



## Legal Certainty in Judge's Decision Against Perpetubuhananak Criminal Actors Sentenced to Prison Under Special Minimum Limits (Case Study Number 38 / Pid.Sus / 2019 / Pn Pdg)

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<http://dx.doi.org/10.18415/ijmmu.v7i7.1822>

### **Abstract**

The Judge's decision is closely related to how the Judge expresses his opinion or consideration based on the facts and evidence in the trial and the Judge's confidence in a case he is trying. Even though the Judge has free or independent power to impose his decision, the prison sentence is still below the specific minimum limit, causing controversy or debate, especially regarding what legal norms are used by the Judge in deciding the case, so that the Judge leaves aside the special minimum threat which is expressly regulated in the Child Protection Act. The verdict in the form of imprisonment imposed under this special minimum threshold can be considered too light and it is feared that it will not cause a deterrent effect for the perpetrators in the future and may damage the legal certainty as mandated in the Child Protection Act. This can be seen in the Padang district court's decision Case number 38 / Pid.Sus / 2019 / PN Pdg, the judge handed down a prison sentence below the specific minimum against the Defendant. The method used in this research is normative juridical method. This type of research is descriptive using secondary data. The results of the study show that 1) Judge's considerations in imposing a criminal sentence under the threat of a specific minimum prison sentence against the Defendant are based more on non-juridical considerations which are then used as judicial considerations of the Judge by observing the reconstruction of legal facts revealed at the trial and guided by Circular Supreme Court Number 1 Year 2017; 2) Judge's consideration of the conviction under a special minimum threat as the case above raises legal uncertainty both at the normative level and at the practical level.

**Keywords:** *Legal Certainty; Child Copulation; Special Minimum Prison Crimes*

### **Introduction**

The law is made to be implemented, the law cannot be said as law if the law has never been implemented. Therefore, law can be called consistent with the notion of law as something that must be done. Such law enforcement is then called law enforcement.

Law enforcement is the process of bringing legal wishes into reality.<sup>1</sup> As with legal certainty, Law enforcement essentially contains the supremacy of substantive values, namely justice.<sup>2</sup>

The implementation of the law is very important in people's daily lives, because the purpose of the law lies in the implementation of the law. Order and peace can only be realized if the law is implemented, and vice versa if the law is not implemented, the rule of law is only a wording that does not mean anything in people's lives.

Soeryono Soekanto explained that "Law enforcement is the activity of harmonizing the relations of values that are set out in solid and embodied rules and attitude of action as a series of translation of the final stage of value to create, preserve and maintain peaceful social relations".<sup>3</sup> This means that the law functions as a protection of human interests. In order for human interests to be protected, laws must be implemented to create, preserve and maintain peaceful relations of life.

Law enforcement will run well if law enforcement is good. Referring to Friedmann's theory, the success or failure of law enforcement depends on the Legal Substance, Legal Structure / Legal Institutions and Legal Culture. Friedman explained that the legal substance is the whole principles of law, legal norms and legal rules, both written and unwritten, including court decisions, the Legal Structure is the whole law enforcement institution, along with its officials. So it includes: Police with the police; Prosecutors' Office with the prosecutors; Lawyers' offices with their lawyers, Courts with their judges and Penitentiaries with their warders, and Legal Culture Are habits, opinions, ways of thinking and ways of acting, both from law enforcers and from citizens. Substance and Apparatus alone is not enough for the operation of the legal system.<sup>4</sup>

Related to the legal structure as Friedmann's theory above, criminal law enforcement in Indonesia is inseparable from the role of the law enforcement institution itself which consists of the Police, Attorney's Office, Lawyers and Courts. But of all these law enforcement institutions, the court has a very central role, because the court has the authority to decide cases, who is right and who is wrong.

State officials who have the power and authority of the judiciary are popularly called judges.<sup>5</sup> Judge is a state court official who is authorized by the Law to adjudicate (Article 1 point 8 of the Criminal Procedure Code). The Judge's duty is to give a decision in every case or conflict that is confronted with him, determine matters such as the legal relationship, the legal value of the behavior, and the legal position of the parties involved in a case, the dispute or conflict is impartial based on applicable law, then the Judge must always be independent and free from the influence of any party, especially in making a decision,<sup>6</sup> as regulated in Law Number 48 of 2009 concerning Judicial Power, which states that "Judicial Power is the power of an independent state to administer justice to enforce law and justice based on the Pancasila and the 1945 Constitution of the Republic of Indonesia, for the sake of the implementation of the State Law of the Republic of Indonesia".

In relation to the freedom of judges, it also needs to be explained about the position of impartial judges. The term impartial must be interpreted not literally, because in dropping the verdict the Judge must side with the right. In this case, an impartial Judge is interpreted to be impartial in his consideration and evaluation.<sup>7</sup> The verdict also referred to as a permanent verdict is the final result of the case examination in a court hearing. The court's decision is the output of a judicial process in a court of law

<sup>1</sup>Satjipto Rahardjo, *Law in the Universe of Order*, UKI Press, Jakarta, 2006, p. 135-136.

<sup>2</sup>Satjipto Rahardjo, *Law Enforcement a Sociological Review*, Genta Blishing, Yogyakarta, 2009, p. 9.

<sup>3</sup>Soerjono Soekanto, *Factors Affecting Law Enforcement*, Rajawali Press, Jakarta, 2004, p. 3.

<sup>4</sup>Lawrence M. Friedman, *Legal Systems Perspective of Social Sciences*, Nusa Meda, Bandung, 2009, p. 15-18.

<sup>5</sup>Dudu Duswara Machmudin, *Role of Judge's Confidence in Deciding a Case in Court*, XXI Judicial Year Varia Law Magazine No. 251 October, IKAHI, Jakarta. 2006, p. 51.

<sup>6</sup>Ahmad Rifai, *Legal Inventions by Judges in the Perspective of Progressive Law*, Sinar Grafika, Jakarta, 2014. p. 2.

<sup>7</sup>Hamzah Andi, *Indonesian Criminal Procedure Law*, Sinar Grafika, Jakarta, 2008, p. 106.

which goes through the process of examining witnesses, examining defendants, examining other evidence and examining evidence.<sup>8</sup>With the existence of this court decision, the parties in criminal cases, especially for the defendant, can obtain legal certainty about their status and also at the same time can also propose legal remedies that can be taken subsequently in the form of appeals or appeals, pardons and so on.

Judges in ruling a decision must be in order to guarantee the upholding of truth, justice and legal certainty for someone. So, it is not only revenge, routine work or formality. Indeed, if we return to criminal procedure law, it is simply to find material truth. Whereas in fact the wider purpose of criminal procedure law is to seek and find material truth, it is only an intermediate goal, meaning that there is an ultimate goal which is the goal of all Indonesian legal order, in that it achieves an orderly, peaceful, just, peaceful and prosperous society. Judges as law enforcement and justice are also obliged to explore, follow, and understand the legal values that live in society. Judges are formulators and diggers of legal values that live among the people, for that, the Judge must jump into the midst of the community to know, feel, and be able to undergo a sense of law and a sense of justice that lives in the community. Thus, the judge will be able to give decisions that are in accordance with the law and the sense of justice of the community.<sup>9</sup>

The judge in examining, adjudicating and deciding on a case he faces, must first use the written law first, namely the statutory regulations, but if the legislation turns out to be inadequate and inaccurate with the problems in a case, the Judge will seek and find out for yourself the law from other sources of law such as jurisprudence, doctrine, tracts, customs, or unwritten law (living law).<sup>10</sup>

This refers to Law Number 48 of 2009 concerning Judicial Power in Article 50 paragraph (1) stated "The court's decision in addition to containing the reasons and grounds for the decision, also contains the article of the relevant statutory regulations or unwritten legal sources used as the basis for judging".

Judge's decision is closely related to how the Judge in expressing his opinion or consideration based on the facts and evidence in the trial and the Judge's confidence in a case he is trying, so that in a court decision there must be considerations regarding matters which incriminate and alleviate, the consideration was used as a reason by the Judge in passing the verdict both in the form of a conviction and others as regulated in Article 197 letter d and 197 letter f of the Criminal Procedure Code In Article 197 letter d reads "Considerations which are summarized concisely about the facts and the circumstance along with the evidentiary tool obtained from the examination of the trial which is the basis for determining the defendant's error. "While Article 197 letter f reads "Article of legislation which forms the basis of punishment or acts and regulations which form the legal basis of the decision, accompanied by circumstances which incriminate and alleviate the defendant".

Regarding decisions that can be handed down by Judges against perpetrators of crimes can take various forms, this is as regulated in the Criminal Procedure Code (Criminal Procedure Code), which is in the form of free decisions, decisions that are independent of all lawsuits, and convictions. The court's decision in the form of punishment is handed down to the Defendant if the panel of judges (the court) is of the opinion that the defendant has been legally proven and is convinced of committing the criminal act charged to him. The court's verdict in the form of an acquittal (*vrijspraak*) is handed down to the defendant if the panel of judges or the court is of the opinion that the defendant is not legally proven and is convinced of committing the criminal act charged to him.<sup>11</sup>

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<sup>8</sup> Leden Marpaung, *Criminal Case Handling Process*, Sinar Grafika, Jakarta, 2011, p. 129-130

<sup>9</sup> Prasetyo Teguh, *Criminal Law*, Raja Grafindo Persada, Jakarta, 2011, p. 32.

<sup>10</sup> Ahmad Rifai, *Op. Cit.* p. 6.

<sup>11</sup> Leden Marpaung, *Op. Cit.* p. 131.

In passing a criminal verdict, the Judge has very broad freedom to choose the type of criminal (strafsoort) in accordance with his wishes, because in principle the positive criminal law of Indonesia uses an alternative system in the inclusion of criminal sanctions.<sup>12</sup> Criminal arrangements or criminal systems according to positive Indonesian law itself are regulated in Article 10 of the Criminal Law Code, which consists of:<sup>13</sup>

- a. Criminal principal:
  1. capital punishment
  2. imprisonment
  3. criminal Cage: V
  4. criminal fines
- b. Additional penalties:
  1. revocation of certain rights
  2. confiscation of certain items
  3. announcement of the judge's decision

In addition, the criminal penal system in Indonesia is also subject to a general minimum criminal system, general maximum, special maximum, and special minimums for certain offenses stipulated in Special Laws such as Corruption, Criminal Money Laundering, Criminal Acts Narcotics, Child Protection Crimes and others.

The minimum criminal formulation that applies in Indonesia is actually regulated in the Criminal Law Act on Article 12 Paragraph (2) of the Criminal Law Act for imprisonment and Article 18 Paragraph (1) of the Criminal Law Act for confinement. The two Articles stipulate that the minimum crime is 1 (one) day and this is generally accepted. Whereas for specific minimum crimes, it is not regulated directly in the Criminal Code Act, only that Article 103 of the Criminal Law Code states that laws outside the Criminal Code Code can only regulate matters that special.

Regarding this specific minimum crime, Barda Nawawi argued that<sup>14</sup> "Special minimum penalties are an exception, namely for certain offenses which are considered to be extremely detrimental, dangerous or unsettling to the public and offenses qualify as a result (Erfolsqualifiziertedelikte) as a quantitative measure that can be used as a benchmark that offenses threatened with imprisonment over 7 (seven) years that can be given a special minimum threat, because those offenses are classified as very heavy.

Barda Nawawi Arief who stated,<sup>15</sup> that the need for this special minimum can be felt from public unrest or lack of public dissatisfaction with imprisonment that has been imposed in practice, especially crimes that are not much different between the perpetrators of high-class offenses and those of lower-class offenders.

In connection with the specific minimum criminal threat mentioned above, there is a case of child sexual intercourse committed by Defendant Yogi Maesa (21 years) against the Afnila victim who was still 15 years old in the span of time between September 2017 to Monday on November 5, 2018, located in a boarding house located in East Sikakap Hamlet Sikakap Village Sikakap District Kepulauan Mentawai Regency and Middle Sikakap Hamlet Sikakap Village Sikakap District Kepulauan Mentawai Regency.

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<sup>12</sup>Muladi, *Capita Selecta Criminal Justice System*, Diponegoro Press University, Circular Letter of the Supreme Court, 2001, p. 107.

<sup>13</sup>R. Soesilo, *Book of Criminal Laws and Their Comments Complete Article by Article*, Politea, Bogor, 1996. p. 34.

<sup>14</sup>Barda Nawawi Arief, *Flower of Criminal Law Policy*, Kencana Prenada, Bandung., 2005, p. 128.

<sup>15</sup>*Ibid*, p. 7.

The incident began on a day and date that is not remembered again around September 2017, at around 20.00 WIB, Defendant Yogi Maesa came to boarding the Anak Afnila boarding house, to meet with the Afnila Child and chat, then around 21:00 WIB Aff Children ordered Defendant Yogi Maesa returned to his house because of the rules in the Afnila Anak boarding house guest hours only until 21.00 WIB then the defendant said to Afnila Children, "No, I just slept here", then around 22:00 Wib Afnila Children and Defendant Yogi Maesa entered the room to sleep, then at around 2:00 a.m. the Defendant woke up and then kissed the Afnila Son's lips, then Afnila Son woke up from sleep and said to Defendant Yogi Maesa, "do not, just sleep again we", then the Defendant immediately opened the pants and underwear of Afnila Children and Afnila Children tried to raise their pants and panties again, then the Defendant kissed Afnila Son's lips again, then the Defendant opened the pants and underwear of Afnila Children, then the Defendant also opened his own pants and pants , after that the Defendant crushed Afnila's son's body and inserted his genitals into the genitals of Afnila's Child until the Defendant released his sperm on the abdomen of Afnila's Child then Afnila's Child told the Defendant "what if I get pregnant later", then the Defendant replied, "I will take any responsibility what happens to you, later if I graduate from the army I will pay for your life and pay for your studies ".then the Defendant kissed the Afnila Child's lips again, then the Defendant opened the Afnila Child's pants and panties, then the Defendant also opened his own pants and underwear, after that the Defendant crushed Afnila Child's body and inserted his genitals into the Afnila Child's genitals until the Defendant released his sperm in on the stomach of Anak Afnila then Anak Afnila said to the Defendant "what if I get pregnant later", then the Defendant replied, "I will be responsible whatever happens to you, later if I graduate the army I will pay for your life and pay for your education".then the Defendant kissed the Afnila Child's lips again, then the Defendant opened the Afnila Child's pants and panties, then the Defendant also opened his own pants and underwear, after that the Defendant crushed Afnila Child's body and inserted his genitals into the Afnila Child's genitals until the Defendant released his sperm in on the abdomen of Anak Afnila then Anak Afnila said to the Defendant "what if I get pregnant later", then the Defendant replied, "I will be responsible whatever happens to you, later if I graduate from the army I will pay for your life and pay for your education".after that the Defendant crushed the Afnila Child's body and inserted his genitals into the Afnila Child's genitals until the Defendant released his sperm on the Afnila Child's stomach then Afnila's Child said to the Defendant "what if I get pregnant later", then the Defendant replied, "I will be responsible whatever happens to you, later if I graduate from the army I will pay for your life and pay for your studies ".after that the Defendant crushed the Afnila Child's body and inserted his genitals into the Afnila Child's genitals until the Defendant released his sperm on the Afnila Child's stomach then Afnila's Child said to the Defendant "what if I get pregnant later", then the Defendant replied, "I will be responsible whatever happens to you, later if I graduate from the army I will pay for your life and pay for your studies ".

Furthermore, because of the Defendants' promises, Afnila's Child wants to be fucked until repeatedly by the Defendant, until the period of September 2017 to November 2018 the Defendant has fucked Afnila's Child 6 (six) times, the last time was on Monday 05 November 2018 at 01.00 a.m. at the house of a friend of the Defendant in Sikakap Tengah Village Sikakap District Kepulauan Mentawai district, while Afnila's son was sleeping the Defendant kissed Afnila's lips and embraced the body of Afnila's Child, then the Defendant opened his pants and underwear Afnila and the Defendant opened his pants and underwear to the extent of his thighs, then the Defendant inserted his genitals into the genitals of Afnila's Children, until the Defendant released his sperm on the abdomen of Afnila's Children.

In accordance with the title discussed in this paper regarding child copulation, the regulation prohibiting child copulation is contained in Article 76D of Law No. 35 of 2014 concerning Amendment to Law Number 23 of 2002 concerning Child Protection, which reads "Everyone is prohibited from doing Violence or threats Violence forces the Child to have intercourse with her or with others." Then in Article 81 paragraph (1) of the Child Protection Act confirms that the consequences of violations of Article 76D can be sentenced to a maximum imprisonment of 5 (five) years and a maximum of 15 (fifteen) years and

a maximum fine of Rp 5,000,000,000.00 (five billion rupiah). It also includes "any person who deliberately deceives, a series of lies,

From the formulation of Article 81 of the Child Protection Act above, it can be seen that in addition to the stipulation of a maximum criminal specifically for the perpetrators of criminal offenses namely a maximum imprisonment of 15 (fifteen) years and a maximum fine of Rp. 5,000,000,000.00 (five billion rupiahs), the Child Protection Act also explicitly sets a specific minimum criminal limit that will be imposed on the perpetrators of a criminal offense if it violates the provisions of that article, namely with a minimum imprisonment of 5 (five) years.

The case has been processed and tried in the Padang District Court with case number 38/Pid.Sus/2019/ PN Pdg where in the trial process, the Public Prosecutor who handled the case charged the Defendant with the provisions of Article 81 paragraph (2) PERPU No.1 year 2016 jo Law No. 17 of 2016 concerning Stipulation of PERPU No.1 of 2016 concerning Second Amendment to Law No. 23 of 2002 concerning Child Protection in conjunction with Article 64 paragraph (1) of the Criminal Law Code concerning continued acts due to sexual acts committed by the Defendant to the victim This was carried out repeatedly in the period between September 2018 and Monday, November 5, 2018, and the Prosecutor in charge of the case demanded the Defendant be imprisoned for 7 (seven) years in prison.

During the trial proceedings, there was peace between the Defendant and the victim in which the Defendant's family promised to marry the Defendant to the victim. The peace is stated in the form of a peace letter.

The peace was then considered by the panel of judges as one of the reasons that alleviated the Defendant in his decision, so that the panel of judges who tried and decided the case handed down a criminal verdict against Defendant Yogi Maesa who was declared to have been legally proven and convincingly guilty of committing a crime persuade children to have intercourse with him continuously "and impose a criminal sentence against Defendant Yogi Maesa with imprisonment for 2 (two) years 6 (six) months. Based on these facts, it can be seen that the District Court Judges who tried and decided on this case have handed down the verdict under the special minimum criminal threat as required by the Child Protection Act.

Upon the decision, the public prosecutor handling this case then filed an appeal to the West Sumatra High Court on the grounds that the Judge's Decision of the District Court of Padang No. 38 / Pid.Sus / 2019 / PN Pdg gave a verdict that was too light (under a special minimum criminal), so the Prosecutor considers that the decision does not / does not meet the sense of justice in the community. District Court Judges do not base considerations on criminal provisions that have been expressly regulated regarding criminal sentences of at least 5 (five) years as stipulated in Article 81 of Law Number 17 Year 2016 concerning Stipulation of PERPU No.1 of 2016 concerning Second Amendment to Law Law No. 23 of 2002 concerning Child Protection.

Upon the appeal of the Public Prosecutor, the West Sumatra High Court has accepted, tried and decided the case with decision number 71 / PID.SUS / 2019 / PT PDG which in essence was the West Sumatra High Court Judge panel in agreement with the previous Judge Majerlis by dropping the judge decisions that strengthen the decision of the Padang District Court Number 38 / Pid.Sus / 2019 / PN Pdg.

Then on the decision of the West Sumatra High Court Number 71 / PID.SUS / 2019 / PT PDG, the Public Prosecutor who handled this case once again stated his disagreement and filed an appeal to the Supreme Court and finally on 22 October 2019 Judge of the Supreme Court through Decision Number 3289 K / Pid.Sus / 2019 has issued a decision on the case of the sexual intercourse of the child with the ruling rejecting the appeal of the Public Prosecutor and charging the court fee at the level of cassation to the Defendant in the amount of Rp. 2,500 (two thousand and five hundred rupiah).

In the case of sexual intercourse with children as explained above, it is clear that the Panel of Judges at all three levels of the court in convicting Defendant Yogi Maesa in his decision did not implement and waive the special minimum criminal provisions as mandated by the Child Protection Act.

Even though the Judge has free or independent power to impose his decision, the verdict in the form of imprisonment which is imposed under a special minimum limit as stipulated in the Child Protection Act causes controversy or debate, especially with regard to what legal norms are used. The judge decided in the case so as to rule out the specific minimum threat that was expressly regulated in the Child Protection Act. Because the verdict in the form of imprisonment imposed under this special minimum limit can be considered too light and it is feared that it will not cause a deterrent effect for the perpetrators or other people in the future and harm the legal certainty as mandated in the Child Protection Act.

### **Result and Discussion**

Hans Kelsen argued that law is a norm system. The norm itself is a statement that emphasizes the "should" or *das sollen* aspects by including some rules about what should be done. Norms are products and human actions that are deliberative. Laws that contain general rules are guidelines for individuals behaving in interacting with society, both in relationships with fellow individuals and in relations with society. The rules are a limitation for the community in burdening or taking action against individuals. The existence of these rules and the implementation of these rules give rise to legal certainty.<sup>16</sup>

Certainty is a matter of certainty, conditions or provisions. An essential law must be certain and fair. Certainly as a guideline of conduct and fair because the code of conduct must support an order that is considered reasonable. Only because it is fair and implemented with certainty law is considered to be able to carry out its functions. Legal certainty is a question that can only be answered normatively, and not sociology.<sup>17</sup>

Certainty is a value that cannot be separated from the law, especially for written legal norms. Law without a certainty value does not mean anything, nor does it have meaning because it cannot be used as a reference and guide for everyone's life. Certainty is one of the objectives of law related to the formation of public order. Order is the essence of certainty because it causes people to live in a certainty and can carry out their activities with good references in social life.<sup>18</sup>

Legal certainty is normatively achieved when a regulation is made and promulgated with certainty and regulates clearly and logically. Clearly in the sense of not causing doubts (multiple interpretations) and logical. Clearly in the sense of being a norm system so that between one norm and another norm does not clash or cause norm conflicts. Legal certainty also refers to the implementation of clear, permanent, consistent and consistent law which in its implementation cannot be influenced by subjective conditions. The certainty and justice are not merely moral demands, but factually characterize the law. An uncertain and uncertain law not wanting to be fair is not just a bad law.<sup>19</sup>

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<sup>16</sup> Peter Mahmud Marzuki, *Introduction to Legal Studies*, Jakarta: Kencana, 2008, p. 58.

<sup>17</sup> Dominikus Rato, *Philosophy of Law Looking for: Understanding and Understanding the Law*, Yogyakarta: Laksbang Pressindo, 2010, p. 59.

<sup>18</sup> Jaka Mulyata, *Justice, Certainty and Legal Consequences of the Constitutional Court's Decision Number 100 / PU-Law-X / 2012 Regarding Judicial Review Article 96 of Law Number 13 Year 2003 Regarding Employment*, Faculty of Law, University of Eleven March, Surakarta, 2015, p. 26. online, <https://digilib.uns.ac.id/dokumen/abstrak/48396/Kaadilan-Kepastian-dan-Akibat-Hukum-Putus-Mahkamah-Konstituit-Republik-Indonesia-Nomor-100PUUndang-Undang-X2012-Tentang-Judicial-Review-Article-96-Law-Number-13-Year-2003-About-Employment>.

<sup>19</sup> CST. Kansil, Christine, ST Kansil, Engelen R, Palandeng and Godlieb N Mamahit, *Dictionary of Legal Terms*, Jakarta, 2009, p. 385.

Utrecht argues that legal certainty contains two meanings, namely the first is the existence of general rules that make the individual know what actions may or may not be done. Second, in the form of legal security for individuals from the arbitrariness of the government because with the existence of general rules that individuals can know what may be charged or done by the government to individuals or society.<sup>20</sup>

Legal certainty stems from Juridical-Dogmatic teachings which are based on the flow of Positivism thought in the development of law which tends to see law as something autonomous and independent. For adherents of this school, the purpose of law is nothing but guaranteeing the realization of general law. The general nature of the rule of law proves that the law does not aim to realize justice or expediency, but rather a Supreme Court Circular Letter for certainty.<sup>21</sup>

Legal certainty is closely related to the principle of truth which can be closely synonymized in formal legal terms. Through deductive logic, positive legal rules are placed as major premises, whereas concrete events are placed on minor premises. Through a closed logic system, conclusions will be obtained. Conclusion is everything that can be predicted, so everyone must hold on to him.

With this grip or reference, everyone will be in order. So in this case, the existence of legal certainty will direct the community to be orderly.<sup>22</sup> Lon Fuller stated that there are 8 (eight) things that must be met to determine the law to run effectively in society, namely:<sup>23</sup>

1. *Prospectively* or the law is not retroactive;
2. *Promulgation* or the law must be announced;
3. *Clarity* or the law must be clear;
4. *Generality* or law is general in nature;
5. *Consistency or avoiding contradiction* or consistency or avoidance of contradictions;
6. *Possibility of obedience* or the possibility of compliance or must be carried out;
7. *Constancy through time or avoidance of frequent change* or constancy through time or avoid frequent changes;
8. *Congruence between official actions and declared rules* or compliance with the Act and implementing regulations.

These eight things must be realized in the process of making a law. If one or more of the eight can not be fulfilled, it will cause legal uncertainty in the community. So that legal certainty must contain several meanings, namely the existence of clarity, does not cause multiple interpretations and is easy to implement and is able to guarantee the rights and obligations of every citizen.

Legal certainty will guarantee everyone to carry out acts in accordance with applicable legal provisions, and vice versa without legal certainty then a person will not have a reference in determining their behavior. Gustav Radbruch revealed there are four references relating to the meaning of legal certainty. Among them is the law based on facts that are not formulations based on judges' judgment, the facts must be clearly formulated to avoid obscurity or error in interpreting the law, the law is positive in

<sup>20</sup> Riduan Syahrani, Summary of Legal Studies, Bandung: Citra Aditya, 1999, p. 23.

<sup>21</sup> *Ibid.*

<sup>22</sup> Shidarta, Legal Reasoning and Legal Reasoning, Yogyakarta: Genta Publishing, 2013, p. 8.

<sup>23</sup> Gunawan Widjaja, Lon Fuller Lawmaking and Interpretation of Law, Law Review, Faculty of Law, University of Pelita Harapan, Vol. VI. No. 1 July 2006, online <http://download.portalgaruda.org/article.php?article=391106&val=8576&title=Lon%20fuller,%20Manufacturing%20Done-Done%20and%20Einterpretation%20Primary>.



the form of legislation. Invitation, the positive law is not easy to change.<sup>24</sup> Still according to Gustav Radbruch justice and legal certainty are fixed parts of the law. He believes that justice and legal certainty must be considered, legal certainty must be maintained for the security and order of a country. Finally, positive law must always be obeyed so that its benefits can be felt by each party.<sup>25</sup>

The existence of legal certainty is a hope and form of guarantee for justice seekers (Justia Belen) against the arbitrary actions of law enforcement officers who sometimes always arrogance in carrying out their duties as law enforcers. The existence of legal certainty will make people aware of their rights and obligations according to the law. Without legal certainty, people will not know what to do, do not know what is right or wrong, are prohibited or not prohibited by law. This legal certainty can be realized through the realization of good and clear norms in an Act and the application will also be clear.

Based on the description above and related to the Judge's decision below the minimum specific prison sentence for the Defendant of the crime of sexual intercourse against a child as explained above, it can be seen that:

1. In connection with the conception of legal certainty at the normative level, as explained above in essence, namely: Legal certainty is normatively achieved when a rule is made and promulgated with certainty and regulates clearly and logically. Clearly in the sense of not causing doubt (multi-interpretation) and logical. Clearly in the sense of being a norm system so that between one norm and another norm does not clash or cause norm conflicts. Legal certainty also refers to the implementation of clear, permanent, consistent and consistent laws which in their implementation cannot be influenced by subjective conditions. Certainty and justice are not just moral demands, but factually characterize the law.

Through this conception, we can assess that the Supreme Court Circular Letter No. 1 of 2017 which becomes the guideline by Judges in deciding crimes under the special minimum threat stipulated in the Child Protection Act. Through the Supreme Court Circular, we can know that in principle the Circular of the Supreme Court creates legal uncertainty in law enforcement against criminal offenses in immoral acts. It can be said thus, by referring to the sentence that "Legal certainty also refers to the application of clear, permanent, consistent and consistent law which in its implementation cannot be influenced by circumstances that are subjective", whereas if we look objectively into Number 5 letter B of the Supreme Court Circular Letter Number 1 of 2017 as explained above, that the Judge in imposing a crime under a special minimum threat depends on the subjective conditions which in the formulation of point 1 (one) and Point 2 (two) of the Supreme Court Circular Letter contradicts each other. Contradicting that, as the writer explained earlier, in essence, point 1 (one) of the Supreme Court tries to prioritize individual rights or individual freedoms of the Defendant and Victim who have made peace, or married after the deed is done or based on like and like. Whereas in point 2 (two) it is clear that the Court requests the Judge to pay attention to legal considerations seen from various aspects namely juridical, philosophical, educative, preventive, corrective, repressive, and a sense of justice. Whereas philosophically and sosilogically, the Indonesian national community, we can know that the act of liking and liking for intercourse carried out is still considered to violate the sense of decency of society and the values of community law. We can prove this ourselves, that the criminal report in the above case was submitted by Victor Witness who was a Family Teacher, not by the Victim's Family.

<sup>24</sup><https://digilib.uns.ac.id/dokumen/abstrak/48396/Kaadilan-Kepastian-dan-Akibat-Hukum-Putus-Mahkamah-Konstituit-Republik-Indonesia-Nomor-100PUndang-Undang-X2012-Tentang-Judicial-Review-Article-96-Law-Number-13-Year-2003-About-Employment>. p. 24.

<sup>25</sup>Achmad Ali, *Revealing the Veil of Law a Philosophical and Sociological Study*, Op. Cit.,

2. In addition, legal certainty is normatively achieved when a regulation is made and promulgated with certainty and regulates clearly and logically. Clearly in the sense of not causing doubt (multi-interpretation) and logical. Clearly in the sense of being a norm system so that between one norm and another norm does not clash or cause norm conflicts. Seen from this aspect it is also clear that the Supreme Court Circular made in principle is not a legal rule that is regulated and clearly stated in Law Number 12 of 2011 concerning the Formation of Regulations and Regulations. So that in principle the Supreme Court Circular is only a legal product recognized in the judicial environment. Like the internal rules of an institution, but unfortunately the Supreme Court Circular often tries to specifically regulate or deviate the rule of law that has passed as positive law in Indonesia, so that the Supreme Court Circular seems as if it can be a *lex specialis* of a Special Criminal Act regulated in the Letter Circular of the Supreme Court. Whereas in principle, in order for a regulation to be referred to as a *lex specialis*, the union must have the same and similar position, for example the Child Protection Act which becomes the *Lex Specialis* of the Criminal Law Code as a general criminal code which has a level of law In Indonesia. so that the Supreme Court Circular seems as if it could be a *lex specialis* of a Special Criminal Law regulated in the Supreme Court Circular. Whereas in principle, in order for a regulation to be referred to as a *lex specialis*, the union must have the same and similar position, for example the Child Protection Act which becomes the *Lex Specialis* of the Criminal Code as a general criminal code which has a legal level In Indonesia. so that the Supreme Court Circular seems as if it could be a *lex specialis* of a Special Criminal Law regulated in the Supreme Court Circular. Whereas in principle, in order for a regulation to be referred to as a *lex specialis*, the union must have the same and similar position, for example the Child Protection Act which becomes the *Lex Specialis* of the Criminal Law Code as a general criminal code which has a level of law In Indonesia.

When the union does not have the same or similar position, then it does not meet the *lex specialis* legal principle, but it will be classified or fulfill the *lex superior derogat legi generali* legal principle because of different legal levels where lower laws may not conflict with higher laws , not the contrary the rule of law which is a guideline that should not be a positive law in law enforcement can override the Act, especially in this case the Child Protection Act.

3. In the context of law enforcement in the settlement of a crime of sexual intercourse against a child, it certainly becomes a domino effect, where it is very unlikely when a rule has caused legal uncertainty in the practice of law enforcement, legal certainty can be achieved, it is precisely the opposite, namely when legal norms have been deemed appropriate and meet aspects of legal certainty, but in practice law enforcement causes legal uncertainty because of various reasons, such as the pursuit of justice or expediency.

The legal uncertainty can be seen through the description above, that the Judge on one hand states to try to see the "justice side" of the crime so that the Judge is not just a mouthpiece of the Act and finally impose a prison sentence under the special minimum threat stipulated in the Act Child Protection. While this seems contradictory to the Judge's consideration, which further explains that because the Child Protection Act regulates criminal witnesses for fines while the Public Prosecutor does not demand the criminal fines, the Judge deems it necessary to continue to apply criminal fines, so the Judges impose criminal fines on the Defendant by criminal fines in the amount of Rp 100,000,000 (one hundred million rupiah) subsidair criminal confinement 2 (months).

Associated with Lon Fuller's opinion, we can see and analyze how legal certainty in the Judge's decision is related to imprisonment under a special minimum threat to the crime of sexual intercourse against a child, namely:<sup>26</sup>

<sup>26</sup>Gunawan Widjaja, Lon Fuller Manufacture, Op. Cit.,

1. *Clarity* or the law must be clear;  
Supreme Court Circular Letter Number 1 Year 2017 and its application in the crime of sexual intercourse with children as explained above can be said to make the law in this case the Child Protection Act, unclear. This is as explained previously, that normally the Supreme Court Circular as a guideline for judges in the judiciary, especially in this case should provide clarity on something that is not clear about the settlement of the crime of sexual intercourse against children, not the contrary the Supreme Court Circular Letter provides something not to be regulated as a guideline,
2. *Generality* or law is general in nature;  
Finally, the Supreme Court Circular Letter No. 1 of 2017 which assesses that the specific minimum threat to criminal sanctions, especially in this case the imprisonment sanctions against Defendants of the crime of sexual intercourse against children is no longer general in nature but there is a subjective element which is hung on a public order by the Judge, whereas as explained above, between the explanations of the Supreme Court Circular also appear to be contradictory. In addition, the equalization of dating (marital) relations with the bond of a marriage after the crime of sexual intercourse occurred which became the basis for the Judge to make it as a basis for imposing imprisonment under a special minimum threat also becomes strange in Indonesia and is not something that is generally applies according to legal culture,
3. *Consistency or avoiding contradiction* or consistency or avoidance of contradictions;  
As explained previously with regard to point (1) one and point (2) number 5 letter b of the Supreme Court Circular Letter Number 1 of 2017, it is clearly inconsistent and creates contradictions in its formulation, because on one hand it tries to accommodate and make rights and freedoms individuals who according to the legal culture of the community are still disgraceful, but ask the Judge to consider various aspects relating to national and state life in Indonesia.
4. *Possibility of obedience* or the possibility of compliance or must be carried out;  
Judging from the position of the Supreme Court Circular which is only as a guideline for judges, the author can state that the application of the Supreme Court Circular is very wide with the judges' lack of judgment, and finally it leads to criminal disparity by the Judge. It can be said that, because we can see that by easing and breaking the legal rules at the level of the Law alone, the Judge seems to have a very free choice to apply or not apply. As it is known that the Law specifically Article 81 of the Child Protection Act alone can be violated which incidentally is a recognized legal rule and has a clear position in the hierarchy of statutory regulations in Indonesia, moreover, a Supreme Court Circular, which is clearly stated as a guideline. On the basis of the independence and confidence of the Judges as explained above, the Judge can be very easy not to apply them.
5. *Constancy through time or avoidance of frequent change* or constancy through time or avoid frequent changes;  
A law is formed in principle through a series of legal processes that begin from planning to enactment in the official gazette. The process of making and amending the Law is also not fast but takes a long time. Unlike the Circular of the Supreme Court which incidentally is the result of a decision of the Supreme Court meeting in each room, or can be said to be a battle of the results of the meeting contained in a guideline rule called the Supreme Court Circular, certainly not a difficult thing to change it, so it seems if the Supreme Court gambles to test the implementation of the applicable legal rules in Indonesia.
6. *Congreunce between official actions and declared rules* or compliance with the Act and implementing regulations.  
Supreme Court Circular Letter especially the Supreme Court Circular Letter Number 1 Year 2017 as a guideline for rules that try to explain the rules regarding Judges' guidelines in imposing a criminal

offense for an accused child crime, is clearly not in accordance with the legal principles stipulated in the Special Law in terms of this is the Child Protection Act. This is due to the fact that the Supreme Court Circular Letter seemed to break through the minimum specific rules / norms arranged in such a way in the Child Protection Act, so that it was no longer a matter of conformity or not in principle, finally the Supreme Court Circular became the rule above the Act.

Based on the description above, it can be seen that in principle the Judge's consideration of the conviction of a criminal under the special minimum threat as the case above raises legal uncertainty both at the normative level and at the practical level. In the normative level, legal uncertainty is caused by the adoption of the Supreme Court Circular Letter No. 1 of 2017 which provides guidelines for judges to impose a crime under a special minimum threat. Whereas in principle the formulation of the Circular Letter of the Supreme Court also contradicts each other in its formulation where on the one hand it tries to open the rights of individuals to engage in sexual relations on an equal basis and likeness to marriages that occur after the act of intercourse occurs so that it becomes the basis for the Judge's consideration to ease the conviction verdict. At the practical level, such decisions and judges considerations lead to legal uncertainty caused as a domino reaction from legal uncertainty at the normative level. Legal uncertainty in this practice can also be seen through an indication of the inconsistency of the Judge in deciding the punishment of the Defendant,

### **Conclusion**

1. Judge's consideration in the decision of the Padang District Court No. 38 / Pid.Sus / 2019 / PN Pdg who imposed a prison sentence under a special minimum threat against the defendant was based on juridical and non-juridical considerations by observing the reconstruction of legal facts revealed at the trial and the judge declared guided by to SEMA Number 1 of 2017, but in the decision the Panel of Judges only saw the justice side of the defendant's side without seeing the best interests of the victim's child and according to the author in the decision the panel of judges had not yet paid attention to and considered philosophical, juridical, sociological aspects, educative, preventive, corrective, and repressive from the imposition of a criminal under the special minimum of the crime of intercourse committed by the defendant to the child, as required by SEMA Number 1 of 2017.
2. Legal Certainty in the Judge's ruling on imprisonment under a special minimum threat as the case above raises legal uncertainty both at the normative level and at the practical level. In the normative level, legal uncertainty is caused by the adoption of SEMA Number 1 of 2017 which provides guidelines for judges to be able to drop a criminal under a special minimum threat by ignoring the Child Protection Act. At the practical level, such judgments and judgments can cause legal uncertainty caused as a domino reaction from legal uncertainty at the normative level.

### **References**

1. Books  
Achmad Ali. Revealing the Veil of Law (A Philosophical and Sociological Study). Publisher of Gunung Agung Shop. Jakarta. 2002.  
  
Ahmad Rifai. Legal Inventions by Judges in the Perspective of Progressive Law. Sinar Grafika. Jakarta. 2014.<sup>1</sup>Barda Nawawi Arief, Bunga Bunga Criminal Law Policy, Kencana Prenada, Bandung. 2005.

- Dominikus Rato, *Legal Philosophy Looking for: Understanding and Understanding Law*, Yogyakarta: Laksbang Pressindo, 2010.
- Hamzah Andi, *Indonesian Criminal Procedure Law*, Sinar Grafika, Jakarta, 2008.
- Leden Marpaung, *Criminal Case Handling Process*, Sinar Grafika, Jakarta, 2011.
- Muladi, *Capita Selecta Criminal Justice System*, Dipenegoro Press University, Circular Letter of the Supreme Court, 2001.
- Peter Mahmud Marzuki, *Introduction to Legal Studies*, Jakarta: Kencana, 2008.
- Prasetyo Teguh, *Criminal Law*, Raja Gravindo Persada, Jakarta, 2011.
- R. Soesilo, *Book of Criminal Laws and Their Comments Complete Article by Article*, Politea, Bogor, 1996.
- Riduan Syahrani, *Summary of Legal Studies*, Bandung: Citra Aditya, 1999.
- Shidarta, *Legal Reasoning and Legal Reasoning*, Yogyakarta: Genta Publishing, 2013.
- Ahmad Rifai, *Legal Inventions by Judges in the Progressive Legal Perspective*, Sinar Grafika, Jakarta, 2014.
- CST. Kansil, Christine, ST Kansil, Engeliën R, Palandeng and Godlieb N Mamahit, *Dictionary of Legal Terms*, Jakarta, 2009.
- <https://digilib.uns.ac.id/dokumen/abstrak/48396/Kaadilan-Kepastian-dan-Akibat-Hukum-Putus-Mahkamah-Konstituit-Republik-Indonesia-Nomor-100PUndang-Undang-X2012-Tentang-Judicial-Review-Article-96-Law-Number-13-Year-2003-About-Employment>.
- Jaka Mulyata, *Justice, Certainty and Legal Consequences of the Constitutional Court's Decision Number 100 / PU-Law-X / 2012 Regarding Judicial Review Article 96 of Law Number 13 Year 2003 Regarding Employment*, Faculty of Law, University of Eleven March, Surakarta, 2015, p. 26. online, <https://digilib.uns.ac.id/dokumen/abstrak/48396/Kaadilan-Kepastian-dan-Akibat-Hukum-Putus-Mahkamah-Konstituit-Republik-Indonesia-Nomor-100PUndang-Undang-X2012-Tentang-Judicial-Review-Article-96-Law-Number-13-Year-2003-About-Employment>.
- Lawrence M. Friedman, *Legal Systems Perspective of Social Sciences*, Nusa Meda, Bandung, 2009.
- Satjipto Rahardjo, *Law in the Universe of Order*, UKI Press, Jakarta, 2006.
- Satjipto Rahardjo, *Law Enforcement a Sociological Review*, Genta Blishing, Yogyakarta, 2009.
- Soerjono Soekanto, *Factors Affecting Law Enforcement*, Rajawali Press, Jakarta, 2004.
2. Journal
- Dudu Duswara Machmudin, *Role of Judge's Confidence in Deciding a Case in Court*, XXI Judicial Year Varia Law Magazine No. 251 October, IKAHI, Jakarta. 2006.
- Gunawan Widjaja, *Lon Fuller Lawmaking and Legal Interpretation*, Law Review.

### 3. The website

Pelita Harapan University Faculty of Law, Vol. VI. No. 1 July 2006,

online <http://download.portalgaruda.org/article.php?article=391106&val=8576&title=Lon%20fuller,%20Manufacturing%20Done-Done%20and%20Einterpretation%20Primary>.

<https://digilib.uns.ac.id/dokumen/abstrak/48396/Kaadilan-Kepastian-dan-Akibat-Hukum-Putus-Mahkamah-Konstituit-Republik-Indonesia-Nomor-100PUndang-Undang-X2012-Tentang-Judicial-Review-Article-96-Law-Number-13-Year-2003-About-Employment>.

<https://digilib.uns.ac.id/dokumen/abstrak/48396/Kaadilan-Kepastian-dan-Akibat-Hukum-Putus-Mahkamah-Konstituit-Republik-Indonesia-Nomor-100PUndang-Undang-X2012-Tentang-Judicial-Review-Article-96-Law-Number-13-Year-2003-About-Employment>.

Jaka Mulyata, Justice, Certainty and Legal Consequences of the Constitutional Court's Decision Number 100 / PU-Law-X / 2012 Regarding Judicial Review Article 96 of Law Number 13 Year 2003 Regarding Employment, Faculty of Law, University of Eleven March, Surakarta, 2015, p. 26. online, <https://digilib.uns.ac.id/dokumen/abstrak/48396/Kaadilan-Kepastian-dan-Akibat-Hukum-Putus-Mahkamah-Konstituit-Republik-Indonesia-Nomor-100PUndang-Undang-X2012-Tentang-Judicial-Review-Article-96-Law-Number-13-Year-2003-About-Employment>

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