

**JURIDICAL ANALYSIS OF THE JUDGE'S CONSIDERATION IN
TERMS OF MITIGATING THE DEFENDANT AGAINST
PREMEDITATED MURDER ACCORDING TO LAW NUMBER 48 OF
2009 CONCERNING JUDICIAL POWER**

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Abstract (Indonesia)

Received: Desember 11,
Revised : 2022
Accepted: Desember 15,
2022
Desember 19,
2022

Latar Belakang: Undang-Undang yang mengatur tentang Hukum Acara Pidana Nasional wajib didasarkan pada pandangan/falsafah hidup bangsa dan dasar negara, maka dari itu ketentuan pasal ataupun ayat yang terkandung di dalam Hukum Acara Pidana Nasional menggambarkan perlindungan terhadap Hak Asasi Manusia serta kewajiban warga Negara.

Tujuan: Penelitian ini bertujuan untuk mengetahui serta menganalisis tentang hal-hal yang dapat dipertimbangkan sebagai keadaan memberatkan dan keadaan meringankan dalam penjatuhan pidana. Serta mengetahui serta menganalisis tentang pengaruh pertimbangan keadaan memberatkan dan keadaan meringankan tersebut dalam penjatuhan pidana

Metode: Penelitian ini termasuk jenis penelitian normatif. Sehingga dapat diketahui bahwa hal-hal yang dapat dipertimbangkan sebagai keadaan memberatkan dan keadaan meringankan dalam putusan pemidanaan harus sesuai dengan karakteristik.

Hasil: Pertimbangan keadaan memberatkan dan meringankan yang paling utama berpengaruh dalam proporsionalitas penjatuhan pidana, baik proporsionalitas antara tindak pidana yang dijatuhkan dengan tingkat kesalahan yang dilakukan terdakwa, proporsionalitas terkait disparitas putusan, maupun proporsionalitas antara pemidanaan dengan keuntungan yang diperoleh dari tindak pidana.

Kesimpulan: Bentuknya berupa sifat, perihal, suasana, atau situasi yang berlaku, yang berkaitan dengan tindak pidana. Rumusannya ditemukan di luar dari tindak pidananya itu sendiri di luar unsur-unsur tindak pidana dan menggambarkan tingkat keseriusan tindak pidananya atau

tingkat bahayanya si pelaku, yang mempengaruhi ukuran berat-ringannya pidana yang akan dijatuhkan.

Kata kunci: Analisis Yuridis, Pertimbangan Hakim, Kekuasaan Kehakiman

Abstract (English)

Background: *The law governing the National Criminal Procedure Law must be based on the views/philosophies of national life and the basis of the state, therefore the provisions of articles or paragraphs contained in the National Criminal Procedure Law describe the protection of human rights and the obligations of citizens.*

Objectives: *This study aims to find out and analyze things that can be considered aggravating circumstances and mitigating circumstances in criminal convictions. As well as knowing and analyzing the effect of consideration of burdensome circumstances and mitigating circumstances in criminal convictions*

Methods: *This research belongs to the normative type of research. So that it can be known that the matters that can be considered as aggravating circumstances and mitigating circumstances in the judgment of conviction must be by the characteristics.*

Result: *The most important consideration of aggravating and mitigating circumstances affects the proportionality of criminal convictions, both the proportionality between the criminal act imposed and the degree of guilt committed by the defendant, the proportionality related to the disparity of the verdict, and the proportionality between the conviction and the profits obtained from the criminal act.*

Conclusion: *The form is in the form of the nature, subject, atmosphere, or situation that prevails, relating to the criminal act. The formulation is found outside of the criminal act itself outside the elements of the criminal act and describes the seriousness of the crime or the degree of danger of the perpetrator, which affects the size of the severity of the crime to be imposed.*

Keywords: *Juridical Analysis, Judges' Considerations, Judicial Power*

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INTRODUCTION

The law governing the National Criminal Procedure Law must be based on the views/philosophies of national life and the basis of the state, therefore the provisions of articles or paragraphs contained in the National Criminal Procedure Law describe the protection of Human Rights and the obligations of citizens.

The principles governing the protection of nobleness and human dignity have been stipulated in Law Number 48 of 2009 concerning Judicial Power.

One of the principles of this Act is the equal treatment of everyone in public by not discriminating against treatment.

Judicial power in the context of the Indonesian state is the power of an independent state to organize a judiciary to uphold law and justice based on Pancasila for the implementation of the State of Law of the Republic of Indonesia.

The decision of the Magistrate is the crown and culmination of a case being examined and adjudicated, therefore a judge should be fair in the enforcement of the law as specified in the Judicial Power Act.

Judges in making decisions must also pay attention to all aspects of it, ranging from the need for caution, and avoiding a little bit of inaccuracy, both formal and material to the technical skills of making it.

If such negativity can be avoided, it is certainly expected that in the Judge should be born, grow, and develop an attitude or nature of moral satisfaction.

If then the judgment he made can be a benchmark for a case, or it can be a reference material for theorists and legal practitioners as well as a separate conscience satisfaction if the judgment is upheld and not overturned by a higher court.

If a Judge is going to pass a verdict, then he will always try to make his ruling later how acceptable to society, at least trying to make the environment of the person who will be able to accept his verdict as wide as possible.

The judge will feel more relieved when his decision can give satisfaction to all parties in a case, by providing reasons or considerations that are by the values of truth and justice (Habibi Insani Pohan, 2017: 2).

Judges' considerations are at the heart of every judge's decision, Legal considerations are the basis or basis for judges in deciding every case tried.

Legal considerations, in addition to containing logical, rational reasons or considerations, also contain other considerations in the form of interpretation and legal construction of the panel of judges on the case being tried.

RESEARCH METHODS

This research is included in the normative juridical type of research is a research procedure that produces descriptive data in the form of written words or writings from people and observed behaviors and seeks to find meaning (Abdulkadir, 2004).

The approaches used by the author from some of the approaches above are the *statute* approach and the conceptual approach.

A statutory approach is an approach that is carried out by examining all laws and regulations concerned about the legal issues handled (Marzuki, 2011).

RESULTS AND DISCUSSION

Matters that can be considered as aggravating circumstances and mitigating circumstances in a criminal conviction

The legislation does not clearly formulate what is meant by aggravating and mitigating circumstances and anything that can be judged as aggravating and mitigating circumstances.

To understand this, it must be extracted from other legal sources as well as by using methods of interpretation. In the Big Dictionary of online Indonesian, it is stated that the notion of "state" is: nature; subject (an object) or atmosphere; or current situation (Language Development and Development Agency, 2018).

Whereas what is meant by "burdensome and that which is lightening" is that which makes it heavy or light, where weight and light are measures, in this context, the measure of the crime to be imposed.

"State" or "circumstance", in *Black's Law Dictionary* is defined as *an accompanying or accessory fact, event, or condition* (Garner, 2004).

(A fact, event, or condition that accompanies or supplements). In this case, "circumstance" is not a fact, event, or underlying condition, but rather an accompanying or complementary one.

According to (Peonaşu, 2015), "circumstances" are circumstances, situations, events, or other information materials from reality that exist outside the content of the criminal act, but are related to the criminal act committed or with the perpetrator of the criminal act, which aggravates or reduces the level of seriousness of the criminal act or the level of danger of the perpetrator.

Peonasu added that without being directly linked to the crime, people can still describe the seriousness of the crime or the level of danger of the perpetrator.

In some countries, these aggravating and mitigating circumstances are known as *mitigating (extenuating)* circumstances and aggravating circumstances.

According to Hessick, aggravating sentencing factor is all the facts and circumstances on which the criminal is based and the mitigating factor is all the facts and circumstances on which the criminal is based (Byrne Hessick, 2008).

Based on the grammatical interpretation and opinion above, it can be concluded that "aggravating and mitigating circumstances" are the nature, subject, atmosphere, or prevailing situation relating to criminal acts.

Outside of the criminal act itself, which describes the seriousness of the crime or the degree of danger to the perpetrator, which affects the size of the severity of the crime to be imposed.

As formulated above, it can be seen that the characteristics of this aggravating and mitigating criminal situation are as follows:

1. The form is in the form of the nature, subject, atmosphere, or situation that applies related to criminal acts.

Briefly, the nature, subject, atmosphere, or situation that applies here can be formulated as anything that affects a criminal act or is affected as a result of a criminal act, it can be:

- A cause, trigger, or driver relating to a criminal offense;
- It can be anything that applies at the time of the commission of a criminal offense; and/or
- Any impact or consequences of the commission of the crime.

2. His formulation was found outside of the criminal act itself. If the formulation of criminal acts can be seen from the elements of criminal acts.

Thus the formulation of these aggravating circumstances and mitigating circumstances is beyond the formulation of the elements of the criminal act but relates to the criminal act itself as required in the 1st characteristic above.

3. Describes the seriousness of the crime or the degree of danger of the perpetrator, which affects the size of the severity of the crime to be imposed. This third feature limits the notion of "relating to a criminal act", that is, it is limited to everything that gives an idea of the seriousness of the crime or the degree of danger to the perpetrator, and therefore these circumstances affect the size of the severity of the crime to be imposed.

Effect of consideration of such aggravating circumstances and mitigating circumstances in criminal convictions

M. Yahya Harahap argued that the facts and circumstances should be clearly outlined according to what was found in the examination of the trial court.

Even as to the facts or circumstances that are "aggravating" and "mitigating" the defendant should be clearly expressed in the description of the consideration of the judgment.

This is very important to elaborate, on because the basis used as the basis for the starting point to determine the severity of the criminal sentence to be imposed on the defendant, is inseparable from the facts and circumstances that are aggravating or mitigating (Harahap, 2002).

In any criminal conviction, the judge is faced with the choice of what types of criminal charges and how heavily the appropriate criminal weight is imposed on a defendant.

It is these types and limits of sentencing that limit the freedom of judges in criminal convictions.

The regulation of specific limits on punishment, along with the elements of a qualifying circumstance, and the criminal ballast factors stipulated in the law, are related to the juridical basis of punishment to meet legal certainty that affects the criminal limits that can be imposed.

Meanwhile, consideration of burdensome and mitigating circumstances has a role/influence on matters related to philosophical foundations and sociological foundations to fulfill justice and expediency.

1. Proportionality of Criminal Convictions

Proportionality here is done to two things. First, about the overall level of the scale of punishment, both the maximum criminal and the severity of the sentence that is as real as it is imposed, which is a consequence of the offender's guilt.

Second, how is the crime imposed on a perpetrator when compared to other events whose guilt the perpetrator is comparable to him (Chairul Huda, 2015).

In other words, this proportionality concerns the equilibrium between the sentence imposed and the degree of seriousness of the crime committed and also concerns the disparity of the verdict whose problem is often referred to as a "disturbing issue" or "*universal issue*".

Regarding the equilibrium between the sentence imposed and the degree of seriousness of the crime committed, consideration of these aggravating circumstances and mitigating circumstances – as the name implies – serves to determine the severity of the sentence.

Like a pendulum that moves from the minimum criminal limit (both general and special minimum) to the maximum limit, where the movement ideally stops at the equilibrium point so that proportionality is achieved.

Regarding the disparity of judgments, these aggravating circumstances and mitigating circumstances can also be used as a comparison between the verdicts to be imposed on a defendant from another defendant in a similar case.

With almost the same error, almost the same result, with the aggravating and mitigating circumstances factor also almost the same, the verdicts in the case of the two defendants should also be almost the same level.

Apart from the two issues of proportionality mentioned above, there is also another consideration of proportionality on which the judge generally stated in the judgment is based, namely that the defendant has enjoyed the proceeds of his crime.

With the premise that human beings as intelligent beings who doing deeds are always influenced by consideration of the *units of pleasure and pain*.

Jeremy Bentham describes the proper nature of each such unit in sentencing by considering the "proportionality between the conviction and the criminal act", with one of the arguments that the criminal conviction must adequately offset the benefits that the offender may have from his or her criminal act (Morrison, 2016).

The fact that the defendant has enjoyed the proceeds of his crime is a consideration of the proportionality between the criminal conviction and the profits earned.

For example, a State Civil Apparatus who is proven to enjoy corruption proceeds of up to tens of billions of rupiah, while his legal income is only a few million rupiahs every month.

The judge may consider the comparison between the profits earned and the length of time the defendant earned them and the legitimate income, as a comparison in the determination of the criminal period to be imposed.

The issue of proportionality of punishment is also a special concern of the makers of the Criminal Code Bill which lists the existence of sentencing guidelines.

Where these matters, according to the Author, are entirely included in the matter of consideration of aggravating and mitigating circumstances, so that considerations regarding the guidelines for conviction can later be considered in consideration of aggravating and mitigating circumstances.

2. Consideration of Aggravating Circumstances in Maximum Criminal Conviction

In Indonesian criminal law, there is no stipulation of the maximum criminal charge, in contrast to Romanian criminal law.

In Article 78 of the Romanian Criminal Law, it is determined that the consequence of *aggravating* circumstances in a criminal act is that both imprisonment and fines can be imposed up to a special maximum limit, and in certain circumstances, a third can be added.

From the judgments mentioned above, it can also be seen the relationship between the consideration of aggravating circumstances and the maximum criminal conviction, as follows:

- In the case of illicit circulation of narcotics, the court sentences death in consideration of aggravating circumstances, including a large amount of narcotics evidence.
- In the case of murder, the court imposes the death penalty in consideration of aggravating circumstances, including that the murder was committed in a very sadistic, heinous manner, and so on.
- In corruption cases, the court imposes imprisonment for a long time considering the aggravating circumstances of the defendant's high position in the constitution/government and the number of state losses caused.

Such aggravating circumstances, such as the example mentioned above, are considered for the judge in imposing a severe sentence up to the maximum sentence.

3. Consideration of Mitigating Circumstances in Maximum Criminal Conviction

In the United States, as Stetler says, consideration of these mitigating circumstances can prevent the perpetrator from the maximum threat of the death penalty.

Even in major gruesome cases, such as in the "*Beltway Sniper*" case with defendant Lee Boyd Malvo, the 9/11 hijacking with defendant Zacarias Moussaoui and Oklahoma City Bombing with defendant Terry Nichols, who was sentenced to life imprisonment (Stetler, 2007).

Justice O'Connor in California, in his concurring opinion on the California case *v. Brown*, argued for thorough consideration of the evidence on mitigating circumstances in a case punishable by death.

The jury needs to get a reasoned moral response regarding the background, character, and crimes committed by the perpetrator, rather than being at risk of an undirected emotional response.

In Indonesia, in jurisprudence, it is still stated that the maximum crime cannot be imposed, as long as there is still consideration of the circumstances that relieve the defendant.

4. Consideration of Mitigating Circumstances in Criminal Convictions under Special Minimum

Several decisions of PN Tangerang No. 2597/Pid.B/2009/PN.Tng, No.297/Pid.B/2010/PN.Tng and No. 904/Pid.B/2010/PN.Tng, which became the object of Tendik Wicaksono's thesis research.

Criminal convictions below the special minimum limit in narcotics cases, taking into account mitigating circumstances, include the role of the perpetrator only as a narcotics abuser, a small amount of evidence, and perpetrators who are still classified as children (Wicaksono, 2011).

(In such cases, Law No. 11/2012 on the Juvenile Criminal Justice System has not yet been enacted which excludes special minimum criminal provisions in juvenile criminal cases).

On the issue of criminal convictions below this particular minimum, Chairul Huda argued, if the use of such a special minimum can result in a judge imposing a more severe sentence than the offender's guilt, then the provisions of the law can be ignored.

The opinion is in line with SEMA No. 03/2015 which stipulates that the judge decides according to the letter of the indictment but can deviate from the specific minimum criminal provisions by making sufficient consideration.

In the SEMA formulation, it is stated that examples of narcotics case cases are charged with Article 111 or Article 112 of Law No. 35/2009 on Narcotics, but the facts of the trial are proven to be Article 127, where the defendant is only proven to be a user and the amount of evidence is only small.

The consideration of the role of the perpetrator only as a drug user/abuser and the small amount of narcotic evidence, is including consideration of mitigating circumstances so that it can be concluded that the mitigating circumstances are such.

If a sentence within the special minimum limit becomes disproportionate to the degree of guilt, then experientially the specific minimum criminal limit may be kept.

CONCLUSION

Based on the above explanation, it can be concluded that the matters that can be considered aggravating circumstances and mitigating circumstances in the conviction must be in accordance with the characteristics:

1) The form is in the form of the nature, subject, atmosphere, or situation in force, relating to the criminal act, 2) The formulation is found outside of the criminal act itself

(outside the elements of the criminal act); and 3) Describe the severity of the crime or the degree of danger to the perpetrator, which affects the size of the severity of the crime to be imposed.

In addition, consideration of aggravating and mitigating circumstances is most importantly influential in the proportionality of criminal convictions, both the proportionality between the criminal act imposed and the degree of guilt committed by the defendant, the proportionality related to the disparity of the verdict, and the proportionality between the conviction and the profits obtained from the criminal act.

Consideration of aggravating and mitigating circumstances also affects the maximum criminal and minimum criminal convictions, and it may even be the basis for imposing a sentence below the specific minimum limit.

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