to share the responsibility that creates mutual commitment between them. It is this aspect of "therapeutic approaches" that is thought to be adopted by Judges in the drug court context (McIvor 2009; Nolan 2009; Wolf 2008). Judges regard drug courts

as a legitimate approach for diverting non-violent drug offenders from imprisonment (Eskey and Eskey 2015). Nevertheless, there is a different function/aim of sentencing behind the problem-solving role of the judges, and it would not have been part of the law-enforcement role of the judges (Ward 2013). Within these problem-solving role of the judges, Ward (2018) focus on the importance of rehabilitative drug sentencing that would facilitate offenders' treatment.Moreover, it was found that judicial understanding about the relationship between treatment, and rehabilitative drug sentencing remain unexplored. In this study, I will consider further this relationship.

Treatment, rehabilitation, recovery

The important role of rehabilitative drug sentencing in facilitating an offender's recovery should be acknowledged. In 2001, rehabilitative drug sentencing was implemented in the USA, the UK, Canada, Australia. In that jurisdiction, rehabilitative drug sentencing is heavily focused on facilitating an offender's recovery. In contrast, in another part of the world such as Asia, retributive drug sentencing is the major form of sentencing for drug offenders (Lai and Birgin 2010). Studies have also shown that if no effective rehabilitative response is carried out, developing countries in Asian, including Indonesia, are likely to suffer from the negative impact of imprisonment reproducing structural inequalities (Nasir 2014). However, it is noteworthy that the sentencing of offenders, does not happen in a vacuum (Duff 2011) but needs to be considered within the context of the judicial understanding of drug use. Ward (2013) thus recommended a better judicial understanding of drug use.

Indeed, the previous study indicated that better judicial understanding of issues of drug use and effective treatment could be considered fundamental to the development of a coherent approach to minor drug offences (Ward 2013). This may mean that developing a judicial understanding of an effective approach to issues of drug use would encourage more use of treatment provision. The focus on rehabilitative measures for issues of drug offences has led to the medical model of drug sentencing. Regarding the efficacy of rehabilitation, various researchers have suggested certain measures. The first measure relates to changing the offender's behaviour and reducing the rate of reoffending (Duff 2001). If the efficacy of rehabilitation is measured by a change in offender behaviour, then

the Judges should tailor sentencing to encourage the offenders to comply with socially acceptable behaviour (Hollin 2002). For example, Davis and Lowe (2015) reported that across the international jurisdiction, the sentencing that was supported by the availability of proper resources for rehabilitation was seen as being effective in reducing the rate of reoffending and the prison population. This rehabilitative sentencing includes problem-solving drug courts. The application of problem-solving drug courts often includes an element of tailoring sentencing toward the offender rehabilitative program. It can be perceived as equally important, however, that such rehabilitative measures take place alongside a clear framework which ensures that social welfare and public health approaches are adequately covered (Ward 2014; Buchanan 2015).

The second measurement of rehabilitative approaches relates to improving the offender's lifestyle and harm reduction. The harm reduction approach refers to the prevention or reduction of the harmful effects of social and personal consumption, through moderating the use of illegal drugs (Rigter et al. 2004). This harm reduction approach has been particularly dominant in the UK. For example, in Scottish drug courts, harm reduction is the primary goal. The drug offenders who had an issue with drug use were expected by the judge to reduce the harm related to drug use. This harm reduction approach underpins the way the judges carry out their supervisory approach and support more flexible treatment (McSweeney et al. 2008). In these jurisdictions, the harm reduction approach is seen as a justification for the judges to facilitate methadone substitution treatment or similar for those offenders who have an issue with heroin (Rigter et al. 2004). In developing countries in Asian, including Indonesia, there is some movement toward the harm reduction approach that is related to drug use (Nasir 2011; 2014). However, this harm reduction approach appears to confuse the Indonesian judge's role within the current context of drug prohibitionist policies. The way in which the Indonesian judge considers this harm reduction approach is one of the main issues that I will reflect upon.

A number of debates about the justification of the harm reduction approach are reflected in the literature (Rigter et al. 2004; McSweeney et al. 2008; Stevens 2011). Nevertheless, many of these debates have taken place in Western contexts. It is worth noting that contemporary scholarship from Asian that adopts an Islamic perspective would

appear to justify the harm reduction approach to drug use (Ibrahim 2013). They justify the harm reduction approach based on "Makasid Al-Sharia", or improving and saving the lives of drug users; "Darura", or protecting the public from an HIV epidemic; "Rafu'Al-Haraj", or preventing the individual from being further burdened with a fatal HIV infection while the individual is already heavily drained by issues of drug use; "Rukshah", or legal dispensation regardless of the degree of harm; "Darar", or lesser harm which may be tolerated to avoid greater harm. Despite this justification of the harm reduction approach, there are disagreements about how far the harm reduction approach can be applied across the international jurisdiction. In the UK contexts, the harm reduction approach is directed towards effective drug substitution (Stevens 2011). For example, in a study in a Scottish drug court carried out by McIvor (2009), those offenders who have an issue with heroin use would be linked to a methadone substitution treatment. On the contrary, in the US contexts, the harm reduction approach is directed towards effective drug substitution (Stevens 2011), the "full recovery" approach is directed towards total abstinence from drugs and permanent change is seen as the only means by which individuals can be seen to be contributing to the community; to stop harming themselves; and to stop offending (Stevens 2011). Nevertheless, harm reduction approaches are being recognised increasingly as being effective among recreational drug users, and this may mean that the criminal justice mind-set should look forward to responding to minor drug offenders as other fields, such as the harm reduction movement, have sought to do (Nadelman 2004). Various scholars have proposed the harm reduction approach among drug users as an aspect of continuing recovery (Rigter et al. 2004; Stevens 2011). Nevertheless, many of these approaches have taken place in the UK and US contexts. It is noteworthy that this harm reduction approach can be considered confusing according to the judge's role within the current context in Indonesian courts. The judicial awareness about harm reduction approach to minor drug offenders in Indonesian courts requires further exploration. In the previous section, I explored the general aims of sentencing identified in the literature and indicated the need to explore the specific aims of sentencing minor drug offenders further (i.e. punishment, deterrence and the medical model). These aims can be considered relevant in both Indonesian context and international contexts. These specific aims of sentencing minor drug offenders are those that I consider further in this study.

Punishment and deterrence

The specific aims that underpin judicial attitudes when sentencing minor drug offenders are perceived as a highly contested topic. Within this topic, it was identified that the debates fall mainly into three aims: punishment, deterrence, and the medical model. There is a different measurement behind each of these aims, and each aim is likely to incorporate different approaches. The first aim is punishment. This punishment focuses on determinacy and proportionality (Paternoster 2011). This punishment model considers sentencing that fits the crimes. In other words, sentencing is proportionate to the seriousness of offences (Henham 2000). As viewed from this perspective, Judges consider imprisonment as proportionate only for serious offenders (Hough et al. 2003).

Concern has been frequently expressed by several authors about sentencing to imprisonment. One main concern of this imprisonment is that it is contradictory in its approach (Carlen 2013; Pasko 2002). On the one hand, it aims to achieve proportionality (Mackenzie 2001; Tarling 2006). On the other hand, it ignores the fact that certain classes of drug offenders are often vulnerable and blindly labelled by the judges as "bad", and for that reason, these classes of drug offenders are often marginalised by the judges because of their behaviours. Unsurprisingly, these marginalised classes are often discriminated against and disadvantaged by the criminal justice process. Moreover, the inequality exists in society as often drug offenders who suffer from socio-economic problems are discriminated against regardless of the nature of their offences (Carlen 2013; Pasko 2002). A number of authors also note that across the international jurisdiction, lengthy imprisonment for the possession of drugs is disproportionate and unequal when compared with the nature of less serious, non-violent, and victimless offences (Bewley-Taylor et al. 2009; Gray 2001; Husak 2002; Nadelmann 2004; Sevigny and Caulkins 2004). For example, a study in the United States (US) indicated that racial minorities, including Hispanic and black male unemployed drug offenders, have been sentenced disproportionately to prison and treated more harshly than white drug offenders (Spohn 2000). In these jurisdictions, Judges perceive the sentencing guidelines for individual states on drug offences as disproportionate and too harsh (Eskey and Eskey 2015). In addition, the negative impact of disproportionate sentences to minorities undermined the existing court's approaches (Nadelman 2004). Also, a rejection of disproportionate sentencing and discrimination is

seen by Nadelman (2004) to be a form of resistance.

The second aim of sentencing minor drug offenders is deterrence. This deterrence focuses on discouragement or fear of the consequences (Oxford English Dictionaries 2014). In such circumstances, sentencing aims to discourage potential criminals from committing certain crimes (Paternoster 2010). In this case, the crimes are minor drug offences, which is the subject of analysis of this thesis. The capital punishment for the criminal who has been executed is not general deterrence, but paramount prevention. That is to say; the criminal does not live any more to commit any crime (Farrell 2003). Consequently, some judges who have deterrent orientations can be considered to impose sentences which presumably lead to the prevention of crime (Beccaria et al. 2009). Deterrence as a theory operates at three levels. The first and second are related to the concept of specific and general deterrence; the third relates to the educative role of deterrence (Paternoster 2010). The discussion regarding specific and general deterrence can be narrowed down to the following points. Firstly, the deterrent theory seeks to discourage crime. In the case of deterring citizens, it is expected that the offender will be deterred from committing drug offences by the unpleasant experience of sentencing. Secondly, regarding the moralising effect of deterrence, it is argued that when an individual think of committing a crime, they will be deterred by the actual threat that if they do the same, they will endure the same sentencing as other offenders who have already suffered. Thirdly, deterrence plays an educative role, since it can be perceived to enforce the habit of not breaking the law. In other words, it creates unconscious inhibitions against committing crimes.

Concern has been frequently expressed by several authors that being sentenced to imprisonment is ineffective as a deterrent (Paternoster 2010; Ward 2014). Unsurprisingly, the deterrence effect of sentencing has relied on the presumption that every time an individual is imprisoned for an offence, public morality is presumably reinforced and the idea that such an act is bad is reinforced (Beccaria et al. 2009). A review of deterrence studies across the international jurisdiction, carried out between 1961 and 2003 (Mathiesen 1994; Villettaz et al. 2006; Wilson 2003), demonstrated the unlikelihood of the severity of sentencing affecting one's criminality. One reason for this is the lack of certainty in sentencing. Moreover, a study on the deterrent effect of sentencing showed that, for cannabis users, the perceived severity of punishment contributed less to the deterrent

effect than the perceived risk of being arrested (Loughran et al. 2014; Paternoster 2010). These studies are important in exploring the offender's perceived fairness of sentencing that contributed in turn to a deterrent effect and compliance. The offender's perceived fairness may be attributed to the offender's respect for the Judge passing sentence, and their perception that sentencing is fair (Bouffard and Sherman 2014). In Sweden, a quantitative-based study conducted by Svensson (2015), showed that, under the certainty of sentencing, when the offenders assessed their awareness risk of being arrested, the deterrent effect occurred less in offenders with a higher morality than in offenders with lower morality. Svensson (2015) defines morality as the offender's ability to exercise self-control and assess their perceived risk of being arrested. The effectiveness of deterrence is context-specific; its success is conditional upon a set of background conditions (the probabilities of apprehension; the degree of rationality and calculation exercised by potential offenders; and the range of information and public awareness) (Wilson 2003).

The moral objection to deterrence theory relates to the retributive limit to deterrence. Critics question whether it is morally acceptable to punish someone more than the individual deserves to be punished so that a probable offender in the future will be deterred from committing a similar act. Cavadino and Dignan (2007) find it challenging to identify conclusive evidence on the effectiveness of the general deterrence effects of sentencing. This inconclusive evidence may also mean that the specific deterrent effect of sentencing is conditional upon individual circumstances to re-offend. Several studies have suggested that lower class drug offenders are not easily deterred. For instance, a review of the study showed that sentencing minor drug offenders to imprisonment were ineffective as an individual deterrent (Bewley-Taylor et al. 2009; Harris 2010; Mackenzie 2005; Schinkel 2014; Spohn and Holleran 2002; The European Monitoring Centre for Drugs and Drug Addiction 2009; Wright 2010). In short, there were few studies that indicated the deterrence effect coming from sentencing. It appeared that there is no convincing evidence that the severity of a sentence operates as deterrence, nor is there any definitive evidence to suggest that it does not deter. Given the contested effectiveness of deterrence, there is an emergence toward the rehabilitative orientation in addressing the problem of drug-related offenders. Its emergence was influenced initially by the medical view of issues of drug use (Nolan 2009). Since that time, the medical model has become

an intrinsic part of sentencing drug offences (Tiger 2011).

The Medical Model[5]

The medical model focuses on the physical disease of drug offenders (addiction). Drug use is viewed as causing uncontrollable psychical compulsion and physiological damage to the nervous system (Nida 2012). Drug users are viewed as lacking individual capacity to control the desire to use drugs. It was suggested that the absence of self-control would require intervention in the form of medical treatment so that the desire to use is reduced and controlled (Rigter et al. 2004). Whether that is true or not regarding the form of medical treatment given to minor drug offenders will be explored later. The medical model has been criticised as it tends to force treatment in the name of "helping" people (Donoghue 2014; Hoffman 2001; Boldt 2010; Tiger 2012). The model also ignores the limits of treatment measures, given that they are still to be provided within a primarily punitive context (Duff and Garland 1994) and drug prohibitionist policies (Nadelmann 2004). Therefore, it would be necessary to be clear about which model is being pursued when sentencing minor drug offenders especially when it came to medical models. Those who have issues of drug use can be considered not necessarily as having a "disease" since they can be regarded as having a complex and multidimensional etymology with multiple paths to recovery (Bamber 2010). The issue of drug use can be perceived as a complex concept which requires a clear framework to understand and to respond to it. As suggested by Freiberg (2002), Judges should consider structural factors attached to drug offences.

The structural factors attached to issues of drug use would appear to represent a departure from contemporary drug treatment study, which has advocated the importance of addressing underlying socio-economic factors related to issues of drug use (Buchanan 2006). Buchanan suggests that the notion of treatment focuses not only on psychological and physiological approaches to issues of drug use but also on the social context related to issues of drug use. Buchanan further suggested that the social context related to issues of drug use require empowerment, inclusion, acceptance from the public and equal opportunity. The underlying issues related to economic factors would require stable employment and access to resources (ibid). In the context of sentencing, Carlen (2013)

[5] I am presenting the medical model as a sub-heading due to the growing number of studies from contemporary drug treatment.

challenges the sentencing of the judges that are not supportive to offenders who suffer from socio-economic problems. However, this supportive role appears to confuse the judge's role within the current context of drug prohibitionist policies. The way in which the judge considers this supportive role is the central issue that I will reflect upon.

The role of judges in producing a sentence that is supportive to offenders who suffer from socio-economic problems would allow some flexibility in that the judges could consider the offender's involvement (Carlen 2013). For example, those offenders who have an issue with drugs value the way in which the judges support greater involvement of drug offenders (McSweeney et al. 2008). In defining treatment outcomes and selecting resources, it can be considered essential that the judge considers the greater involvement of drug offenders in the effectiveness of programmes (Malloch and McIvor 2013). It has been suggested that involving drug users can be considered to offer the prospect of motivation to change on their part (McIvor et al. 2006). The aspect of offenders' involvement that is thought to be presented in the Scottish drug court involves judges and drug users themselves as part of the process. There are indications identified in the literature that offenders' consent to treatment may increase their motivation to change and readiness to recover (Stevens 2010; Yates 2011). There can be considered a need, also, for sentencing guidelines to provide proper safeguards; the safeguard to ensure that offenders consent entirely to receive treatment; statutory rules to prevent sentences being increased for rehabilitative aims; and scrutiny of their implementation to avoid abuse (Donoghue 2014; Hoffman 2001; Quinn 2000; Boldt 2010; Seddon 2007; Stevens 2012; Tiger 2012). Therefore, a great deal of further consideration is required concerning drug users' informed consent to treatment. This informed consent would ensure the human rights aspect of treatment.

Various scholars proposed effective responses including individualised, flexible, continuous, and engaging, during offenders' treatment and supervision (McSweeney et al. 2008). Regarding individualised responses, these authors have suggested that for stimulant users, psychological approaches (e.g., therapeutic communities, residential rehabilitation, 12-Step treatment, and motivational interviewing) can be considered effective. Motivational interviewing, developed initially by Miller (2005), suggests a client-centred, directive style of counselling for changing client behaviours, resolving and

exploring ambivalence (Miller et al. 2005). It can be considered necessary, however, that any individualised response to offenders who have an issue with drugs use should be anticipated in advance to ensure its implementation (e.g. the challenges for women seeking locally-based community treatment). For example, in Brooklyn, New York, the importance of an individualised response for women encouraged the establishment of Drug Courts for women (Harrell 2001). In these courts, resources (e.g. vocational counselling and health clinics) have been provided to re-establish the relationship between mothers and their children. Similarly, in Glasgow, Scotland, the diversion from prosecution and referral to the 218 programme have prevented the short-term imprisonment of women (Malloch 2011). Also, services provided by 218 are more individualised than those of short-term imprisonment. Along the same line, another study by Millie et al. (2007) indicated that Scottish Judges' perceptions of drug treatment orders prevented them from sending drug offenders to prison. However, this individualised response appears to confuse the judge's role, because the Indonesian judges might not be aware of individualised response (i.e. drug treatment orders) to drug offences. The judicial awareness about an individualised response to minor drug offenders among Indonesian Judges requires further investigation.

Regarding flexibility, previous studies indicate the importance of sentencing that accommodates the offender's dynamic changes. By the dynamic change, I am referring to the gradual process of lowering drug consumption, and productive lifestyle. A study in the USA carried out by Csete and Catania (2013) reports the lack of sentencing that accommodates the offender's dynamic changes. In the US drug courts, complete abstinence was a primary goal (no longer in active use). A number of studies indicated that it was more challenging for the judges to expect the offenders who have an issue with drug use to abstain (i.e. no longer actively use drugs). This is because there will always be the possibility of relapse (The European Monitoring Centre for Drugs and Drug Addiction 2007; White and Torres 2010; Tiger 2012). In the Scottish drug courts, harm reduction is the primary goal. The study mentioned above reported that it was more flexible for the judges to expect the harm related to those offenders who have an issue with drugs use to be reduced (McIvor 2009). In term of continuous engagement during offenders' treatment and supervision, those offenders who have an issue with drugs use value how judges carry

out their supervisory approach and support more flexible treatment (McSweeney et al. 2008). McIvor (2009) has identified a common judicial approach to improve drug offender's lives, such as judges' sympathetic response to relapses becoming an essential driving factor in successful drug treatment. Previous studies also indicate the importance of continuity in support offered to the drug offenders, and targeted supervision (Stevens et al. 2006; The European Monitoring Centre for Drugs and Drug Addiction 2007; McSweeney et al. 2008). However, increased judicial understanding about sympathetic response, continuity in support, and targeted supervision would not be without its challenges because many in the field can be considered unaware of such responses. This requires further investigation.

In terms of a supportive approach to offenders who have drug use issues, a suspended sentence combined with intensive drug treatment would appear to have been effective in improving the social functioning of those offenders with long histories of drug abuse (Passey et al. 2007). McIvor (2009) found that the operation of Drug Treatment and Testing Orders (DTTOs) led by the Scottish drug court judges had a significant effect because the drug offenders were linked to appropriate treatment services (outside prison). Malloch and McIvor (2013) suggest that the combination of a preliminary progress report before the court hearing, ongoing treatment, and court review (by the same Judge) appears to be effective in encouraging offender motivation. It is this aspect of combination of a supportive approach that is thought to be present in the Scottish drug court involving judges and drug users themselves as part of the recovery process. Such a combination is a promising development in the drug recovery field and has been shown to be successful in the Western context (Kerr et al. 2011; McSweeney et al. 2008; Ward 2013). However, since these supportive approaches in Indonesia are currently arranged via the criminal justice system, the value which Judges attach to support those offenders who have an issue with drug use requires consideration. This individual factor of the judges will be considered in this study.

Regarding supportive approaches to offenders in their path to recovery, several authors highlighted the importance of providing realistic aims for drug recovery (i.e. Yates and Malloch 2010; Best et al. 2010; Sacks et al. 2004; Prochaska 2010). They also recommended that recovery from drugs ought to take full account of the factors and

viewpoints in today's society and the realities of drug users as viewed by drug users themselves. Once the factors and viewpoints in today's society in relation to the offenders' recovery from drugs are taken into account, it can be considered important that the conception of "normal" from the perspective of drug offenders is considered because otherwise, as found by Etherington and Barnes (2006) concerning recovery, there is the possibility that conflict occurs between the world of drug offenders and the world of "normal" non-drug offenders. It is viewed easier for those offenders to relapse. Such a conception of "normal" can be perceived to not have to include ambitious targets (Duff 2011 on modest aims of sentencing to rehabilitation) to behavioural change (though this could be included if desired) but could be outlined merely regarding productive lifestyles or active citizenship. Judges might need to recognise a change in the use of drugs from recreational to having an issue with drug use, and how to best approach the offenders who have issues of drug use. Indeed, as Stevens (2008) explains, those who have issues of drug use need someone who helps with their addiction and removes obstacles to access services that may help their addiction. Despite Stevens (2008)'s comment about the supportive role referring to services outside the criminal justice system, the supportive role, according to Stevens (2008), is a role that can also be facilitated by judges. Judges might use sentencing as a way to facilitate the offenders who have issues of drug use accessing resources that may help their issues. However, since sentencing to such rehabilitation in Indonesia is currently arranged via the criminal justice system, one needs to know what key factors contribute to a judges' sentencing. Without considering the circumstantial factors which influence sentencing, there can be no justice (Hutton 2006). For this reason, it was perceived necessary to acknowledge the circumstantial factors which influence sentencing (Ashworth 2002). In this study I will consider further these influencing factors.

The factors that influence sentencing

There are a number of influencing factors identified in sentencing. The Judicial culture influences, the structural influences, the resources available, are a few of the factors that may influence sentencing. In 2001, Duff noted that numerous influencing factors must be considered but reported that they found a small numbers of empirical studies dealing with the perceived factors which, according to the judges, they think

influence them when sentencing. Since that time, studies have been done to address the influencing factors on sentencing. The identified studies are reviewed and presented below.

Issues around availability of resources

Across the international jurisdiction, several issues concerning resources can be perceived as hindering factors that have influenced sentencing. For example, evidence from a study in the USA carried out by Farole Jr et al. (2005) indicates that lack of accessible treatment services in the society could prevent judges sending drug offenders to treatment. Also, lack of funding has often resulted in challenges to accessing treatment (Belenko 2000)., In the Scottish study on drug sentencing, the existing support and structured rehabilitation program available to Judges encouraged Judges to use more treatment provision (Tombs 2004; Ashworth 2010). Particularly, in the Scottish study on problem-solving drug courts, it is considered advantageous to link criminal courts with community-based support and treatment. Linking supportive arrangements in the community as part of the sentence could be seen as reintegrating the offenders with the community. This supportive arrangement could also prevent the need to treat addicted offenders in prison (McIvor 2009). When considering the form of sentence, this resources factor might become paramount, mainly if the resources factor entered the judicial deliberation when linking criminal courts with community-based support as described above. However, it is worth noting that only several jurisdictions have problem-solving drug courts. In the existing system of criminal justice in Indonesia, the issues concerning resources can be perceived differently by the Indonesian judiciary when sentencing. This resources factor is the issue that was considered further in this study.

Structural factors

It is noteworthy that during the last two decades there has been a growing body of literature exploring the relationship between sentencing and structural factor. Nevertheless, many of these studies are in the Western jurisdiction. Many studies in these jurisdictions, explore the relationship between sentencing and structural issues that may lead to longer imprisonment (Ward 2014; Carlen 2012; Nadelman 2004). The structural factors referred to in this thesis are the social forces that enter into Judges' deliberations,

particularly the extent to which society labels drug offenders as doing wrongful deeds and they are therefore viewed as 'outsider' (Becker 2008). This societal label is reflected in drugs laws that prohibis drug use and lead to the imprisonment of drug offenders. This societal label can be perceived as a factor that influence sentencing (Duff 2001). Many studies indicate that societal labels and the demonisation of drug use among minorities in English-speaking countries appear to be attributable to the imprisonment of those belonging to poorer classes and racial minorities. For example, Garland (2001) notes that in the USA, 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 more prolonged periods, while middle-class citizens remained hidden from the criminal justice system. In addition, it can be perceived that mass imprisonment in the USA appears to be attributable to class discrimination in the criminalisation of lower class drug offenders. I have drawn from the previous study in the USA that those from lower classes were sentenced severely, while those from higher/ruling classes often went unsanctioned for minor drug offences (Melossi 2008). Moreover, mass imprisonment in the USA appear to be attributable to racial prejudices in the criminalisation of black and lower-class drug offenders (Buchanan 2015; Lassiter 2015; Nadelmann 2004; Provine 2011). I have drawn upon the findings of previous studies about the mass imprisonment for minor drug offences (Pettit and Western 2004; Shiner 2015) and the disparities in drug sentencing in the USA (Chen and Nomura 2015; Nunn 2002; Spohn 2015). In those jurisdiction, those 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 et al. 2007). Similarly, in the Slovenia study, those offenders who consume drugs were likely to be punished disproportionately harshly (Kopenic 2015). However, it is noteworthy that many of these are in the Western jurisdiction. Few have explored the interplay between social structural issues when sentencing minor drug offenders in developing countries (Ward 2014) and less have done so in Indonesia (Mulyadi 2013). Mulyadi (2013) thus recommended for better understanding of the broader structure of audience (i.e. social structure) issues when sentencing minor drug offences. Thus, such structural factors (i.e. the extent of social forces that enter into Judges' deliberations) when sentencing minor drug offenders requires investigation.

Judicial Culture

In the last two decades, there has been an increasing number of studies, particularly in western countries, exploring the relationship between judicial cultural factors and judges' accountability when sentencing (Nolan 2009, Hutton 2006). Judicial culture in this thesis is related to the knowledge that informs everyday practice and shapes the Judges' values such as bureaucratic culture. It is noteworthy, that since early 2003 there is an increasing number of studies, particularly in western countries, exploring the relationship between judicial culture and their performances in managing the court's caseload. Lipsky (2010), for instance, found that as street level-bureaucrats, lower court judges are subject to the performance of the higher court. Thus, judges at the lower court are expected to satisfy those in the higher court. This is what Lipsky describes as judicial coping strategies. Lipsky's study indicated the way in which the judges were influenced by their bureaucratic culture which required compliance with senior judges' directives. A number of debates about the judicial coping strategies are reflected in the literature. These debates have taken place between an international context around the judicial culture. A proponent of judicial coping strategies claims that junior judges tended to follow senior judges' opinions (Klein and Mitchell 2010). On the one hand, judges are "independent" (Biland and Steinmetz 2014) and permitted to exercise judicial discretion (Thomas 2003). While on the other hand, judges are "dependent" on their bureaucratic culture which needs to give accountability to the chief justice concerning their performances in managing the court's caseload. This bureaucratic culture and managerial orientation may subvert the judicial interpretation of justice into merely expediting the court's caseload which is perceived as essential criterion from the higher court (Lipsky 2010). Because of their bureaucratic culture and under the court's misplaced aim of pursuing case-processing efficiency, those offenders who wish to exercise their right to trial may be sentenced more severely than those who pled guilty (Ulmer et al. 2010; Ulmer and Bradley 2006; Kramer and Ulmer 2009).

Despite the study on the relationship between judicial culture factors when sentencing has increased since 2003, mostly stimulated by their bureaucratic culture in Western countries, the focus mainly on satisfying those in the higher court, once again neglecting the broader structure of audience (i.e. the sphere of politics, the public and the

religious communities). Numerous studies on sentencing exploring the broader structure of audience on sentencing, including the political determinant (Babor 2010), the public determinant (Ulmer 2008). These studies are important in exploring the underlying legitimacy that underlies sentencing. Legitimacy is defined in this research as the extent to which agencies appear to reflect others' expectations within legitimised performance (Goffman 1959). Within the sphere of politics, Babor (2010) focus on the importance of sentencing that would reflect the judicial accountability to the state. In terms of political accountability, there is a direct accountability mechanism in term of how the judges choose to interpret what justice is, in this way that they are doing is a political job, acting in the political arena, and not just acting in a judicial role. For example, in the United Kingdom, judges are appointed by the state, and for that reason the judicial interpretation of justice there is part of their direct accountability to the state (Helm 2009). In terms of public accountability, Ulmer (2008) focus on the importance of sentencing that would reflect a direct accountability mechanism to the community. For example, in the United States, the judge is democratically elected by the community, and because of that the judicial interpretation of justice presented their direct accountability to the community (Ulmer 2008). This acknowledges the way, within Western culture, that judges are doing a political job through interpreting justice. It is also noteworthy that since early 2013 there is one study exploring the perspectives of the judiciaries in Asian countries, mainly in its relationship between Buddhist community and sentencing in Thailand (Yarampancha 2013). However, it is noteworthy that the extent in which the judges' interpretation of justice appears to reflect their accountability to the broader structure of audience (i.e. the sphere of politics, the public and the religious communities) related to issues of drug use remains unexplored. It is this relationship between the Islamic community and Indonesian judges' accountability when sentencing that I will consider further in this study. One should bear in mind that in Indonesia, the judges are appointed by the state and Indonesia has Muslim majority in the country.

The main conceptual framework

In the past decades few studies have been applied the concept of dramaturgy to judicial different approach when sentencing. Nevertheless, currently there has been a growing interest of the application of concept of dramaturgy in studying socio-legal issues

related to sentencing. The growing application of concept of 'dramaturgy' is evident in the field of socio-legal studies as well as criminology in the effort to better understand the political, cultural, socio-economic context of judicial sentencing in drug offences (Nolan 2003; 2009). Again most of these studies have been carried out in the Western jurisdictions. Few have explored the broader context of audience (i.e. the sphere of politics, the public and the religious communities) when sentencing minor drug offenders in developing countries and particularly in Indonesia. To explore the judges' perspective of their role, I drew on dramaturgy as the main conceptual framework to examine the issue of sentencing of minor drug offenders in Indonesian' context. I considered this concept of dramaturgy to be within the broader theoretical field of symbolic interactionism.

Erving Goffman used the image of role play to make sense of human interaction. According to Goffman's scheme, all humans are actors playing a different role in various social spheres. These roles are based on individual understanding and experience. Individuals utilise symbols during their interactions with each other. Through the management of impression, individuals present a favourable image to an audience and other actors in life's ongoing drama. Because acts are most often performed in the team, individuals depend upon others to support the image they seek to project - a sometimes tenuous link (Goffman 1959). More recently, the concept of dramaturgy has been adapted to explain the dynamics of social movement. James Nolan, for example, demonstrates - in keeping with Goffman's interpretative metaphor that a drug court hearing, played by the court actors and viewed by the offenders, is similar to the drama of theatre (Nolan 2003). The life-as-theatre metaphor was viewed as applicable to the Indonesian court on at least two levels. Firstly, it provides a useful tool for interpreting how Judges tried to influence the judicial process. Judges' strategies in the context of sentencing rely on negotiating the judicial process to avoid unjust sentencing on the front-stage, that is, strategy to adjust the form of sentence that meets public expectation. Secondly, written scenarios and composed performances are used to present an image of the judicial perception of defendants and encourage others about the moral responsibility on sentencing.

Relatedly, the Indonesian court itself can be understood as theatre, as seen in the way in which the individual judges were trying to present a favourable image to the audiences (i.e. political figures, the public and the religious communities). The way in which

justice is presented by the judges in a court setting with specific relevance to drug sentencing, exercising judicial discretion and the power relations extant in the court hearings will be examined. This concept of dramaturgy was drawn to explain the presentation of justice of the participating judges as the panel judge's interaction in the court sentencing. As will be seen from the finding in this study (Chapter Four and Five) their access to cultural (Islamic understanding of justice) partly leads these judges to establish their performance at the individual level, and judicial culture. Instead of obtaining sources of legitimacy through conventional means (i.e. judicial power), they strive for justice through their Islamic understanding of justice as their source of legitimacy. Moreover, as can be seen from the perspective of the judiciary (Chapter Six), their performance to presenting justice accrued from their Islamic understanding of justice as well as generated from their audience (the public, the politician, the media) facilitate more engagement with their audience. These in turn play an important condition in facilitating them to considers rehabilitative drug sentencing as a form of negotiated form of sentencing.

Summary

In summary, previous studies relating to sentencing of drug offences indicate that being sentenced to imprisonment for minor drug offences is not only punitive but also, ineffective as a deterrent. The negative impacts of imprisoning minor drug offenders raise issues of justice. The role of the court in considering rehabilitation for minor drug offences as a form of justice has been identified from the literature. It has been suggested that a modest aim of rehabilitation would be achievable if an improvement in offender life-styles and conduct become a measure (Duff 2001). To this end, the judges should try to reduce harm by producing a sentence that is non-punitive and supportive to offenders who suffer from socio-economic problems (Carlen 2013). However, this can be considered confusing according to the judge's role within the current context in Indonesian courts. These are the issues that I consider further in this study. In light of this central issue, I explored the role of the court in considering rehabilitation to minor drug offenders who suffer from socio-economic problems. A common form of judicial approach has been identified from the literature concerning judicial attempts to improve drug offenders' lives. This approach includes how judges respond to the needs of different groups; how judges carry out their supervisory approach and support more flexible treatment and respond sympathetically to relapses (McSweeney et al. 2008). Moreover, the way in which judges help and empower the offenders to deal with their issues and remove obstacles are significant (Buchanan 2004b; Stevens 2008). These judicial approaches are considered effective in supporting the drug offenders in their path to recovery.

The overall picture that can be deduced from the review of the literature provided in the studies presented in this thesis is that the issue of justice to minor drug offenders becomes an important issue in international drug policy/ sentencing practice. Since the judges play a central role in sentencing, understanding the judicial perspectives when sentencing minor drug offenders is therefore essential. The concept of justice in relation to minor drug offenders can be perceived differently in the Indonesian context. In the following Chapter, I present the context of Indonesian justice from different perspectives and I include information about the setting where the study took place.

Chapter 2: Indonesia

In this chapter I present the context of the judicial approaches to drug offenders in Indonesia. First, I set out the history of legislative change - how drug law has changed over time and how law enforcement perspectives dominate Indonesia's drug policy-making. Second, I set out the socio-economic conditions - the potential connection between the socio-economic context and minor drug offences. Third I look at the value of Sunni Islam in determining 'justice' - how religion may influence some dimensions of justice. Fourth, I examine the training for and inspection of judges may influence the judges' intention and action. Finally, I provide an overview of the sentencing options available to minor drug offenders in law.

Historical Context

Colonialisation, brought about by the Dutch Empire, changed Indonesian living conditions. Cannabis use in Indonesia evolved from being eaten, primarily as a food ingredient, to being smoked for pleasure (Courtwright 2001). The colonialisation has increased the availability of the drug and reached broader coverage from previously being used by middle-class citizens to also becoming used by lower class citizens.

Babor (2010) notes that the opposition to drugs was brought by the temperance movement in the USA and UK. The opposition to drugs also reflected the indigenous movement among colonised people (i.e. Indonesia). The first prohibition of drugs was the Brussels General Act of 1889 and international alcohol control treaties (1919), but this prohibition fell gradually into disuse. In the 19th century, temperance workers attempted to limit the drug exploitation of the indigenous population with the USA taking an active role against the opium trade (Babor 2010).

The first convention on international drug control took place in Shanghai in 1909 and was sponsored by the USA. This convention was followed by setting up control of exports and imports and an International Narcotics Control Board (INCB). This control was then extended to limiting drugs to scientific and medical needs. The second convention on international drug control was held in 1961; it included the criminalisation of distribution or sale and punishment and/or treatment of the individual user (Carstairs 2005). The third

convention on international drug control was held in 1988, focusing on the perceived negative impact of drugs on economic development; threatening the national security; and widespread corruption and money laundering. This convention extends to 'possession or purchase' which is punishable. The USA's international effort is pursued through policy statements asking other lower-income countries to update and ratify the convention on international drug control. Compliance is sought with a promise; if a lower income country ratifies the convention, then it may result in it receiving more foreign assistance. This affected lower-income countries, such as Indonesia that needed economic opportunities and international support (Gordon 1994). Consequently, Indonesia adopted the convention on international drug control.

From 1961 onwards, the United Nations (UN) International Drug Control Conventions have been ratified by Indonesia. These conventions are aimed at controlling the supply and demand, and subsequently followed the United States' leadership on 'war on drugs' (Nadelmann 1990) and adopted a bifurcated approach by imposing harsh sentencing on the serious drug offences. The second part of the bifurcated approach imposes lenient sentencing on minor drug offences (Lynch 2008). Moreover, it imposed prison sentences of up to four years on minor drug offences (Law 35/2009). The court also provides the option to sentence drug addicts to rehabilitation. If the penalty imposed is in the form of rehabilitation, the time spent in drug rehabilitation is deducted from the overall period of the prison sentence (Law 35/ 2009, Article 103 (2)). As a result of national ratification, the Indonesian government prohibits the possession of drugs, which is punishable. Since law enforcement perspectives dominate Indonesia's drug policy-making, there is no clear legal distinction between drugs for personal use and drugs for selling. The notion of drug prohibition is interpreted differently by the law enforcement that using drugs also resulted in imprisonment. This interpretation is challenging because the law enforcement often chooses to charge the drug user under the provision of drug possession which carries a sentence of imprisonment.

Another factor that can be considered as a challenge relates to perceptions about the deterrent effect of sentencing to serious and minor drug offenders in Indonesia. There are those who believe that it is a deterrent and a social necessity to deter others from committing serious drug offences. Nevertheless, the deterrent effect of judicial sentencing

to death for serious drug offenders in Indonesia is under-studied (Stoicescu 2015), and there is no indication of it having a positive deterrent effect (Hoyle and Hood, 2015). A review of Nagin and Pepper's (2012) study showed that the economist and the sociologist arrive at different conclusions about the deterrent effect of sentencing to death, which could be due to different methods of interpreting the data (Nagin and Pepper 2012). The literature indicates that the sentencing of drug users to prison is not only punitive (Spencer 1995) but also ineffective as a deterrent (Paternoster 1987; Sherman 1993; Spohn and Holleran 2002; Wright 2010). There are those who believe that maximum sentencing up to capital punishment is a necessity for those offenders who commit serious drug offences. Debates continue over what constitutes seriousness, due to differences of judicial perspective in this question. For example, in nine recent drug cases in Bali, between State Prosecutor versus Myuran Sukumaran and State Prosecutor versus Andrew Chan. The offenders are perceived by the judges as convicted of 'serious' drug offences that led to the imposition of capital punishment. The seriousness of drug offences is considered as the offender's actions have seriously influenced the future of the Indonesian nation with mental destruction to the younger generation (Supreme Court Decision 2011). By contrast, some judges believe that capital punishment is immoral, unethical and above all ineffective as a deterrent. Objection to capital punishment appears to come from several judges of the Indonesian Constitutional court, such as Judge Achmad Roestandi, Judge Laica Marzuki, and Judge Maruarar Siahanan, who in principle opposed the use of capital punishment, as evidenced in their dissenting opinion of constitutional court sentencing number 2-3/PUU-V/2007. They are members of the panel of judges who held the perception that capital punishment contradicts Article 28A and Article 28I Paragraph (1) of the Indonesian Constitution. This article is about the fundamental right to life; they realised that another kind of sentencing would enable the same function without losing the right to life (cited in Supreme Court Decision 2011).

Another factor that can be considered a challenge relates to the inability of study findings to prove that, for serious drug offenders, capital punishment has a deterrent effect in the broader community (Appleton and Grøver 2007). Although capital punishment may stop individuals re-offending (an individual cannot re-offend if they are dead), capital punishment has less collective deterrent effect as it did not stop the broader community

using drugs. Questions have also been raised over the deterrent function of sentencing convicted drug offenders to imprisonment. In Indonesia, there is a 30 % increase in the total number of drug arrests from 22,612 to 29,526 in the four-year period from 2008 to 2011 (BNN 2013). This number suggests that the promise of being sentenced to imprisonment is not deterring the broader community from using drugs.

Crime reduction and prevention appeared to be the philosophy of the judicial system in Indonesia. For example, in 2013, the new draft Criminal Code was submitted to the parliament. This draft specifies the sentencing aim as preventing the crime by enforcing the rule of law for the sake of public protection and encouraging the convicted to adhere to the law and be a useful citizen. This resolved conflicts caused by a criminal act (Bill of Criminal Law 2013 Article 54). It was in this context that crime reduction or prevention is seen to be the philosophy of the Indonesian government and its existing system of criminal justice. However, it is not clear whether this crime reduction and prevention philosophy entered the judicial deliberation when sentencing minor drug offenders.

Socio-economic Context

The link between the socio-economic context and the significance of drug use in Indonesia socially can be considered as relational, i.e. the requirement to increase the stamina needed by labourers for undertaking hard manual labour increases the risk of drug use. Another historical factor affecting current socio-economic conditions occurred during 1997 when the new order created a crucial gap between manual labour and skilled labour. Understanding these socio-economic conditions is essential for understanding the gap that creates the class structure that could lead to drug dealing. Nasir et al. study (2014) indicated that the majority of the people involved in drug activity lived in urban neighbourhoods, even though there are some cases in which people in rural neighbourhoods are involved in drug dealing. The high-level of underemployment among the youth allows them an opportunity to become involved in drug dealing including using drugs (Nasir et al. 2011). Poverty stimulates conditions whereby the majority of minor drug offenders brought into the court were coming from a more impoverished background. In the context of poverty, that caused drug use may raise the issues surrounding justice. Also,

the context of religion in Indonesia, Sunni Islam may determine the judicial interpretation of 'justice'.

The value of Sunni Islam in determining 'justice.'

Indonesia reflects a Muslim majority in the country, which may influence some dimensions of justice within the Indonesian context (Davis and Robinson 2006). There are two main denominations or schools of thought in Islam, i.e. Shia and Sunni Islam (see Madkur 1974 for more information). Sunni Islam is dominant in Indonesia (Fox 2004). Apart from the Aceh jurisdiction, which implements Sharia law, the majority of the country implements the national law while some district judges tend to be religiously neutral, one might even say secular (Pompe 2004). My experience as a judge illustrates that, despite the absence of sharia law on sentencing minor drug offenders, Islam does not seem to be an alien concept to Indonesian judges. For example, the value of moral responsibility when sentencing can be considered influenced by the values of Islam. There are indications identified in the Quran about three forms of justice: legal justice, social justice and moral justice[6].

Firstly, the Islamic understanding of legal justice means that judges need to do justice to themselves and the person being judged. Legal justice is in turn related to the concept of procedural justice. Procedural justice in this case means that judges need to apply the law with accuracy and neutrality. Legal justice also relates to the concept of "maslahah as maqasid al-shariah" or "improving and saving the lives of people".

Secondly, social justice means that judges need to do justice to others and not just themselves. This social justice requires them to respect fellow judges, be fair and give benefit to the offenders and society when sentencing. The social justice approach prescribes an equal opportunity amongst society members. This mean that the opportunity should not be the privilege of the rich alone, but also the poor. Social justice

[6] The following Quranic verses are indicating these three forms of justice. "O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness. And fear Allah; indeed, Allah is acquainted with what you do." (Qur'an-5:8).

related to socio-economic aspect in which everyone has an equal opportunity and requires authority to protect and develop it. Mercy is also a symbolic expression of social justice's support for the weak. This mean that everyone should care for the rights of the socioeconomically disadvantaged population.

Thirdly, moral justice means that judges are morally accountable to God. For example, all sentencing statements in Indonesia begin with the declaration: "for justice in the name of God" with accountability to being God. Moreover, they learn that one condition of the legitimacy of sentencing is accountability to God. Regardless of which religion they believe in, the moral value of their religion can be considered as influencing their approach to sentencing. To understand the influence of religious values when sentencing minor drug offences requires us to go into some details.

The Professional training and Judicial Monitoring

The professional training and judicial monitoring of the judges may influence their interpretation of justice. In terms of the training of judges, the influence of training may shape the judicial interpretation of justice. The guideline on judicial training was published in 2008 by the Indonesian Supreme Court (SKMA 2008). The preface to the guidelines states that judicial training will enable judges to meet the value of justice that lives in the society. For this reason, it is expected that training provided by the judicial training unit would enable the judges to meet the expectation of society (Subroto 2015). In 2014, Nasima noted that the curriculum and implementation of judicial training are not adequately identified in the available literature. Nasima (2014) recommended further investigation of the influence of judicial training. Nasima (2014) reported a lack of studies that could account for the influence of the training process on judicial sentencing.

Despite the absence in the literature on the formation of the professional identity of the judiciary in Indonesia, Indonesian judges develop their professional identity through a training process which enables them to consider 'justice' in their sentencing. Based on my experience as a judge, I found that trainee judges learn the three most important forms of justice: legal justice, moral justice, and social justice. Concerning sentencing, the primary aim of training is to raise awareness of some of the tensions between those three forms of justice when sentencing. The judge will also learn from training that judges would be

required to reconcile the often-competing forms of justice. In this study I will consider further the way the judges reconcile the often-competing forms of justice.

In terms of judicial performance evaluation, some individual judges may have a desire to fit with the organisation of the judiciary. They want to be respected by colleagues and are anxious about losing point of their performance. Moreover, the criteria for the performance evaluation which emphasise conformity to the law also may provide a disincentive for judges to exercise discretion. These performance criteria are often a challenge, as the task of the judge is not only about implementing the standard minimum sentencing, but also interpreting the facts and the relevant law. For example, the judge was not only expected to ensure that their sentencing adhered to such standard minimum sentencing but also to take into account the importance of sentencing that would benefit the offenders and be just to society (I.e. social justice). The potential connection between performance evaluation and sentencing minor drug offences required further detailing.

Inspection of the judge in the Indonesian judiciary creates tension. For example, the issue of judicial accountability of the judges caused them to become subject to external and internal inspection (SKMA 2009). For external inspection, the judicial commission as the external body of the judiciary conducts the inspection. For internal inspection, internal body of the judiciary (i.e. the higher court and inspector at the Supreme Court) conduct the inspection. In 2008, there was a tension when the external inspector (i.e. judicial commission) reported the issue of professional integrity of the judges to the Supreme Court. The judicial commission urged further investigation of the professional integrity of the judges. The tension between the judicial commission and the judges may influence the judicial interpretation of justice. This inspection can be considered as a challenge for the lower court judge to give accountability to those pressures in the issue around justice. Judicial accountability on sentencing at the lower court is not only expected to comply with the Supreme Court policies on sentencing, but also with the inspector. How the inspector reacts to issues relating to judicial departure from the standard minimum sentencing for drug offences may have a direct influence on how lower court judges choose to interpret what justice is. To understand the influence of judicial inspection on the judges' interpretation of justice required further detailing.

Sentencing System

Penalties Available

The latest 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 Narcotics Law 35/2009 is one third longer than under Narcotics Law 22/1997) of imprisonment up to the death penalty. Also, 'serious' drug offenders are prosecuted for drug trafficking and, in Indonesia, convicted serious drug offenders may be sentenced to death (Leechaianan and Longmire 2013; Lynch 2008; Schabas 2010). This sentencing to death is in line with the Indonesian Law that enforces capital punishment for drug trafficking (Indonesia Narcotics Law 35/2009 Article 113, 114, 116, 118, 119, 121, 144). However, I am presenting the study in this thesis not to explore capital punishment but to explore instead the sentencing options for drug misusers for the reason that was mentioned in Chapter 1. Regarding 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 either being punished by imprisonment or sent for treatment. The choices are as follows:

1. Imprisonment

Under Narcotics law, a determinate sentence is the most likely option which determines the minimum and maximum length of imprisonment. It is indicated by Purwoleknsono (2012) that such determinate sentences may limit the judges' freedom. Purwoleksono's question on the ability of the minimum imprisonment principle to provide the Judge with the freedom to impose fair sentencing on drug users was raised. A study by Litbang MA-RI (2012) found that the majority of responding judges (50.57%) preferred dual sentencing which includes both rehabilitation and imprisonment. This preference was because imprisonment was in line with the principle of legality (Litbang MA-RI 2012). Contrarily, 48.28 % of the responding judges preferred rehabilitation as a single sentence, because they considered that a rehabilitation order did not conflict with the principle of legality (Litbang MA-RI 2012). As I am presenting in this thesis (Chapter 1) the judicial preference of punishing drug offenders with harsh sentences of imprisonment may reflect a bifurcated approach to drug offences. However, with the introduction of the drug

assessment team in Indonesia, this situation is gradually changing from incarceration to rehabilitation. In March 2014, the agreement of six ministries (SKB) regarding the drug assessment team to assess the eligibility of the drug user to receive rehabilitation was introduced. The assessment team consisted of the police, the BNN and the medical doctor. This team was required to provide assessment through the prosecutor. Once the prosecutor attached this assessment to a case file and brought it into the court, the court was expected to sentence those drug users to rehabilitation based on the assessments.

According to the Narcotics Law 35/2009 Article 111, sentencing to imprisonment for drug possession offences in Indonesia is made by the Judge passing sentence on the basis of applying the law. In looking to imprison to give the drug offenders an opportunity for help, Judge Mulyadi perceived that the policy of targeting and the imprisonment of (mainly) drug users could be considered to have had an impact on the increasingly crowded prison occupancy rate (Mulyadi 2012). Moreover, the mechanism to access health services while in prison can be considered very challenging for prisoners with drug dependency. According to the UNDOC (2012) report, during the prison sentences, the drug offenders who cite a problem with drug dependency decide to obtain medical care outside prison since they feel that what is provided by the prison is not adequate for their needs (UNDOC 2012). The prisons' long-term capacity to provide drug treatment services becomes a challenge. This stems from the insufficient supportive drug treatment services available in the nation's prisons, i.e. out of the 459 available prisons, only 21 deliver drug rehabilitation programmes (Directorate of Corrections 2013). The lack of supportive drug treatment may be due to the limited government budget, which may have failed to cover the rehabilitation costs of an estimated three million[7] drug misusers in Indonesia (Yusroh 2010). Consequently, the lack of drug treatment services may impede appropriate responses to "withdrawal" symptoms in prison (UNDOC 2012). Access to services outside prison is facilitated by the Harm Reduction Officers (UNDOC 2012). They are not part of the existing system of criminal justice but are from the public health sector. It can be argued that the service available outside the prison meets the need of drug users. For example, prisoners may have access to methadone services when outside prison. It is in

[7] The statistical indicators are not an accurate indicator but merely reflect how the Policy maker indicates the specific number of drug users in Indonesia.

the context of lack of service in prison that the negative impact of imprisonment may raise the issues surrounding justice.

2. Rehabilitation

Indonesian law is currently using the term drug rehabilitation to sentence offenders convicted of having an issues of drug use. Throughout this thesis, the term medical rehabilitation is used to indicate the medical approach to treating the person who has issues of drug use (Law 35/ 2009 Article 1(16)). The term social rehabilitation relates to a social approach to recovery so that the person in recovery can take part in social activity (Law 35/ 2009 Article 1(17)). The diagram below (Figure 1) illustrates the sentencing options available to minor drug offenders.

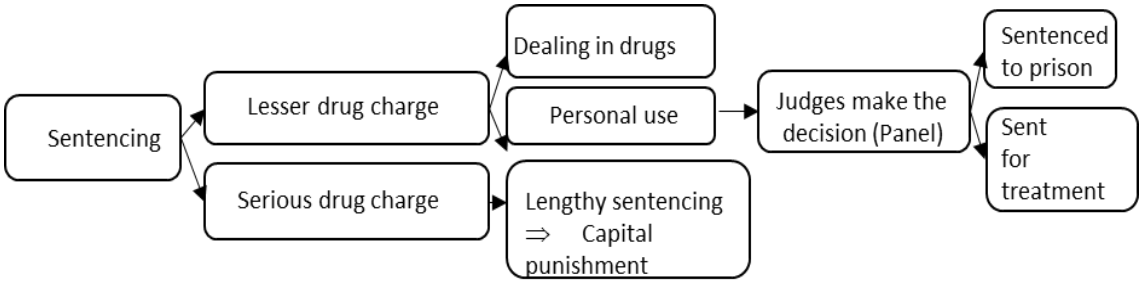

Figure 1 The sentencing options available to minor drug offenders in law.

Figure 1 above illustrates that the Law 35 /2009 allows for the use of judicial discretion of sentencing drug-dependent offenders who are found guilty of drug possession (Indonesia Narcotics Law 35/2009 Article 103). Should the drug user be considered to be dependent on drugs, the judge may decide whether or not to send the drug user for treatment (Indonesia Narcotics Law 35/2009). The Law provides opportunities for the drug misuser to undergo rehabilitation (Law 35/ 2009 Article 54). However, in reality, it becomes a challenge to obtain an assurance of rehabilitation. This challenge is because the narcotics law does not distinguish between selling and using. The law enforcement interpretation of selling has been narrowed down sometimes to distributing and delivering and, at times, has been widened to buying for personal use (Mulyadi 2012). This blurred boundary between selling and using can be considered a challenge for the panel judge's interpretation of justice.

To support the sentencing for the rehabilitation of minor offenders, the Indonesian Supreme Court has attempted to encourage judges to focus on rehabilitating minor drug offenders who have a drug dependency (Sema MA-RI 4/ 2010). According to the Supreme Court internal regulation number 4/2010, minor drug offenders are considered to be those showing evidence of daily drug usage; a positive urine test; the medical certificate of dependency; and showing no evidence of involvement in illicit narcotics trafficking (Sema MA-RI 4/ 2010). This encouragement from the Supreme Court received a mixed reception among lower court judges. This mixed reception relates to lack of resources. As described in the previous study in the eastern part of the country, for example in Bali, the main challenge to the implementation of sentencing drug users to rehabilitation programmes is resources (Dewi 2012). This resources challenge related to a lack of state budget to finance the rehabilitation and the high cost of rehabilitation. This challenge also related to the lack of appointed rehabilitation centres. These conditions are challenging because those defendants who come from low economic and social status groups are encouraged to undergo rehabilitation at their own expense (Diputra 2013). At the same time, lack of state funding to undergo rehabilitation may cause futility and uncertainty regarding judges' sentencings about rehabilitation orders (Diputra 2013). For example, the High Court Judges consider that because the defendant is a patient of the Mahoni Mental Hospital, in order to sustain diagnosis and treatment, a rehabilitation order should be applied on the understanding that all medical expenses are charged personally to the accused (Prosecutor versus Harahap 2012). This medical expense can be considered a challenge for sentencing to rehabilitation.

Judicial understanding of issues of drug use may influence their response to minor drug offences. Despite the Supreme Court directive encouraging lower court judges to consider rehabilitation as a sentencing option (Sema MA-RI 4/2010). The length of the rehabilitative programme counts towards the period of the sentence to be served. This encouragement from the Supreme Court received a mixed reception among lower court judges. This mixed reception may be attributable to judicial understanding regarding the operation of the rehabilitative programme but may also be reflected either in the perceived lack of medical assessment (JANGKAR 2013), or in determining whether or not the drug user is addicted (Lai, Asmin & Birgin 2013). At the same time, the judiciary is also

perceived as confused about the mechanisms to monitor the implementation of sentencing offenders to rehabilitation (Dewi 2012). Moreover, judges are viewed by the public as lacking awareness of the interpretation of the drugs law 35/2009(JANGKAR 2013). The way in which the judge interprets this drug law is the central issue that I will reflect upon.

The Judicial Process

This section will consider the judicial process (investigation, prosecution, the court hearing, and judicial interpretation of the facts). In term of investigation, the influence of the police who set up the case needs to be considered. Previous study indicated that the influence of policing practices that determine the judicial interpretation of justice can be considered challenging. For example, in the post-2009 era following the 'war on drugs', Judge Mulyadi was concerned about the policing practices (Mulyadi 2012). Those drug users who were undergoing rehabilitation (not based on the judge's sentencing) could be charged criminally on past drug history and can be prosecuted. Mulyadi's concern was that the drug users would be in a state of constant worry because once they have completed their residential rehabilitation, and go outside, they can be considered easily be targeted by the police and arrested. The influence of these policing practices in relation to drug users can be considered as important in shaping the judicial interpretation of justice in the court sentencing. To understand the influence of policing practices that determine the judicial interpretation of justice requires us to go into some details.

In term of prosecution, the influence of the prosecutor presenting evidence needs to be considered. The presentation of evidence used by the Indonesian criminal justice system, is similar to the adversarial system (Akub and Baharu 2012). The prosecutors are required to present evidence. This presentation of evidence is initiated by establishing the identity of the defendant and presenting the indictment. Once the defendant understands the aim of the indictment, the witnesses (i.e. the police) are asked to testify. To assess the issues of drug use measurement, an assessment is obtained from a psychiatrist. If necessary, psychiatrist testimony is requested (Law 8/ 1981). The panel of Judges then examines the evidence seized by investigators and the urine test report carries by the Food and Drug Administration (POM). On completion of the examination of witnesses,

examination of the urine test report, the assessment and psychiatrist testimony, the defendant is asked to testify[8]. After the whole presentation of evidence is completed, the panel of three Judges analyse and discuss the evidence in a confidential meeting. Consultation is based on the facts that have been proven and the indictment. To understand the judicial interpretation of the facts and the relevant indictment requires us to go into some details.

In terms of the court hearing, the various power dimensions that may be operating at the judicial process should be taken into consideration on sentencing. A previous study has been examined the power dimensions that may be operating in the judicial process in Indonesia. For example, Meliala (2008) viewed the trial process as a power relation between the offenders - the prosecutor – and the panel judge. The offenders are often under pressure. The prosecutors are often able to put pressure to plead guilty on offenders. The judges are expected to be sensitive to the offender's feelings of pressure and are expected to put the offender at ease. This sensitivity of offender vulnerability is what Melilla (2008) has called the sensitive response of the judge. Thus, the judge's sensitivity to the offender's situation can impact on sentencing. As an example, while examining the case and sentencing, this sensitivity can make the judge more understanding of the offender's problems (Meliala 2008), which therefore influences their judgement. It is this sensitivity among the Indonesian Judges that I will consider further in this study.

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

[8] Exceptions are made for child offenders (Law 8/ 1981, Article 153 (3)). The Juvenile Court Law indicates that child offenders are those aged between 8 to 18 years. For child offenders, the judge considers the recommendations of the correctional officer for children (BAPAS) and the family members of the child offenders to assess the children's interest. The Juvenile Court Law (Law 3/1997, Rule 24) enables a choice to be made between child offenders either being punished by imprisonment or being returned to their parents.

courts (Figure 2). The District Court starts the appeal process. These appeal procedures are arranged hierarchically up to the High Court and the Supreme Court.

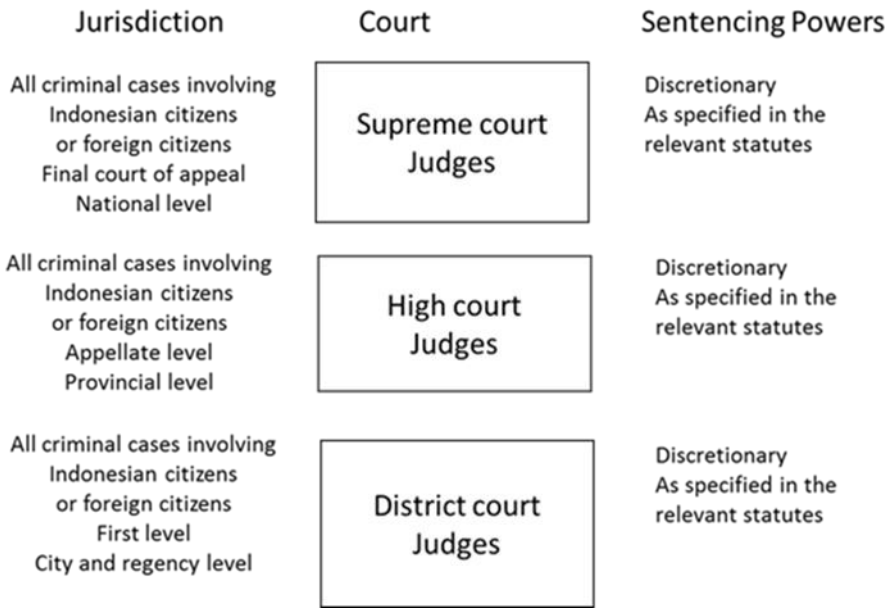

Figure 2 The structure of criminal courts in Indonesia

Figure 2 above illustrates that all criminal cases (including minor drug offenders) will be sentenced first at the district court. If the prosecutor or the offender appeal the case, the sentence is continued to the High Court as the first court of appeal and, lastly, to the Supreme Court as the final court of appeal. This appeal procedure creates tension between expediting the case versus pursuing justice. The way in which the appeal procedure enters into judges' deliberations is the central issue that I will reflect upon.

Summary

In Chapter 2 I set out the context of the judicial approaches to drug offenders in Indonesia.

First, the historical context of drug legislation- how drug law has changed over time. In 1997, the Drug Law 39/1997 was born, and the provisions of drug sentencing were set under minimum sentencing. In 2009, the provision about minimum sentencing remained for drug possession, but the judges may decide whether or not to sentence to rehabilitation for drug use. In mid-2014, there was a shift of policy from the BNN head who declared a 'war on drugs'. As discussed in the Introduction, the shift of BNN policy motivated me to explore the issues of justice among Indonesian judges.

Second, the socio-economic context-the way in which poverty may led people into drug use. Since 1997, industrialisation has had an unintended consequence. There was a crucial gap between manual labour and skilled labour. This gap creates the class structure that may cause drug dealing. For example, poverty may drive people into drug dealing. It is in the context of poverty that precipitated drug use may raise the issues surrounding justice.

Third, the value of Sunni Islam in determining ‘justice'-how religion may influence some dimensions of justice. For example, all sentencing statements in Indonesia are prefaced with the expression "for justice in the name of God" with accountability to God. As discussed in Chapter 1, the extent to which judicial accountability is influenced by religious values is a gap in existing studies; if this is as substantial as argued in Duff and Garland’s (1994) work, this aspect would be worth exploring further.

Fourth, professional training and judicial monitoring of the judges-how judges are trained and inspected may influence the judges’ interpretation of justice. The primary aim of training is to raise awareness of some of the tensions between three forms of justice (legal justice, moral justice, and social justice) when sentencing. The judge will also learn that judges would be required to reconcile the often-competing forms of justice. In term of inspection, the challenges of inspection may lead judges to avoid drug cases being inspected by the inspector (i.e. the high court and the judicial commission). To understand

the influence of judicial inspection on the judges' deliberation when sentencing minor drug offenders required further detailing.

Finally, the way in which the police set up the case, the way the evidence is presented may influence the judicial interpretation of the facts and the relevant law. The perspectives of the judges when interpreting the facts and the relevant law of sentencing to minor drug offenders requires us to go into some detail. To this end, in Chapter 3, I present the design of the study.

Chapter 3: Methods

In Chapter 3, I present the methodological approach to generate a contextual understanding of these influencing factors on drug sentencing. I start this methods chapter by explaining the reason why I adopted a certain philosophical assumption for data generation; the search strategy by which all of the previous study on drug sentencing was searched in the literature; the reason I adopted a qualitative study as a method to explore the contemporary judiciary; the preparation of negotiating access and ethical approval. I continue the chapter with ethical considerations - informed consent, confidentiality, building rapports, and dissemination of the study. Then, I continue the chapter by presenting the technique used for data analysis which consisted of coherent social theory integrating, at the micro level, the judge-offender interactions, and the structural level of judicial culture and social structure. Subsequently, I present a specific reference to the challenges of fieldwork, the sources of bias, and the limitation in the design of the study.

Philosophical Basis

In term of philosophical basis, there are two broad ontological approaches to social studies defined as objective and subjective (Mason 2002). Objective ontology sees an object without being influenced by the researcher. Subjective ontology describes a situation where the object of the given study might be influenced in some way by being observed. I adopted this subjectivist ontology because I considered that my previous background as a judge would have provided an insider's interpretation to the judge's perspective. I was actively interpreting the data that is considered meaningful for the findings. This subjectivist approach was also appropriate to explore the research question about the judicial perspectives of sentencing. The perspectives of judges that is the value they hold, how they think and categories they employ in their thinking, is a vital element in the production of routine patterns of sentencing, divergence from these patterns and change in the patterns over time (Hutton 2002). This study stems from a social interpretivism epistemology, which means that the researcher is actively interpreting the data. I adopted this interpretivism position because I was actively interpreting the data that is considered important for the findings. The objectivity, epistemology and subjective

epistemology are different at least in two ways. For the objective epistemology, the researcher takes a detached position from the realities (Mason 2002). The knowledge and the reality are discovered rather than constructed. For the subjective epistemology, the knowledge and reality are constructed by the researcher rather than discovered. I adopted this interpretivism position because I considered that the study was aimed to understand the judicial perspectives on the sentencing of minor drug offenders in Indonesia. This interpretivism position can be considered useful for the researcher who aimed to understand participant's (i.e. the judges are the participants) perspective (Bryman 2012). My previous background as judge influences the generation of the participant's perspective of reality. Thus, I adopted a subjective and interpretivism position to understand the participant's perspectives on drug sentencing.

To understanding the participant's perspective on drug sentencing in Indonesia, I adopted semi-structured interview and observations because the investigated context was relatively new. This semi-structured interview and observations facilitated the context and nuanced perspective of people (Creswell 2007); and this approach is the most appropriate tool to answer the research question (Luo and Wildemuth 2009). The semi-structured interview can generate higher uniformity than unstructured interviews and is more flexible than the survey (Luo and Wildemuth 2009). Thirty-one judges were interviewed using a semi-structured interview schedule. These interviews would provide insights on the sentencing of minor drug offenders from different perspectives. In terms of observation, I adopted the position of non-participant observation because I am aware that when I took a seat to the side in the visitor room, my appearance may have influenced the way the panel judges behaved during my observation. Thus, I considered non-participant observation as the best way to minimise the influence on the participant being observed (Maykut and Morehouse 2002). As Baldwin (2008) note, understanding the interplay of relationship at the court hearing between the offender and the judges are important. To this end, observations were conducted in sixteen court hearings on drug cases to shed light on understanding the actual sentencing practices.

Search strategy

In terms of search strategy, I adopted several strategies to identify relevant studies in the literature. First, I identified key studies in the field (Duff and Garland 1994) and used them as sources of further references. Second, each new document studied allowed me to identify other relevant studies and to become familiar with the journals relevant to the field. A list of the titles that I found relevant to the studies were as follows: International Journal of Drug Policy, British Journal of Criminology and Criminal Justice, Justice Quarterly, European Addiction Research, European Journal of Criminal Policy and Research, Criminology & Public Policy. A limited list of relevant journals was identified from the USA. Similar findings were obtained from my discussion with the librarian at the University of Stirling. This similar finding indicates that few studies from the USA can be found from the academic databases. These journals identified from the USA can be considered necessary for my study. Because as discussed in Chapter 2 the drug prohibitionist policy in Indonesia appeared to follow the US leadership on 'war on drugs' (Nadelmann 1990).

I considered that it would be most relevant to use "drug sentencing" as the keyword. This keyword can be considered a broader topic to start the search strategy. I also carried out searches of specific topics (e.g. "judicial perspectives"; and "drug treatment court") as the keyword. I carried out searches at regular intervals of the relevant databases (Scopus, Ebsco, and Science Direct). These searches elicited a number of peer-reviewed papers from which the relevant ones were ordered and studied and, again, these referred to further published work. The relevance of the papers was based on the topic, sample, and methods. These searches also covered the grey literature which includes the reports that are not readily identifiable from the academic databases. This grey literature consisted of reports published by the Scottish Centre for Crime and Justice Studies, Therapeutic Jurisprudence Studies and through contacts established over the phase of this study. Given the evolving nature of the study, I retrieved and read literature (i.e. symbolic interactionism) as required to maintain an understanding of key issues at each stage of the study and to ensure that no key papers were omitted. In total, over the course of the study, I studied over 224 papers, books, and reports.

Choice of methods

Regarding the choice of methods, I chose a qualitative study as a method to explore the contemporary judiciary. As Mason (2007) suggested that across the international jurisdiction, the contemporary phenomenon can be effectively explored through a qualitative study. For example, the qualitative study in the USA contexts was useful to understand the judges' perspective about managing the court's caseload at the lower criminal court (Feeley 1992). However, it is noteworthy that in the USA context, the judge appeared too focused on managing judicial tasks. This situation is perhaps qualitatively different from the Indonesian context, where I felt that the judges are being multi-tasking and not only managing judicial tasks but managing ceremonial tasks. Thus, I considered this qualitative study as the most appropriate method to explore the contemporary judiciary under the social conditions in which they operate, in this case in Indonesia (Hutton 2006). The qualitative was carried out in two district courts, which I termed the urban court and the rural court based on geographical terms. These Courts, located on two different islands across the country of Indonesia, revealed essential differences concerning their socio-economic condition and their respective available resources. These differences revealed the availability of and access to treatment for offenders. These differences also generated the social context and, ultimately, the judiciary's contextualised perspectives on sentencing minor drug offenders. The implication of the findings from the urban court and the rural court was drawn to conclude the study.

Permission for study and ethical approval

Regarding permission for study and ethical approval, a letter requesting permission for study (Appendix 1 and Appendix 2) was sent to the Chief Justice in the Urban, Rural, and Supreme Courts outlining the background and aim of the study and requesting permission to carry out the fieldwork. All three responded positively to the study and permitted fieldwork. I obtained ethical approval from the University of Stirling Ethics Committee. The Courts required no further formal ethical approval. In terms of access, I

anticipated that access to the judiciary would present challenges since this group tended to resist social study inquiry.

First, I discussed the study with public relations officers for Urban and Rural courts. I considered these public relations officers as gatekeepers as they were procedurally the first point of contact for negotiating access. This negotiating access with these gatekeepers was essential to secure wider access. Second, I negotiated the study with the potential participant by advising them of their choice not to participate and informed them of the benefits of expressing their views. Negotiating access with the potential participants (i.e. the judges) consisted of the District Court judges involved with the organisational case studies, namely, those working in the Rural and Urban Courts. Upon making contact, I asked all the judges whether they were available for the potential interview session. They were emailed with the study information sheet (Appendix 3), the interview schedule (Appendix 4) and Consent (Appendix 6), Anonymity, Recording and Use of Data Sheet (Appendix 5). They were asked to read these documents carefully, raise any questions and, if they were still interested in participating, to confirm their availability to take part. I also negotiated the importance of their participation and making sense of their perspectives. The beneficial result of the study for making sense of their perspective can be considered as a valuable incentive that would have ensured their positive response to the study. Once the Urban and Rural court judges were available to participate in the study, I started by interviewing gatekeepers (relatively middle position regarding seniority) as it may help developing rapport and trust with other participants. Once an interview with the gatekeepers was carried out, more participants were obtained. I continued with interviewing less senior judges. The interviews were used to gather data about judicial perceptions of sentencing convicted minor drug offenders. To ensure that the collected data was relevant to my theory, I drew from symbolic interaction as the theoretical framework within the schedule of interviews and observations before commencing the fieldwork. The latter involved close examination of the philosophy of the Indonesian judicial system.

The third negotiating access point was the Public Relations Officer for the Indonesian Supreme Court. I consider these public relations officers as gatekeepers as they were procedurally the first point of contact for negotiating access. This negotiating access

with gatekeepers was essential to secure access to the Indonesian Supreme Court. Upon making contact, I asked the gatekeepers to confirm the Supreme Court judges' availability to take part. Once the Supreme Court judges were available to participate in the study, the interviews with them were carried out. The interview aimed to (1) Understand how Supreme Court judges conceptualise minor drug offenders. (2) Investigate factors that Supreme Court judges think influence them when sentencing minor drug offenders. (3) Examine the Supreme Court judges' overall aims on the sentencing of minor drug offenders and critically assess these against their outcomes. These objectives were set to generate an understanding of the Supreme Court perspectives and to cross-check with the understanding of the lower Court.

Research Methods

Pilot Study

In this section, I discuss the pilot study as the basis to develop the interview guide. Then I discuss the selection of court and selection of participants. I continue the section with court hearing observations that were aimed to add illustration to the interview data. Subsequently, I present a specific reference to the management of data.

In terms of the pilot study, before approaching the study site, I piloted the topic guide with one judge (referred to as "Pilot Participant" throughout the thesis). The pilot participant was a judge who had worked at Rural Courts for ten years and who had experience in sentencing minor drug offenders. I considered that piloting the topic guide with one judge is enough as the result of the pilot study was used as the basis to review and refine the interview guide. After the pilot interview, feedback was asked from the pilot participant. The comments received are summarised in term of technique and rapport, procedure for arranging the interview, and participant's comfort. Regarding technique of interview and questioning, the pilot participant was very confident in his assessment of the actual interview process and how I managed it: "*I hope you [named me] can also bring a new approach to sentencing drug offenders which can be implemented in Indonesia"* (Pilot participant). Concerning the procedure for arranging the interview, the pilot participant suggested arranging the interview outside or in a café. He also commented that the offer to make the participant aware of the finding of the study for the area was a valuable incentive that would have ensured his positive response to an initial letter.

> *The setting for interviews with your real participants, it would be great if you could interview in an open-air Café or garden. Hopefully, the participant would feel fresh, more willing to speak, all out, and feel comfortable. It is expected that the interviewee will honestly answer your questions and hide nothing. (Pilot participant)*

In terms of participant's comfort, the pilot participant noted that he was more comfortable in answering questions about his views and experiences on sentencing rather than commenting on other judges. He noted:

> *I am not allowed to give more comment I am afraid because the judicial code of conduct does not allow me to comment on other judges'*

sentencing... Sometimes, I have a different view regarding another colleague's sentencing. However, it is not appropriate for me to comment. (Pilot participant)

Based on the comments above, the interview guide was once again examined and re-drafted, based on the pilot participant's aforementioned comments. For example, in my previous interview guide, I used the term “minor drug offender”. However, during the pilot study, it was found that the term was interpreted as 'children who do drug offences', which was not my intended definition (i.e. offenders who use drugs). For this reason, the term was refined into 'low-level drug offenders'. I reworded the question to understand the specific issue being asked. When I asked each judge about the factors that they thought influenced their sentencing, the questions were semi-structured to allow for consistency amongst the judge's responses. I asked both District Court judges and Supreme Court judges about possible solutions to help me to identify ideas on how the current approach could be improved to support drug users. The judges were also asked what they consider interesting based on their experiences in sentencing and how sentencing could be improved.

Selection of Court

Regarding selection of court, I selected Urban and Rural courts as the study location because those two courts are on two different islands in Indonesia. The two different locations revealed differences in social context and resources availability. Urban district court is located in South Indonesia and has the capacity to process 327 drug cases with an average of about 14 cases of drugs per month processed between January 2013 and November 2014. This includes cases of misuse, sale, and possession of drugs. According to their fiscal year 2014 case record, the drug types, used by those convicted of drug misuse, were cannabis (48%), methamphetamine (48%), and methamphetamine plus heroin (4%). This court had sentenced 90% of people convicted of drug misuse to custody and 10% to rehabilitation. The court had also sentenced to custody 100% of the people convicted of the sale of drugs and possession. The Urban district court judge were the only court who exercise discretion at their early career. In contrast to Urban district court, Rural district court is located in North Indonesia and has the capacity to process 209 drug cases with an average of about 9 cases of drugs per month processed between January 2013 and

November 2014. This includes cases of misuse, sale, and possession of drugs. The court also sentenced to custody 100% of the people convicted of the sale of drugs and possession. Despite these differences, there were similarities identified, i.e. the comparable positions of junior judges and middle judges. The identified similarities and differences were considered necessary as they help the generation of contextual data and, ultimately, revealed the availability of and access to treatment. Also, I selected those two courts based on the grounds of practicality (i.e. study time and cost).

Concerning the selection of participants, the participants in Urban and Rural courts were purposely chosen in a way most likely to shed light on the research question. The context of the participants who worked in Urban and Rural courts and various characteristics of the participants such as experiences and training status, might affect the judicial perspective on sentencing. All judges, within the Urban and Rural Courts, were included to obtain a range of perspectives. The profile of the participants can be found in Appendix 10. Thirty-one participants were interviewed. As Ward (2016) suggested that across the international jurisdiction, the various social understanding of the judges' motivation when sentencing can be effectively explored through interview. For example, Ward' study in the UK indicated the way in which the judges were influenced by the managerial performance measure, which required an economically efficient and effective trial system. The current performance system of incentivising speedy trial may undermine due process and fair justice (Ward 2016). This situation is perhaps qualitatively different from the Indonesian context, where I felt that the lower court judges are needs to give accountability to the broader structure of the audience (i.e. the sphere of politics, the public and the religious communities). For the purpose of my study, the number of participant includes those relocated to another jurisdiction but still willing to participate. Out of these 31, 27 participants come from the District Courts in Urban and Rural jurisdictions (17 in Urban Court and 11 in Rural Court) and three Supreme Court judges[9].

Judges Interview

In terms of judges' interviews, I carried out the interviews on a face-to-face semi-structured basis. I arranged the interviews in advance, and each lasted between 27 and 97

[9] Supreme Court was used to manage the anonymity of the actual court.

minutes. My interview guides were based on the question of the study (Appendix 7). My observations of the sentencing hearings by a panel of judges were mostly carried out after the interviews. As Anleu and Mack (2017) suggested, that the observational data was useful to add insight to the interview data and to illuminate the arrangement of the routine court hearing. For example, the observational study in the Australian contexts was useful to add a nuanced insight to the individual judges' performance at the court hearing (Anleu and Mack 2017). However, it is noteworthy that in the Australian context, the judges acted in their capacities as not as a member of the panels. Since the Australian judges' sit alone at the bench, their statement in the courtroom might reflect the individual judge' attitude toward the offender. This is perhaps different with the Indonesian context where I considered that during the observations, the judges acted in their capacities as members of the panel, and therefore, the judges' statements in the courtroom during sentencing might reflect the panel's attitude towards the offender. For the purpose of my study, observation of the court hearing would generate an insight at the panel performance at their interaction with the offenders at the courtroom. Sometimes, my observations were made between the interviews since these enabled me to discuss the motivation behind their statements at the Court hearing. The observations were not aimed to assess the judges' body language but to assess their stated aims in the courtroom when sentencing minor drug offenders. I carried out face-to-face interviews with the Urban Court participants, whereas interviews with two Rural Court participants who had relocated to another jurisdiction were carried out using telephone interviews because those participants were located far away, and therefore, it became a challenge to reach them. As described in Hay-Gibson (2009), telephone interviews take considerably less time to set up than travelling to access the study's location.

Court Hearing Observation

For this study, I observed sixteen court hearings per two weeks per court including observations of sentencing for drug offences. I used an observation checklist to note judges' interactions with offenders during the sentencing hearing and allow for consistency amongst the judges' interactions (Appendix 11). This checklist included observable interactions such as the direct dialogue between judges and offenders being sentenced, judges' attention to speeches in mitigation and how judges appeared to respond to the

offender. These observable interactions were considered necessary as they were illustrative of the panel judges in their response to the audience in the courtroom. I observed the sentencing processes of the trial court at Rural and Urban Courts for approximately three hours for maximum observable interactions. During my observations of the Court hearings, I typically took a seat to the side in the visitor room and did not attempt to take part in the Court hearing. Inside the courtroom, before the Court hearing began, the Judges introduced me to the audiences in the courtrooms to inform them about my previous professional work and my current status as doctoral research student at the University of Stirling. This introduction may influence the way people behaved during my observation. On some occasions after the Court hearing, the judges asked me about the panel "performances" during the Court hearing. I answered the question by referring to my observation notes.

In this section, I have discussed the use of court observations as a method. Baldwin (2008) discussed of court observation as a method and its usefulness, but also limitations. The observational study was useful to understand the influence of 'court culture' on sentencing and to illuminate the relationship between the various court actors. However, the limitation of the observation is that after several observations, the researcher become aware about the tedious nature of court hearing. In Baldwin's (2008) study, the researcher could easily spot the delay in the court calendar, that may upset the researcher energy and time and enthusiasm to observe 'the lively dynamic of court actors'. In this study, the offender that was often vulnerable, weak, sleepy, concentrated, and looked down. The offender was often not familiar with the court process in contrast to the prosecutors. In Baldwin's (2008) study, the researcher has no influence to the theatre of courtroom drama. This is perhaps different with my experience when my appearance may influence participant behaviour, (as some participants asked for comments on their performance). In Baldwin's (2008) study, the researcher felt that the decision making was been made elsewhere before the court hearing. This is perhaps different to my experience where I felt that the decision making was made in the foreground of the court hearing.

Data Management

In terms of data management, data from each interview, which lasted between twenty-seven and ninety-seven minutes, was recorded. I transferred the interview data on

my audio recorder to my University computer for analysis and storage. I transcribed all the interview data in full. The transcription process took approximately one day per interview data. I thematically coded the transcribed data in the Indonesian language and then translated it for analysis into English. This thematic coding was used to develop themes and sub-themes (Mason 2002). Efforts to protect the confidentiality of the information included the secure storage of original interview data and paperwork and the protection of electronically stored transcripts with passwords. An anonymous version of the transcript was prepared, with all identifying information removed. Next, I entered the anonymous version of the data into Excel for analysis. Careful data management is central to ensuring reliability in qualitative studies.

Ethical Considerations

Previously, I created a procedural ethics to follow (Appendices 1-10); this was to navigate the integrity of the study's secure access. I was clear that my study had to show ethics of respecting the people. As Guillemin (2004) explains, procedural ethics are valuable in encouraging a researcher to consider the guiding principles that shape the integrity of the study. In this section, I discuss an informed consent as the basis to create a situation of mutual respect. Then I discuss the issue of confidentiality. I continue the section with the building rapports that were aimed to generate a high degree of trust between the participant and researcher. Subsequently, I present a specific reference to the dissemination of the study.

Informed Consent

Regarding informed consent, I followed the ethical standards of social study regarding the creation of a situation of win-win and mutual respect, enabling explicit responses from the participants so that the findings are valid, and useful conclusions may be addressed (Miller and Brewer 2003). I asked the participants whether they were interested in receiving a copy of their transcripts (Appendix 8). Due to their busy work, they asked not to receive their transcripts but expected that the outcomes of this study would be helpful in recommending a better approach to drug users. The recording of data was essential for the qualitative interviews. I obtained consent from each potential study participant before the session commenced. I asked the participants to confirm their

consent either orally or in writing and for the session to be recorded using a sound recorder. The use of data was explicitly laid out in the Consent, Anonymity, and Recording and Use of Datasheet. As explained above, I took steps to store data securely and for my sole access. The participants consented that the data could be used for publication.

Confidentiality

Confidentiality and privacy were ensured during generating data, analysing data, writing up findings and the dissemination of findings. I protect the identities of judges and individual offenders in this thesis using pseudonyms (applies to organisations, places, and names of individuals), changing biographical details, and eliminating identifiers. The study participants were labelled from Judge 1 to Judge 28 for Urban and Rural judges, and Judge 29 to Judge 31 for Supreme Court judges (twenty-eight of 3,034 Indonesian District Court judges) and the key experts (three of 49 Indonesian Supreme Court Judges). To maintain privacy, I held the interview in a private space either in her/his office or in another court building. I observed the sentencing processes in an open court. To maintain confidentiality, I stored the data in a password-protected home folder on the University of Stirling's computer. A professional proof-reader has signed the declaration to adhere to principles of confidentiality. There was no Indonesian Data Protection Act and, therefore, the study data were protected in compliance with the UK Data Protection Act (1998). The following principles summarise the data protection used only for the agreed aim and secured from unauthorised access.

Power Relations

Concerning power relations, Sultana (2007) notes the importance of paying attention to building rapport in the study. This was clear to me when one of the court staff complained to me, during the court ceremonial in which the higher court attended the celebration of the urban court's achievement of international standard (ISO) for case management, because I still planned to interview the judges. She was concerned that I was still using a tag as a researcher and bringing my folder containing the interview guide, information sheet and consent form, tape recorder and observation checklist. Implicitly, she expected me to discard all of my study materials. This was despite the gatekeepers

advising me to take advantage of the court community ceremonial as an opportunity to interview senior high court judges and Supreme Court judges. I realised that I had not consulted the court staff about my intention to interview the senior Supreme Court judges during the Court community ceremonial. This ceremonial was a time when perhaps I should have taken a step back and not interviewed the senior Supreme Court judges. In that situation, I realised that it was not the right time to interview the judges. Jabeen (2013) reminds us of the importance of adapting to this setback of power relationships. The plan of the interview was often cancelled due to the potential participants' situations. Mason (2002) notes that using qualitative interviewing reduces power imbalances since a high degree of trust is generated between study subject and researcher. Therefore, responsibility for data interpretation was considered since an interpretation of the judge's perspectives is essential to avoid misinterpretation and to balance the competing interests of the study participants, my profession, my colleagues, my sponsors, and my institution. My claim to such epistemological privilege was based on a careful reconstruction and retracing of the route by which I arrived at this interpretation. In doing so, data analysis, data generation, and theory were developed concurrently as moving back and forth within the context of ethical considerations. It was evident that ethical dilemmas occurred due to the Judges' protective occupational culture. To minimise the possibility that awareness of being observed for study might affect the participant's behaviour, I positioned myself as a complete observer. During the Court hearing, the participants looked natural in making statements in the Courtroom. Then, I explained that observation was based on the observation checklist as described in the information sheet. Regarding positionality, I adopted outsider/insider position.

As an outsider, I considered it would be important to establish my status as a researcher and to respect the study participants. I never sought the responsibility of sitting on the bench or making the judgement of the case. I was ensuring to consider the implication of the finding and its contribution to knowledge. In order to persuade the participants, I changed my approach to explain carefully about my position as a doctoral researcher in order to generate an understanding of their perceptions as well as an appreciation of their views and also, how it would help me to complete my PhD. Although the Indonesian government has funded my research, they did not determine the

formulation of my research question and the research design. The formulation of the research question resulted from my own reflection. I was also aware of the need to adhere to the principle of independent research. I take responsibility for the interpretation of the data and for presenting an argument reflexively and contextually. My claim to such epistemological privilege is based on a careful reconstruction and retracing of the route by which I arrived at this interpretation (Mason, 2002). In doing so, data analysis, data generation, and theory were developed concurrently in a dialectical process. Also, I explained to the participants my position as a researcher and as someone who wanted to know more about the subject area. Then, the participant Judge introduced me to the audience in the Courtroom. After the court hearing ended, the participant Judge asked me to comment on the panel's Courtroom "performance". I am aware that the participants wanted me to evaluate their performance. This might have occurred because of the participants regarding me as a former judge who is already familiar with the procedural aspect of a court hearing and due to studying abroad may be expected to improve the procedural aspect of the court hearing. I explained that I am not in the position to evaluate the participants' performance.

As an Insider, I reflected on my professional background as practising judge in rural court Indonesia. Access issues may be eased by the researcher's prior working experience in the court, the management of contact in the field work, and demonstrating a basic understanding of organizational routine and culture. Also, the Indonesian Government funded my study. Perhaps, my professional background and sources of funding for the study were determinant to the first impression with study participants which may pose challenges for the participants to say 'No' to my study invitation.

The dissemination of the study

Regarding the dissemination of the study, the qualitative study enables those involved to reflect upon their perspectives. For example, this study can be considered as enabling the participant to reflect on the negative impact of imprisonment to the sentenced minor drug offenders. During generating the data, I sought participants' feedback. This feedback allowed the study participants to raise their concerns and hopes in the presentation of justice as well as engaging in self-reflection throughout the process.

I considered that the concept of an interactive, 2-way process of interviewing was beneficial to ensure that the study is both meaningful for the participating judges and contributes to knowledge (Maxwell 2012). I have presented findings from the study at conferences (both nationally[10] and internationally). I have also disseminated the study through an e-learning portal for the Indonesian Judiciary and will be submitted for publication at the Indonesian Supreme Court's research centre.

Challenges of Fieldwork

Challenges of Fieldwork

This section explores the risk associated with the general challenges of conducting the study, informed consent, confidentiality, protection from harm, and researcher effect due to my previous association with a rural court. In general, the main challenges were the practical difficulty in conducting fieldwork abroad, and real time ethical appraisal. A compilation of protocols was translated for application in Indonesia. These included: interview schedules for key informants, individual interviewees; and emails of information, confirmation, and appreciation. Piloting was done to gain feedback on content, layout, language, and clarity of concepts (Bell, 2005). Complying with ethical guidelines helped me to appreciate the participants, and enabled me to deal with the challenges of fieldwork.

This section contributes to an examination of the ways in which our ethical appraisal navigates our whole methodology. It is perhaps noteworthy that researching within the Indonesian judiciary was not difficult in terms of access. Many researchers engage in study with more difficult access to the judiciary (see Ashworth et al., 1984; Tata, 2002; Feldman et al., 2003; Maxfield 2014). Perhaps, my prior working experience in the Court, the management of contact in the field work, and demonstrating a basic understanding of organizational routine and culture, may have eased access issues. While access was relatively easy, I still encountered a range of ethical and practical challenges

[10] When presenting my paper at the 2nd International Conference of Public Health in Indonesia, I called for the involvement of public health and social welfare approaches aimed at addressing structural inequality. It was well received with some mixed responses. Some delegates expected a new policy to incorporate drug treatment that is covered by national health insurance. Some other attendees 'stayed in the middle' due to current conditions in which the fund is allocated for law enforcement rather than treatment.

throughout the course of my fieldwork (see De Laine 2000; Maykut and Morehouse 2002; Miller et al 2012). To work through this process, I utilised my field journal as a way of expressing various challenges and ethical appraisals that I encountered to assist me in carrying out my fieldwork. The field journal developed in numerous forms. Occasionally, it was a Google drive version of the emotional journey of my Ph.D. I also wrote notes on my smartphone, about my conversations with the gatekeepers. In addition, I wrote emails to my supervisor and began to use them as a form of asking for advice about the real-time difficulties that emerged from the fieldwork. The way in which my supervisors supported and encouraged me to continue with the initial method of data collection enabled me to inform the participants about the importance of my chosen method and to respond effectively to those participants who requested that I change the interview into a questionnaire. The level of supervision was sensible in the way that I needed to email my supervisor at the time the issue with the participant emerged. In this way, the supervisor could offer constructive advice to ease the key challenges of the fieldwork (Huyghe 2012; Bryman 2015). Due to time difference between Scotland and Indonesia (7 hours' difference), I adjusted the time so that I approached the supervisor during working hours (Scotland's time). This allowed me to receive the necessary support when I needed it.

In this section, I have showed the key challenges that occurred including practical difficulties and ethical challenges. Practical difficulties include the nature of judicial rotation, time-management, logistics, and environmental hazards. Ethical challenges include respect for autonomy, reciprocity, and access to the Supreme Court. The first practical difficulty was the nature of judicial rotation to other jurisdictions; it was a real worry to me that I would lose participants because I relied on the gatekeepers to allow me to secure access to the judges. Fortunately, the gatekeeper arranged for me to meet the lower court Judge who would assist me with access and introduce the study to potential participants. The gatekeeper also really helped in the recruitment of key experts from the Indonesian Supreme Court. He had identified the Judges who were knowledgeable about sentencing minor drug offenders. I approached the identified Judge. I informed him/her about the aims, the benefits and confidentiality measures involved in participating in this study. Then, I contacted the gatekeeper to inform me of the participant's interest in the study. Then, via the gatekeeper, I arranged the dates and times to conduct the interviews.

The second practical difficulty was time-management. Time was a significant challenge, particularly in staying on track with conducting field work where over-running was not an option financially. Before conducting fieldwork, communication was made via email to key experts from the Indonesian Supreme Court. This was because they were more difficult to get time with and this method was flexible since it did not require me to be physically present in Indonesia too. The potential research participants' availability affected field work time-management. Recruitment of potential interviews were arranged a month in advance of the fieldwork. During fieldwork, at times, I had to remain in the judge's room as this was a place where I waited when the participating Urban Court Judges were busy with the court calendar, panel meetings, and meetings regarding ceremonial matters. Constant reference to the court calendar in my field journal assisted me to consider the time constraints on managing court hearings. When local judges complained that the prosecutor came late to court, I became more aware of the difficulty in holding a Court hearing on time at 9.00 am. Thus, I felt more compassion for the Judges who were multi-tasking and not only managing judicial tasks, but managing ceremonial tasks. Consequently, for my colleagues in the second study sites, I negotiated morning interviews.

The third practical difficulty was organization. Both my wife and I are PhD students with two children aged six and seven. We conducted our fieldwork in Indonesia over the same period. There was thus the added challenge in terms of childcare. Frequently, I had to return from the fieldwork site to temporary accommodation which is 2-6 hours' peak time by bus because I could not leave my children alone at night. Explaining our situation to the gatekeeper and the research participants helped to ease the process of data collection. Logistic issues arose, also, in terms of increased living expenses because we had to pay the rent both in the UK and in Indonesia. Fortunately, the Indonesian government funded our living expenses. Consequently, I appreciated the importance of financial support from the Indonesian Endowment Fund for Education during fieldwork. This helped me to cover day to day logistical issues.

The fourth practical difficulty was environmental hazards. Being uncomfortable with cigarette smoke was my personal struggle in the field. This is because I am allergic to smoke and I have been operated on previously for my sinusitis. Every time I approached

the male judge's room, the first smell would be cigarette smoke. Yet, I did not smell any cigarette smoke in the female Judge's room. Similarly, waiting outside the Courtroom, I smelled smoke most everywhere. Although it was comparable to the previous experience of living in Indonesia, that did not make it more comfortable. Lee-Treweek (2000) reminds us of a range of potential hazards, including physical trauma during fieldwork. To increase safety and reduce risk, a procedural risk-assessment of the study project was found to be useful. Consequently, I had to be patient of the participant smoking during the interview in their room office, and I politely exited the room after the interview.

Regarding ethical challenges, the first was respect for autonomy. Concerns were raised about the informant's reputation based on research findings. Some Judges felt no obligation to justify their sentencing. I addressed this challenge by advising the Judges of their right to refuse to participate and informed them of the benefits of expressing their views, understanding their own perspectives and of the importance of their participation in the study. The second ethical challenge was maintaining privacy. The actual interview, which lasted about 30 minutes, was held in his office even though five staff occupied his office. However, the gatekeeper and I lowered our voices to reduce the risk that another staff might hear our interview. As Tyldum (2012) notes, the researcher is responsible for ensuring privacy and to minimise risk of harm for participants. The third ethical challenge was reciprocity. One example of reciprocity during my fieldwork was the participant wanting to take a picture with me. I was fine with that. On another occasion, inside the participant office, outside the courtroom, the other participant wanted me to become one of the Judges on the panel and to draft the sentence; I was always reluctant to do this. I explained that, due to my current position as a student, I would be unable to wear a robe and to sit on the bench and be involved in the decision making. On another occasion, the same participant asked me to help with summarising a book and I was happy to do so. Consequently, when put on the spot, despite judicial openness to research, it was important to stress the real time ethical appraisal of the situation and to reaffirm my role as researcher rather than as a professional. As Salleh and Saata (2010) note, understanding culturally acceptable forms of reciprocity are important. This section has highlighted the role of ethics in researching the judiciary via the representation of diary entries from my

fieldwork. It has discussed the ethical appraisal of my study and how this navigates my methodological approach.

Data Analysis

Analyses of data were taken as moving back and forth between broader concepts, experience, and data (Mason 2002). The data analysis also consisted of coherent social theory. The theory that integrated, at the micro level, the judge-offender interactions, the judicial culture and social structure. This interaction produces an analysis of criminal justice as an ongoing process of social interaction (Henham 1998; Henham 2000; Henham 2001). I used the following conceptual model to analyse how the dimensions of judicial culture, social structure, and the judge's characteristics might shape the judicial perspective of sentencing for drug offences. Figure 3 below illustrates this conceptual model.

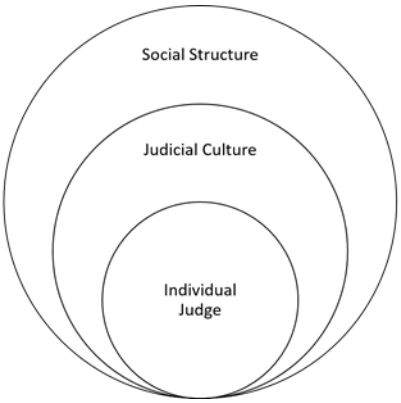

Figure 3 Conceptual model

Figure 3 above illustrates the conceptual model that the individual judge's definition, interpretations, and act are influenced by, and in turn influence, judicial culture and broader social context. The individual judge's definition refers to their attitudes and expectations and how these influences their sentencing practices. The judicial culture is associated with the knowledge that informs everyday practice and shapes the judge's values. The social structure is associated with the social forces that enter into judges' deliberations. Viewed within such a conceptual model, judicial perception on sentencing is viewed as an iterative process. This is the process by which Judges consider the nature of drug offences within the wider context of judicial culture (Davies et al. 2004; Ulmer and Johnson 2004), social structure (Duff and Garland 1994) and their perspective on

sentencing (Hogarth 1971; Mackenzie 2005). As Ulmer (2012) noted, judges' perceptions are influenced by-, and in turn influence more widely the social structure (Ulmer 2012).

To analyse the judicial perspectives within the wider context of social structure, data analyses were based on interviews and field notes, with the following considerations. First, to understand the judges' explanations regarding sentencing, the interview data and field notes were compared with each other. I started the questions about the individual judges' views on drug sentencing. Then I moved the question onto the judicial culture and how that impacts on sentencing. I continued the question with the wider pressures on society that enter into judges' deliberations. Second, I linked the findings of the field observations to the findings of the interviews and gathered them together. Details of the court hearing process enriched the field notes. My notes from the initial observations were written in a notebook, and the notes of my observations included in-depth descriptions of the judge's approach to sentencing (Ashworth et al. 1984; Tait 2002). Third, the coding process was checked line by line and through open coding. I re-read the data sets in the form of court observation notes and interview transcripts. Every meaning of sentences, phrases, words, dialogue, and expression was analysed equally. Fourth, all data sets were coded by specific names and categories (Maykut and Morehouse 2002). I code the patterns of complex experiences of district court judges. I developed the theme codebook during fieldwork study in Indonesia and further developed it after fieldwork in Scotland. I categorised the fact-sheet data based on geographical location as this can present similarities and differences between this two courts. A descriptive coding book and qualitative data analysis was performed using Microsoft excel software. The data were sorted and merged in Excel tables. Theme and sub-theme that were found were discussed with the supervisors. Fifth, I adopted thematic analysis to determine theoretical links between the social structure, the judicial culture and individual perspective of the judges. A thematic coding book were sorted and merged using Microsoft excel software. To broaden out my analysis of drug sentencing, I included the supplementary statistics (Appendix 11). To this end, the reliability and validity of this study are considered as follows:

Validity and Reliability

Internal Validity

In this qualitative study, internal validity refers to the findings that reflect the reality (Mason 2002). The finding is considered regarding its truth and credibility. To ensure the truth of the findings, I considered the effects of the method used to shed light on the study topics. My position as an independent researcher but with Court connections allowed for potential bias. As Tata (2002) stated, each judge's response to the researcher's inquiry will be different from their colleagues' responses (Tata 2002). I informed that my role was to generate an understanding of judicial perceptions and an appreciation of his/her views. I was also alert to the need not to make assumptions or judgements concerning personalities or how the Court operated. Laying out interview schedules enables a protocol to be followed, a standardisation of questions and prevents deviation. I inserted a disclaimer statement at the beginning of the interview schedules asking judges who had contact with me previously to avoid assumptions that I know certain issues or aspects. As Mason (2002) notes, the researcher's life story also contains interpretation validity, which the researcher adopted throughout this study. The interpretation of this validity can be approached in two ways: epistemological privilege characterised by standpoint theory whereby the researcher comes from a similar location, e.g. judges interviewing other judges; and participant validation where the participant's feedback verifies interpretation/ meanings.

Conceptualisation of this study stems from my former self-identity as a judge but also from my biography since I am more familiar with the practical pressure and challenges of lower Court judges. Having worked previously at a Rural Court, I had prior experience of the Indonesian court system. I carried out all the fieldwork for this study in my capacity as a full-time doctoral researcher at the University of Stirling. My concern about the judicial perspective on sentencing comes from my learning journey arising from my experiences as a practising judge, and doctoral student. During my seven years, as one of the 3034 district court judges in the nation, I have sent less serious drug offenders to prison for standard minimum sentences ranging from one to four years, including women and young adults. However, I believe that such terms of imprisonment are too harsh for drug

offenders, whose involvement in drug offending is based on many factors, including economic factors such as for income generation. Also, I perceive drug crimes to be less serious than the crime of murder. Previously, I felt conflicted regarding my role of sentencing minor drug offenders. Regarding the sentencing behaviour of judges, they are likely to face criticism from the public and the media where lower sentences are given for drug offences, as this is perceived as judges being too soft on drug crime. Meanwhile, among the public, drug offences are perceived as a moral issue according to the Islamic religion, and judges' sentencing will be viewed with suspicion as favouring drug offenders. Yet, when I have asked offenders after a drug conviction what they think a fair sentence would be, most of them asked for lower sentences or for the opportunity to receive drug treatment. However, within my jurisdiction, there are no viable resources to support drug treatment in the community. Therefore, any attempt to sentence drug offenders to treatment would be futile.

Having felt that sentencing drug offenders to prison would be the best option because it would protect the public, since studying sentencing practices internationally, I realise that there may be more effective sentencing options available for drug offenders. This sentencing option may be true of other Indonesian judges, who may have experienced a lack of understanding about alternatives to imprisonment. Additionally, the topic of sentencing a minor drug offender may touch upon judicial perceptions and accounts. I consider that my background may be beneficial in dealing with this aspect. By studying about it, I am presenting the contemporary understanding of judges' perspectives and experiences, which will potentially help a greater understanding of drug sentencing in the context of delivering justice in Indonesia. Regarding delivering justice in an Indonesian context, I identified from the judicial training that the sentencing of drug offenders should cover at least three dimensions, juridical, philosophical, and sociological: juridical concerning executable sentencings; philosophical in term of the aims of sentencing and sociological concerning public acceptance. Therefore, I considered these three dimensions to be essential within the Indonesian context. The case study which forms the basis for this thesis offers insight into these three dimensions of sentencing in practices. Although the Chief Justice permitted to study, they exerted no influence on any of the fieldwork, data analysis or interpretation.

Regarding rapport, I used different approaches to developing rapport. First, the rapport that existed between me and one of the gatekeepers who professionally had already been known in each court was expected to be crucial to the success of the case study. It was considered likely that these gatekeepers in each court would act as "gatekeeper" for the case study court, arranging introductions to other judges and planning for the fieldwork in the court. These gatekeepers were also more likely to facilitate my observation of the court hearing, and it was therefore decided to approach them. Twenty-seven individual interviews with judges were conducted inside the court's office; at the participant's request, one interview was conducted on the trip to their home. I found that my methodology evolved by working in the field. When it was clear that not all participants were willing to be recorded, I decided to take notes. Also, I decided to conduct a kind of focus group by having two judges in the room concurrently. In this regard, I captured the participant's experience without being too intrusive. Also, I decided to record phone interviews with two of the participants who had relocated to other jurisdictions and were physically unable to meet. Accordingly, building rapport via a telephone interview with two participants was made by seeking sympathy from them about the challenge to arrange face-to-face interviews with them. The phone interview was initially offered to four participants who had relocated to another jurisdiction. The first two was responsive to my invitation. The third judge was unable to be interviewed due to a low signal network reason. The fourth judge did not respond.

Second, my position as "outsider/insider" had implications for my ability to understand the terminology, abbreviations and acronyms used by the participants and the issues raised by them that were specific to the Indonesian court setting. I was careful to avoid making assumptions about the field as far as possible. Through each discussion, I carried out checks on my understanding. I also attempted to use member checking in the pilot interview study. A summary of themes that emerged from the pilot study was given to the pilot participant, along with an invitation to respond and comment. As the pilot participant had no comments on the findings, it was not found to be a helpful exercise under these circumstances. In any case, higher participant involvement was not considered feasible in this study, as participants were full-time judges who were already on duty. I also asked colleagues to consider the findings as they emerged. One colleague of the

Indonesian judges who was competent in English was asked to translate them, and his results were later compared with my translation, which he had not seen, to identify any bias. There were no major differences between his translation and mine. In this study, observation evidence was also used to add to the body of data for analysis. As the themes and descriptions emerged, I discussed them at various intervals with the supervisory team.

Third, despite no indication of pressure from the higher power like the chief judges, since it is in fact not easy to set up a meeting with the chief judges due to their crowded schedule, they expected that I start interviews from the bottom up, from the less senior judge to the more senior judge. Bearing in mind that the less senior judges recommended that I start from judges that are more senior, I changed my approach by starting the interview with the gatekeepers (relatively middle position regarding seniority).

Fourth, I maintained contact with both gatekeepers. I have regularly reminded the gatekeepers to regard me as a student rather than as a professional. The gatekeepers regarded me as a former colleague who is on professional leave and doing a PhD. I contacted the gatekeepers regularly to report the number of participants that I had interviewed so far and those whom I had yet to interview. Also, I regularly reminded the gatekeepers that the study was voluntary. This management of contacts helped me to secure access, promote the study and build trust and rapport with the potential participant.

Fifth, to persuade the participants, I changed my approach to invite participation in the study by explaining about my position as a doctoral researcher to generate an understanding of their perceptions as well as an appreciation of their views and how it would help me to complete my PhD. When it became clear that my study would be used to complete my PhD and would be disseminated at the Indonesian judiciary research centre and in academic publications, I focused on the aspect of seeking solutions to promoting better approaches to sentencing.

Sixth, developing interactions with other more recently recruited participants were done through multiple attempts. First, I adopted "speed dating". This "speed dating" means the first face-to-face meeting with the participants after the invitation letter was sent to them. I presented the aim and benefits of the study, the issue of confidentiality, as well as informed consent to the potential participant within a minute and followed up with

a brief explanation of my motivation. Within the study schedule, it was necessary for me to develop interactions that stressed that I really required to interview the judges. This interaction is required to highlight that the participants' views are valuable and appreciated. My interest in the discussion was communicated to the participants by verbal means, by commenting "I see" or "it's very interesting" at regular intervals and questioning the participants further on reported issues. Non-verbal means of communication such as nodding, eye contact and facial expression also contributed to the expression of interest. I acknowledged that, whilst maintaining interaction, I had to share my previous dilemmas about sentencing. Judges were assured that their responses remained confidential and their identities anonymous. These strategies contributed to a respectful relationship. Okoli (2014) notes the prominence of a respectful relationship and clear communication between the participants and the researcher so that a trusting relationship can be developed to open the doors for study. Second attempts were made through sharing humour and responding to their jokes sensibly until the potential participant feels comfortable enough to participate. For example, during informal meetings, the group of male judges who have not met with me before and who smoke cigarettes, jokingly asked whether I was a smoker, I said, "I am smoking every cigarette", and they began to laugh. Then the gatekeeper who knows my allergy explained to the smoker judges that I am allergic to smoke and they responded, "That's okay, I like you, Sir".

Seventh, there is no doubt that my previous background would have had some impact on the participants' openness to the study. The participants regarded me as a "vege". I learned what the term meant from one of the participants who referred to it as "vegetarian", which means those who are perceived as not attempting to receive bribery. It seems that the potential participant who did not know me before might have heard about my previous background. Eighth, the potential participants also had sympathy since the source of funding for the study came from the scholarship (not from self-funding). The participants regarded me as "a kind of poor student who studied abroad and needed a bit of help and support in the completion of his study". In gaining, in a relatively short timescale, the trust of the Supreme Court senior judges, I realised that the Supreme Court Senior judges needed to be fully informed about the benefits of their participation in this study and that this would make a positive contribution to the Supreme Court's work. I

devoted half of the one-hour period to answer several questions about my experiences in the UK along with recent developments of drug policy and useful articles. This sharing of information allowed me to craft an atmosphere of inquiry and to develop trust with the Supreme Court Senior judges thus allowing them to share their experiences freely. Schuermans and Newton (2012) note the importance of developing the dialogue between study participants and researcher, thus allowing each participant to voice their thoughts freely.

The final aspect involves me being sensitive to the participant's cultural and social norms. I was careful to build up questions related to their perceptions of drug sentencing slowly, asking about their perception first so that the participants would be assured that they were happy to answer. Also, where necessary, I built up these questions in an open-ended, non-threatening way, such as by asking the participants about exciting experiences in sentencing minor drug offenders. Similarly, when discussing what might be perceived as influences on sentencing, I tried to listen to the participant's description without implying any criticism. Moreover, I regularly reminded the participants that the study was voluntary. In this study, I employed a number of quality assurance steps and procedures to enhance the validity and reliability of the findings. Also, I was always vigilant in ensuring that each emerging theme and description was grounded truly in the data. This fastidiousness and vigilance enhance confidence that this study's findings reflect closely the reality of drug sentencing in the courts studied over the period of fieldwork (December 2015 to March 2016).

External Validity

In this study, I had to select a limited number of courts to be involved in the interview part of the study. Therefore, the question arose as to what extent the findings might apply to other Indonesian courts or elsewhere. To assess this study’s transferability, it is necessary to consider how typical the case study court is of other Indonesian courts. In the presentation of the study results, the court, judges, and the context in which they approached sentencing, I describe them as fully as possible within the limit of confidentiality and ethics. The reader can consider the similarities and differences. This study's transferability can be examined based on whether the issues, identified in the case

studies, apply equally to urban and rural jurisdictions. Also, the two Courts had twenty-eight judges of varying ages, gender, perceptions, and experience. Therefore, my observations of the court hearing may be a very good illustration of the general process that occurs in sentencing in Indonesian Courts. One issue, on which the Urban Court was notably different from other Courts and which it was anticipated that it would influence the findings, was the availability of and access to treatment. Thus, it may be expected that the resource factor is one illustrative factor that enters into judges' deliberations when sentencing minor drug offenders.

A further consideration is how typical the observed study site is in comparison to the Court's other forms of criminal sentencing cases. To select the optimum combination of sentencing to ensure maximum coverage of different approaches to sentencing, I observed each panel of judges during at least one Court hearing. Although my Court hearing observations were agreed with the participants in advance, no judges ever refused to be observed for any Court hearing or attempted to influence the selection of the Court hearing in any way. Sixteen drug cases were observed. As such, a wide variety of drug cases were observed, it seems unlikely that those selected were biased regarding approaches to sentencing. Finally, it is necessary to consider whether the days which I spent in the Courtroom were in any way unrepresentative of typical Court days. The selection of which days to spend in the Courtroom was determined by which drug cases were selected by me for observation as well as any prior commitments elsewhere. Visits to the Courtroom occurred on two days every week and were spread out over the period from December 2015 to March 2016. Although the planned visits were discussed in advance with the gatekeepers, as with the selection of Court hearings, the gatekeepers did not attempt to influence the timing of the visits in any way, and I was made to feel that I was free to choose the days that suited me. Seen in this way, it is less likely that the selection of visit dates may bias the data or that similar issues did not arise in any other Courts over a similar period.

Reliability

Reliability was strengthened through the participants' verbal feedback. I asked the participants to provide feedback verbally rather than in writing. The study participant

feedback was featured heavily throughout the study process. The following excerpt highlights the participant feedback from the main study about the positive consequences of my study.

> *I am speaking about the approaches to sentencing, I hope, someday, and that the Supreme Court will be able to contribute to a breakthrough with the younger generation. If the aim of the study on drugs can provide a breakthrough, which could categorise the victims, drug dealers, with people who, based on the law, act technically as drug dealers by providing drugs, all my trust in people like you would be well placed. This categorisation is my general aspiration. I am confident of the study of the criminal justice system on drugs, especially to a case study in Urban, Indonesia. I am very proud that, hopefully, your study and your recommendations will be beneficial to both our fellow Indonesian Supreme Court Judge colleagues and to lower court judges in the countries strive for justice.*

During repeated visits to the study court, I paid attention to allowing the participants space for reflection and to elaborate on any issues surrounding confidentiality. Allowing participants' reflection and ensuring confidentiality would enhance the confidence in the findings. While, as an insider, I was more sensitive to the culture and content of written work on Indonesia, I made every effort to ensure that there was a coherent study process through establishing a lucid audit of the study process. For example, I utilised my field journal as a way of expressing various challenges and ethical appraisals that I encountered to assist me in carrying out my fieldwork. Additionally, I maintained study records to improve reliability. The documentation process and fieldwork diaries were analysed in the study or in the analytic notes, which were indexed, organised, and sorted (Mason 2002). Consequently, other researchers can follow an audit trail (Bloor and Wood 2006). Quotes from interviews were provided, which cannot only be seen by the reader, but which enable, also, the interpretation of data to be assessed. However, my efforts to enhance the confidence of the findings are not without limitation. This limitation might have happened, due to my influence in every stage of the data analysis, where I actively considered the emerging of themes from the data. At least, I attempted to follow the procedures and precautions as described in the ethics section.

Ultimately, having the previous judicial culture not speaking about public concern, the participants wished that their voices were truly acknowledged through my study. It seems that from their provocative intonation, thoughtful response, and sympathetic

expression, the participants' responses aimed not only to answer my interview questions; they also seemed to try to raise their concerns that the majority of minor drug offenders brought into the court were coming from 'lower class[11]'. The judicial perception on structural inequality drives moral responsibility of the panel judges. The influence of inspection, the tension with police, the National Anti-Narcotics Agency of the Republic of Indonesia (BNN) and the prosecutor often become a challenge. This challenge led the majority of the participants to adjust their interpretation of justice into circumstances and led the substantial minority of the participants to exercise their discretion. By the 'substantial minority' I am referring to the numerical minority of the study participants that shares common perspectives. To this end, the key themes that are analysed from this study are presented in the following three chapters: Judicial Perception on Structural Inequality (Chapter 4); Constraints on Sentencing (Chapter 5); and Exercising Judicial Discretion (Chapter 6).

[11] There was an essential issue about the term 'lower class' which the participants often assumed to mean 'manual labourers and 'jobless person '. The term 'lower class' used by the participants in this thesis is not an accurate classification but merely reflecting how the participants categorise certain strata of Indonesian society.

Chapter 4: Perspectives on Sentencing

This study aimed to address the first research question about the way in which sentencing minor drug offenders was perceived by the judiciary in Indonesia. To achieve this aim, in Chapter 4, I present the different perspectives and understandings that underpin the judicial response to minor drug offenders. I start this findings chapter with the participants' perception of defendants. The findings are considered in light of participant perceptions that the sentencing of minor drug offenders embodies challenging issues, especially given structural inequality issues. Based on the interviews with judges and court hearing observation, I present in this chapter the participants' perceptions of defendants and the significance of the class structure that emerged from the interviews. I continue the chapter with consideration of the structural inequality that affects issues around the presentation of justice in the judicial system. Subsequently, I present a specific reference to the participants' perceived harm of those minor drug offenders, sentencing based on compassion and moral responsibility, stages to sentencing, and the assessment of sentencing.

Inequality in Sentencing

This section presents the participants' perceptions that people of a lower social class use drugs and get caught trying to resource their drug-taking. Interviews with participants in this study revealed that post the 2009 Indonesian Drug Act, people of a lower social class were being targeted by the criminal justice system. The people who are more likely to experience poverty are at risk of being arrested because they tend to be involved in drug offences to earn money from selling drugs. Consequently, most of the people charged with breaking this new Drug Law are from underprivileged/poorer backgrounds. The participants argued that these people do not receive appropriate treatments (e.g. rehabilitation) and are therefore at disproportionate risk of being imprisoned. For example, Judge 5 (Urban) describes how during the pre-Reformation era[12],

[12] The term "Reformation" refers to the end of New Order Era during Suharto regime. The New Order Era is more focused on the economic development and less focused on the democratic system. The Drug Law 35/2009 was born after the Reformation era. After the Reformation era, particularly the provisions of drug sentencing were set under standard minimum sentencing. The provision required the judge to adhere to the standard minimum length of imprisonment required by the law. This impacted on judicial discretion limiting them from delivering a sentence below the standard minimum sentencing.

drug use was a 'trend'. By contrast, during the Reformation era, drug consumption was a crime, and those from underprivileged/poorer backgrounds were at risk of being arrested. The following excerpt indicates this point:

> *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 hanging out on the street in an affluent area would often take ecstasy on a Sunday evening. The people who resided in a poorer areas 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, Urban)

The above quote indicates that Judge 5 is aware that drug users from underprivileged/poorer backgrounds are more likely to be arrested. A substantial minority of the participants (i.e. 5 from 31) frequently explained that the majority of the people being charged with breaking the new drug laws were from lower social backgrounds. This can be seen as an indication of the discriminatory effects that the war on drugs has on lower class citizens. Furthermore, the substantial minority of the participating judges in Rural Court stated that the criminal justice system often targeted lower-class drug users. For example, Judge 28 (Rural) describes how 90% of minor drug offenders are lower class citizens. They mentioned:

> *I ask the offenders: "why do you use methamphetamine?" 90% of them coming from a lower class replied: "the first is to increase my stamina for undertaking hard manual labour"; 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, Rural)

Along a similar line, Judge 8 (Urban) stated: *“So far, as I have observed during the court, the offender I sentence is not a middle-class person, actually, they are rarely from the middle class”* (Judge 8, Urban). Judge 12 (Urban) also commented,

> *At the moment, those who are being arrested are mostly low-level offenders, while the drug dealers remain hidden, and the police will close the cases. By contrast, those who use one smoke, or those who are found using drugs, although the quantity of drugs is only zero points zero, their cases will be brought to the court.* (Judge 12, Urban)

From their statement, it can be seen that Judge 12 and Judge 8 believe that poverty influences a person's choice to sell drugs to provide themselves with free drugs to use. Also, the substantial minority of the participants (i.e. 4 from 31) indicates the reason why people from a lower class tend to use drugs compared to people from the middle-class. As Judge 6 indicated: "The *motive is economic problems, obviously, the offenders have no jobs, and unemployment weighs heavily, and citizens are marginalized because of their behaviours...."* (Judge 6, Urban). This quote indicate that Judge 6 is aware that drug users are marginalised because of their behaviour. Moreover, it seems that Judge 6 recognised these effects of poverty on sentenced offenders. In understanding the causal relationship between the effects of poverty and drug taking, Judge 14 (Urban) indicates that unemployment led people to get involved in minor drug offences:

> *In urban areas, unemployment becomes an issue; this is the reason why people want to sell drugs because they receive not only commission for selling drugs but, also, receive free drugs to use. So, they have a dual role, for example, the price of drugs is Rp50,000.00 (around £3.00), the person will receive commission both from the seller and from the buyer and will be allowed to have a sample of drugs for his own use.* (Judge 14, Urban)

Moreover, Judge 14 (Urban) asserted that a jobless person is at risk of being involved in minor drug offences. The substantial minority of the Rural Court participants (i.e. 3 from 11) claim that drug taking often occurs because of the environment. As Judge 20 (Rural) mentioned, "*People use drugs just to have fun, or due to their unstable job status, or through curiosity about drugs, and peer influence…"* (Judge 20, Rural). Similarly, Judge 23 (Rural) believed, "The *minor offenders are a perpetrator who, at the same time, becomes a victim of their circumstances. Sometimes, they become the victim of their circumstances due to peer influence and living in a drug dealing environment*". Regarding the connection between minor drug offences and having a lower-class status, the substantial minority of the participants noted three different reasons why lower-class citizens have the potential to engage in minor drug offences. First, lower class citizens tend to get involved in drug culture, as can be seen 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 carry out dual activities of both selling as well as using drugs for a commission.* (Judge 19, Rural)

As shown, Judge 19 (Rural) considers the offender's social circumstances to be a motivation that influences minor drug offences. Judge 19 indicates that unemployment led people to drug taking. The substantial minority of the participants (i.e. 4 from 31) indicate that lack of understanding of the harm caused by taking drugs and the perceived energy boost for working hard led the defendant to drug-related offences. As stated by Judge 8 (Urban), "*...once the person has an issue of drug use, he/she could do collective purchasing*[13]*, or alternatively, other ways such as stealing. This is the reason why despite his job is only a driver, he/she can purchase methamphetamine*" (Judge 8, Urban). Similarly, Judge 27 (Rural) indicated, "Drugs *seem to have become the disease; sometimes they are 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 and this escalates to stealing.* According to Judge 27's assertion, lack of understanding of the harm caused by taking drugs has led lower class citizens to a risk of being arrested because they tend to be involved in other offences to feed their need for drugs. Seen in this way, both participating Rural and Urban Court judges described how poverty, drug culture, and living under drug prohibition regimes can be considered as contributing factors to the lower classes being targets of the police. As expressed by Judge 28 (Rural) who indicates the following reasons for this selective targeting: "*…the tendency of the police to take advantage in the case of drugs is quite significant. We have to be honest about it"* (Judge 28, Rural). Moreover, the assertion expressed above by the rural Judge about the link between lower class citizens and discriminatory policing practices of targeting drugs indicates that lower-class drug users are arrested more often. The second impact of lower-class drug users on sentencing was seen by the substantial minority of the participants (i.e. 3 from 17) as affects discriminatory sentencing practices. This is because the majority of the people being charged with breaking the post-2009 Drug Law are from lower social backgrounds and have no other choice than to accept imprisonment. The following statement from an Urban Court judge indicates this point:

[13] Personally, they have not enough money to buy drugs, so each person was contributing to buy drugs.

> *The current problem relates to the requirement for doing rehabilitation…On the one hand, all the requirements for rehabilitation should be met. On the other hand, the offender should pay for the assessment. For those who become the victim of their circumstances and economically poor as beggars, they should receive rehabilitation. However, due to the challenges to meet the requirement for receiving rehabilitation, there is no other choice for those poorer offenders than having to accept imprisonment. However, for those wealthy offenders, they receive rehabilitation no matter how large the quantity of drug evidence.* (Judge 1, Urban)

As shown above, Judge 1 (Urban) asserts that drug users who are economically weak are discriminated against as they have an issue paying for an assessment, preventing them from receiving rehabilitation. It also seems that Judge 1 identifies those drug users as lower-class citizens. This suggests that being poor is the reason behind the failure to receive equal access to treatment. The substantial minority of the participants emphasised that lower class drug users tend to be sentenced to prison. Moreover, they are all in agreement that drug users suffer from discriminatory sentencing practices and lack of opportunity to receive treatment.

A Moral Basis for Sentencing

Perceived Harm

The substantial minority of the participants stated that police officers are often discriminatory when arresting drug users. The lower-class drug users are often arrested and charged, whereas middle-class drugs users are often not arrested and not charged. The issue of discriminatory targeting and prosecution of those drug users who came from poorer backgrounds drives the substantial minority of the participants (i.e. 5 from 31) to make judgements on a moral basis, insomuch that they demonstrated compassion and a lenient approach to sentencing. They conveyed that one should uphold one's moral responsibility both at the deliberation on sentencing and at the court hearings. Consider, for example, Judge 19's comment: "*I think drug users have become victims of criminalisation*" (Judge 19, Rural). From this judge's perspective, identifying them as such is strategically appropriate to elicit public support for a sympathetic response. For Judge 23, this lenient response is a deliberate strategy to minimise the negative impact on the

offenders. Judge 23 stated, "*Because they [the offenders] were victims of circumstances-right? Essentially, they are not harming others but harming themselves*" (Judge 23, Rural). For Judge 23, one should keep the perceived harm to minor drug offenders in minds during the deliberation on sentencing. For other participants, the moral responsibility of sentencing should be presented at the court hearings. Consider, for example, Judge 19's panel comment at the court hearings. At the court hearings, Judge 19's panel tried to facilitate the offender receiving a lawyer's services for mitigation aims:

> *"Judge 19 Panel: You can make your mitigation, or your lawyer will do it for you. For the latter, we will give the lawyer one week to draft a plea of mitigation*" (Extract from court hearing Observation Notes, Judge 19 Panel).

For Judge 19 (Rural, Panel), providing a lawyer for the offender functions to minimise the negative impact in their sentencing. For other participating Rural Court judges, considering drug users as victims of their circumstances functions as a way of minimising the negative impact on the offenders in their sentencing:

> *Those drug users are regarded as minor drug offenders because they are the victims of drug traffickers... I consider, also, the amount of evidence of daily drug usage and the offender's background; it is about why they became a victim of their circumstances. I saw that most became victims as a result of lack of parental supervision.* (Judge 18, Rural)

> *A minor offender is a perpetrator who, at the same time, becomes a victim of their circumstances. Sometimes, he/she becomes the victim of circumstances due to peer influence and lives in a drug dealing environment... This means that, initially, they are blindly following their peers.* (Judge 26, Rural)

As shown above, Judge 18 and Judge 26 (both Rural) consider lack of parental supervision, peer influence and living in a drug dealing environment to be contributing factors to offenders' involvement in minor drug offences. The substantial minority of the participants from Urban Court (i.e. 2 from 17) expressed the view that discriminatory practices towards minor drug offences become a challenge because they contribute to social exclusion. For these participants, one should keep the issue of social exclusion in mind at the judicial deliberation on sentencing. The comment from Judge 6 (Urban)

illustrates this deliberation on sentencing. Judge 6 considers that offenders who use drugs do not necessarily have issues of drug use, nor are they necessarily harmful to others or public order. From Judge 6's perspective, discriminatory practices contribute to social exclusion (i.e. the drug offenders are being removed from the public). As Judge 6 stated below:

> *I would argue that those drug misusers are people who are not necessarily having issues of drug use... It was because of his/her friendship that he/she became either victim of drug trafficking itself or coerced or deceived or being cheated and so on, or being trapped… If the persons were using the drug for themselves, they were not doing evil and were not harming anyone. They were self-harming. I never agreed with the opinion that persons who use drugs were harmful to others or public order. No, it is not the case.* (Judge 6, Urban)

As shown above, Judge 6 (Urban) considers the lack of understanding of harm caused from taking drugs and living under drug prohibition regimes to be contributing factors to lower class citizens being discriminatorily arrested and removed from the public domain. This discriminative practice affects issues surrounding the pursuit of justice on sentencing. These issues surrounding the pursuit of justice drive the substantial minority of the participants to make judgments on a moral basis, exercising compassion and moral responsibility on sentencing.

Sentencing Based on Compassion and Moral Responsibility

Regarding sentencing based on compassion and moral responsibility, there were a number of variations between the different Courts. At the judicial deliberation on sentencing, the substantial minority of the participants (i.e. 6 from 31) noted the importance of sentencing on a moral basis, essentially exercising compassion and moral responsibility in sentencing. The following statements from the participating Rural Court judges illustrate this kind of deliberation on sentencing:

> *In my opinion, the judge is not the mouthpiece of the law since she/he could interpret the law differently. Therefore, we feel that the law aims to improve conditions, to organise life and to manage everything in order.* (Judge 23, Rural)

As the above excerpt demonstrates, Judge 23 believes that judges sentencing on a

moral basis act to improve the offender's conditions. In other words, Judge 23 considers it the judge's role to minimise the stigmatising effects on sentenced offenders. As a result of this, the substantial minority of the participants in the Rural Courts (i.e. 3 from 11) passed lighter sentences to minimise the negative impact of detention and to ensure that those minor drug offenders would not be too long in detention. This was indicated by Judge 25, who stated *"…after release from the detention centre, the offender again is willing to receive rehabilitation"* (Judge 25, Rural). In Urban Courts, the substantial minority of the participants (i.e. 3 from 17) noted the importance of developing self-awareness and reflexivity on sentencing: "*I hope that the judge will be wiser in holding the court hearing and not strictly follow the rules"* (Judge 12, Urban). "*I invited the panel to consider it with honesty and reflexively, as we imagine that we are in the position of the offender... I encouraged panel judges to consider from their hearts*[14]*"* (Judge 9, Urban). As can be seen from their statements, Judge 12 (Urban) and Judge 9 (Urban) tended to develop self-awareness on sentencing. By this self-reflection, the substantial minority of the participants from Urban Court considered that their sentencing based on compassion and moral responsibility would contribute to the pursuit of justice.

Stages of Sentencing

The majority of the participants across the two jurisdictions explained that, sometimes, their sentencing was "matching-to detention period": *"...the length of sentence is matched with the period the offender has been detained"* (Judge 25, Rural).

> *At the Supreme Court hearing, I always remind the Supreme Court judge that they are, also, human beings... I say: "Sir, the detention will be expired soon", then the Supreme Court judge said: "Okay then, the sentence will be matched with the expiry date of detention".* (Judge 2, Urban)

As shown from the excerpts, Judge 25 (Rural) and Judge 2 (Urban) noted that the length of sentence sometimes corresponded to the period of the offender's remand. Similarly, Judge 27 and Judge 24 (both Rural) begin with the approaches "matched-to-

[14] Judge making judgments on a moral basis, essentially following their compassion and moral responsibility on sentencing.

prosecutorial indictment[15]": *"… at the moment, we are mandated to accept a "readymade[16]" case file. Then, we do the matching approach, meaning we will fit the facts with the indictment"* (Judge 27, Rural).

> *We should consider first the indictment, whether or not the indictment is proven with the offence being committed. Then, I formulate the elements of the offence which, then, are matched with the indictment. If the case is proven, I sentence according to his/ her offences.* (Judge 24, Rural)

However, not all the participants start out with this 'matched-to-prosecutorial indictment' approach. It was apparent from the interview finding that the Supreme Court judges are concerned about this approach. As an example, Judge 31 (Supreme Court) suggests a better way of interpreting the facts and the relevant law. Judge 31 also tried to respect colleague judges' perspectives on interpreting the facts and the relevant law:

> *There are two perspectives on sentencing minor drug offenders. The first perspective which we consider is that, although the offenders are arrested for possession of drugs, the offenders are sentenced under Rule 111 committing drug possession... The second perspective which we consider is that, although the offenders are just finished using drugs, then the offenders were carrying the remaining drugs, and then the remaining drugs were found by the police. In my opinion, the judges should not follow the Rule 111[17] because the offenders are drug misusers[18].* (Judge 31, Supreme Court)

Judge 31 (Supreme Court) further expected the judges to find a better way of interpreting the facts and the relevant law. Again, this does not mean that the judicial

[15] After the whole process of examination of the case is completed, the panel of three judges analyse and discuss the evidence in a confidential meeting. Consultation is based on the facts that have been proven, circumstantial factors and the initial indictment.

[16] Before undertaking a court hearing, case files and evidence are obtained from the public prosecutor. After the court registrar checks the case files, the incomplete case files are returned to the public prosecutor. Once the case files are completed, they are sent to the Chief of the District Court. The Chief of the District Court then distributes the case to the panel of judges.

[17] Rule 111 is concerned with the rules about illegal possession of drugs in the form of a plant (e.g. cannabis). This rule holds a standard minimum-maximum tariff of 4 to 12 years. Rule 112 is concerned with the rules about illegal possession of synthetic drugs (e.g. methamphetamine). This rule holds a standard minimum four years and maximum 12 years.

[18] Rule 127 is concerned with the rule about drug misuse. Rule 127 enables a choice to be made between drug misuser either being punished by imprisonment or sent for treatment.

interpretation of the facts and the relevant laws are based purely on the quantities of drugs but also previous drug use, and the positive urine test as evidence of daily drug usage. As the following extract indicates:

> *In my opinion, a person who takes a drug would test positive for methamphetamine. It would then be misleading to assume the person was possessing drugs with intent to sell even though they tested positive. Positive drug testing does not tell us how the offenders sold the drug, when the offenders sold the drug, or to whom the offenders sold the drug. A positive drug test would give insight that the person has used drugs […] If the quantity of drugs is smaller [...] [the participant then asked me to] see the Supreme Court circular[19] also, number 3 from the year 2011.* (Judge 31, Supreme Court)

The above excerpts highlight the Supreme Court judge's adoption of an individualised approach to finding a better way of interpreting the facts and the relevant law. In doing so, re- interpretation of the facts and the relevant law functions as an individualised approach in their sentencing. However, the adoption of an individualised approach was not fully reflected in the Lower Court judge's approach. My interview with Judge 4 (Urban) demonstrates a narrow interpretation of the facts and the relevant law towards the offenders who were arrested for small quantity of daily drug usage.

> *One day, in 2013, I proceeded with a drugs case, the quantity of evidence of daily drug usage was very light, it was less than two grams, and the offender was a foreigner. It was then that I imposed minimum sentencing by the quantity of evidence of daily drug usage.* (Judge 4, Urban)

The above excerpts (i.e. Judge 31 and Judge 4) can be seen as an indication that the Urban Court judge's approach of imposing minimum sentencing was contrary to the Supreme Court's expectation. For smaller quantities of drugs, the 2010 Supreme Court Circular number 4 and 2011 Circular number 3 regarding rehabilitation should be applied. Thus, the adoption of an individualised approach is not fully reflected in the Urban Court. However, the adoption of an individualised approach seems to be reflected in the Rural

[19]. Both SEMA 2010 and SEMA 2011 set the maximum quantity of drugs being used at the time of the offender being arrested, which is eligible for rehabilitation. According to both SEMA 2010 and SEMA 2011, the maximum quantity of evidence of drugs being used is one gram of methamphetamine, and five grams of cannabis.

Court. The interviews with Judge 23 (Rural) indicated that the various factors deliberately considered in Judge 23's interpretation of the facts and relevant law does not mean that Judge 23 thinks only of the amount of evidence of daily drug use, but also considers the reason behind the offender's drug use. The following extract illustrates this point:

> *I consider, also, the quantity of the evidence of daily drug usage. Whether it is a large or a small amount. Whether they use drugs regularly; whether at the time of being arrested the urine is positive or negative; the reason behind his drug use; whether he has been sentenced previously; and whether he is purely a drug user or whether he has a dual role as the trafficker or doing business with drugs.* (Judge 23, Rural)

Also, a substantial minority of the participants from Urban Court (i.e. 2 from 17) deliberately consider the offenders' motive (i.e. the underlying factors which led to minor drug offences) in their sentencing. The substantial minority of the participants from Urban Court indicates the adoption of individualised approaches in their interpretation of the facts and the relevant law. As remarked by Judge 6, for example:

> *I shall see how the accused relates the story of the violation of law or criminal acts, for example, whether he was a dealer, whether he sells, whether his motive was economic, profits, or no reason or, more importantly, the negative impact to the young Indonesian generation.* (Judge 6, Urban)

Judge 9 (Urban) also adopts the individualised approach in their interpretation of the facts during Court hearings to understand the offender's motive. The following extracts illustrate this point:

> *If we look in depth at the consistency of the information about the offender, ranging from the investigation to the court hearing, there is always one consistent theme. No matter whether the type of question is rephrased and twisted, the answer will remain the same; on that condition, it is likely that that the offender is truthful.* (Judge 9, Urban)

The above excerpts (i.e. Judge 23, Judge 6 and Judge 9) can be seen as an indication of the adoption of an individualised approach to the interpretation of the facts and the relevant law. Judge 30 (Supreme Court) further expected the judges to interpret the facts and the relevant law beyond the prosecutorial indictment:

> *It was found after the court hearing that the offender was convicted as a drug user; however, the Rule 127 on drug use was not part of the indictment. Therefore, recently, we agreed that the convicted offenders would be sentenced under Rule 127 as a drug user... If the urine is positive and a bit of cannabis is found, then we believe that this man bought cannabis or methamphetamine as such for consumption only.* (Judge 30, Supreme Court)

The participating Supreme Court Judges considered that, although the Rule 127 on drug users was not part of the indictment, as long as the offender was convicted as a drug user the convicted offender would be sentenced as a drug user. From Judge 30's perspective, reinterpreting the facts and the relevant law functions as an individualised approach to their sentencing.

Assessment of Sentencing

Concerning the assessment of sentencing, the judicial approaches to sentencing depend on each judge's characteristics. The following excerpt highlights the various characteristics of each judge on their assessment of sentencing:

> *Sentencing in the Supreme Court depends on the individual judge; some judges do not bother: "just enough, just reject [the appeal]". These are influenced, also, by the overburdened caseload... the more experience in the Supreme Court, the more likely speed in the sentencing of the case.* (Judge 2, Urban, Female)

As may be shown above, Judge 2 (Urban) views that the experienced Supreme Court judge tends to exercise a more managerial approach in their assessment to sentencing. On the one hand, the individualised approach was not reflected in the participant Supreme Court judges' responses to this topic. On the other hand, a number of participating Rural Court judges explained that they perceived the importance of understanding the human factor as a form of individualised approach in their assessment to sentencing. For example, as stated by Judge 20 below:

> *People use drugs just for having fun, or due to their unstable job status, or through curiosity about drugs, and peer influence. Women use drugs during pregnancy even though they will be giving birth. These are all human factors.* (Judge 20, Rural)

There were a number of variations of individualised approach to sentencing between different judges in the same Court. A number of the participants explained that, sometimes, their approaches to sentencing came from their feelings about the case. For example, Judge 17 (Urban) panel stated that they formed their impressions of the offender at the court hearing. This personal impression could drive judges to adopt more punitive approaches in sentencing. The following extract illustrates this point:

> *During a court hearing, due to our experience, we can feel "okay, this man is a drug user, this man is the drug dealer, and this man is just a follower". These feelings will appear on their own as we deal with more cases; we will have such feelings about the typical offender.* (Judge 17, Urban)

As may be shown above, Judge 17 (Urban) views the seriousness of the offenders based on physical impressions and a negative response to using drugs. The impression mentioned by Judge 17 above become a challenge because the judge might be unable to make an assessment about the extent of drug use. Other participants consider that their assessment to sentencing stemmed from the offender's circumstances. The circumstances of female drug offenders, who were perceived as having multiple responsibilities for childcare and supporting the family income, were perceived to be mitigating factors in sentencing. This made the judges sympathetic to the women's circumstances and resulted in them sentencing female drug offenders leniently. As Judge 13 remarked: "*...I do sentence the women more lightly than men due to women not only having responsibility for childcare but, also, to support the family income. Those factors made the sentencing of women lighter than for men"* (Judge 13, Urban). Along a similar line, Judge 2 mentioned:

> *The sentencing of female offenders will be more lenient than sentencing of male offenders. Normally, the gender of the offender influences the judge's sentencing... Other mitigating speeches are such as "because my children need milk, and there is an opportunity to get easy money" these speeches make me sympathetic.* (Judge 2, Urban)

The sympathetic respond mentioned by Judge 13 and Judge 2 was not reflected in the participant Rural Court judges' responses to this topic. Only Judge 20 (Rural) was concerned about the woman who was unaware of the effect of drugs on her pregnancy: "*I held a court hearing for a pregnant woman drug offender. I blamed her because, although*

she was pregnant, she was still using drugs; this meant that she was not aware of the effect of drugs on her pregnancy" (Judge 20, Rural). This blaming statement can be seen as a punitive approach towards a pregnant drug user because it condemns the woman's lack of understanding about the harm caused by taking drugs while pregnant. The divergence of individualised approaches to sentencing minor drug offences permeates the conduct of children who offend. They are subject to judgement based on their 'best interest'. The interviews with the participating judges across the two jurisdictions demonstrate the judicial interest in assessing children's best interests. The substantial minority of the participants (i.e. 4 from 31) indicated their interest in paying attention to the needs of children. Once judgments are made on a moral basis, which essentially means that the judges exercise compassion and moral responsibility when sentencing, the substantial minority of the participants have been able to foster an individualised approach towards children who offend. Judge 18, for example, mentioned: "*I tend to rehab or return those children who use drugs to their parents because none of their parents wanted their children to become victims of their circumstances"* (Judge 18, Rural). In the same vein, Judge 17 stated, "*For children who use drugs, if the evidence of daily drug usage shows a few drugs, this will lead us to believe that, once children who use drugs receive rehab and treatment and therapies, they will not do drugs anymore"* (Judge 17, Urban). In a more detailed sense, Judge 8 believed that children should not be imprisoned. They argued:

> *The sentencing of those children who use drugs is not imprisonment since we are trying to return those children to society and sent them back to their parents. We will consider the opinion of the correctional officer for children (BAPAS), the parents and we will consult with the psychologist to understand the underlying factor that puts the children in trouble.* (Judge 8, Urban)

The above excerpts (i.e. Judge 18, Judge 17 and Judge 8) can be seen as an indication of a lenient approach towards children who use drugs. For example, the sentencing of children who use drugs was not imprisonment but returning them to society and sending them back to their parents. The Supreme Court's response to this echoed the judicial interest in assessing children's best interests, as Judge 29 stated: "*The judge is free to sentence in the interests of saving the children and means that the standard minimum sentencing is not applied to children"* (Judge 29, Supreme Court). Concerning an

individualised approach to sentencing minor drug offenders, the substantial minority of the participants indicated that the offender's background behind the drug dealing and the stigmatising effects of sentencing were compassionately considered. Seen in this way, the substantial minority of the participating judges considered an individualised approach to sentencing. For example, as mentioned by Judge 14 below:

> *...The meaning of possession should be clarified because it is unfair to apply the drug law without considering it from a variety of angles. For example, we consider if the case attracts public attention, the effect of sentencing, the background behind drug dealing and whether it is for doing business or due to a lack of income or over making an income.* (Judge 14, Urban)

As the above excerpt illustrates, the case, which attracts public attention to the background behind drug dealing, is often considered by the substantial minority of the participants regarding the impact of sentencing on the public. Therefore, the substantial minority of the participants are considering the stigmatising effects of sentencing. While the substantial minority of the participants' deliberation of individualised approaches to sentencing seems implicitly to rely on 'risk-based' assessment, there is an implicit expectation from them, which is that their assessment would minimise the risky behaviour of sentenced offenders. For example, dialogues between Judge 14 (Panel) and an Offender taken from a court hearing observation illustrates this 'risk-based' assessment:

> *Judge 14 Panel: How long have you used drugs?*
>
> *Offender: Three months*
>
> *Judge 14 Panel: When did you start to know about cannabis?*
>
> *Offender: Since high school*
>
> *Judge 14 Panel: What did you do when in high school?*
>
> *Offender: I used drugs*
>
> *Judge 14 Panel: Why do you accept drugs?*
>
> *Offender: I accept drugs for a fee Rp50, 000.00 (around £3.00)*
>
> *Judge 14 Panel: What happens if you do not use drugs?*
>
> *Offender: I start to overthink.* (Extracted from court hearing Observation Notes, Judge 14 Panel)

From the above excerpt, it can be seen that participating Judge 14 (Panel) pays

attention to the offender's risk of becoming dependent on drugs. This finding suggests that the substantial minority of the participating judges across the two jurisdictions compassionately consider their sentences from a variety of angles, including 'risk assessment' based, and considering their role to minimise the stigmatising effects of sentenced offenders.

Summary

In Chapter 4 I present the different perspectives and understandings that underpin the judicial response to minor drug offenders. I present the judicial perception of the significance of lower level class citizens in the criminal justice system. The substantial minority of the participants note that the class structure has a direct influence on the context of sentencing in two different ways.

First the war on drugs has been targeting lower class citizens and is discriminatory. This is because most of the people being charged with breaking the 2009 Drug Law are from lower social backgrounds. In contrast, middle-class drug users are not the target of its sanctions.

Second, the people who are more likely to experience poverty fail to receive treatment, and it has been shown that the substantial minority of the participants' attribute this to the inequality of access to treatment. Consequently, this affects issues around the presentation of justice in the judicial system and drives the substantial minority of the participants to make judgments on a moral basis; i.e. exercising compassion and moral responsibility in sentencing.

In this study, I have identified that this compassionate approach to minor drug offenders in Indonesia leans toward individualised approaches to sentencing. The finding of the interviews has shown the potential for discretionary practice which could be either lenient or punitive, depending on personal attitudes toward drug use. The substantial minority of the participants consider their sentences from a variety of angles, including the judicial interest in the case, 'risk assessment' and considering the impact of sentencing on the wider society. Regarding lenient approaches to sentencing, the substantial minority of the participants' state that they are interested in paying attention to the needs of the offender's family and children. For example, children who use drugs are not sentenced to imprisonment but are returned to their parents. The substantial minority of the participants also indicated that the offender's background to their drug dealing and the stigmatising effects on sentenced offenders were compassionately considered. For example, the challenging situations of women being mothers and caring for their children are mitigating factors which make the substantial minority of the participants sympathetic

to sentencing female drug offenders leniently. The substantial minority of the participants also considered the importance of making judgments on a moral basis, essentially following moral responsibility on sentencing. The substantial minority of the participants consider that drug users have become victims of their circumstances. The substantial minority of the participants consider the lack of understanding of harm caused by taking drugs and living under drug prohibition regimes to be contributing factors of drug users being targets of its sanctions the criminal justice system. Because of this, the substantial minority of the participants pass lighter than standard minimum sentences to ensure that those minor drug offenders are not held too long in detention. The substantial minority of the participants believed that if the offenders were victims of circumstances, then they, as judges, should confidently reduce and depart from the standard minimum sentencing. The substantial minority of the participants concerned that the recent enforcement of a drug law contributes to the structural inequality of sentenced offenders. It shows that judges do not expect to merely follow the discriminatory practices of the enforcement of a drug law, which affects issues around the pursuit of justice in the judicial system. Thus, this drives the substantial minority of the participants to make judgments on a moral basis, basically being compassionate and morally responsible when sentencing. They consider that their efforts to adopt lenient approaches in sentencing minor drug offenders contribute to the pursuit of justice. Despite the substantial minority of the participating judges' intentions to pursue justice, some challenges prevent the pursuit of justice. The challenges to pursuit of justice related to judicial culture, social structure and resources. I present the extent of these challenges in the following chapter.

Chapter 5: Constraints on Sentencing

This chapter presents the findings that address the first research question "What factors do judges disclose that influence them when sentencing minor drug offenders in Indonesian courts?" Thus, this chapter examines key causal factors which the judges perceive to influence their sentencing decisions. Hutton (2006) has argued that, to pursue justice, one needs to know what key factors contribute to judges' sentencing. Without considering the circumstantial factors which influence sentencing, there can be no justice. Therefore, it is necessary to acknowledge the different factors that were taken into consideration when sentencing (Ashworth 2002). In this chapter, I present the constraining factors that the participants encountered on sentencing. I present the constraints in the light of the judicial culture, the social structure, and resources, which the majority of the participants encountered on sentencing.

Judicial Culture

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

> *I have been inspected although the inspector said: "you will be okay if you truly believe in your sentencing and are led by your heart; if you are confident that your opinion is right, there is no need to worry, you just calm down!" No, never! There is no peace of mind after being inspected! It is always we who get the blame.* (Judge 11, Urban)

The above excerpt illustrates Judge 11's concerns of being discredited by scrutiny from their superiors. The majority of the participants in Rural Court convey their concern regarding lack of encouragement. Judge 25 (Rural) believes that "*at the moment, we cannot simply break the rules because our hands and feet are tied by the rules*"... The majority of the participants in Urban Court continued to express anxiety over their

sentencing being overturned by the Higher Court, and the judges' supervisors led them to fear that their sentences would be void.

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

From the above excerpts, the Urban Court judges' anxieties, due to the perceived pressures from their superiors can be seen about either their sentences being dismissed or being below the standard minimum sentence. Furthermore, the majority of the participants in Urban Court saw such dismissals as a dilemma since it was less likely that the prosecutor would set the charge below the standard minimum. As Judge 11 stated, *"It is a dilemma! It is automatic that the prosecutor never sets the charge below the standard minimum and, therefore, what should we do?"* (Judge 11, Urban). It is identified that the Supreme Court's responses to this topic about the influence of judicial culture echo their explanation about judges who are either granting a dismissal or sentencing below the standard minimum being at risk of being discredited. The Supreme Court expects that the judges ought to comply with the prescribed standard minimum sentences. The following extract illustrates this point: *"...if a judge gives sentencing which is above the prescribed limit of the law, the Supreme Court will dismiss this judge because this would be regarded as unprofessional"* (Judge 29, Supreme Court). This excerpt indicates that the Supreme Court discourages those judges who depart from the minimum sentencing, prescribed limits of the law, which are set to provide some protection for the individual. It is this discouragement that leads the majority of the participants into a sense of insecurity and, consequently, into becoming defensive about this most public aspect of the judicial role. As Judge 11, for example, mentioned:

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

The above excerpt from Judge 11 indicates that the absence of the practice of

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

> *There is no leading argument, who can we depend on? [The inspector] …It is said: "If your judgement is okay, then no need to worry, please be confident in considering such factors in your sentencing!" However, this depends on them being like-minded with us. But what happens if the inspector is more senior than us and said: "Are you able to read?" in this situation, what should we do? This inspector's comments are the reason some of our fellow judges did not want to take any risk and said: "Just follow whatever the law determined!"* (Judge 11, Urban)

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

> *In the end, among the judges, there were two opinions. On the one hand, there were those who were confident in downward departing from the standard minimum sentencing based on several considerations and, on the other hand, there were also those who said: "never mind, rather than getting troubled, better just follow the minimum sentencing" Finally, we become the echoer of the laws because, although we want to dissent*

according to the facts on the ground, not everyone necessarily accepts those facts as actual facts!". (Judge 11, Urban)

As shown above, Judge 11 mentioned that the judges' choice to simply implement the laws was associated with the lack of appreciation from the inspectorate of the way in which the judges exercise their discretion to depart from the standard minimum sentencing. Findings from this study suggest that 'justice' is conditional. Another factor that challenges the pursuit of justice seems to stem from the shared view that the inconsistency between the law and the categorisation of drug offences makes the sentencing ineffective. As Judge 1, for example, indicates, the boundary between selling and using can be considered blurred.

If the criteria for minor offences are based on the quantities of drugs, in my opinion, it will then become biased. Moreover, if the seriousness of offences is based on the role, then harsh sentencing might happen for group III[20]; although it was a small role, it continues to be regarded as a serious offence. (Judge 1, Urban)

The above excerpt from Judge 1 indicates that the blurred criteria for interpreting the seriousness of offences has affected their capability to interpret the facts and the relevant law. It is this blurred boundary that leads the substantial minority of the participants (i.e. 2 from 31) into disagreement. As Judge 6, for example, mentioned:

From when I became a judge, I disagreed with the drug law definition... for those drug offenders being arrested coercively and charged under Rule 111 about drug storage [with an intention to sell] because he stored drugs, I insist on sentencing the offenders under Rule 127 about drug use. (Judge 6, Urban)

The above excerpts highlight Judge 6 the Urban Court judge's disagreement with the boundary between selling and using. This disagreement led Judge 6 to interpret the fact and the relevant law. While in another way, this disagreement led to Judge 7's reluctance to send a drug user to rehabilitation, due to their sceptical view that "*the law did not mandate the judge to send drug users to treatment and rehabilitation*" (Judge 7, Urban). During my observation, Judge 7 assumed an inevitable trajectory of drug use, as

[20] Group III refers to possessing drugs without a prescription.

can be seen in the following dialogue:

> *Judge 7 Panel: Have you previously been convicted of a drug offence?*
>
> *Offender: Yes, previously I was convicted of using cannabis, and I am now on Methamphetamine.*
>
> *Judge 7 Panel: So previously cannabis, and then Methamphetamine, and then it will be Ecstasy, and, then, it will be heroin, right?*
>
> *Offender: [silence].* (Extracted from court hearing Observation Notes, Judge 7 Panel)

The above extract from a court hearing observation highlights Judge 7's (Panel) proclamation of the inevitable trajectory of drug use. Judge 7 (Panel) proclaims that once the offenders start to use drugs, they will suffer from issues of drug use. Another factor that constrains the pursuit of justice seems to stem from the judges' limited knowledge about issues of drug use. The interview with the participating Urban Court judge indicates that the sentencing to send minor drug offenders to rehabilitation is determined by the offender's level of relapse. As Judge 13, for example, mentioned:

> *The offender might claim that he was a person who is new to drug user who became a person with issues of drug use and requested rehabilitation. However, after our inquiry for more information, we observed that after several months of being abstinent from drugs at the detention centre, these offenders' conditions seemed healthy and they did not look like a person with issues of drug use. Therefore, we have no preference to put them into rehabilitation.* (Judge 13, Urban)

The above extract highlights that Judge 13's refusal to facilitate access to treatment is because Judge 13 feels that the offender has recovered enough not to merit it. Another factor that challenges the pursuit of justice seems to stem from the lack of guidelines. From the Supreme Court's response to this guideline outlined below, it was identified that the explained lack of a principal argument on sentencing is caused by the lack of statutory guidelines.

> *Here in Indonesia, we don't have such guidelines [guidelines were not made available to the participants to enable sentencing that is supportive to minor drug offenders.]... So, if you consider the quantity of*

> *0.05 gram, it will be priced at one million rupiahs[21]. If we consider the price, it is not small money. If we consider the quantities, it is small. Then, it raised concerns whether the offender deserved to be sentenced to four years' imprisonment... Therefore, guidelines are indeed required.* (Judge 29, Supreme Court)

The above excerpt highlights that on the one hand, the absence of guidelines leads to confusion among Lower Court judges. On the other hand, the judges are confused about whether there are opportunities for Lower Court judges to exercise judicial discretion. A number of participants shows different pressures discouraging them from exercising judicial discretion in sentencing. For example: '*we [judges] were worried that, if we acquitted [the accused], there would be suspicions of "something" behind acquittal'* (Judge 25, Rural). This finding suggested that the majority of the participants were merely implementing the law, and they did not mean necessarily to have discretion outside the law.

Another factor that challenges the pursuit of justice seems to stem from the participant experiencing such feelings of isolation. This feeling of isolation seem to derive from the lonely task a judge has when sentencing. The majority of the participants mention that they are unsure of the medium of communication that would channel their concerns. As Judge 17, for example, mentioned:

> *We found challenges in channelling our concerns; we are unsure about the medium to do so. I am not sure whether there is such judicial training available which would allow us to raise our concerns, or whether there are other types of judicial meetings... So far, we have found it challenging to channel our aspirations and that is the reason our sentencing becomes our source of reflecting on our concerns.* (Judge 17, Urban)

As can be seen above, Judge 17 is concerned by experiencing feelings of isolation. On the one hand, the majority of the participants were in confusing situations regarding sentencing that would be supportive to minor drug offenders. On the other hand, they feel they cannot consult with colleague judges in applying a difficult sentence. In experiencing such feelings of isolation, they often declare in the written judgement that despite this they try to make the best of their judgement. Nevertheless, they are only human and may

[21] One million rupiahs (around £ 58)

make errors. It can be considered that they are hopeful that someone in the Higher Court will read this declaration of judgement limitation and act accordingly. To overcome this isolation, Judge 14 (Urban) recommended the online learning provided by the Supreme Court for Rural Court judges: "...*for the Rural Courts, there are more opportunities for e-learning*" (Judge 14, Urban). However, such e-learning would not be without its challenges because other participating judges might not be aware of such e-learning. For example, when I accessed the e-learning portal for the Indonesian Judiciary, there was no specific study course on sentencing minor drug offenders. Another suggestion to overcome isolation was remarked by Judge 13 (Urban). Judge 13 suggested that isolation could be overcome by learning through books written by colleague judges: "*The book says that drug users are those with five grams of drugs while, at the time of sentencing, the offenders were convicted of carrying less than five grams of drugs; it is around zero-point one gram"* (Judge 13, Urban). However, such learning through books would not be without its challenges because other participating judges might not be aware of such books. For example, during fieldwork, it was acknowledged that the majority of the participating Urban judges referred to a recent edition of a book about the implementation of the Indonesian Drug Law. Two Indonesian judges wrote this book. By contrast, it was found that the participating Rural Court judges did not refer to any book.

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

> *My effort to influence panel judges would be on a collision course once with the personal interests of the panel members... In that situation… our duty is done once we share our beliefs (ijtihad) "... if you are happy with these beliefs then that's great, if not, then it is still okay".* (Judge 9, Urban)

As shown above, Judge 9 emphasised the value of tolerance to ensure panel solidarity when the conflict of interest among panel judges occurs. It is apparent that the

Supreme Court's response to interference echoes the explanation given below:

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

The above extract is illustrative of how the judges would be required to reconcile the competing interests between applying the principle of legality (i.e. following the standard minimum sentencing) and applying the principle of beneficiary (i.e. sentencing that is supportive to minor drug offenders). In such conditions where it is not feasible for minor drug offenders to receive rehabilitation/treatment inside the prison, the substantial minority of the participants (i.e. 4 from 31) try to enable those minor drug offenders to receive treatment outside of prison. The length of rehabilitative period counts towards the length of the sentence to be served[22]. Judge 9's and Judge 31's explanation demonstrated the influence of competing interests within the judiciary which add challenges to the pursuit of justice. Another factor that constrains the pursuit of justice seems to stem from structural issues, which will be explained in the following section.

Structural Factors

The influence of politics

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

> *Mr X [new BNN head] replied: "make an island, guarded by a crocodile, those offenders, who want to jump, will be caught by the crocodiles there"... However, I think it's not as easy as that! If the person is released only there [island] without any support, which would be killing people,*

[22] If the penalty imposed is in the form of rehabilitation, the time spent in drug rehabilitation is deducted from the overall period of the prison sentence (Law 35/ 2009, Article 103 (2))

> *torturing people, that's the punishment again... Indeed, this has become a national problem.* (Judge 30, Supreme Court)

As can be seen from the statement above, the participating Supreme Court judge is concerned about the punitive atmosphere of the war on drugs that apparently put pressure on the judges to punish minor drug offenders. This punitive atmosphere may puts pressure on the discretion of the participating judges. Regarding the minimum sentencing prescribed by the law, Judge 9 (Urban) is concerned that this could result in up to five years' imprisonment: "*...I spoke about my concerns; the indictment was under Rules 111, and 114*[23] *and we sentenced offenders to five years' imprisonment*" (Judge 9, Urban). Along the same line, Judge 5 stated, "*Due to minimum sentencing being prescribed by the law, I sentenced the offender to four years' imprisonment"* (Judge 5, Urban). The lengthy prison sentences reflect the influence of the existing punitive atmosphere that is putting pressure on the discretion of the participating judges. My observations revealed that, although the length of prison sentences appeared to be discounted by the participants, the length of prison sentences remained longer, roughly around eight years:

> *Judge 4 Panel: We decide that… [The panel discuss again to finalise the length of sentences]: the offender should be convicted of possessing class one drugs, and the sentence is discounted from ten to eight years of imprisonment. The weight of cannabis, 728 grams, will be owned by*[24] *[assets forfeiture] the government.* (Extract from court hearing Observation Notes, Judge 4 Panel)

The above extract from a court hearing observation highlights a retributive model of sentencing that was influenced by the existing punitive atmosphere of the war on drugs. The Supreme Court's response to the influence of non-popular politics echoed the judicial concern.

> *...the offenders need shelters; they should not be merely released alone into the jungle. They are, also, humans, not tigers! We should not do that!*

[23] Rule 114 is concerned with the rules about illegal selling and buying of drugs class 1 (e.g. cannabis). This rule holds a minimum of 5 years and a maximum of 20 years.

[24] This asset forfeiture of the seized drugs seems to be an unusual judgment, usually the seized drugs will be destroyed.

> *Indeed, this has become …a legal issue which we should respond to. It is not possible that we convict everyone.* (Judge 30, Supreme Court)

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

> *If we arrest these drug misusers repeatedly, this will result in the prison capacity being full of those people who are sick and not with those people who have done evil. 'Doing evil' is those people who sell and distribute narcotics with the intention of doing evil.* (Judge 6, Urban)

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

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

Harsh sentencing under the regime's 'war on drugs' is viewed as having a negative impact on justice, as stated by Judge 18, "*... Too long in detention causes a negative effect, due to the offender mingling with the drug traffickers who are serious drug offenders...*" (Judge 18, Rural). On first being asked about the influence of non-popular politics on sentencing, Judge 18 considered that, after the drug user entered prison, their conditions would be more severe. In Urban Courts, when considering the negative effects of

imprisonment, Judge 5 illustrated that the offenders are experiencing the disadvantage of sentencing under the regime's 'war on drugs'. Judge 5 explained that when the offenders who have an issue with drug use spent seven months in prison, they would suffer almost a near-death experience: "*I saw that for those people with issues of drug use, a prison sentence is not effective because, when I saw the condition of my brother during his six to seven months in prison, he was almost near death*" (Judge 5, Urban). The disadvantage of sentencing under the regimes 'war on drugs' can be seen from the three different extracts presented below: "*Judge 6 Panel: Also, the judges argued that the sanction of imprisonment would have a negative impact on the offenders because they were victims of drug trafficking*." (Extracted from court hearing Observation Notes, Judge 19 Panel).

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

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

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

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

Judge 24's and Judge 9's explanation demonstrated the disadvantage of imprisoning minor drug offenders within the current context in Indonesian courts, which are primarily

channels for deploying drug prohibitionist policies.

The influence of Law Enforcement

The way in which the police set up the case influences the judicial interpretation of the factors of the case. These can be seen in the police's selective targeting of individuals from the more impoverished backgrounds for policing. In this study, a substantial minority of the participants (i.e. 5 from 31) are concerned about the selective targeting. This selective targeting is summarised by Judge 27 (Rural) who reveals the following reasons for his concerns: '*There is a need for credibility during the process of investigation, prosecution, and court hearing; this means that the police investigation should not selectively target'* (Judge 27, Rural). From their statement, Judge 27 (Rural) seemed to be concerned that the tendency of the police to be selective in setting up drugs cases raised an issue of credibility during the process of investigation. Another participant group, Urban Court judges, are concerned whether the criminal justice office's credibility is evident, as Judge 9 remarked:

> *The thing that gave me most concern here was that this jurisdiction was too obvious with the money stuff whether or not the case contained money... it was amusing that their cases were split, and all were indicted under Rule 127. One offender was prosecuted for one-year imprisonment, and the other two offenders were prosecuted for four to five years' imprisonment. This credibility issue is something that is challenging to resolve... not only will the offender become an "easy target" but, also, we, who implement the Drug Law, will become an "easy target".* (Judge 9, Urban)

The above excerpt highlights the participating Urban Court judge's concern that the question of criminal justice officers' credibility affects issues around justice. In this situation of selective targeting, the amount of money received from the offender often decides whether the offender will be charged, prosecuted, and sentenced leniently or severely. The lower-class offenders, who are unable to offer a bribe to the law enforcement officer (i.e. the police, the BNN, the prosecutor), often find that their cases are altered from drug use to drug possession, which is subject to four years' imprisonment. Even if their case is set up for using drugs, often they do not receive an assessment and miss the opportunity to receive treatment. This selective setting up of the case happens

because assessment and treatment are often offered to offenders who can pay. In this situation, the judge's concern about the credibility of the whole process of setting up the drug case and setting up the indictment and prosecution had a negative impact on sentencing. This selective targeting suggests that the justice we see is conditional - one that depends on the police who set up the case. The issue of selective targeting led to the participants making extra efforts in court to interpret the facts of the case. This judicial interpretation is clear in the way the participating judges attempted to redefine who could become a witness in a drugs case. The way in which the police acted as witnesses was interpreted by the substantial minority of the participants as a constraint on sentencing. This interpretation was because the police often made contradictory statements. Consider, for example, Judge 9's comment:

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

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

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

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

decide the sentencing, and therefore the sentencing outcome might be different. As Judge 9, for example, mentioned:

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

The excerpt above highlights the substantial minority of the participants in Urban (i.e. 2 from 17) who made a dismissal of the case against the woman. The diversionary powers held by the police enabled them to regard the woman's circumstances in relation to the short period of time in which she was handed the drugs in a very dark environment. Due to the lack of light, the woman was not aware that the property handed to her by her partner was drugs. From this point of view, the police could simply have cautioned the woman without prosecution. In this circumstance, Judge 9 (Urban) carefully considered the woman's circumstances and decided she could not be penalised. Moreover, the interviews with the participating Urban Court Judges indicated that the judges themselves could also interpret the fact of the case. As Judge 8, for example, mentioned:

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

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

establish the facts of the case, as Judge 28 revealed:

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

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

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

The above excerpt highlights Judge 31's concern about the challenge to establish the facts of the case due to the fact that the police officers failed to check the detainee's urine. Another factor that challenges the pursuit of justice seems to stem from the prosecutor's presentation of evidence. As Judge 7 and Judge 11, for example, mentioned: "*Our sentences depend predominantly on the initial indictment"* (Judge 7, Urban). "*...firstly, if we sentence below the standard minimum, the prosecutor will definitely appeal the sentence..."* (Judge 11, Urban). As shown, the participating Urban Court judges' concern is that sentencing below the standard minimum often results in an appeal by the prosecutor. This often becomes a challenge since the judge should follow the standard minimum sentencing to avoid the case being appealed. In the following excerpt, two Rural Court judges express their concern about the discriminatory practices of the prosecutor:

> *I am so upset when there are such cases where the offender could be charged under Rule 127 due to the smaller quantity of drugs, but the offender is not charged [by the prosecutor] under Rule 127. By contrast,*

when the quantity of evidence of daily drug usage is larger, the offender is charged [by the prosecutor] under Rule 127. (Judge 23, Rural)

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

The above excerpts highlight the substantial minority of the participants' concern that, for smaller quantities of drugs, the prosecutor is often accused severely while, for larger quantities of drugs, the prosecutor is often accused leniently. This was within such conditions where the boundary between 'possessing with an intention to sell/selling' and 'using' are blurred. It was not clear whether the criteria are based on the quantity of the drug or on the role of the offender. In these situations, the prosecutorial presentation of evidence is often challenging as it found after the court hearing that the offenders were charged differently than they ought to have been. As a result, the discriminatory practices of the prosecutor add challenges to the pursuit of justice. My observations at a Rural Court hearing revealed that the prosecutor consults with the participants. This indicates the prosecutor's influence on the final sentencings in such matters.

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

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

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

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

As shown above, Judge 20 (Panel) cut short the court session to allow the prosecutor to consult with the participants. The prosecutor gave his input on the acceptable length of the prison sentence within the standard range of minimum sentencing. Here, the prosecutor's view on the final sentencing permeated the orchestration of this court drama. Recall in this section how judges are notified that the prosecutor is more likely to appeal if the judges sentence below the standard minimum. Judge 20 (Panel) responded to the prosecutor's input as though he would change his mind. This finding suggests that even the imposition of a sanction is viewed as part of the negotiation. In other words, both the discriminatory practices of the prosecutor and the imposition of a sanction add challenges to the pursuit of justice. It is apparent that the Supreme Court's response to this topic about the influence of prosecutorial indictment echoes the explained challenges to the pursuit of justice:

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

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

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

The above excerpt highlights Judge 5's concern about how the prosecutorial appeal often becomes a challenge. Once the case is appealed, the Higher Court is likely to extend

the periods of remand, which may take ninety days. Once convicted, the length of extension for the remand counts towards the length of the sentence to be served. As a result of this remand extension, the sentencing of minor drug offenders at the Higher Court is likely to be for more extended periods of imprisonment than sentencing at the Lower Court. Thus, the appellate procedure is having a negative impact on justice. However, not all the participant judges share this perception. A number of participants did not consider the appellate procedure as challenges. Consider, for example, Judge 6's comment: "*Following the court hearing at which I gave the sentence, it was evident that neither the prosecutor nor the offenders appealed. Therefore, there was no appeal procedure"* (Judge 6, Urban). Another participant considers challenging the prosecutor:

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

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

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

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

substantial minority of the participants (i.e. 2 from 17) also acknowledged the tension between the judge and the prosecutor's resistance due to the substantial minority of the participants often dismissing many minor drug offenders without sentence. The following extract illustrates this point:

> *I dismissed the cases without sentence. This dismissal is the reason the prosecutor hated me, the local chief of prosecutor warned me, also, due to my dismissing too many cases against the offenders...* (Judge 9, Urban)

The above excerpt highlights the tension between Judge 9 and the prosecutor concerning dismissing many minor drug offenders without sentence. The prosecutor often protested this dismissal of sentencing, and the dismissal tended to be approved by the Supreme Court. In Rural Courts, the substantial minority of the participants also acknowledged that inter-agency tension adds challenges to the pursuit of justice. A number of the participant Rural Court judges (i.e. 2 from 11) reported this inter-agency tension:

> *Despite the law, the multi-agency assessment team should be involved in the investigation and prosecution process... Usually, these case files were presented by the prosecutor to without offenders' assessment. If the case does not make sense, the judge should make an extra effort in court to find the facts.* (Judge 28, Rural)

Here, Judge 28 discloses the inter-agency tension concerning providing a preliminary assessment before the court hearing, which would make matters more challenging for the substantial minority of the participants' interpretation of the facts and the relevant law. These inter-agency tensions add challenges to the pursuit of justice. The public and media also add challenges to the pursuit of justice.

The Influence of Public Opinion and Media

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

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

The above excerpt highlights the community's understanding that the accused person was innocent, and this was why they asked the judges to set the offender free. These members of the community knew about the alibi and understood that the person was innocent. The substantial minority of the participants were aware that the community wanted the offender to be free and considered that there was an alibi. In this situation, the judges accepted these public opinions, and this led to the accused person not being convicted. Therefore, it could be considered that the role of public opinion acts as an "add in" to non-conviction. In Rural Courts, the substantial minority of the participants (i.e. 2 from 11) indicated that public expectation was considered to ensure that the sentencing met the society's expectation: "*If we believe that the offender is purely a drug user, then we will sentence them as a drug user. This is what society expects, hopefully, our sentence will help"* (Judge 27, Rural). As shown, once the judicial beliefs met societal expectation, Judge 27 would hope that their sentence would help the drug user. Therefore, public expectation is a source of knowledge that adds value to the justification on sentencing. Yet the justification for this form of knowledge from the public needs to be considered with caution. In Urban Courts, a number of the participants (i.e. 2 from 17) indicate the way in which they were cautious in filtering public opinion:

> *We should distinguish the level of public opinion and whether or not it is the journalist's opinion. Therefore, if the journalist is writing about their own opinion, then it will be regarded as the journalist's opinion that is published and not necessarily the public opinion. By contrast, if the community's opinion is being reported by the journalist, it will be regarded as public opinion.* (Judge 9, Urban)

As the above excerpt illustrates, the solution in responding to public expectation is to filter it and, thereby, instil in the judge the cultural value of considering public opinion. However, it seems that both aims make it clear that filtered public expectation often affects the judicial sentencing. Such positioning contrasts with the judges' views about being autonomous. In justifying their sentencing, a number of the participants assessed

the impact of filtering public opinion into their sentencing. As Judge 14, for example, mentioned: "… *We consider if the case attracts public attention, the effect on sentencing….* (Judge 14, Urban). This excerpt illustrates that the case which attracts public attention is often considered by a number of the participants regarding the impact of sentencing on the public. Therefore, a number of the participants are justifying their sentencing based on public expectations. In Rural Courts, variations exist since a number of the participants indicate that the justification of their sentencing is based on the anonymous informant when the judge meets people in the community. As Judge 24, for example, mentioned:

> *Offenders' testimony in court cannot be a reference because many offenders say: "I only used drugs once", but I heard from the outsider who said: "they have been a professional drug player [continually dealing with drugs]". I heard these rumours, also, from the society, from the anonymous person or from the police who arrest them.* (Judge 24, Rural)

The above excerpt highlights the negative role of anonymous opinions in identifying stigmatising attributes of sentenced minor drug offenders at the Rural Court. This identification of stigmatising attributes (i.e. 'professional drug player' [continually dealing with drugs]) in the society adds challenges to the pursuit of justice. There was an enormous variation that existed between different judges in the same court, as explained by the substantial minority of the participating judges in Urban Court. Judge 2 (Urban) and Judge 7 (Urban) see the media's role in sentencing as a negative one since the media are discrediting them. Judge 3 (Urban) views the sentencing to imprison as being related to the media's ability to condemn those judges, particularly progressive judges, who sentenced below the standard minimum. This condemnation prevents the judges from sending minor drug offenders for treatment and pushes them to send more people to prison: "*… the media reported our sentencings inaccurately, only half-truths"* (Judge 7, Urban).

> *We read the newspaper about the story of the person who has been rehabilitated, then re-enter the rehabilitation again, meaning that, there is no improvement, no repentance, and they keep having an issues with drug use.* (Judge 2, Urban)

> *...when the quantity of methamphetamine was three kilograms. One offender was a foreigner and one was from Indonesia I felt extreme*

> *external pressure, mainly from the press media and from journalists... inversely, when we sentence the offender to life imprisonment, the media are judging us as untrustworthy and incompetent...* (Judge 3, Urban)

A number of the participants (i.e. 2 from 17) mention that the media often portray the offender's behaviour as unchanged (i.e. the offender continues to have issues of drug use). Whilst modest aims of rehabilitation could be measured by improvement of the offender's lifestyle, a number of the participants seem to be challenged by unrealistic expectations from the media's portrayal of the offenders who continues to have issues of drug use. Moreover, a number of the participants (i.e. 2 from 17) are concerned that issues of corruption, which seem to penetrate the judiciary, was a source of public mistrust and raises the issue of credibility. Consequently, a number of the participants avoid attracting public accusation. As Judge 12, for example, mentioned:

> *...we were concerned that we were at high risk of being questioned by the Higher Court: "Why are you doing acquittal?" then we would be examined: "What kind of gratification have you received?" Sometimes, we cannot stop society's view about us [judges] […]: "Do you [society] never have a negative thought about us [judges]!" this is something that we cannot avoid. These views affect us!* (Judge 12, Urban)

Overall, this excerpt highlights that since imposing dismissal sentences are often accused by society as being a sign of corruption to favour the offenders, these judges avoid attracting public accusation. Therefore, this avoidance somewhat contributes towards the greater use of imprisonment and following the prosecution. Imprisonment is justified as a judicial attempt to minimise public accusation. Thus, public accusation adds challenges to the pursuit of justice.

Resource Factors

Another factor that challenges the pursuit of justice seems to stem from the inequality of access to treatment. The interviews with the participating Rural Court judges indicate that the majority of the participants are concerned that treatment facilities are available only in the capital city and not in all districts. Consider, for example, Judge 25's and 19's comment: "*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, Rural). "*Our*

problem at the Rural Court is that, due to unavailability of treatment facility, where we are going to rehab them? Unfortunately, the offender will return to habits of drugs!" (Judge 19, Rural). As shown, Judge 25 and 19 (both Rural) were challenged by the lack of treatment facilities. Thus, resources for treatment facilities were often seen as hindering factors in sending the minor drug offenders into rehabilitation. The majority of the participants in Rural Court frequently stated their concerns about the lack of support available for drug users. As Judge 27, for example, mentioned:

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

As shown above, Judge 27 mentioned that the prosecutor's failing to do an assessment of the offender often resulted in offenders being charged differently than they ought to have been and led the judges to not sentence offenders into rehabilitation. The majority of the participants in Urban Court are aware that such Lower Courts have no facilities for rehabilitation and that this hinders judges when sentencing offenders to rehabilitation. The following extract illustrates this point:

> *We remind the Supreme Court judges that at such Lower Courts, there are no facilities for rehabilitation, the Supreme Court judges then did not sentence offenders into rehabilitation. I remind them, also: As we know there is no fund available to transport the offender to BNN, these can be considered difficult to the prosecutor to arrange the offenders' travel to the rehabilitation centre, moreover for the inter-city transport, which should take the aeroplane, how we can handle it?* (Judge 2, Urban)

As shown above, Judge 2 is aware that the lack of treatment facilities in such Rural Courts forms part of the challenges in sentencing offenders to rehabilitation. It is apparent that the Supreme Court's response to this topic about the influence of resource factors on drug sentencing echoes the explanation given about the difficulties in facilitating offenders' rehabilitation:

> *It was agreed that the assessment is required for rehabilitation. So, we rely on the medical assessment about the level of issues of drug use. If*

> *the requirement of assessment is not met, even though the offender is the drug user, they could not be rehabilitated. This raises concerns with those offenders who are unable to receive rehabilitation and will end up in prison.* (Judge 30, Supreme Court)

The above excerpt highlights the Supreme Court judges' concern that offenders, who are unable to receive rehabilitation, often ended up in prison. Consequently, sentencing to prison was often decided upon by the majority of the participants because it was not feasible for those offenders to receive treatment outside of prison. Another factor that challenges the pursuit of justice seems to stem from the interpretation that a number of the participants' place upon evidence of a daily drug use assessment. As Judge 8, for example, mentioned:

> *To enable rehab, the roles of the medical doctor, the psychologist, and the psychiatrist are essential to my sentencing. This is because the opinions of the specialists will give us confidence that, in these drug cases, the offenders are, indeed, eligible candidates for rehabilitation.* (Judge 8, Urban)

The above excerpt highlights that to decide upon rehabilitation, Judge 8 considers the availability of assessment made by the medical doctor, the psychologist, and the psychiatrist. However, such assessment would not be without its challenges because the minor drug offenders were often brought into the court without assessment. As Judge 18, for example, mentioned:

> *The Supreme Court guidance has not been fully implemented because each jurisdiction is different. Some jurisdictions lack in [treatment] facilities. If there are no such [treatment] facilities, the sentencing will remain imprisonment, although it will be lighter.* (Judge 18, Rural).

As shown above, Judge 18 was aware that there are no treatment facilities available in Rural Court. This lack of resources caused unequal medical assessments. A number of the participants in Rural Court perceive these resources to be unequal treatment of offenders. The following extracts illustrate this point:

> *...we should be careful, also, because there are doctors or institutions interested only in passing offenders for rehabilitation. Then, it becomes less independent and less professional and only those rich people can*

receive assessments. However, if the doctor is truly independent, then the poor people should also receive assessments. (Judge 19, Rural)

We really need competent agencies for rehabilitation, bona fide, those who can complement sentencing. An independent body should do these; however, so far, those bodies were unavailable...Therefore, we have doubts about sentencing the offenders into. (Judge 24, Rural)

The above excerpt highlights the participating Rural Court judges' concerns that some assessments are less independent and unprofessional. These less independent assessments result in poor people being unable to be assessed. Also, the lack of competent agencies for rehabilitation often results in inequality of access to treatment. Despite the majority of the participants' concerns in relation to the inequality of access to treatment, the problem in Urban Courts was the inequality of access to a medical assessment for lower class drug users who have no money to pay for an assessment. Judge 11 (Urban) states that only those who can pay for an assessment will be considered for rehabilitation. The following extract illustrates this point: *"... the requirement assessment should be completed...This is because providing the assessment is easy, anyone who has money can pay for an assessment* "(Judge 11, Urban). This excerpt clearly shows that, in Rural Courts, the lack of assessment and credibility of the existing treatment providers are reasons for the failure of resolving the drug user's need for treatment. In Urban Courts, although the treatment facilities are available, those who have no money to pay for an assessment are often considered to be an ineligible candidate for rehabilitation: *... I have often asked: So, you are asking for rehab, right? The offender replied: Yes Sir, but please make it shorter, I asked: Why? The offender replied: Because it is too costly Sir "(*Judge 11, Urban). This excerpt indicates that often assessment and treatment are offered to offenders who can pay because of the high cost of rehabilitation. It is clear from the findings presented in this section, that inequality of access to treatment is more likely to be the reality in Urban rather than Rural Courts. These inequality issues are viewed as having a negative impact on justice.

Summary

In Chapter 5, I address the research question: “What factors do judges think influence them when sentencing minor drug offenders in Indonesian courts?” It can be seen from the findings presented in this Chapter, that the majority of the participants are constrained by the blurred boundary between ‘selling’ and ‘using’ which leads them into a confusing situation when deciding. Also, the majority of the participants experience such feelings of isolation that lead them into a sense of uncertainty. Consequently, they become confused whether there are opportunities for Lower Court judges to carry out sentencing that is supportive to minor drug offenders. The majority of the participants are also concerned about being constrained by scrutiny from their superiors (i.e. inspector). They are often accused by the inspector of the judiciary for the downward departure from the standard minimum sentencing and often do not feel supported. Also, the appeals procedure and a range of other pressures discourage them from making judgments from a moral perspective, essentially exercising compassion and moral responsibility on sentencing. This range of pressure leads the majority of the participants to avoid taking any risks on sentencing for fear of being judged by their superiors, and thus, follow the standard minimum sentencing.

The majority of the participants indicated, also, that since issues of corruption which seemed to pervade the entire area of law enforcement was a source of public mistrust, the majority of the participants avoided attracting public attention. This avoidance leads to some contributions towards the greater use of imprisonment and following the prosecutor's indictment. Thus, the majority of the participants were insulating themselves from society's prejudices.

The limited access to medical assessment was another issue hindering effective sentencing. Due to the requirement of assessment about the level of drug use not being met, some judges were discouraged from sentencing the drug offenders into rehabilitation. Another factor that adds constraints to the pursuit of justice seemed to stem from the requirement of medical assessment as the only source of knowledge. This is challenging because they recognised the fact that some offenders who are economically weak were discredited as having challenges paying for assessment, preventing them from

receiving rehabilitation. These constraints may suggest that being poor is behind the failure to receive equal access to treatment.

All these challenges contribute to the reproduction of structural inequality and ultimately have a negative impact on justice. This reproduction of structural inequality has incited resistance from the substantial minority of the participants, which is shown in their attempts to exercise judicial discretion to lower class drug users in making their sentencing achieve broader social justice. The extent of this exercise is presented in the following chapter.

Chapter 6: Exercising Judicial Discretion

This chapter presents the findings that address the second research question "What are the Indonesian court judges' stated aims when sentencing minor drug offenders?" To address this research question, in Chapter 6, I present cases where the substantial minority of the participants appeared to resist the punitive enforcement of the law, through their interpretation of the law. The findings are considered in light of the way in which the substantial minority of the participants attempt to exercise judicial discretion which is visible through negotiating the judicial process. I present this form of negotiation as being achieved through judicial persuasion, encouragement, and consensus among the panel of judges. I present evidence that the substantial minority of the participants attempt to exercise discretion in the light of the influences of Sunni Islam in determining 'justice', and I also present the various models that underpin the participants' attitudes, and the findings are presented in this chapter.

Negotiating the Judicial Process

In the study presented in this thesis, the negotiation of the judicial process is evident in three different ways, i.e. through persuasion, encouragement and consensus. Not only is the court hearing of sentencing heavily influences by these things, but they also function as negotiating factors in the imposition of the sanction. The interviews with Urban Court judges showed that the substantial minority of the participants (i.e. 4 from 17) tend to negotiate the judicial process in different ways. For example, Judge 6 (Urban) panel indicated that they had an amicable relationship with the prosecutor, thus when a case involving a breach of the new law arose, the judge would discuss a change in the charge against the accused with the prosecutor who set up the indictment. As Judge 6 mentioned:

> *So, before the case was brought to the court, the prosecutors consulted with me about the indictment. After that, the prosecutor changed the indictment and included Rule 127 of drug law about drug misuse. In this way, I advised the prosecutor to change it because the Criminal Procedure Code also allowed for this type of consultation.* (Judge 6, Urban)

The above excerpt highlights how Judge 6 influences the prosecutorial indictment

before the prosecutor presents evidence in the court room. After Judge 6 negotiated with the prosecutor, this indictment was often changed to a lesser charge of using drugs, which had a sentence of only one year. The following extract illustrates this negotiated indictment: "*thank God, there is a change, yes, thank God, all [the prosecutors] work to follow my directives. I feel happy and proud when the prosecutor understands my feelings"* (Judge 6, Urban). This excerpt highlights the Urban Court judges' skill in using persuasion that results in changes to the prosecutorial indictment during the backstage process of setting up the case. The interview with the Urban Court judge has also shown that encouragement is used by the substantial minority of the participants at the panel judges 'meeting. A member of a panel of judges is encouraged to make judgments on a compassionate basis, being sensitive to the offenders' situation, and not discussing how the standard minimum sentencing would apply to the accused person. As Judge 9, for example, mentioned:

> *Let us imagine what would happen if we were in the offender's position, at that time, were you aware that the thing you possessed was Ecstasy, within a second, without any opportunity to think, "What is this in my possession? "This is the core of my approach...* (Judge 9, Urban)

The above excerpt highlights Judge 9's approach in encouraging their peers. Judge 9 was encouraging the panel judges to be imaginative in understanding the offender's situation and being compassionate on sentencing. After Judge 9's encouragement of the panel judges, the panel often resulted in dismissal:

> *...in my opinion, the person cannot be penalised based on handling something without self-awareness that this thing is against the law... In this sense, it goes back to basic "better to set free a thousand guilty people rather than to punish one innocent person", and interestingly, ten of my cases of dismissal of sentencing have been approved by the Supreme Court* (Judge 9, Urban)

The above excerpts highlight the approach of the substantial minority of the participating Urban Court's in encouraging their members of the panel to be reflective. The judge considers that handling drug cases without judges having self-awareness means that this drug is not illegal, and the accused person cannot be penalised. In doing so, Judge 9 is encouraging their members of the panel to interpret the fact and the relevant law

differently. The substantial minority of the participating Urban Court were led by their own interpretation about the facts and the relevant law, and this helped to develop self-confidence. As Judge 8, for example, mentioned: *The judicial sentencing is led by the heart and the factual information before the court. Therefore, if we are confident, then just do it! Whatever the media comment, or whatever is being examined by the judicial commission, just let them know!* (Judge 8, Urban). The comment from Judge 8 (Urban) provides a useful illustration of this interpretation of the facts and the relevant law. There were enormous variations between different Courts. In Urban Courts, the substantial minority of the participants developed confidence once they made judgments on a moral basis, essentially being compassionate and considering the information before the court. In the situation where the written statute is deemed to be more an expression of political interest and less of discretion for the judiciary, the substantial minority of the participants was seen to inject morality into the process of sentencing. In Rural Courts, the substantial minority of the participants (i.e. 2 from 11) explained that they were also seeking consensus with other panel judges to minimise unjust sentencing by developing self-awareness. As Judge 18, for example, illustrated: *I see fellow judges follow their hearts on sentencing. For example, if it was impossible for the drug user to receive rehabilitation due to lack of facilities and capital, the judge would compensate by giving a lighter sentence so that those offenders who become victims of their circumstances [drug users] would not be too long in detention.* (Judge 18, Rural)

Comment from Judge 18 (Rural) provides a useful illustration of this consensus-seeking with other panel judges about sentencing options during the informal meeting. The above excerpt highlights how Judge 18 developed self-awareness in jurisdictions where rehabilitation was challenging due to the lack of facilities and capital. After seeking consensus about the importance of making judgments on a moral basis, the substantial minority of the participating Rural Court agreed to sentence the minor drug offenders to shorter periods of detention than guidelines stipulate. The substantial minority of the participants also expected that their practices would influence their fellow judges' practices. The interviews with the participating Urban Court indicate that other judges also learned to be more confident in exercising discretion by referring to their fellow judges. The majority of fellow judges followed Judge 13 (Urban) and Judge 6 (Urban) who were

confident in sentencing below the standard minimum:

> *After our downward departure from the standard minimum sentencing, other fellow judges become less worried about following my sentencings. Then, their sentences were based on the quantity of drugs. This is good news because, previously, other fellow judges were concerned: "what would happen if we depart downward from the standard minimum sentencing?" They were concerned about the legal consequences that would affect them.* (Judge 13, Urban)

> *In general, colleague judges, who were on the same panels with me, approved of my thinking and agreed with it... the majority of my judge colleagues, whom I have known during my career as a judge, say 'it must be as it is' [the offenders deserve to be sentenced below the standard minimum] …'* (Judge 6, Urban)

The comments from Judge 13 and Judge 6 (both Urban) provide a useful illustration of this kind of consensus-seeking among the member panel of judges about departure from the standard minimum sentences. Here, Judge 13's assertion refers to the fact that learning from peers who are confident in sentencing below the standard minimum seems to be a positive culture whereby the judge can learn to solve the problem of disproportionate sentencing. Here, Judge 6 indicated that he received wider acceptance from his fellow judges. In doing so, the interpretation of sentencing options was displayed in their capacity to shape the fellow judges' sentencing practices in relation to downward departure from the standard minimum sentencing. Thus, Judge 13 and Judge 6 were exercising discretion in an antagonist role within the requirement to follow the standard minimum sentencing. Generally, across the two jurisdictions, the substantial minority of the participants emphasised that their downward departure from the standard minimum sentencing was because of their awareness of the structural issues that underlie minor drug offences. Therefore, they aimed to reach agreement about the exercising of discretion in sentencing rather than following the minimum sentencing. As Judge 13, for example, illustrated:

> *...we agreed to a sentence that was below the standard minimum. This sentencing was purely led by our hearts because of the disproportionate level of punishment that would be received considering the quantity of drugs the offender had/level of evidence of daily drug usage the courts had.* (Judge 13, Urban)

The above excerpt illustrates the judge's attempt to reach agreement. Here, Judge 13 (Urban) concurred with a downward departure from the standard minimum sentencing on the basis of proportionality. The small quantity of drugs handled by the offenders led to judicial sentencings below the standard minimum. In doing so, the interpretation of the sentencing options was presented by the substantial minority of the participants as departing from the standard minimum sentencing. Another process of negotiating the judicial process was presented by the substantial minority of the participants (i.e. 2 from 31) in deviating downwards from the initial indictment. The following interview data illustrates the way in which Judge 26 reached agreement to confidently decide the case outside the scope of the initial indictment: "*...we insisted on sentencing them under Rule 127. This case made a difference because although the offenders were charged under Rule 112, we sentenced them under Rule 127.* (Judge 26, Rural). Here, Judge 26 (Rural) was reaching agreement to decide the case confidently outside the scope of the initial indictment in order to achieve justice. In doing so, the negotiation of the judicial process by the substantial minority of the participants was displayed in their agreement to redefine the sentencing options. It is apparent that the Supreme Court's response to this topic about the aim of sentencing echoed the explained redefining of the sentencing options.

> *Nowadays, due to a large number of small drug cases, the judges feel that they are being coerced to impose the minimum sentence of four years. Therefore, many judges have 'crossed the border' meaning that some judges sentence differently from the initial indictment*. (Judge 29, Supreme Court)

The above excerpt highlights the Supreme Court judge's awareness of exercising judicial discretion. In doing so, the exercise of judicial discretion is displayed in the substantial minority of the participants' capacity to sentence differently from the initial indictment. In a similar vein, another form of interpreting the imposition of sanctions was displayed in the substantial minority of the participants' capacity to influence the prosecutor. As Judge 6, for example, illustrated:

> *I advised the prosecutor when she consulted me about the indictment of the case before the first court hearing... I said: Why do you not charge the offender under Rule 127 about drug use? Do you fear [that the drug offenders] are being punished lightly? I said: Do not be like that! After*

that, the prosecutor changed the indictment and included Rule 127 of drug law about drug misuse... (Judge 6, Urban)

The above excerpts highlight the judge's attempt to influence the outcome of the sentencing. A number of different power dimensions may be operating here (e.g. gender[25]) since the judge is male and the prosecutor is female. Judge 6 (male) might be reluctant to be dictated to by female prosecutor about how the sentencing outcome should be produced. Instead, Judge 6 asserts his proactivity in questioning the prosecutor's authority to change the initial indictment. In doing so, the negotiation of the judicial process is displayed in the substantial minority of the participants' capacity to shape the prosecutorial indictment. In a similar vein, another form of negotiation is displayed in the substantial minority of the participants' capacity to seek consensus of other panel judges in exercising discretion in sentencing into rehabilitation. In seeking consensus of other panel judges to develop their levels of confidence, the substantial minority of the participating Urban Court (i.e. 2 from 17) used a range of techniques.

First, during the panel meeting, the substantial minority of the participating Urban Court would influence other judges and seek agreement. As Judge 8, for example, illustrated:

...One of the panel judges asked: Should we hear the medical doctor at court hearings? ... Finally, we were convinced that, we needed also to hear directly from the medical doctor... After that, we are confident that the offender is worthy of the status of drug misuser and eligible candidate for rehabilitation. (Judge 8, Urban)

The above comment from Judge 8 (Urban) provides a useful illustration of the kind of attempt to find an agreement at the panel meeting. The panel's discussion around assessment and expert witnesses often results in panel agreement about the offender's eligibility for rehabilitation. In doing so, the negotiation of the judicial process is displayed in their capacity to seek the panel's agreement to support the offender's rehabilitation.

Second, the substantial minority of the participating Urban Court (i.e. 2 from 17) take advantage of appealed cases as a way of seeking the Supreme Court's support, which is reflected in the Supreme Court internal regulation (SEMA) and the Supreme Court

[25] I am providing information about the participants' gender in Appendix 10.

external regulation (PERMA). Accordingly, another form of negotiation is reflected in seeking institutional support from the Supreme Court. As Judge 8, for example, illustrated: *Alhamdulillah, it was proved now that there are circulars and regulations from the Supreme Court concerning the judicial approach to sentencing drug misusers. One of the main ideas of the Supreme Court regulation is about the rehabilitation of drug offenders…* (Judge 6, Urban). Judge 6's and Judge 8's implicit endorsement indicates that the judges do not only aim to reflect their beliefs in sentencing, but also try to interpret through legal structure. This is because negotiating through structured influencing, results more widely in sentencing offenders to shortened periods of detention, which has an impact on the reduction of the prison occupancy rate. The interview with the Urban Court judge revealed the following reason for shortened periods of remand:

> *The fate of the people is in our hands; we are the people who will impose the sentencing. Therefore, I think it is fine if we want to discount the sentence, we are not taking advantage of it any way, are We Sir? Because it will affect prison in general.* (Judge 12, Urban)

This extract is an example of sentencing discounts as a means of negotiating the way through the legal structure to yield wider reduction of prison occupancy rates. Third, the substantial minority of the participants (i.e. 4 from 31) used the language of 'victim of circumstances' which they attributed to minor drug offences. This adoption of the language of 'victim of circumstances' led the substantial minority of the participants to be confident in sentencing below the standard minimum. As Judge 28, for example, implicitly endorsed:

> *We should be able to choose our point of view between the offender's family perspective, the offender's perspective, and the victim's perspective. If the offenders are actually a victim of their circumstances, then we have to be confident in departing downward from the standard minimum sentencing.* (Judge 28, Rural)

Judge 28's implicit endorsement indicates that the substantial minority of the participants aim to consider the offenders not as perpetrators but as victims of circumstance. This is because considering the offender as a victim of circumstance will result in convicted offenders being sentenced under Rule 127 as a drug user, which enables the judge to send drug users for treatment. It is apparent that the Supreme Court's

response to this topic about the aim of sentencing, given the adoption of the language of 'victim of circumstances', enables the judge to sentence the convicted offenders leniently:

> *...recently, we agreed that the convicted offenders would be sentenced under Rule 127 as drug users. These sentencing policies came from the Supreme Court. In my view, these sentencing policies were practised by the Lower Courts and the guidance regarding the quantity of evidence of daily drug usage was determined under the Supreme Court circular... Moreover, we should consider the offender's urine... since this is an indication of using drugs...* (Judge 30, Supreme Court)

The above excerpts highlight the participating Supreme Court Judge's acknowledgment of leniency. The convicted offenders were sentenced under Rule 127 as drug users which allowed sentencing to rehabilitation. This sentence under Rule 127 as drug users is different from prosecution under Rule 114[26] as drug suppliers. Thus, the leniency is displayed in the adoption of the language of 'victim of circumstances'. This understanding is also reflected in the Supreme Court's recent sentencing. As Judge 9, for example, indicated:

> *The indictment was under Rules 111 and 114, and we sentenced offenders to five years' imprisonment. My sentences were approved by the Higher Court, but the Supreme Court significantly reduced the sentences to one year.* (Judge 9, Urban)

The above excerpts highlight that not all judges are keen on leniency but that the Supreme Court's leniency is demonstrated by their significant reduction in the length of the recent sentencing. This significant reduction sends a message to the Lower Court to be lenient with certain cases. The Supreme Court reduced the sentences significantly from five years to one year. Another form of negotiating the judicial process was displayed in the substantial minority of the participants' capacity to balance the offender's position in court. The interview data symbolically illustrates the way in which the substantial minority of the participants (i.e. 4 from 31) considered their role to be a director, balancing the offender's position in the court drama. The following extract illustrates this point:

[26] Rule 114 is concerned with the rules about illegal supplying of drugs class 1 (e.g. cannabis). This rule holds a minimum of 5 years and a maximum of 20 years.

> *During the court hearing, there is an important role for the judge... It is the psychology of the court hearing; the judge should be aware of the psychology of the court hearing, including the psychology of the prosecutor, the offender, the legal counsel, and the panel member... As the director, the head of the panel should have the capacity to arrange the court hearing, and not only the formality of the court hearing; there is a time for making a joke if necessary, without reducing the credibility of the court...* (Judge 9, Urban)

The comment from Judge 9 (Urban) provides a useful illustration of this kind of court drama. As a director, the various actors in the court drama should know and understand their role in the overall production. This comment indicates that the court hearing was orchestrated to balance the offender's position in the court. As Judge 9 asserted, this was because the offender might feel powerless either next to the prosecutor or the judges or might be anxious about talking directly. Given the offender's inability to stand up for their rights, and their inability to be assertive about fair treatment, there was a requirement to identify power imbalances and to provide procedural justice. As a director, Judge 9 ensured that his panel knew about the power relations extant in the court hearings:

> *In court hearings, we should learn about the human attitudes, including the attitudes of the prosecutor, the offenders. If we wish to conduct a successful court hearing, then we should act as a good director; a good choreographer is a path to success.* (Judge 9, Urban)

Further, Judge 9 recommended the scenario for influencing the defendant. The interview data demonstrate the judge's role as the influencer. According to my observations, the court hearings were orchestrated to influence the offender's decision not to spend money on drugs.

> *Judge 9 Panel: It would have been the same amount of money to buy fish ... and I heard that using methamphetamine makes you awake all day, right?*
>
> *Offender: Right.*
>
> *Judge 9 Panel: What is your job?*
>
> *Offender: I sell groceries.*
>
> *Judge 9 Panel: So, methamphetamine makes you stronger for lifting groceries?*

Offender: Yes. (Extract from court hearing Observation Notes, Judge 19 Panel)

The above extract from a court hearing observation provides a useful illustration of the orchestration of this court drama, the focus on 'improving' the offender's lifestyle. Judge 9 advised the offender that consuming fish is healthier than consuming drugs. As illustrated by this example, the judge deliberately and consciously orchestrated the court drama to produce certain outcomes. At the panel meeting, Judge 9 also employed an improvisational act to affect a certain outcome. He tried to find key issues in the drug cases brought to the court; to present key arguments and to find key justification for the criminal procedure. The following extract illustrates this point:

> *I try to find the interesting part in any case brought to the court. For example, the panel thought the case was outside its jurisdiction; however, I became more curious... I looked back to the criminal procedure... It then became clear... I showed the rule to the panel, and the panel responded: okay. So, the case was heard in court in the place in which the majority of witnesses lived. It was evident that the panel agreed again...* (Judge 9, Urban)

The above comment from Judge 9 provides a useful illustration of this interpretation of the sentencing options at the panel meeting. The above comment highlights Judge 9's enthusiasm in finding the interesting part of the drugs case and seeking justification for the criminal procedure. The issue of jurisdiction made Judge 9 more curious. This curiosity often led to the panel being more informed and agreeable. Therefore, at the panel meeting, another form of interpreting the sentencing options is displayed in the substantial minority of the participants' capacity to ensure an informed and agreed form of the sentence by the panel. However, the substantial minority of the participants were mindful that this form of negotiation at the panel meeting ought to be based purely on compassionate and moral responsibility. As Judge 9, for example, mentioned:

> *I realised, that to become a judge, we should have the capacity to influence people during their role as the member or as head of the panel, so long as it is guided by the heart. This ability to influence should be based purely on the heart. Because, once the judge has a conflicting interest, then we could never be able to influence.* (Judge 9, Urban)

The above excerpt highlights Judge 9's caution on interpreting the form of sentence influencing other judges at the panel meeting. The judicial attempt to negotiate the form of sentence ought to be free from conflict of interest. Thus, the judicial caution on interpreting the form of sentence is displayed in their capacity to assess their own intention and to make judgement on a moral basis. Moreover, if the judge's effort to negotiate were unsuccessful due to competing interests, the substantial minority of the participants recommended the need for them to be tolerant. This could be done by practising Sunni Islamic values of tolerance to minimise conflict on the panels:

> *So long as we use our hearts in our sentencing, I will try to influence. However, if there is a conflict of interest, no matter how hard I am influencing, it will be reversed back! If that happens, then I will remind myself that the most important part of my duty has been done, to voice my belief, that is! Whether my belief is followed, it does not matter to me.* (Judge 9, Urban)

It is apparent that the above assertion enhances the requirement of the judge's role regarding the capacity to influence the panel judges on sentencing. These requirements stress the need for tolerance among member of panel judges. Similarly, the substantial minority of the participating Rural Court judges (i.e. 2 from 11) recommended the need for the judge to have an active role in the interpreting the sentencing options with the local BNN, the offenders, and the offender's families:

> *I have a dual role as a public relations officer as well, so I can inform the head of local BNN[27] in the rural jurisdiction, about the SKB[28] and about providing rehabilitation... We also advised their families at the court hearing, that the aim of these sentences was a more active approach to treatment.* (Judge 28, Rural)

Judge 28 indicates that an active role in the negotiating process inside and outside

[27] BNN it the National Narcotics Agency. The number of drug-dependent individuals undergoing drug rehabilitation at the National Narcotic Board (BNN) treatment Unit, at Lido-Bogor (Urban).

[28] SKB is the six ministries' Joint Agreement about treatment provision. The current regulation (SKB) ruled that "(1) those convicted, who have substance use disorder and victims of circumstances and are not related to drug dealers, are eligible to medical rehabilitation and/or social rehabilitation. This rehabilitation carried out in prison or detention centre and/or rehabilitation institution that has been designated by the Government. (2) those convicted, who have substance use disorder and have a dual function as drug dealers, are eligible for medical rehabilitation and/or social rehabilitation in prisons or detention centre" (SKB Regulation number 01/2014).

courtroom will allow the local BNN, the offenders, and the offender's families to be better informed of their right to treatment. During fieldwork, there seemed to be a lack of awareness about the current Joint Agreement about treatment provision (SKB) among the prosecutor, the police who were witnesses, and the offender's lawyer. In this situation, it raised concerns as to whether the offenders were aware of their right to treatment. To seek a balanced power relation between the parties in negotiation, the substantial minority of the participating Rural Court across the two jurisdictions aimed to provide a lawyer to defend the accused person and to speak in mitigation. The following extract from a court hearing illustrates this point:

> *"Judge 24 Panel: Did you understand the indictment? We will provide a free lawyer for you; the government will pay for this lawyer. The proceedings will continue next week to hear your defence from your lawyer" (Extract from court hearing Observation Notes, Judge 24 Panel).*

As Judge 24 (Panel) highlights, in the court hearing, the aim was to balance the power relation between the offenders and the prosecutor. At the court hearing, the substantial minority of the participating Urban Court (i.e. 2 from 17) deliberately attempted to balance this power relationship. Consider, for example, Judge 9's (Urban) comment:

> *I think, sometimes, the judge should stand behind the offender because the offender, who has no defence lawyer, is in a vulnerable position... In this situation, the judge should balance and position the offender equally and uphold the offender's rights against the prosecutor... only within these conditions, would the notion of a fair trial exist.* (Judge 9, Urban)

The above excerpts highlight Judge 9's attempt to balance power relations by 'standing behind the offender'. Judge 9 attempted to balance the offender's position equally and support the offender's rights against the prosecutor. In the situation where the prosecutor is deemed to be asking tendentious questions, judges could ask the prosecutor to deliver open-ended questions. In the situation where the prosecutor is deemed to be overusing law terminology, judges could ask the prosecutor to use plain language. In the situation where the prosecutor is deemed to be making claims about conviction, the judges could ask the offender to make a counterclaim. For Judge 9, insisting on upholding procedure is a deliberate strategy to reconcile the power imbalance between the prosecutor and the offenders. Another attempt to balance power relations was

displayed in the substantial minority of the participating Urban Court capacity to ensure that rehabilitative support is in place. The following extract illustrates this point:

> *Once we sentence into rehabilitation, then the cost of rehabilitation should be a burden to the state and not to the offender. Therefore, we are not looking at the offender's social background, or whether the offender is wealthy or poor. Therefore, once being sentenced to rehabilitation, the cost will be covered either by the state or by the public hospital.* (Judge 8, Urban)

As shown, Judge 8 (Urban) attempted to ensure that the offender's social class did not become an obstacle to the offender's access to rehabilitative support. The cost of rehabilitation was a burden to the state once the panel judge sentenced the offender to rehabilitation. The judges are required to consider the offender's acceptance of the drug sentencing. Therefore, the judge's role was also presenting an acceptable form of sentence in the eyes of the offenders. Since the judge could do so, the tactic is to discount the sentencing. The substantial minority of the participants (i.e. 2 from 31) noted that responding to an offender's family who come to her/him and asks for help would reduce the length of sentencing: "*I see no problem with allowing intervention so long as the length of sentencing is not too far a departure from the standard minimum…"* (Judge 2, Urban). As Judge 2 indicates, departing from the standard minimum is seen as acceptable for the offenders and the offender's family to negotiate the acceptable form of the sentence. The substantial minority of the participating Rural Court seeks agreement among members of the panel of judges. Consider, for example, Judge 23's (Rural) comment: "*On my first appointment as the judge, Judge 24 who was one of our members, I said to Judge 24: how if we categorise the offenders as drug misusers?* (Judge 23, Rural). As shown, Judge 23 was seeking negotiated agreement in the panel meeting. The judicial agreement to sentence the offender to rehabilitation is decided by three panel judges. Thus, the sentencing to rehabilitation is a result of the negotiated agreement.

The interviews with participating judges across the two jurisdictions also indicate the need to prevent conflict during the negotiating process. There is a need for tolerance among members of the panel, regardless of their ideological differences. The substantial minority of the participants note that tolerance allows condition for negotiating process; as summarised by Judge 9, who practises the Sunni Islamic teaching of tolerance to

minimise conflict in the panels. Judge 9 still had to respect the majority voice within the panel despite regarding the majority voice as potentially having a conflict of interest in the case: "*I am trying to practise the Islamic teaching... the important thing is that we have made an effort to the best of our capabilities... This tolerance is another approach to avoid conflict in the panels*" (Judge 9, Urban). These excerpts highlight the value of tolerance to minimise conflict in the panels. It is apparent that the Supreme Court's response to this topic about the aim of sentencing echoes the explanation given about tolerance: "*Due to my current position as Supreme Court justice. I prefer to take a moderation approach. As the judge, I appreciated the thoughts of other fellow judges...*" (Judge 31, Supreme Court). These finding suggests that the substantial minority of the participants use the practice of tolerance while negotiating the judicial process on sentencing.

The Pursuit of Justice

When asked what judges are trying to achieve when sentencing minor drug offenders, the substantial minority of the participants across the two jurisdictions tended to view it as negotiating the competing aim between legal certainties and pursuing justice. They were also in no doubt that the competing aim of the law was negotiated by this beneficial aspect, as is evident from the following quotes from two judges:

> *... [It's a metaphor of being like a magnetic pole] Pursuing justice and pursuing legal certainty are located at opposite ends of a magnetic pole. Pushing the scale toward pursuing justice resulted in pulling the scale back toward legal certainty. Pursuing justice and pursuing legal certainty are always competing with each other. What will be beneficial to the offender, is pulling together both justice and legal certainty creating a balance...* (Judge 23, Rural).

> *My sentencing tried to balance between legal justices - the current offences and convicted of violating regulation about hard medicine- and moral justice- buying hard medicine without the prescription is in violation of the public order and endangers themselves.* (Judge 16, Urban)

The above excerpts highlight the judges' style in negotiating the competing aims to pursue social justice. Here, Judge 23 (Rural) asserts that a progressive judge strives for

social justice that will be beneficial to the offender (social justice). Judge 16 (Urban) tries to achieve a balance between moral justice and legal justice. In doing so, the judge is seen as negotiating the competing aim to pursue social justice. It is apparent that the Supreme Court's responses to this topic about the aim of sentencing echo the explanation given about sentencing being a negotiating process as a means to pursue justice:

> *"…On the one hand, the enforcement of the drug law tends to criminalise drug use, while, on the other hand, the sentencing policy aims to reduce the prevalence of drug misuse… I prefer to take a middle course…, it is still possible that the period of rehabilitation will be counted as part of the period of sentencing" (Judge 31, Supreme Court).*

As shown, Judge 31 (Supreme Court) attempts to negotiate the competing aim by stating that the period of rehabilitation would be counted as part of the period of sentencing. Therefore, Judge 31 is attempting to negotiate the competing aim as a means to pursue social justice. Regarding the pursuit of 'justice', there is enormous variation between different judges across the two jurisdictions. The substantial minority of the participating Rural Court (i.e. 2 from 11) encouraged other judges to interpret what justice is. Consider, for example, Judge 28's (Rural) comment:

> *The judge is not the mouthpiece of the law. We should deliver a sense of justice because the level of culpability among offenders is varying. We will sentence differently those offenders who carry 0.1 gram of drugs at the time of being arrested, and those who use drugs at the time of arrest, even with a more significant quantity of drugs. We should help these drug users, this is our approach to sentencing, as a panel, we all agreed.* (Judge 28, Rural)

Comment from Judge 28 (Rural) provides a useful illustration of this kind of judicial interpretation of justice. Here, Judge 28 (Rural) tries to interpret justice into circumstances and the varying degrees of harm among drug offenders. He wants to ensure the audience knows that judges are not the mouthpiece of the law, but that they try to pursue justice. The interviews with the participating Urban Court Judges indicate that the substantial minority of the participating Urban Court (i.e. 2 from 17) try to consider the benefits of sentencing while at the same time pursuing social justice.

> *I am trying to pursue social justice in the hope that my sentencing will benefit others; at least, I have tried to touch the panel's heart. For*

> *instance, in the case of women offenders, I consider, also, that the witnesses had said that the offender had so far never been involved with drugs. In doing so, I add the facts of the case as flavour to my recipe in sentencing.* (Judge 9, Urban)

Here, Judge 9 (Urban) attempts to consider the benefits of sentencing to female drug offenders. The substantial minority of the participants across the two jurisdictions, express their expectations that their sentencing pursues social justice. The judicial attempts to pursue social justice are administered in two ways, the first administration of social justice is to produce sentences that would allow the offender the opportunity to receive treatment. The following extract summarises this point: "*…the progressive judge will sentence the offender under Rule 127 courageously below the standard minimum sentencing. She/he strives for social justice that will be beneficial to the offender, although it will abandon legal certainty somewhat"* (Judge 23, Rural). This excerpt highlights the approach of the substantial minority of the participating Rural Court in striving for the benefit of the offenders as a means to reconcile the competing aim between the legal certainty and pursuing justice. In these competing aims, the substantial minority of the participating Rural Court categorise the offenders as drug misusers who would benefit from treatment. The second objective of social justice is lies in producing short sentences applying to the drug users with the aim of allowing them to receive an early release and permitting them early treatment outside prison:" …*after release from the detention centre, the offender again is willing to receive rehabilitation" (Judge 25, Rural).*

> *…the reason we give short sentences in the hope that they could be released from the prison as quickly as possible and that they will receive treatment outside prison, become human again after treatment and can return to normal. For example, in Lido[29], spiritual treatment is provided.* (Judge 27, Rural)

Here, it appears that it is perhaps Judge 27's (Rural) hope that drug users will be able to cope with issues of drug use after treatment and that they can return to normal. The substantial minority of the participating Rural Court (i.e. 2 from 11) indicate that the aim of giving drug users short sentences is to enable them to be released sooner from

[29] In *Lido*, medical treatment, social rehabilitation, therapeutic community, religion-based treatment, acupuncture, and hypnotherapy were provided.

prison and to enable them to receive treatment outside prison. In doing so, the substantial minority of the participating Rural Court is seen to be exercising discretion in supporting an alternative way to treatment in the community. The substantial minority of the participating Rural Court explicitly convey that the aims of sentencing are to develop family and community support. In turn, this supports the drug offender's rehabilitation:

> *I also always inform the offender while he/she is accompanied by their family in court... There is a better chance in society. With media support, and with the offender's consciousness, and their family support. "This is my son," or "This is the member of my family, and they are a drug user". These were surprising to me... secondly, the society's awareness that the local BNN can provide rehabilitation, and the society is coming voluntarily to local BNN and asking for rehabilitation, this is starting to happen.* (Judge 28, Rural)

The above excerpts highlight Judge 28's (Rural) consideration about the importance of society's awareness in supporting the drug offender's rehabilitation. The offenders' families came forth voluntarily regarding local treatment and asked for rehabilitation. Whilst efficacy of rehabilitation could be measured by an improvement of the offender's lifestyle, there is an explicit expectation from the substantial minority of the participating Urban Court judges (i.e. 2 from 17) that sentencing is aimed at educating drug users about being productive citizens. The substantial minority of the participating Urban Court indicates the way in which they educate the offender in court about the beneficial aspect of sentencing. The following extract indicates this point:

> *...the first person who understands the aim of sentencing, the content of sentencing, and the beneficiary of the sentencing is the offender. The second is society's understanding of drugs. The reason such a drug cannot be consumed, cannot be ordered, cannot be possessed, and cannot be bought. The reason it should be reported, if found, the reason the offender should be rehabilitated if he has an issues of drug use...* (Judge 6, Urban)

Comment from Judge 6 (Urban) provides a useful illustration of the importance of the offenders' acceptance and the society's support toward sentencing minor drug offenders to rehabilitation. It seems that by understanding the socio-economic background which causes the individual to use drugs, this would be one step towards

managing their drug use. In doing so, the substantial minority of the participating Rural Court judges consider the benefits of sentencing the offenders into rehabilitation in their attempts to pursue justice. In their attempts to pursue justice, the substantial minority of the participants express the importance of changing the narrative. There were enormous variations between different Courts in articulating these issues. In Urban Courts, the substantial minority of the participants were concerned about the loss of direction in responding effectively to drug offenders:

> *If we agree that drugs have become an enemy, then we need to seek an agreement; what are we going to do with the offender? What we are going to achieve? So long as there was an unclear and unstructured program from the government, then it will be useless! I think these depend on those in the authority.* (Judge 9, Urban)

The above excerpt highlights the Judge 9's (Urban) concern about the government's program being unclear and unstructured. Consequently, the war on drugs is seen as having lost its direction. The substantial minority of the participating Urban Court continued to doubt taking part in the war on drugs. The next extract illustrates this point:

> *If we still old fashionably agree to the war on drugs, then we should not be breaking the law even in the name of the war on drugs. This is because, if we break the law, then it will become the real war on drugs. Perhaps, it would be better to approach it with kindness; we cannot approach it by means of war or by an intimidation approach or by a trapping approach. If these approaches are still practiced, then the war on drugs would lose its legitimation.* (Judge 9, Urban)

The above excerpt indicates Judge 9's concern about the current approach to the war on drugs having abandoned human rights. The substantial minority of the participating Urban Court continued to offer a better approach to it with kindness. They recommended the need for considering the circumstances of the offender and what has led them to their offence, thus viewing the offender as a human and not as an objective case. Consider, for example, Judge 6's (Urban) comment about his reluctance to sentence a drug user who was being arrested repeatedly because he believed that drug users in these circumstances did not deserve to be punished:

> *If the offender keeps the drug with the intention of using it for his or herself, of course, in these cases, we should be more sensible in dealing*

with the offender... I do not want to sentence those offenders who use cannabis or other drugs for the first time or the second, or the third or the fourth or the fifth time being arrested because she/he had no reason for urine tests, no [medical and social] assessment. (Judge 6, Urban)

The above excerpt illustrates the need for judges to be sensitive in responding to offenders who present in court for using drugs recreationally without the accompaniment of adequate information and assessments to support their charge. It is the view of the substantial minority of the participating Urban Court that those offenders who use drugs should not necessarily be punished. This does not mean that he only takes a lenient approach, but rather that as acceptable strategy, the court should start with a lenient approach to drug offences and expand after achieving wider public support. How this is presented may depend on the messenger. In their role as a public relations officer, the substantial minority of the participating Urban Court explained that, sometimes, they took advantage of the media coverage to send the message to the public that they attempted to follow the rule:

It [sentencing] was appreciated, also, by the National Anti-Narcotics Agency of the Republic of Indonesia (BNN) and by the voluntary sector on anti-anarchy to drug users (GRANAT). The case was reported, also, on Detik[30] [online newspaper]. They all appreciated it. (Judge 4, Urban)

The comment from Judge 4 (Urban) above provides a useful illustration of this form of social justice. Judge 4 considers that media coverage is an excellent opportunity for sending a message that reaches the public, that is, that rules are being followed in one Rural Court, Judge 28 offers slightly different approaches on how to handle the media. Judge 28 mentions that the media's role is helpful in strategically disseminating the judicial approach to treatment provision, particularly when the judge already had an amicable relationship with the media. Judge 28 believes it is strategic to disseminate information about the six ministries' (SKB) Joint Agreement about treatment provision. Judge 28 comment is particularly apt:

After downward departure from the minimum sentencing, the prosecutor began to question. Then, we offer them an explanation; we use the SKB

[30] The Detik.com is an online newspaper, meaning ‘time in a second’. People can subscribe to this to receive timely and updated news.

> *as the basis of our sentencing... I offer them the copy of SKB and, also, continuously inform them... I shared this SKB through the media and, also, I informed the media continually that, once the members of community uses drugs, it would be better for them to be referred to rehab.* (Judge 28, Rural)

The above excerpt highlights Judge 28's strategic relationship in disseminating the drug user's referral to rehabilitation. A relationship with the media, Judge 28 believes, must be cultivated over time. For Judge 28, this is a deliberate strategy of presenting social justice to the public. Judge 28 strategic relationship is processed through inter-agency coordination and sharing information. Judge 28 believes it is a relationship that inter-agency communication should proactively cultivate, and Judge 28 is willing to cooperate with the media to build cooperation and information sharing. It was this inter-agency cooperation that channelled a more "informed public opinion" and more reasonable and realistic public expectations of rehabilitating drug users:

> *I can inform the head of local BNN in the rural jurisdiction, about the SKB and about providing rehabilitation. After several attempts by the media to help inform the public about the SKB. The process of rehabilitation is starting before the case is brought to the court... We advised their families, also, at the court hearing, that the aim of these sentences was more an approach to treatment.* (Judge 28, Rural)

Here, Judge 28 (Rural) highlights the substantial minority of the participating Rural Court judges' relation with the local BNN, media and public in seeking wider support for offenders' rehabilitation. The substantial minority of the participating Rural Court's efforts and media support, in informing the local BNN and the public about the agreement to provide rehabilitation, shaped the earlier process of rehabilitation before the case was brought to the court.

In their attempts to pursue social justice, the substantial minority of the participants highlighted the importance of shaping the Supreme Court and Government policy. There was an enormous variation that existed between different courts. In Urban Court, the substantial minority of the participants explained that their attempts received support from the Supreme Court. From 2009 until 2014, there seemed to be some changes in the way that the Supreme Court policy dealt with minor drug offenders. Thus, the pursuit

of justice is reflected in the form of support from the Supreme Court. This pursuit of justice was indicated in the following statements: "*… Thank God that the Supreme Court heard my opinion [five years ago]. These have been reflected in the Supreme Court internal regulation (SEMA) and the Supreme Court external regulation (PERMA)"* (Judge 6, Urban).

> *The Supreme Court sentencing follows the Lower Court sentencing, so long as the Lower Court sentencing is rehabilitation, then the Supreme Court will sentence the offender to rehabilitation as well. If the Lower Court did not sentence the offender to rehabilitation, it is rare for the Supreme Court to sentence the offender to rehabilitation.* (Judge 2, Urban)

The above excerpts highlight the Urban Court Judge's power relation in shaping Supreme Court sentencing policy. Here, Judge 6 (Urban) and Judge 2 (Urban) assert that the Supreme Court tends to approve Lower Court sentencing to rehabilitation. This approval is reflected in the Supreme Court's regulation about the rehabilitation of drug offenders. Thus, a substantial participating Urban Court judges are seen to be exercising discretion in shaping the Supreme Court sentencing policy. It is apparent that the Supreme Court's response to this topic about the aim of sentencing echoes the explanation given about policy support of the pursuit of social justice: "*Nowadays in sentencing, the judge pursues not only the legal certainty but also considers the social justice system. It seems that these sentencing policies were implemented down in the Lower Court"* (Judge 30, Supreme Court). The above excerpts highlight the Supreme Court judge's acknowledgement that the placement for rehabilitative support should be within the nearest catchment area. The rehabilitative support should cover medical and social rehabilitation. Hence, the Supreme Court's support of the rehabilitative support is seen as an attempt to pursue social justice. This means that the opportunity and arrangement to provide rehabilitative support as far as possible should be equal and accessible irrespective of the subject's social circumstances. The interviews with the participating Supreme Court judges also indicated extensive support from the policymaker. Recently the government has started to discuss the notion of human rights. The following extract illustrates this point:

> *...the policy coming from the [previous] BNN [head] and the Ministry of Justice and Human Rights, they come here to consult with us. The*

> *Ministry of Justice view the issue of overcapacity in prison from the angle of humanity...* (Judge 30, Supreme Court)

The above excerpt highlights the judge's response to the government's initiative about taking a humanitarian approach to the drug user. The government's initiative to discuss the issue of prison overcapacity from the angle of humanity came in response to the Supreme Court's policy on drug user rehabilitation. Thus, the government's humanitarian reform shaped the pursuit of social justice. In their attempts to consider social justice, the substantial minority of the participants (i.e. 3 from 31) across the two jurisdictions aimed to conform to societal expectations to support those minor drug offenders. Consider, for example, Judge 27's and Judge 8's comment: "*...Those mentally ill drug users should be treated differently. This treatment is perhaps in line with society's expectation that the treatment facilities need to be adequate"* (Judge 27, Rural).

> *That is why nowadays we are focused on sentencing the minor drug offenders into rehabilitation. The aim of sentencing is to ensure that the society becomes aware and people are willing to report themselves if they have issues with drug misuse...* (Judge 8, Urban)

Here, Judge 27 (Rural) asserts his view regarding society's expectations about sentencing to rehabilitation to minor drug offenders. In doing so, Judge 27 highlights that rehabilitation is seen to be in line with societal expectations.

The importance of Sunni Islam in determining 'Justice.'

The importance of Sunni Islam in determining 'justice' may be seen as part of submitting judicial accountability to God. Part of the aim of sentencing seems to stem from the view that sentencing is a vocation and not merely a job. The following extract illustrates this point:

> *I just want my sentencing to be seen as fair in the view of God. I try to approach from God's justice although I realise that I will not be able to be equivalent to God's level of justice. However, at least, I wish my sentencing to be more valuable and to provide more justice in the view of God.* (Judge 9, Urban)

Some of the participant judges indicated that they viewed justice as linked to God and beyond society. Judge 9 (Urban) uses the approach of God's justice to develop fairness.

During my observations, the substantial minority of the participating Urban Court judges (i.e. 3 from 17) attempted to encourage the offenders to pray to God for justice:

> *Offender: I have a wish, my Lord;*
>
> *Judge 12 Panel: You should not wish to me but God. You should be wishing that the panel can bring justice, neither about punishing harshly or softly.* (Extract from court hearing Observation Notes, Judge 12 Panel)
>
> *In my sentencing, if God permitted, I will not sentence to death because life is about human rights, then let God determine the fate. For me, even life sentences are very painful because the life inside prison is different from our life here.* (Judge 12, Urban)

The above extract from a court hearing observation highlights the judge's 'religious' approach of considering sentencing as part of serving God (vocation). The extract from interviews demonstrates that Judge 12 (Urban) stated that the offender's human rights on sentencing reflected the balance between spiritual justice and moral justice. Judge 12 continued to claim that spiritual justice was the ultimate goal: *"I think the ultimate justice is in the hands of God"* (Judge 12, Urban). Sentencing as a way of acknowledging the judicial accountability to God is a recurring theme in these findings. This term "accountability to God" came from the substantial minority of the participating Urban and Rural Court members (i.e. 5 from 28). Consider, for example, Judge 8's and Judge 9's comment: *"...we are not accountable to public protest but to God. That is why the title of our sentencing is "in the name of justice, based on the one God" meaning that we are responsible to God..."* (Judge 8, Urban).

> *...in my opinion, I am accountable to God. Therefore, I am aware that, if I sentence like this, will God be happy or not? I am not bothered whether the boss will be angry at me, or whether society will be angry, the important thing is whether God is angry with me...* (Judge 9, Urban)

As shown, the Judge 8 and Judge 9 were more likely to pay attention to God's approval of sentencing. The substantial minority of the participants in the Urban Court continued to show that sentencing was spiritually produced and validated by the judges' feelings of tranquillity. The following extract illustrates this point:

> *Minimally, when I am sentencing, whether my heart becomes calm, I perceive it as the "sign" from God, from the Highest, at least, that God*

agreed, though perhaps more or less there will be some limitations in my sentencing... (Judge 9, Urban).

God's approval is perceived as being important in balancing the competing objectives of sentencing in practice. Since, in Indonesia, the term "accountability to God" is used in sentencing, some of the participants believe that this “accountability to God” enhances judicial confidence. The following extract illustrates this point:

At that time, the media are being confused because our panel confidently sentences outside initial indictment. I then inform the media that the judge is not the mouthpiece of the law. So long as we are accountable for our sentencing and as long as God permits, then we will be safe. (Judge 28, Rural)

As shown, Judge 28's confidence of their accountability for sentencing was considered to be a result of God's approval. The substantial minority of the participating Urban Court continued to show that their religious beliefs enhanced self-identity and the ability to show mercy:

As human beings, we were born to show mercy to others [biblical]: Love our neighbour, so long as you can help them, then help them. Don't let them go back to being sad, while you can offer your help. If you were able to help, but you ignore them, then it is outrageous.... (Judge 2, Urban)

...the prosecutor charges the offender with a one-year sentence; sometimes, I discounted the sentences to eleven or ten months, there was still some discount in my sentence, even for a month, quite a lot because of the instinct of motherhood, because, principally as human beings, we need to show mercy. (Judge 12, Urban)

The substantial minority of the participating Urban Court members emphasise that the term "accountability to God" is used in terms of sentencing. Judge 12 and Judge 2 (both Urban) use the approach of God's mercy to develop the flexibility to show mercy. It is clear from the findings presented in this study that the substantial minority of the participants try to balance social and moral reasoning. See, for example, the following comment:

I think those offenders do not deserve to receive minimum sentencing since even the religion says that this is not a major sin. Therefore, that was why we as human beings, as a person, I am a Muslim, do not think

> *theologically or only about my religion, when the offenders only keep drugs for their use. What are we going to achieve? If we sentence those offenders with imprisonment, it will create more damage to them! This damage is what I'm concerned with, Sir!* (Judge 6, Urban)

This study shows that the substantial minority of the participating Urban Court are tolerant toward the competing objectives of sentencing. The interview data indicate that reduction in sentencing is a means of reducing prison overcrowding. During my observations, the substantial minority of the participating Urban Court members attempted to present an awareness of the relativity of distribution of justice from an individual perspective:

> *Lawyer: In the name of justice, the judge is perceived as God's second hand in the world... this objection is not only for the offender, who is in the "hot seat" but, also, for the sake of justice. I believe that the judge will take our objection seriously.*
>
> *Judge 12 Panel: To the offender, please pray that our proceedings go well. Also, we can pursue justice, not too harsh or not too soft because justice is relative, you might feel it just, but not for your adversary* [31]*[prosecutor].* (Extract from court hearing Observation Notes, Judge 12 Panel)

The above extracts from a court hearing observation is an example of how Judge 12 (Panel) finds a basis for 'discretion' based on their sense that they are 'God's second hand'. The moral responsibility of the panel judge when sentencing is marked with high expectation within the Sunni Islamic community. This expectation is negotiated through the orchestration of the court drama. Religious perspectives inform and give meaning to the functions of the court drama. Although in Indonesia, the term "accountability to God" is used in sentencings, this study shows the gaps between justice in aspiration and practice. The interview data indicate that, while Judge 12 (Urban) aspired to release people, in practice Judge 12 never dismissed an offender:

> *I hope that my sentencing does not cause a disadvantage. Although definitely, our sentencing may disadvantage the offender, I hope that does not happen. My principle is "better to release people, than punish*

[31] Adversary here relates to how the offender is positioned opposite to the prosecutor in the courtroom, and thus they appear to be battling each other.

the innocent". So, if for example, we make a wrong sentencing, there is still a God who will give ultimate justice… I have not been dismissing an offender. (Judge 12, Urban)

These extracts are examples of the irony regarding sentencing aspirations not being reflected in practice. During several observations, a number of the participants presented judicial dismissive.

Judge 4 Panel: Hi offender! Can you hear the sentencing? According to the procedure, you have three options: firstly, to accept our sentencing. Secondly, you can appeal, thirdly, you will think about it for seven days. If you appeal, the Higher Court might disapprove of our sentencing, or dismissal, or discount, or pass a longer sentence. To the offender: are there any questions?

Offender: I have a wish, my Lord!

Judge 4 Panel: I don't want to hear anymore whether you appeal or accept our sentencing, the criminal procedure allows a time for you to think and, therefore, we don't need your decision at the moment!

Offender: I wish I could make a request, my Lord!

Judge 4 Panel: No, you cannot, the sentences are passed, if you are not happy with it, you can appeal! Are there any more questions?

Offender: No. (Extract from court hearing Observation Notes, Judge 4 Panel)

The above extract from the court hearing observation highlights that Judge 4 (Panel) tended to be dismissive, generally saying that any request or opinion put forth after the sentencing was made were not required under the current criminal procedures. Therefore, the question which arises is whether the term accountability to God reflected in sentencing practice.

The various models that underpin judicial attitudes

Justice presented in this study depends on the various models that underpin judicial attitudes. A number of participant judges adopted a punishment model: "*So far, it was miserable that punishment had become the dominant approach in sentencing drug offenders…*" (Judge 28, Rural). "*…now sick people get punished"* (Judge 23, Rural). These

excerpts are indicators of the punishment model of sentencing. In a Rural Court, to drug users, one judge was concerned about the punishment model. On reflection, the participating judges considered that punishment did not 'fix' the problem: "*The fact is that we must be honest, in rural courts, 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, Rural). Here, Judge 26 is aware that punishment does not 'fix' the problem of drug use. It is apparent that the Supreme Court's response to this topic about the aim of sentencing echoed the explanation given about the punishment model: "*Judges have a responsibility to impose sentencing proportionate to the seriousness of offences. If the offence is small, the punishment, of course, is small..." (Judge 29, Supreme Court).* Here, the participating Supreme Court Judge has emphasised the punishment model.

Other participant judges adopted a medical model. In Rural Courts, to persons with issues of drug use, a number of the participants (i.e. 2 from 11) were expected to circumvent the need to treat persons with issues of drug use in prison. Consider, for example, Judge 23's and Judge 27's comment: "*Essentially, The offences are not about harming others, but harming themselves. So, the best place to treat them is rehab, not prison. Because sick people should get treatment…"* (Judge 23, Rural). "*Our interest is to humanise the human because they use drugs due to their mental health being unstable. So we prefer to return them to their families"* (Judge 27, Rural). The above excerpts highlight that the medical model underpins Judge 23's and Judge 27's attitudes. What seems to underpin Judge 23's perspective is the presumption that the drug offenders are physically ill and are therefore in need of medical treatment. Similarly, Judge 27's (Rural) perspective was underpinned by the presumption that the drug offenders are mentally unstable and therefore need medical treatment. Therefore, both participants adopted a medical model of issues of drug use. In Urban Courts, the observation data illustrates the way in which Judge 6 Panel paid attention to the offender's potential rehabilitation: *"Judge 6 (Panel): The mitigating factor is that the offender is showing remorse and, honestly admitted his offences, and promises to reduce his dependency on drugs*." (Extract from court hearing Observation Notes, Judge 6 Panel)

> *It would be better if self-awareness among the society was developed "I am a drug user, and I asked to get rehabilitation". Therefore, there is no*

need to enter the court anymore, and that is the effect that we would expect. (Judge 6, Urban)

I expect that the number of drug cases will reduce. The persons being imprisoned should be reduced. The society will be happy to report themselves, also, like drug users and they would be willing to be self-treated. So, the role of the trial would no longer be required. (Judge 8, Urban)

The above extract from the interview highlights Judge 8's rationality on harm reduction by considering the offender's promise to reduce his dependency on drugs. Judge 8 aimed to educate drug users about establishing a productive lifestyle. This goal of a productive lifestyle includes reducing dependency on stimulant drugs. It is apparent that the Supreme Court's response to this topic about the aim of sentencing echoes the explanation given about the medical model: "*...the benefit of sentencing is to allow the condition for the offenders to restore recovery*[32] *so that ordinary people can be cured...* "(Judge 29, Supreme Court). The above excerpt highlights the participating Supreme Court Judge's aim to instil a sense of self-generated recovery in the drug user's readiness to change. Judge 29's perspective is underpinned by the presumption that the drug offenders are mentally ill and therefore need to be cured. In doing so, a number of participants adopted a medical approach to issues of drug use. This participant's notion of assisting recovery becomes a challenge in a broader context. This participant's notion was underpinned by the presumption that recovery is narrowly directed towards the medical model of recovery that focuses on the physical illness of the drug offenders. A number of the participants in the Rural Court, recognised that rehabilitative effects could not be addressed by current prison methods.

Regarding sentencing to rehabilitation, there was wide acceptance of rehabilitation as a sentencing aim amongst the judges, particularly for young drug users and first offenders. See for example Judge 17 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,

[32]. In Indonesia, the term social rehabilitation refers to "an integrated process of recovery activity either physically, mentally, or socially so that the person in recovery may be recovered to perform his/her social functions within people's life" (Law 35/ 2009, Rule 1(17)).

Urban). On reflection, the substantial minority of the participating judges considered that imprisonment does not 'fix' the underlying problem of minor drug offences. Also, imprisonment for minor drug offences is seen to become a challenge because it contributes to the stigmatising process. Imprisonment for minor drug offences often labels the individuals concerned as 'criminal' and removes them from the public. To minimise the stigmatising effect, the participating judges considered that the rehabilitation of minor drug offenders was seen to be more suitable than punishment. Here, Judge 17 (Urban) asserts that, once inside the prison, they are involved with other drug dealers and drug users. Thus, imprisonment is seen as having a negative impact on drug users' rehabilitation. Not unreasonably, rehabilitation is seen as a suitable alternative to 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 society's expectation that the treatment facilities need to be adequate*" (Judge 27, Rural). Whilst family can potentially look after minor drug offenders, a number of participants acknowledge that it is challenging to assume that the families of minor drug offenders suffering from socio-economic problems would facilitate access to treatment: "*In the case of rehabilitation, firstly we consider the offender, if the offenders are supported by the family and financially capable to control themselves, OK, we will do it [rehabilitation]* "(Judge 11, Urban). Findings from this study suggest that structural inequality becomes a challenge to the possibility of family support during offenders' rehabilitation. A number of participants acknowledge that a rehabilitative process requires '*the responsible person'* for facilitating a treatment:

> *The main point is that once the offender is sentenced into rehabilitation, there should be a person who is responsible for facilitating a treatment and who is confident that the treatment will bring recovery and return the offender back to the correct way of life.* (Judge 8, Urban)

Such a '*responsible person'* could be facilitated by the community to act as a source of support. It is apparent that the Supreme Court's response to this topic about the aims of sentencing echoes the explanation given about the value of treatment in the community: "*Viewed from the beneficial aspect of the law, it would be better if those*

offenders were not convicted and, instead… brought to Abah Anom[33]*. Perhaps, it would more beneficial like that*" (Judge 30, Supreme Court). The participating Supreme Court judge's view captures this point when he asserts the importance of community-based support. The Supreme Court uses this argument not to retain the judicial power, but to minimise the court involvement, as they expected that the drug user was not brought into the court but directed to rehabilitation somewhere else outside the prison (i.e. community-based treatment). The court considered that diverting minor drug offenders who suffer from socio-economic problems to community-based support is necessary for the people in recovery. Whilst diversion requires shifting responsibilities, there is an explicit expectation from a number of participating judges that the diversion process requires the community to hold responsibilities in the process of offenders' recovery. Whilst diversion facilitates the aim of having control over case-flows, there is an explicit expectation from a number of participating judges that rehabilitation for minor drug offenders has the potential to reduce the courts' caseload, to meet society expectation, and to facilitate offenders' recovery.

In relation to 'recovery', a number of the participants appeared to be confused, and it seemed that participants were not quite sure about whether the notion of recovery and rehabilitation were the same thing. Consider, for example, a number of the participants in the Urban Court who explained that they viewed rehabilitation as a path to 'recovery':

> *I met the offender after he had been released from residential treatment. "You are the person whom I sentenced, right?" I said, "Have you recovered yet?" the person replied: "I did Sir", I asked: "What is the evidence that you have been recovered?" he said: "I have Sir, I have been completed" I asked: "So, what should be avoided then?" I realise then, that he has a recommendation from the medical doctor stating that he has recovered, and he was recommended to avoid the previous friend who was doing drugs. The recommendation stated that. I am so grateful that the offender is recovered, so I am not wrong in my sentencing.* (Judge 8, Urban)

The above excerpt highlights the medical view towards the person in 'recovery'. The offender was considered by Judge 8 as having 'recovered' after being medically treated. Even the notion of treatment and 'recovery' are regarded by some of the

[33] *Abah Anom* is community-based support service which provides spiritual-based treatment

participants as the same thing. In addition, the notion of 'recovery' belongs to the medical doctor. Thus, an assessment of a person in 'recovery' is a knowledge resource for these allocation activities to permeate medical control indicators. Judge 8's emphasis on the letter of recommendation from the medical doctor as a control indicator utilises the language of assessment: a plan in place to distance themselves from peer pressure by those who are using drugs as something related to the rehabilitative effect of Judge 8's sentencing. It is apparent that the Supreme Court's response to this topic echoes the explanation given about the aims of sentencing:

> *...according to research from BNN and my last meeting with the Coordinating Minister for Politics... if that person, who uses drugs, having a drug disorder. This drug disorder will discourage them to enter college, be less motivated to work, and unable to create innovations... this will endanger the society and, mainly, those families who have the misfortune to be affected by narcotics. Consequently, it will become a burden.* (Judge 29, Supreme Court)

This finding suggests that the Supreme Court's attitude toward an offender's 'recovery' is underpinned by the medical model. Several other judges (including one who said that prison does not rehabilitate) also said that prison and detention centres could, in certain circumstances, have a 'rehabilitative effect': "*I think the function of prison is basically as a correctional institution, this applies to all cases. So actually, as long as the offender in the detention centre can be healed, then no need to put them into prison*" (Judge 19, Rural).

> *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. After the offender was released from prison, he no longer does drugs.* (Judge 22, Rural)

Here, Judge 19 (Rural) and Judge 22 (Rural) assert that the sanction of imprisonment and detention would have a 'rehabilitative effect' (i.e. healed and no longer does drugs). What they are probably referring to here, however, is individual deterrence. Whilst the deterrent model is underpinned by the presumption that sentencing is still required to stop both individual and societal level drug use, some of the participants were cynical about deterrents. Consider, for example, Judge 11's, Judge 12's and Judge 13's

comment: "*Would sentencing to imprisonment deter? It seems that imprisonment would not have provided ways of understanding his deeds". (*Judge 11, Urban). "*There seems no significant change because the number of drug cases is increasing significantly and, typically, the cases brought to the court are small cases with small packets of Methamphetamine"* (Judge 12, Urban).

> *After the offender committed drug offences for the first time, it seems less serious but, then after they are released from prison, the offences become more serious. I have observed such seriousness. On reflection, it has no deterrent effect.* (Judge 13, Urban)

The above excerpts highlight Judge 11's, Judge 12's, and Judge 13's cynicism about the deterrent effect of imprisonment. Here, the substantial minority of the participating Urban Court members agree that the offences become more severe once the drug offender is released from prison. Therefore, imprisonment is not seen as a deterrent. This finding indicates that it is challenging to assume the deterrent effect on sentencing minor drug offenders.

The substantial minority of the participating members of the Urban Court considered that those minor drug offenders do not necessarily need "medical" treatment. The substantial minority of the participating Urban Court members (i.e. 2 from 17) perceive those who have issues of drug use as an indication of an underlying structural issue such as the failure of the state to meet the socio-economic needs of the drug user through their failure to provide equal opportunities (i.e. social inclusion). Consider, for example, Judge 6's comment:

> *I would say that 'rehabilitation is nice, but it is only for those with issues of drug use, while at the moment, the Indonesian people [who use drugs] are still on moderate use of drugs and show no indication of having issues of drug use. For those people, they need some advice, discourse, motivation, or even encouragement...* (Judge 6, Urban)

As shown, Judge 6 contended that people who use drugs do not necessarily have issues of drug use and need treatment. Moreover, he feels that the stigmatisation of being a drug user might make the person unable to be productive. This stigmatisation may result in them being excluded from the public: "*Due to the stigma received from the public, it*

would be challenging for the offender to get chances to remain positive and do regular things usually done by other human beings" (Judge 6, Urban). As shown, Judge 6 recognised that minor drug offenders need the opportunity to remain productive and included like other human beings. He recognises that to ensure the effectiveness of the sentencing options, there needs to be a recommended approach to dealing with the drug offender's motives: "*We should seek an approach to deal with all these motives, while the offenders were serving a sentence and being rehabilitated. We can retrain them never to be tempted and to be brave to refuse any offer to use drugs...*" (Judge 6, Urban). This understanding is also reflected in my observations at the Urban Court. Judge 6 (Panel) sentenced the offenders to rehabilitation and, in their interviews, they explained the negative impact of imprisonment: "*It will have a negative effect on the offender inside the prison. This negative effect is because, inside the prison, those offenders will meet other prisoners who have trafficked drugs*" (Judge 6, Urban). In their court hearing, they explained the reason for sentencing the offender to treatment:

> *Judge 6 (Panel): …the offenders are convicted of using drugs and are to be sentenced to eight months' treatment; this period covers the period of medical and social rehabilitation...*
>
> *Judge 6 (Panel): Are you happy with the sentencing?*
>
> *Offenders: Yes.* (Extract from court hearing Observation Notes, Judge 6 Panel)

The above extract from a court hearing observation highlights Judge 6 (Panel)'s rationality regarding treatment by considering that sentenced offenders receive medical and social rehabilitation. Findings from this study suggest that the socio-economic context is indeed a relevant consideration during rehabilitation. The importance of addressing structural inequality may become a first step towards the rehabilitative process.

Summary

In Chapter 6, I present ways in which the substantial minority of the participating judges (i.e. 5 from 31) attempt to exercise judicial discretion. This exercise is visible through negotiating the judicial process. Regarding negotiating the judicial process, the form of negotiation is manifest through judicial persuasion, encouragement and consensus upon the panel of judges. For example, the substantial minority of the participants tried to persuade other member of panel judges to heed their compassion and moral responsibility and not to consider how the standard minimum sentencing applied to this person. The substantial minority of the participants were encouraging the prosecutor to change the initial indictment. The substantial minority of the participants also recommended a consensus approach, which considers the need for tolerance among panel members, regardless of their ideological differences.

Concerning the pursuit of 'justice', the finding is considered in light of the tension between legal certainty and pursuing 'justice'. On the one hand, judges experience anxieties about cases being reviewed by their superior, while, on the other hand, the judge does attempt to pursue social justice. In these situations, the beneficial aspect of sentencing to the offenders is pulling together both justice and legal certainty, creating a balance. The judicial attempts to pursue social justice are administered in two ways: the first being the administration of social justice by producing sentences that will be beneficial to the offenders; the second being the administration of social justice by applying short sentences to drug users with the aim of allowing them to receive an early release and allowing them early treatment outside prison. Sometimes, the substantial minority of the participant judges take advantage of the media coverage to send the message to the public that they have tried to pursue justice. The substantial minority of the participants were willing to cooperate with the media to build cooperation and share information. This study demonstrates that the attempt by the substantial minority of the participants to cooperate with the media-is seen as an attempt to gain an understanding of public concern and to shape the participants' interpretation of 'justice'.

The substantial minority of the participants also seem to consider sentencing as part of serving God. Therefore, part of the judicial interpretation of justice is contextualised

within the Sunni Islamic community. This judicial interpretation of justice would include the way in which the panel judge is viewed as the God's second hand in the world and interprets ‘justice’ as reflecting the Sunni Islamic community’s expectation about sentencing to rehabilitation. However, this interpretation of ’justice’ was conditional dependent on the punishment, deterrence and medical model that underpins the judicial attitude.

Regarding the punishment model, the majority of the participants presume that minor drug offenders have a real sense of accepting their punishment; that sentencing is based on proportionality to the seriousness of offences. Concerning the deterrence model, their sentencing drug users to imprisonment was initially driven by the majority of the participants’ expectation that prison could provide ways of understanding the minor drug offenders' deeds; that prison could stop the individual from using drugs. In term of the medical model, a number of participants were familiar with the issues of drug use, but they often referred to mental health instability and, therefore, they often viewed those drug users as being best treated in public hospitals. On reflection, however, a substantial minority of the participants believed that issues of drug use should not be considered too early as medically having a "disease"; that drug users suffered from socio-economic problems; and that addressing those structural problems is necessary to achieve broader social justice. The full implications of these findings are discussed and concluded in Chapter 7.

Chapter 7: Discussion and Conclusion

The study presented in this thesis aims to explore the judicial perspectives on sentencing minor drug offenders in Indonesia, focusing on identifying the influencing factors of drug sentencing. To achieve this aim, a qualitative study, which involved interviews with District Court Judges and observations in two selected Courts, was conducted. This chapter aims to discuss the overall context of the study, particularly, the findings (the participants' perception of structural inequality, conditional justice, the challenges to balancing the pursuit of justice and doing public service, and the issue of judicial legitimacy) and their contribution to knowledge. I found that the key findings evolved whilst I was working in the field. When the participants' perception of structural inequality clearly emerged from the interviews, I decided to discuss the issue of structural inequality as a moral basis for sentencing. The overall methodology used, reflecting upon the methodology limitations, is discussed. The implications of the study for policy and practices are highlighted and elaborated. This chapter ends with a review of conclusions reached in the study.

Key Findings

Structural Inequality

It can be seen from the findings presented in Chapter 4 that poverty often led people to become targets of the criminal justice system and they often ended up in prison. Findings showed that the majority of minor drug offenders are those who have socio-economic issues. The socio-economic issues also led to the condition where the minor drug offenders had no other choices that would prevent them from using drugs. An underlying issue that caused drug use was the circumstantial one situated in socio-economic disadvantage. Thus, minor drug offenders are considered as victims of their circumstances. Poverty was found to lead people to the drug culture. For example, labourers (i.e. poor people) used drugs to increase their stamina for undertaking hard manual labour. Moreover, lack of understanding of the harm that can be caused by taking drugs was also considered as a contributing factor to people involved in minor drug offences. Based on these points, it can therefore, be argued that drug taking in Indonesia reflects the

economic inequality in broader social structures. This is aligned with the argument given by Carlen (1994; 2013) that the reality of the society under socio-economic disadvantage is one which itself is often unjust. Within structural inequality, the imposition of sanctions to minor drug offenders who suffer from socio-economic problems engenders issues around the delivery of justice. This finding support Buchanan's (2006) argument which has advocated the importance of the judges producing a sentence that is supportive to those offenders who suffer from socio-economic problems. 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 (Duke 2010). The desire to deliver justice to minor drug offenders instinctively drives the substantial minority of the participating judges (i.e. 5 from 31) to make judgments on a moral basis in the case study court.

The substantial minority of participating judges who make judgments on an instinctual basis displayed sensibilities to address the need of minor drug offenders and the adoption of compassion and moral responsibility when exercising discretion, encouraging the participants to redefine sentencing options beyond imprisonment. These participants attempted to reduce the length of sentence with the aim to release the minor drug offenders from prison sooner and to enable them to receive treatment outside prison. Using a moral basis on sentencing could potentially lead the substantial minority of the panel judges to be compassionate on sentencing. I have drawn this from the finding that the substantial minority of participating judges attempted to be compassionate, as evidenced by them using the term 'victim of circumstances' as an attribute of minor drug offenders. This can be seen as an indication that there is a shared sense of moral responsibility on the sentencing of minor drug offenders. Such indication leads to the belief that the substantial minority of the panel judges are compassionate on sentencing of minor drug offenders who suffer from socio-economic problems. Moral responsibility shapes the presentation of leniency seen in such practices as disregarding the standard minimum sentencing. However, the presentation of leniency is based on an instinctual approach and needs to be balanced with the unintended result that could lead to punitive practices. I have drawn this from the finding that instinctual approach to sentencing may become ineffective if the majority of participants do not understand issues of drug use regardless

of their feelings towards drug rehabilitation (i.e. rehabilitation is preferable and consequently they showed merciful discretion in their efforts to facilitate the drug offender's rehabilitation). For example, when referring to the international literature, a sympathetic response to relapses perceived by the judges was seen as an important driving factor in effective drug treatment (McIvor 2009). When referring to the finding presented in Chapter 5, 'stigmatising' behaviour was displayed by Judge 7 (Panel) through the panel proclamation of the inevitable trajectory of drug use. The question which arises is whether the panel judge was not encouraged to be rational in sentencing as opposed to 'instinctual.' It may be compassionate to be 'instinctual', but equally, it may also be more punitive. This potential for 'instinctual' approach which may be either lenient or punitive, suggests that the effectiveness of the instinctual approach in achieving broader social justice is conditional.

Conditional Justice

The findings presented in Chapter 5 that justice is presented as conditional, depends on various influencing factors that are primarily, though not entirely, one of tension and contradiction. I am presenting this contradiction and tension and the way in which this tension and contradiction are negotiated by the substantial minority of participating judges. The study presented in this thesis indicates that the relationship between social structure, law and politics are the dominant context for some of participating judges' interpretation of justice. The study indicates the influence social structure has on sentencing, as presented in Chapter 5, whereby the Sunni Islamic community, which prohibits drugs, influenced policy-makers' intentions and actions to suppress those who use drugs. The overall impact of law and politics on sentencing was also presented in Chapter 5, where law was the product of political interest in punishing those drug users who came from poorer backgrounds. This drug prohibitionist policy creates tension because drug taking in Indonesia reflects the economic inequality in broader social structures. The enforcement of drug law creates a contradiction because the imposition of sanctions on minor drug offenders who suffer from socio-economic problems engenders issues surrounding justice.

Legal scholars argue that the law has morality built into it and the law is an expression of political agreement on what is right and wrong (Hart et al. 2012). The findings presented in Chapter 5 indicated that this was not necessarily the case for the judiciary in Indonesia, where a substantial minority of participating judges were likely to interpret the law without the discretion as lacking morality built into the law. The legal definition of selling and using appeared to be blurred. This blurred definition led the substantial minority of participating judges to interpret the facts and the relevant law. In considering whether the act of interpreting the law would achieve broader social justice, it partly depends on the apparent political atmosphere that underpins drug policy. The findings presented in Chapter 5 indicated that as long as a punitive atmosphere remains the predominant value that underpins drug policy, the prevalence of punitive sentencing practice is likely to remain. For example, people who are merely possessing drugs and could not be penalised under decriminalisation policies (Stevens et al. 2006; Ward 2013), were hence more likely to be penalised under criminalisation policies, as presented in Chapter 5. The judicial interpretation of justice also partly depends on the influence of law enforcement practices (Ashworth 2010).

The overall impact of law enforcement practices (i.e. policing and prosecutorial practices) are presented in Chapter 5, where the police appeared to be selective on targeting minor drug offenders who came from poorer backgrounds. The evidence for this selective targeting is that individuals from the more impoverished backgrounds are more often investigated than individuals from the more affluent backgrounds. This selective targeting is often challenging as it found after the court hearing that the police set up undercover buying, arrested the buyer, and released the seller (i.e. the undercover police). This selective targeting led to a substantial minority of participating judges reinterpreting the facts of the case and to distinguish between the victim of circumstances and the perpetrator. This selective targeting also affected the selective presentation of evidence in the courtroom. The prosecutorial presentation of evidence is often challenging as it found after the court hearing that the offenders were charged differently than they ought to have been. For example, for smaller quantities of drugs, the accused is often prosecuted severely while, for more significant quantities of drugs, the accused is often prosecuted leniently. The contradictions between the filed indictments and the factual evidence of

daily drug usage revealed in court have increased the task load of the substantial minority of the participants in interpreting the facts and the relevant law. To consider whether the act of interpreting the facts and the relevant law would achieve broader social justice, partly depends on public and the media.

In such conditions where the substantial minority of participating judges received public trust and confidence, public expectation and the media's portrayal often decide whether minor drug offenders should be imprisoned or facilitated to rehabilitative support. The term “the public” used here refers to the offenders, the offender’s family, the visitors inside the courtrooms, the community protests, the anonymous informant when the judge meets people in the community, and the Sunni Islamic community. The public expectation regarding rehabilitative support to minor drug offenders apparently facilitated the emergent rehabilitative model. The public expectation is considered by substantial minority of participating judges as a source of knowledge that adds value to the justification on rehabilitative support. In such conditions where some of participating judges received public suspicion due to the issues of corruption, these conditions may put the judges in an embarrassing situation. These conditions may make the overall image of judicial reputation discredited. These conditions have consequences for the individual judges: the sentencing to imprison for drug offences was seen as a way to insulate a substantial minority of participating judges from social prejudice. This suggests that the justification for imprisonment is conditional subject to public trust, since The Public often sees rehabilitative support as being a sign of corruption to favour the offenders undermines the judicial performance. The majority of the participants avoid attracting public accusation. This avoidance can be seen as an indication that imprisonment is often justified as a judicial attempt to minimise lapses in performance. From here it will be shown that in such situation where imposition of the sanction is made conditional subject to public acceptance, the participants in this study were challenged to present the balanced presentation between pursuing justice and delivering public services.

Pursuing Justice versus Public Service

The pursuit of justice was commonly described as the application of the rule of law (see Chapter 1). In this study, I present the case where the pursuit of justice is achieved

not merely through the application of the rule of the law or the legal codes, but through the balancing or the interpretation of the law by the judiciaries, as the heart of justice in court sentencing. I present the case where the majority of participating judges accept the implementation of the legal codes in drug sentencing and some of the participants resisting the legal codes, through interpretation the law.

Regarding judicial acceptance, I present the majority of the participants' perception that the law is working efficiently through the implementation of the law in drug sentencing. I have drawn this from the finding that the majority of the participating judges were merely following the standard minimum sentencing. Their adherence to the law was also based on the punishment, deterrence model, managerial and stereotypes orientation that underpins their attitude. Regarding the punishment model, the majority of participating judges who sentenced minor drug offenders to prison have the intention to punish. This presentation of punitive response encapsulated the panel judges' means of fulfilling the expected role of law enforcement. This punitive attitude partly depends on how the panel judge justifies their sentencing (Tarling 2006). For example, a number of authors note that lengthy imprisonment for the possession of drugs is disproportionate and unequal when compared with the nature of less serious, non-violent, and victimless offences (Ward 2013; Bewley-Taylor et al. 2009; Gray 2001; Husak 2002; Nadelmann 2004; Sevigny and Caulkins 2004).

Concerning the deterrence model, the majority of the participants who sentenced minor drug offenders to prison have the expectation that prison could stop the individual and the wider society from using drugs. Some of the participants saw the deterrence model as ineffective as they admitted that deterrence model does not stop individuals from reoffending, and does not prevent the broader community using drugs. With reference to the international literature in this context, the deterrent model viewed as ineffective as neither individual nor a general deterrent (Bewley-Taylor et al. 2009; Harris 2010; Mackenzie 2005; Schinkel 2014; Spohn and Holleran 2002; The European Monitoring Centre for Drugs and Drug Addiction 2009; Wright 2010). My finding is a confirmation of this view.

Regarding managerial orientation, the increased number of sentenced minor drug offenders to imprisonment reflects the influence of managerial preference and the focus on the output-based performance. The performance target fulfilled by targeting minor drug offenders who come from more deprived backgrounds and once met; the majority of participating judges matched the sentence with the prosecutorial indictment as they saw fit. This finding support Lipsky's (2010) study that the adoption of managerial orientation which is perceived as essential criterion from the Higher Court may subvert the Lower Court interpretation of justice into merely expediting the court's caseload. '

Regarding stereotypes orientation, some of participating judges have a particular impression of the minor drug offenders. An impression influences by stereotyping minor drug offenders based on a socio-economic status; those conducting hard manual labour are commonly stereotyped as 'lower class' (see Chapter 5). The stereotype attached to minor drug offenders who were coming from poorer backgrounds has developed into prejudices, which, in turn, are reflected in discrimination. Such discrimination can be seen from the way minor drug offenders who come from poorer backgrounds, who have no money to pay for an assessment, are often considered by the majority of participating judges to be an ineligible candidate for rehabilitation. In term of the international literature, many of this stereotyping of certain strata come through the literature in another jurisdiction. For example, in a study conducted at the United State, drug offenders who could not afford to pay for voluntary drug treatment programmes were likely to be perceived by judges as being less suitable for rehabilitation (Ulmer 2007). It is no surprise that, given the punishment, deterrence model, managerial and stereotypes orientation that underpins the majority of the participating judges' attitude, there is no possibility of resistance to the standard minimum sentencing.

Regarding judicial resistance, I am presenting the perception of the substantial minority of the participants that there is underground resistance to the legal code that they see as quite harsh. By the underground resistance I am referring to the judicial symbolic rejection of the law or the enforcement of the law which has a negative impact on justice. I have drawn from the finding that the substantial minority of participating judges seem to resist the recent enforcement of drug law, and there is tension between balancing the legal framework and justice. In such conditions where the law and the

enforcement of the law is seen to have a negative impact on justice, a substantial minority of the participating judges are likely to interpret the law. This interpretation of the law was contextualised in such socio-economic inequality that calls upon a substantial minority of participating judges' moral responsibility to reconceptualise the sentencing option. For example, even though the prosecutor set up the person for drug possession which carries four years of imprisonment, they are not the one who decides the sentencing, and therefore the sentencing outcome might be different. The substantial minority of the participating judges were likely to depart from the standard minimum sentencing.

In terms of the rule of law in this context, a substantial minority of participating judges still could find a way to make their application of the law achieve justice in the court sentencing. They were aware of the legal code that is quite harsh which raises issues surrounding justice. They were also aware of the importance of public acceptance on sentencing. Their awareness of the issues surrounding justice and public acceptance led to the situation where they were attempting to present a balance between the pursuit of justice and public service. As public servants, they were aware that they were expected to provide excellent service to meet the public expectations. To do so, they displayed interaction with the community. For example, they displayed compassion and were at the time morally expected to reflect the community expectation of moral justice which is based on Sunni Islamic teaching. In this situation, such influences shape the individual to adapt to situational expectations (Goffman 1959). This view can be used to explain the adoption of compassion and moral responsibility when exercising discretion as presented in Chapter 6. The 'compassionate judges' in the case study court displayed sensitivity towards minor drug offenders and this encouraged the substantial minority of the participating judges to redefine the sentencing option beyond imprisonment. This option included sentencing reduction with the aim of releasing the minor drug offenders from prison sooner and enabling them to receive treatment outside prison. This demonstration of judicial compassion and supportive approach in the case study court were interpreted as an acceptable response in the eyes of the public.

To gain an acceptable response from the public, the substantial minority of participating judges also adopted a humanistic approach which considered the human rights aspect of minor drug offenders. The substantial minority of the participating judges

also attempted to inform the public that the existing approach to the war on the drugs had lost its direction. The substantial minority of the participating judges have a dual role as public relations officers. This role allows them to share the treatment provision (SKB) with the media. To do so, the substantial minority of the participating judges take advantage of the media coverage to send the message to the public about the judicial approach to treatment provision. They were willing to share information with the journalists at the participants' offices on a daily basis. They shared the treatment provision (SKB) with the media to ensure understanding of the minor drug offenders' referral to rehabilitation. Then, they used the comments from the media and the public to adjust their interpretation of justice. In this way, they disseminated their approach and considered the public opinion so that they could gain insight into the level of public acceptance. Media and public comment also functioned as an important mechanism in helping the participants to earn public trust, to gather an understanding of public concern and to adjust their interpretation of justice. Having provided a context where the substantial minority of participating judges interact with the community as part of their effort to gain an acceptable response from the public, the following section will now focus on the issue of judicial legitimacy.

Conditions of Legitimacy

A number of participants in this study present the various approaches to seeking legitimacy. Legitimacy was defined in this study as the extent to which an agency appears to reflect others expectations within a legitimised performance (Goffman 1959). This point of view about legitimacy would help to explain the notion that legitimised performance is conditional upon audience recognition. Analysis of data from court hearing observations and interviews suggested that the judicial consideration of their role centred on legitimising their performance within their audiences. It was necessary for some of participants that this audience recognised their performance to balance the tension between pursuing justice and public service. A number of participating judges interviewed considered that they needed to adjust their performance to fit with audiences' views during their interaction. In line with Goffman's (1959) view of self-presentation, a number of participating judges perceived the view of audience as influential. Self-presentation was evident in the way that a number of participating judges reported adjusted their approach

to the expectation of various audiences in the case study court. Judicial interaction with their audiences has been reflected in the imposition of the sanction. This approach towards sanctions reflects the formation of a number of panel judges into a group on forming interaction with their audience. Such judicial interaction is contextualised within their political, public, and religious status in their acts on the issues surrounding justice, which will be explained in the following paragraphs.

First, regarding political status, the apparent political desire to put pressure on the war on drugs agenda creates tension between serving the political agenda versus pursuing justice. The pursuit of justice frequently clashes with political considerations aimed at preserving power. The majority of participating judges do not yet have the confidence to reconcile this tension. This lack of confidence is reflected in their demonstration of power by merely doing what the State wants. I have drawn this from the finding that in a court hearing a majority of participating judges cut short the court session to allow the prosecutor to consult with the participants. The prosecutor, as the State's representative, gave their input on the acceptable length of the prison sentence within the standard range of minimum sentencing, bearing in mind that the prosecutor is likely to appeal if the participants' sentence is below the standard minimum. The majority of participants accept the prosecutor's input on the acceptable length of the prison sentence. Thus, the imposition of the sanction is negotiated and not purely compassionate. While in another way, a substantial minority of participating judges appeared to develop their confidence. This development of confidence was reflected in the exercise of judicial discretion. I have drawn this from the finding that a substantial minority of participating judges persuaded other panel judges to heed their compassion and moral responsibility and not to consider how the standard minimum sentencing will be applied to the person; this encouraged other panel judges to depart from the standard minimum sentencing, seeking consensus on deciding for dismissal. Their compassion and moral responsibility drove them to adjust their interpretation of justice to the circumstances. This gave accountability to political pressures and the judges were at this time exercising their discretion. Therefore, judicial discretion is considered here as healthy for democracy; judges have a role in interpreting or trying to achieve balance in the law with their interpretation to achieve broader social justice. In another context, legal scholars presented the judiciary as sitting on the judicial

process, the law as being the reflection of democracy, and the panel judge's job as merely being to implement the law, without necessarily having discretion outside the law (Hart et.al 2012). The implementation of the law is considered as an attempt to further the democratic process, through interpretation in terms of balancing the application of justice with the particular circumstances which achieve justice. The judicial interpretation is considered as a reflection of their political accountability. For example, in the United States, the judges were democratically elected by the community, so the judicial interpretation of justice reflected their direct accountability to the community (Ulmer et al. 2008). In the United Kingdom, the judge was appointed by the state, thus the judicial interpretation of justice reflected their direct accountability to the state (Helm 2009). Some critics have said that a judge is democratically elected, and that there is a direct accountability mechanism in terms of how they choose to interpret what justice is, in the sense that they are doing a political job, acting in the political arena, and not just a judicial one. This political accountability may reflect what a judge does.

In this study, some of the participants acknowledged the influence of political pressure on drug sentencing. The political pressure was considered as a challenging factor that limited their capacity to exercise discretion, bearing in mind that the participant was appointed by the state, which means that the sentencing made by some of participating judges could not be fully politically independent. The aim of drug sentencing was therefore to give direct accountability to the state. The participants also had a bureaucratic status; they needed to adhere to their superior: the inspectorate for the judiciary. Instead of encouraging the participants to exercise good discretion, the inspectorate for the judiciary puts pressure on some of participating judges to stand firm and maintain their sense of enforcing the law. The current accountability system appeared to put pressure on the participants to follow minimum sentencing. This accountability system created an unhealthy condition-particularly where the accountability was measured by judicial adherence to the standard minimum sentencing. This accountability system led a substantial minority of participating judges to present some form of solidarity in order to heed their moral responsibility and exercise meaningful discretion. After exercising discretion, they were hopeful that someone in the Higher Court would treat their declaration of sentencing on a moral basis as well as accepting their sentencing limitation,

and act accordingly (see Chapter 6). This formation of solidarity to exercise meaningful discretion can be seen as giving the panel responsiveness to political and bureaucratic pressure in their action in the issue surrounding justice.

Second, in terms of the public, I present the case here and in Chapter 5 that the justice is conditional depending on public acceptance. The fear of sceptical public opinion surrounding the issues of corruption may put the majority of participating judges in a confused situation when responding to public demands for accountability. Instead, the majority of participating judges avoid sentencing that would attract public accusations. This avoidance may limit their opportunities to gain public acceptance. However, a substantial minority of participating judges appeared to develop interaction with the public, due to public expectation in terms of rehabilitative support available to minor drug offenders. This public expectation apparently led the substantial minority of participating judges to consider the beneficial aspect of their sentencing to the offenders and the level of public acceptance. To consider the level of public acceptance, this substantial minority of participating judges engaged with the public to earn public legitimacy. According to Goffman (1959), to gain legitimacy requires conditions which enable the member of the group to reflect the others' expectations within a legitimised performance. This point of view would help to explain that the notion of legitimised performance is conditional upon the participants' presentation of a balance between reflecting public expectations and pursuing justice. The substantial minority of participating judges attempted to negotiate their role as being supportive to the minor drug offenders and at the same time being accountable to the public.

In negotiating their accountability to the public, the substantial minority of participating judges appeared to reflect the community expectation regarding rehabilitative support to minor drug offenders. The way in which they perceived their supportive role contextualised in Sunni Islamic society regarding what was considered an acceptable judicial response. Their moral responsibility when sentencing marked with high expectation within the community as a result of their expected role as supportive to the minor drug offenders who suffer from socio-economic problems. Within this expected supportive role of the judges, the substantial minority of participating judges seemed responsive to this public expectation. For example, the substantial minority of participating

judges have a dual role as a public relations officer as well. As public relations officer, they inform the public via the media. In seeking validation, before approaching with treatment provision, they share the treatment provision (SKB) with the media. They test how the audience give feedback, to gain an insight into the level of public acceptance. They seek public feedback to check if their response would be acceptable. They deploy the dramaturgical competence through displaying two ways process of communication.

Third, in terms of religion, as presented in Chapter 6, sentencing can be perceived as a part of serving God. Therefore, a part of the judicial accountability is to God. This accountability to God is contextualised within Sunni Islamic society. This view would include the way in which the panel judge viewed by the offenders' lawyers as the God's second hand in the world and sentencing as a vocation. This view led to the condition that the legitimacy when sentencing minor drug offenders in Indonesia is conditionally based on Sunni Islamic values. Sunni Islamic values have been seen as a potential source of legitimacy that goes on in a communicative relationship, whereby the participants consider pursuing justice as part of submitting their accountability to God. Much of the religious value as one legitimising value comes through the international literature of other national jurisdictions. For example, the participating judges in the American study on problem-solving drug court during appeared to consider the religious value in their drug sentencing (Nolan 2003). This point of view about religious value as one legitimising value would help to explain the influence of Sunni Islam as one legitimising value that shapes the judicial interpretation of justice. In considering whether the influence of Sunni Islam would lead to the condition of legitimation basis would partly depend on the presentation of justice when sentencing. The majority of participating judges present punitive practice when sentencing the minor drug offenders. In practice, they rarely dismissed the offenders. During several observations, the majority of participating judges presented judicial defensiveness. The presentation of these punitive practices, however, would challenge the legitimacy of Sunni Islamic values in sentencing.

From a different perspective, the findings indicated that the substantial minority of participating judges attempted to adopt the supportive approach. This supportive approach draws upon a perspective derived from a socio-economic explanation for drug use that was brought together by the judicial preference to maintain the impression of

leniency. This impression of leniency is based on religious and supportive principles, not punishment principles. The religiously-based supportive principle is an important distinction that would distinguish the uniqueness of the case study court given its cultural context. Considering the supportive approaches to minor drug offenders who suffer from socio-economic problems entered the substantial minority of participating judges' deliberation when sentencing. This supportive approach opens the door for the influence of Sunni Islamic values as one of legitimising value when sentencing. Sunni Islamic values appear to be more compatible with the internalisation of moral responsibility than the punishment orientation. As viewed from this perspective, religion influences the form of justice. Much of the influence of religious value on the forms of justice comes through the international literature of other national jurisdictions. The first form of justice was legal justice (Duff 2001), the second was moral justice. The third was social justice. The term social justice used here refers to the beneficial aspect of sentencing to both the offenders and to the community (Duff 2001). In this study, the substantial minority of participating judges attempted to achieve social justice. The imposition of short sentences to minor drug offenders was intended to allow the offenders to receive an early release and to enable the offender's treatment outside prison. The substantial minority of participant judges felt that this imposition of short sentences was in line with being just. This attempt to achieve social justice was informed by moral responsibility values. This moral responsibility was elevated by the substantial minority of the judges concern about the offenders' socio-economic issues, by the concept of a 'victim of circumstances', and by understanding behaviour in sociological terms rather than criminal absolutes. In considering whether the re-emergence of moral responsibility values, along with the continued support of the Sunni Islamic community would lead to the condition of legitimation basis would partly depend on the non-popular politics in Indonesia.

In this study, I present the case in which non-popular politics in Indonesia may be putting pressure on the discretion of the panel judge. The apparent political desire was to push the war on drugs agenda which contributed to structural inequality, and the issues surrounding justice. Therefore, there is pessimistic trend on the influence of non-popular politics on drug sentencing. In term of participating judges' response in exercising discretion, this study demonstrated that there are grounds for reasonable optimism. The

way the substantial minority of participating judges were motivated or how they are morally being responsible after they saw people brought into to court from a more impoverished background and this calls on their moral responsibility, and motivated them to exercise meaningful discretion. Therefore, there is reasonable optimism, coming from the pessimistic atmosphere, leading to hope. However, insofar as the political agenda continues to push the war on drugs in the foreseeable future, the structural inequality and the issues surrounding justice may come up again. Detailed consideration of the current trend on the influence of political agenda of war on drugs on drug sentencing in the case study court allowed me to suggest how the current study would contribute to existing knowledge.

Contribution to Knowledge

This study contributes to knowledge by considering that the Indonesian court itself can be understood as theatre. A substantial minority of the participants (i.e. 4 from 31) symbolically considered their role to be a director in the court drama. The presentation of the dramaturgical competence of the panel judge at the front (i.e. court hearing), backstage (i.e. panel meeting) and public relations of sentencing offer confirmation for symbolic interactionism and Goffman's (1959) concept on dramaturgy. I draw this from the evidence in this study that the imposition of the sanction was negotiated between the panel judges and the prosecutors. At the panel meeting, a substantial minority of the participants encourages rehabilitative sanctions. This sentencing to rehabilitation is seen as giving an impression that the outcome of the sentencing meets the community's expectation. The presence of evidence in this study is support for what Robert and Hough (2002) were investigating (i.e. that the more the relevant socials factors are taken into account, the more lenient the public are toward sentencing minor drug offenders). In this study, the substantial minority of the participating judges were interacting with the media. This sharing of information is seen as presenting an image of "informed public opinion" of rehabilitating drug users. This judicial interaction when sharing information with the media is a confirmation of the opposite view to deviance amplification which encourages punitive sanctions by the judges, who are influenced by the media that is amplifying the populist punitive attitude.

The symbolic interaction was used as an analytical strategy for explaining the judge interaction with their audiences (i.e. political figures, the public and the religious communities). Since the relationship and meaning-making characterise symbolic interactionist, my study is also a study of power relation and judicial interpretation of justice. The concept of dramaturgy has enabled a more in-depth analysis of the relationship between drug sentencing, exercising judicial discretion and the power relations extant in the court hearings, than is indicated in the sentencing literature (Henham 2000; Thomas 2003). I draw this from the findings that the majority of the participating judges were influenced by their bureaucratic status which required compliance with Inspectors' directives. This influence has often resulted in their adherence to the standard minimum sentencing as a reflection of modifying their performance to satisfy those in the Higher Court. This evidence is a confirmation of Lipsky's (2010) view about the coping strategies of the judges.

Before this study, drug sentencing in Indonesian Rural and Urban Courts has never been examined or recorded in detail using a qualitative approach. I have presented in this qualitative study the confidence of the substantial minority of the participants in their attempts to interpret the law, within the limitations of the legal system and bureaucratic environment. Some of these limitations related to the discretion allowed in terms of: what constitutes an offence and what sentence may be given. Previous studies indicated the various challenges that the criminal justice officers encountered during their interaction and response to drug-related offences but reported that they found little examination of study dealing with this issue (see literature review on Chapter 1). The study documented in this thesis contributes to the structural challenges the contemporary judiciary encountered in the issue surrounding justice for minor drug offences. The participating judges were confronted with structural inequality and at times required to account to their superior, both public and religious. The judicial exercise of discretion in trying to be supportive of minor drug offenders who suffer from socio-economic problems is seen to be an attempt to achieve social justice. Within this socially unequal environment, the examination of participating judges' attempt to be supportive to offenders in sentencing is a gap in existing study and arguably as substantial as Duff 's (2001) work indicated (see Chapter 1).

In term of theoretical contribution, the study presented in this thesis contributes to the sociological approach to sentencing. From the sociological approach, sentencing of drug offences has not happened in a vacuum but has often been influenced by the social structure (Beyens 2000; Nolan 2003; Davies et al 2004; Mackenzie 2005; Hutton 2006; Ulmer 2012). These sociological approaches include defining the agency within the broader social structure. In this study, I am presenting the case that sentencing to rehabilitation is seen as the way of negotiating the form of sentence that meets the community's expectation. This draws from the symbolic interaction that typically characterises interaction of a social group with another social group or social individual (Becker 2008). I am presenting the judiciary here as a member of group panels who have both formally and informally tried to organise themselves. They are trying to legitimise their role as a professional group within Indonesian society. I drew from observation of three judges who were formally sitting as a panel during sentencing in the open courtroom. Part of developing their broader identity as a group is holding informal meetings across the panel. I present the way in which the substantial minority of participating judges encourage another participating judge outside the panel meeting. The way in which a substantial minority of participating judges are persuading, encouraging, and also seeking consensus on drug sentencing reflects the formation of the social identity of the judiciary in their response to the audience. They share compassionate and moral responsibility on the sentencing of minor drug offenders during an informal meeting across the panel. These findings contribute to the sociological understanding of the context in which judicial culture shaped the formation of the judiciary as a group and the impact of Islamic culture on a judge's positive preference for rehabilitative problem-solving in the Indonesian context. A concept described by Goffman (1959) on dramaturgy was also drawn upon to explain the dramaturgical competence of the panel judges in their attempt to negotiate an acceptable response through the broader social structure of the audience: political, public, and religious. Through this research, I find an example of my work to explore the way in which the court and the individual performance- the theme of what Goffman (1959) can do for me, to understand my research, and to contribute to international sentencing research, and the area of socio-legal studies (Tombs 2004; Stevens et al 2006; Babor 2010; Ashworth 2010; Ulmer 2012; Ward 2013).

Limitation of this study

In terms of the limitation of the methods, my position as an independent researcher but with Court connections allowed a potential bias. My previous background as a judge and my current status as a researcher may influence the participating judges' response. My efforts to minimise bias is explained in detail in the section about validity (see Chapter 3). The issue of researcher bias in respect of the validity of the information, obtained in the studied courts, needs to be considered carefully. Future qualitative studies of sentencing minor drug offences may be better conducted by researchers acting independently from, but actively supported by local research institutions to ensure the researcher's impartiality. In this way, the participants could give high levels of commitment to the study. The relatively small sample of panel judges who participated in the study, although comparable with other similar qualitative studies and justified by the contextualised of the data collected, limits the generalisability of the findings outside Indonesian jurisdiction. The study can only provide a partial picture of justice for minor drug offenders in the Indonesian context since it examined the empirical evidence only from judges' point of view, not from that of the person judged or other law enforcers or the public and media. Thus, it would be valuable if a future study would consider the public perspective on justice for minor drug offenders.

Concerning the limitation of the findings, the study can only provide a partial picture of structural inequality from the judge’s perspective. It can be seen from the findings (Chapter 4) that the majority of minor drug offenders brought into the court came from more impoverished backgrounds. Nevertheless, the actual number of these minor drug offenders who came from more impoverished backgrounds was not recorded anywhere else. The interplay of power relations also becomes evident in this study (see Chapter 5), yet, the relationship between gender and power is not readily identifiable although an attempt has been made to explore the various power dimensions that may be operating at the judicial process. The influence of Sunni Islam that promotes tolerance among panel judges when sentencing, becomes evident in this study (see Chapter 6). However, the tension between Sunni Islam ideology and Christianity ideology among panel

judges when sentencing minor drug offenders were not readily identifiable; however, this study has shown the potential conflict in the panels depending on the level of individual tolerance when dealing with ideological differences (see Chapter 6). The limitation of the concept of Goffman (1959) on the dramaturgical competence of the agency was acknowledged due to the influence of structural inequality. This context of structural inequality led the substantial minority of participating judges to interpret the acceptable form of sentencing within the limitation of the legal structure. Thus, it would be valuable if future study would consider the form of interpretation in the imposition of harsh sentencing at other jurisdictions within their context of social structure.

The implication for policy and practices

Detailed consideration concerning social structure and agency allowed the recommendation on how the current policy and practices towards minor drug offenders can be improved. For the judiciary who have a role in the policy making, there are three practical measures that can be taken to improve the effectiveness of the judiciary: 1) at the individual level, an instinctual approach to sentencing may be ineffective if the majority of participating judges do not understand issues of drug use. There is a need for a better understanding of issues on drug use that can maximise an effective response to minor drug offences. 2) At the judicial culture level, some of participating judges were concerned that they were often blamed by the inspector of the judiciary for departing from the standard minimum and often felt unsupported. For this, there is a need for a better performing system that would incentivise the judges who exercise good discretion in drug sentencing rather than following the minimum sentencing. Improving the performance of the current system, as described above, would be insufficient because it only gives accountability to the state. Further consideration is required to give accountability to the public and religion. There is a need for better accountability through nurturing relationships with the public and religion. 3) At the structural level, structural inequality is one of the key variables in the study, and the participants are interpreting the imposition of harsh sentencing within the limits of the existing legal structure. Even if we are thinking to improve the effectiveness of the judiciary, the structural inequality and the issues surrounding justice may come up again. Drug taking in Indonesia reflects the economic inequality in broader

social structures. Therefore, the practical measures recommended above need to be coupled with a social-policy that addresses the issue of structural inequality to achieve broader social justice.

Conclusion

From the perspective of the participant Judges in this study and from my own perspective, sentencing minor drug offenders was perceived as complex and influenced by five major factors (the law, politics, the public, the media, and religion). In term of the influence of the law, the majority of participating judges were likely to accept the law without discretion. The substantial minority of participating judges (i.e. 5 from 31) were likely to interpret the law without the discretion as they lacked morality. The substantial minority of the participants also perceived that the drug law definitions of selling and using are blurred. This blurred boundary led the substantial minority of the participants to use their own interpretations towards the fact and the relevant law. In considering whether the act of interpreting the law would achieve broader social justice, it partly depends on political influence on the process. Babor (2010) noted the influence of the law and politics on drug sentencing. Non-popular politics has potentially put pressure on the criminalisation of drug use. Some nations treat drugs primarily as a problem for law enforcement and policy makers and give great prominence to efforts to criminalise drug use (including in the USA). Similarly, this seems to be the case in Indonesia because the law enforcement perspectives dominate Indonesia's drug policy-making. The imposition of the sanction is made conditional depending on the strength of the values that underpin drugs policy. Within the current context in Indonesian courts, political pressure is a challenging factor that limits the judges' capacity to exercise discretion. Within this limited discretion, the majority of participating judges consider following the standard minimum sentencing as reflecting those political pressures. From a different perspective, the substantial minority of participating judges consider departing from the standard minimum sentencing as reflecting their resistance to political pressure. In doing so, there is an element of resistance. In terms of the international literature, much of this judicial resistance comes through the literature of other national jurisdictions. For example, in an American study, although the law appeared to be disproportionately harsh for drug

offences, the law is not the only source that determines sentencing outcomes, and therefore the judicial rejection of disproportionately harsh sentencing is a form of resistance (Nadelmann 2004). In considering whether the judicial departure from the standard minimum sentencing would achieve broader social justice, it partly depends on the influence of the public and the media.

I present the case that the imposition of the sanction is made conditionally dependent on public acceptance. In such a situation where imposition of the sanction is made conditional subject to public acceptance, the substantial minority of participating judges sought feedback from media, to gain insights into the level of public acceptance. The international literature also presented the influence of the public and media toward drug sentencing. For example, in the Scottish study, although the popular politician appears to push for a punitive approach for drug offences, they are not the ones who decide the sentencing, and therefore the sentencing outcome might be different (Tombs 2004). The participants in the Scottish study appeared to distance themselves from populist punitive sentencing. They were equipped with many sentencing options and had many resources available to them. This situation enables them to use prison sentencing as a last resort and only if other options are unavailable. This situation also enables them to develop supportive approaches (McSweeney et al. 2008). These include being flexible, being responsive, continuously supporting drug-related offenders who need assistance in their attempt to recover. There are two approaches presented in the case study. First, the majority of participating judges appeared to distance themselves from the media due to the issues of corruption which seemed to penetrate the very organs of law enforcement (i.e. the police, the prosecution service, and the judiciary) was a source of public mistrust. Second, the substantial minority of participating judges are willing to cooperate with the media to share information which functions an essential mechanism in negotiating the form of the sentence that met the community expectation. Within the current context in Indonesia which reflects a Sunni Islamic community, this religion may influence some dimensions of justice (Davis and Robinson 2006). Even though Sunni Islam prohibits drugs, when it comes to sentencing minor drug offenders, the Sunni Islamic community seems to support the sentencing to rehabilitation. This support functions as an essential aim in negotiating the form of the sentence that would achieve broader social justice. This

support offer confirmation for symbolic interactionism and Goffman's (1959) concept on dramaturgy that such understanding of the situation was likely to be sustained during the interaction of a social group with their audiences. This interaction offer confirmation for Ulmer (2012) assertion that judges' perception is influenced by-, and in turn influence more widely the social structure.

Overall, there are so many factors which can influence the participants on sentencing minor drug offenders. Drug sentencing is made conditional depending on the five major factors (the law, politic, public, media, and religious). Under the influence of these major factors, the majority of participating judges present a harsh approach on drug sentencing, while the substantial minority of participating judges present a lenient approach because of their awareness about the underlying issue that caused drug use was the structural inequality located in socio-economic disadvantage. Thus, minor drug offenders are considered as victims of their circumstances. Within the current context in Indonesian courts, which are primarily retributive and coupled with strong drug prohibitionist policies, I present the case that problem-solving and justice that was influenced by Islamic culture go together very well, that actually Islamic more sympathetic, rather than the central government more punitive, the ways in which the Indonesian judge use that Islamic culture to support the sentencing to rehabilitation. And that this makes this study significant and highly original in the field of judicial sentencing generally and in relation to minor drug offenders specifically.

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Appendices

Appendix 1: Sample Letter to District Court

Dear – Chief Judges of (Rural/Urban District Court)

I am writing to seek consent (Rural/ Urban District Court) for research I am carrying out as part of my PhD studies. My study is an exploration of the judicial perspectives on Sentencing of Minor Drug offenders in Indonesia.

As part of the research design, I would very much like to conduct a case study of (Rural/Urban District Court). This study would entail semi-structured interviews with members of judges from each hierarchical level and observation on the sentencing of minor drug offenders. The overall objectives are:

- To understand the judicial perspectives on the sentencing of minor drug offenders
- To understand the aims that Indonesian court judges are trying to achieve when sentencing minor drug offenders
- To understand the factors that judges think influence them when sentencing minor drug offenders in Indonesian courts.

Throughout this research, all interviews will be kept strictly confidential and entirely anonymous. There are Consent, Anonymity, Recording and Use of Data sheets, interview schedules, and a copy of the confirmation email.

It would be highly appreciated if you could consider my request for consent to conduct the case study of (Rural/Urban District Court). I will be treating your data – in the absence of Indonesian data protection legislation - according to the same standards set down under UK data protection law.

If you have any queries or complaints concerning my research at any time, please feel free to contact me (Researcher's email address and phone number), or my PhD supervisor who will be able to assist you (Supervisor's email address), or LPDP of Ministry of Finance Republic Indonesia (LPDP's email address).

Thank you very much for your time.
Best regards
Researcher

Note: statements were translated into the Indonesian language.

Appendix 2: Sample letter to Supreme Court

Dear – Chief Judges of Indonesian Supreme Court

I am writing to ask approval to carry out a study as part of my PhD studies. My study is an exploration of the judicial perspectives on Sentencing of Minor Drug offenders in Indonesia. This study would entail semi-structured interviews with a representative from the Supreme Court.

The overall objectives are:

- To understand the judicial perspectives on the sentencing of minor drug offenders
- To understand the aims that Indonesian court judges are trying to achieve when sentencing minor drug offenders
- To understand the factors that judges think influence them when sentencing minor drug offenders in Indonesian courts.

Attached are my research instruments for your perusal which will be sent to potential participants. There are Consent, Anonymity, Recording and Use of Data sheets, interview schedules, and a copy of the confirmation email.

It would be highly appreciated if you could consider my request for permission to interview with a representative from the Supreme Court. Throughout this research, all interviews will be kept entirely anonymous and confidential. I will be treating your data – in the absence of Indonesian data protection legislation - according to the same standards set down under UK data protection law.

If you have any queries or complaint concerning my research at any time, please feel free to contact me (Researcher's email address and phone number), or my PhD supervisor who will be able to assist you (Supervisor's email address), or LPDP of Ministry of Finance Republic Indonesia (LPDP's email address).

Thank you very much for your time.
Best regards
Researcher

Note: statements were translated into the Indonesian language.

Appendix 3: Reminder Email

Dear (name of potential participant)

Many thanks for your interest in my PhD research "The Judicial Perspectives on Sentencing of Minor Drug offender in Indonesia: an exploratory study".

This email is an automatic reminder to highlight the specific date and time which would be suitable for our interview session to take place.

In the meantime, if you have any queries, please feel free to contact me.

Best regards,
Researcher

Note: statements were translated into the Indonesian language

Appendix 4: Information Sheet

The Study

This research is being conducted as part of my postgraduate research study at the University of Stirling. You are invited to take part in an interview. The period of the interview will take one hour and will cover three main sections:

- How you conceptualise sentencing of minor drug offenders
- Factors that you think influence sentencing of minor drug offenders
- The specific aim of your sentencing of minor drug offenders.

This interview will be held in the court office or in another court building to maintain privacy. If you agree, I will record the interview. If you are uncomfortable with this interview, please be aware that you can withdraw your interview at any point. I would also like to sit in the courtroom and observe how the sentencing practice operates. These observations will cover your engagement with drug offenders at the sentencing hearing.

Anonymity

When writing up the interview, I will remove your identity, and your contribution will be anonymised.

Confidentiality:

When storing up the data, only I, my supervisor and a proof-reader will have access to the data. The proof-reader will be required to sign a confidentiality clause and will not be given your name.

What it will be used for:

This information will be used in a PhD thesis for the Faculty of Social Sciences, the University of Stirling as part of a four-year project. Furthermore, it may be published in an academic journal. Data will be kept for a minimum of ten years from the date of publication of the research. Data will be destroyed ten years after the date of publication. I hope that your perspectives will enable greater understanding of drug sentencing in the context of delivering justice in Indonesia.

You do not have to answer all or any of the questions or discuss all of the topics. If you have any queries or complaints concerning my research at any time, please feel free to contact me (Researcher's email address and phone number), or my PhD supervisor who will be able to assist you (Supervisor's email address), or LPDP of Ministry of Finance Republic Indonesia (LPDP's email address).

Thank You for Your Interest.

Note: statements were translated into the Indonesian language and were explained orally to each participant.

Appendix 5: Consent, Anonymity, Recording and Data Use

Dear: (name of potential research participant)

I am enclosing further information concerning consent, anonymity, recording and the usage of the research data.

Consent

I will confirm that you consent to participate. This confirmation will be done verbally. I will use a sound recorder which will enable me to keep a record of your consent. However, if you prefer formal consent, then you can sign a printed consent research agreement. Please let me know before the meeting, and this will be made available.

If you wish, a copy of data will be made accessible for you to comment on or to correct any factual statement that is wrong. If you are uncomfortable with this data, please be aware that you can withdraw your data at any point.

Anonymity

Anonymity for your court will be challenging. You will be able to indicate your personal preferences for anonymity. If you prefer, I will assist with anonymity for public consumption as participants would be assigned a label such as Judge 1 until Judge 22 for District Judges. If you are uncomfortable with these issues surrounding anonymity, please be aware that you do not have to take part and that you can withdraw at any point.

Recording of data

I will use a Sony digital sound recorder to record our interview. This will allow me to concentrate on your comment, transcribe sessions for analysing the data and keep an audio record of consent and anonymity. The data will be transferred to my University computer which is password protected and situated in a keypad secured office. Audio files on the digital recorder shall then be deleted.

Please do not hesitate to contact me concerning these issues raised above.

Thank you once again, and I very much look forward to speaking with you.
Best wishes,
Researcher

Note: statements were translated into the Indonesian language

Appendix 6: Interview Consent Form

Date

As an informed participant of this study:

I have read and fully understood the information and the aim of the interview on the above study.

I am aware that content of the interview will be maintained securely and remain completely confidential. I have been informed that the data will be destroyed ten years after the date of publication.

I have agreed to take part in the study voluntarily, but I understand that I am entirely free to withdraw from the study at any time.

Every aspect of the research has been fully explained to me in my native language (Indonesia).		I agree with the interview being recorded	
I agree that the findings of the research will be published as part of the doctoral thesis and may also be written up for publication.		Name of Interviewee:	
Court jurisdiction:		Recording oral consent Signature	
Date:			

Note 1: This consent was translated into the Indonesian Language and was explained orally to each participant before obtaining and recording his/her consent.

Note 2: Oral consent is assumed if the participant said that he/she agrees to participate in this study and if he/she continues with the interview.

Appendix 7: Interview Guide

Judicial Perspectives on Sentencing of Minor Drug offender in Indonesia: an exploratory study

Introduction

The following questions will be used to guide our discussion around the judicial perspectives on the sentencing of minor drug offender in Indonesia. If you have had previous contact with me or to any of the judiciary, please consider that I know nothing about the work currently being undertaken by the judiciary. Also, you can withdraw from the study at any stage and choose to leave out any of the questions.

1. Questions concerning individual judges.

    - How do you perceive sentencing minor drug offenders?
    - What are you hoping to achieve? Regarding the aim of sentencing? Regarding the treatment of minor drug offenders?
    - To what extent do you feel the individual judges actively shape sentencing policies for minor drug offenders in Indonesia?

2. Questions relating to judicial culture

    - In your opinion, what are the existing sentencing practices for less serious drug offences?
    - Do you think other judges have this view?
    - In your opinion, are there any policies or practices which influence the judiciary when sentencing minor drug offenders in Indonesia?
    - To what extent do you feel the judiciary actively shape sentencing policies for minor drug offenders in Indonesia?

3. Questions relating to social structure.

    - In what ways do issues such as the new head of BNN orientation who declared a new 'war on drugs' against rehabilitation policy would influence the judiciary when sentencing minor drug offenders in Indonesia?
    - In your opinion, in what ways do issues such as the law enforcement, the public and media, resources and persistent offending enter into the judge's deliberations?
    - Do you have a view on the role that the judiciary plays within society and the policy-making process?
    - Are there any aspects of sentencing minor drug offenders which you feel the court does not address at the moment?
    - What do you consider should be key policies or practical solutions towards sentencing minor drug offenders?

Note: statements were translated into the Indonesian language

Appendix 8: Confirmation of Copy of the Full Transcript

Dear (participant's name)

Thank you once again for your contribution to my PhD study "The Judicial Perspectives on Sentencing of Minor Drug Offenders in Indonesia: an exploratory study". Thank you very much for providing feedback on viewing a copy of the full transcript. This feedback will now be used during my research data analysis.

As a research participant, if you wish, you will receive a copy of the key findings from the research once it has been submitted and accepted by the University of Stirling. My thesis is due for submission April 2018.

In the meantime, if you have any queries, please feel free to contact me. (Researcher's email address and phone number)

Best regards,
Researcher

Note: statements were translated into the Indonesian language

Appendix 9: Letter of Appreciation

Dear (name of research participant)

Thank you very much for giving up your time to participate in my study "The Judicial Perspectives on Sentencing of Minor Drug Offenders in Indonesia: an exploratory study". Your contribution is much appreciated, and I am grateful that you took the time to take part.

My thesis is due for submission April 2018. If you wish, you will receive a summary of the key findings from the research. The entire thesis will be available from the University of Stirling's Library.

Meanwhile, if you have any queries or comments about my research, please feel free to contact me. (Researcher's email address and phone number)

Best wishes,
Researcher

Note: statements were translated into the Indonesian language

Appendix 10: Profile of Participants

Participant Number	Court	Gender	Previous training on Drug Law
Judge 1	Urban	Male	n/a
Judge 2	Urban	Female	n/a
Judge 3	Urban	Female	n/a
Judge 4	Urban	Male	n/a
Judge 5	Urban	Female	n/a
Judge 6	Urban	Male	n/a
Judge 7	Urban	Male	n/a
Judge 8	Urban	Male	Once
Judge 9	Urban	Male	Once
Judge 10	Urban	Male	n/a
Judge 11	Urban	Male	n/a
Judge 12	Urban	Female	n/a
Judge 13	Urban	Female	n/a
Judge 14	Urban	Female	n/a
Judge 15	Urban	Male	n/a
Judge 16	Urban	Male	n/a
Judge 17	Urban	Male	n/a
Judge 18	Rural	Male	n/a
Judge 19	Rural	Male	n/a
Judge 20	Rural	Male	n/a
Judge 21	Rural	Male	n/a
Judge 22	Rural	Female	n/a
Judge 23	Rural	Female	n/a
Judge 24	Rural	Male	n/a
Judge 25	Rural	Female	n/a
Judge 26	Rural	Male	n/a
Judge 27	Rural	Male	n/a
Judge 28	Rural	Male	n/a
Judge 29	Supreme Court	Male	Once
Judge 30	Supreme Court	Male	N/a
Judge 31	Supreme Court	Male	N/a

Appendix 11: Profile of Courts

The urban district court is located in South Indonesia and can process 327 drug cases with an average of about 14 cases of drugs per month processed between January 2013 and November 2014. This process includes cases of misuse, sale, and possession of drugs. According to their fiscal year 2014 case record, the drug types used by those convicted of drug misuse were cannabis (48%), methamphetamine (48%), and methamphetamine plus heroin (4%). This court had sentenced 90% of people convicted of drug misuse to custody and 10% to rehabilitation. The court had also sentenced to custody 100% of the people convicted of the sale of drugs and possession of drugs. The rural district court is located in North Indonesia. The court had also sentenced to custody 100% of the people convicted of the sale of drugs and possession of drugs.

Appendix 12: Observation check list

The observation will take place in the courtroom. This observation will focus on the interaction between the District Judges (DJ) and the drug offenders during the sentencing hearing.

Is the DJ making eye contact with the offender(s)?	Yes___No__
Are they making personal interaction with the offenders?	Yes___No__
Is the DJ having direct dialogue with the offenders being sentenced?	Yes___No__
Is the DJ maintaining working arrangements between the courts and service providers?	Yes___No__
Is the DJ talking to other offenders (s)?	Yes___No__
Does it look like they are paying attention to the needs of different groups (stimulant users, cannabis user, poly-drug user and women)?	Yes___No__
Does it look like they arrange to offer continuous support to the drug offenders?	Yes___No__
Does it look like they are paying attention to offender's issue?	Yes___No__
Does it look like they are paying attention to relapses?	Yes___No__