

## The principle of Restorative Justice in sentencing In the 2023 Criminal Code

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### Abstract

the concept and analysis of the regulation of the principles of restorative justice in the 2023 Criminal Code is a solution for imposing sentences on minor criminal cases and avoiding short-term imprisonment, as well as preventing this. Application of the principle that the aim is to prevent people from being punished. This is for protection and is seen in society as an effort to rehabilitate the perpetrator. By upholding a sense of justice and the benefits of the law, as well as Pancasila values in law enforcement and criminal objectives, implementing the principle of judge's forgiveness in the 2023 Criminal Code means that there are defendants who have not been found guilty or served a sentence, even though their charges have been legally and convincingly proven.

**Keywords: Principle of Restorative Justice; judicial pardons; Criminal Code 2023**

### Introduction

The concept of social justice has become one of Soekarno's philosophical thoughts. According to Soekarno, social justice is a society or the nature of a society that is just and prosperous, happy for everyone, there is no humiliation, no oppression, no exploitation. According to him, social justice must be more oriented towards the lower classes of society. Soekarno wanted to establish social justice as the heritage and ethics of the Indonesian nation that must be achieved. In order for social justice to be realized, social justice must start from living in society.<sup>1</sup>

The idea of a judge's pardon (rechterlijk pardon/judicial pardon) is one of

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<sup>1</sup>Bur Rasuanto, "Social Justice Two Indonesian Thoughts of Soekarno and Hatta", Journal of Discourse, Vol. 2, no. 1, 2000, p. 108.



the interesting things in the current national Criminal Code. Under certain conditions, the judge has the authority to apologize to the defendant and not take any action against him, even though his crime and guilt have been proven.

The idea of forgiveness is expressly stated in paragraph (2) of article 54 of the Criminal Code;

*"The severity of the act, the personal condition of the perpetrator, or the circumstances at the time the crime was committed and what happened afterwards can be used as a basis for consideration for not imposing a crime or not taking action by considering aspects of justice and humanity."*

Forgiving judges is a new idea that is not covered by the current Criminal Code (a colonial legacy). This is a form of modification rather than legal certainty which so far seems rigid and standard in regulations, and the current punishment formulation only takes into account criminal acts and mistakes. Therefore, punishment is seen as a mandatory consequence that must exist if crime and guilt have been established.

Really, this model of judicial pardon principle looks very interesting,

but the author is of the opinion that if this judicial pardon is not combined with harmonization of the Criminal Procedure Code then it is clear that there will be many regulations that are difficult for judges to implement. The Criminal Procedure Code (KUHAP) defines three types of decisions made by judges, namely,

- a. decision to be free from all lawsuits (onslag van recht vervolging), verdict.
- b. punishment (veroordeling tot enigerlei sanctie), and



c. acquittal (*vrijspraak*).<sup>2</sup>

Apart from that, the Criminal Procedure Code reiterates that the option of punishment is given if the court considers that in this case the defendant has been legally proven guilty of committing the crime of which he is accused. Furthermore, the court can also decide to acquit the defendant because it considers that the evidence that has been presented before the trial is not strong enough to prove the defendant's guilt for the act of which he has been accused. Finally, with various considerations, if the court considers that the criminal act charged against the accused party is proven but the act is not wrong or is not a criminal act, then in this case the defendant is acquitted of all charges.

This description raises the question of what will happen. If in accordance with Article 183 of the Criminal Procedure Code, the defendant is declared guilty legally and convincingly, the Panel of Judges is of the opinion that the defendant's actions do not require a sentence other than an apology. Because as we probably know, in our law enforcement framework there is only punishment and not good punishment (*vrijspraak*)acquittal and (*onslag van recht vervolging*) a decision to be free from all legal demands which in terms of legislation is a form of decision. Apart from that, it must also be made clear what model will be imposed in the panel of judges' verdict

If the Panel of Judges is of the view that if a defendant has been legally tested and has been proven to have committed the criminal act charged against him,

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<sup>2</sup>Andi Hamzah, Indonesian Criminal Procedure Law, Second Edition, (Sinar Graphics: Jakarta, 2008), p. 36.



but imposing a crime on a defendant will actually bring injustice, then the judge in this case has no option but to impose a sentence from one of the three categories. the provisions mentioned previously. This creates problems because the judge has no other option. Another reason is because in this case the judge is still struggling with the guidelines of the principle of legality, which is still one of the main foundations in criminal procedural law. For this principle of legality, all law enforcement actions need to be based on legal provisions and statutes, in other words, law enforcement officials cannot be justified in carrying out actions outside the law.<sup>3</sup>

Therefore, there is no reason for the judge not to punish the defendant if his actions violate the rules, are in accordance with the formulation of the law, and meet all the requirements for punishment. Another thing that is also noted and often receives input in terms of enforcement in the world of criminal justice, which still has a pattern of thinking about the pattern of retaliation, of course, often does not have a clear punishment objective in this retributive model, especially in light criminal cases with the aim of ensuring the continuity of punishment in providing an effect. deterrence and reduction in the percentage of crime is also questionable.

Judges have the freedom to prioritize justice above legal certainty if the imposition of a crime will cause societal upheaval and is contrary to justice and humanity. There is a judge's pardon. The existence of judicial pardon began in communist countries such as China and Russia which have high subsociality. In this concept of judge's forgiveness, experts Andi Hamzah emphasized that if an act

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<sup>3</sup> m Yahya Harahap, Discussion of Problems and Application of the Criminal Procedure Code: Investigation and Prosecution, (Second edition, Sinar Grafa: Jakarta, 2006), p.36.



is a crime, regardless of its social significance, neither punishment nor action is actually necessary.<sup>4</sup>

This research will discuss the judge's forgiveness arrangements (judicial pardon). The National Criminal Code currently recognizes the principle of judge's forgiveness as a substantial form of justice which aims to avoid prison sentences wherever possible, especially for minor crimes involving short-term deprivation of rights. This principle can also be used as a foundation as a guide to balancing justice in society. Efforts to improve material criminal law through the regulation of judge pardons in the national Criminal Code is a serious issue that needs special attention. These arrangements should be synchronized with the provisions of criminal procedural law in the Criminal Procedure Code so that the current regulations regarding judge forgiveness in the national Criminal Code are not wasted or it is feared that it will become a dead article.

In connection with the concept of social justice which is related to the case of Minah's grandmother who stole 3 (three) cocoa beans, this was not achieved, because if we refer to the Old Criminal Code which is implicitly contained in Article 1 paragraph (1), namely the principle of *nullum delictum nulla poena sine praevia lege poenali*, meaning that a person cannot be punished if there are no criminal law regulations. Logically, when there are criminal law regulations and someone commits a criminal act, they can be subject to criminal sanctions. The Old Criminal Code did not recognize any dispensation for criminal acts. However, currently the government has updated a criminal law product or what could be called the Criminal Code which contains the

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<sup>4</sup>Andi Hamzah, *Principles of Criminal Law*, (Rineka Cipta: Jakarta, 1994), p. 137.



concept of rechterlijk pardon, namely giving the judge the authority to forgive someone who is guilty of committing a minor crime.

## **METHOD**

The type of legal research carried out is normative juridical (normative law). In this research, we use the statutory approach and the conceptual approach. The statute approach is an approach by using legislation and regulations,<sup>5</sup>

## **THE PRINCIPLE OF RECHTERLIJK PARDON FROM THE PERSPECTIVE OF THE RESTORATIVE JUSTICE PARADIGM**

The terminology rechterlijk pardon in Dutch, which when translated into Indonesian, means a judge's forgiveness, can generally be interpreted as forgiveness for actions that are contrary to the law on the basis of justice in society. The judge's forgiveness aims to eliminate the implementation of the criminal decision if the implementation of the criminal decision would actually cause injustice. For this reason, even though basically the law must be enforced in certain cases, the judge's forgiveness can be given by overriding the law itself. As previously explained, this judge's forgiveness in principle has 2 (two) main objectives, namely an effort to correct the strict application of the principle of legality and as an alternative to the crime of short-term deprivation of liberty.<sup>6</sup>

During Roman times, soldiers who were deemed to have made a service were given immunity and pardon by the Roman rulers (royal authority). The use of the institution of forgiveness during the Roman period was used arbitrarily

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<sup>5</sup>Peter Mahmud Marzuki. Legal Research. Prenladamedia Group (Kenclanla Division). East Jakarta. 14th cet. 2009 p 137

<sup>6</sup>Adey Syahputra, Op. Cit, p. 4-7.



without any clear indicators, and was even used to strengthen imperial authority. This also happened during the Han era as Chinese emperor who used the Forgiveness Institution to seem to allow all actions that were contrary to regulations in order to strengthen the Han emperor's influence.<sup>7</sup> Excessive use of forgiveness institutions also occurs in common law countries. One of the horrendous cases was the granting of amnesty/pardon by King of Charles II to Danby as prime minister, who at that time was about to be impeached by the British Parliament for a criminal act.<sup>8</sup>

Forgiveness is not a legal remedy (*rechtsmiddel*) in criminal procedural law, and therefore is not a right given to the defendant or public prosecutor, whereas forgiveness has another purpose, namely eliminating enforcement even though the principle is that the law must be upheld, in special cases forgiveness is given (forgiveness) by not implementing the law.<sup>9</sup>

The judge's principle of forgiveness is certainly a *contrario* to the principles of legality and strict ability. The principle of legality (principle of legality) determines that no act is prohibited and punishable by crime if it is not specified in advance in legislation. This principle is known in Latin as *nullum delictum nulla poena sine praevia lege poenali* (no offense or crime without prior regulations). The principle of legality contains 3 (three) meanings or meanings, namely as follows:<sup>10</sup>

1. There are no acts that are prohibited and punishable by criminal law if this has not been previously stated in a statutory regulation.
2. To determine the existence of a criminal act, analogies (figures of speech)

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<sup>7</sup>Mc. Knight, Op. Cit, p 238.

<sup>8</sup>Ibid.

<sup>9</sup>Moeljatno, Op. Cit, p. 26

<sup>10</sup>PAF Lamintang, Op. Cit, p. 3-5.

must not be used.

3. Criminal law rules do not apply retroactively.

In Indonesian criminal law, the principle of legality is clearly regulated in Article 1 paragraph (1) of the Old Criminal Code which determines that an act cannot be punished, except based on the strength of the provisions of existing criminal legislation. Article 1 paragraph (1) of the Old Criminal Code contains two important things, namely: first, criminal acts must be determined first in legislation. Second, legislation must exist before the criminal act occurs.

The principle of legality which has been universally recognized in the national criminal law system adopted by many countries is re-regulated in Article 1 of the 2023 draft Criminal Code. Article 1 paragraph (1) of the Criminal Code stipulates that no one can be punished or subject to action, unless the act committed has been determined as a criminal offense in the laws and regulations in force at the time the act was committed. As the explanation of the paragraph states that an act is only a criminal act if it is determined as such by or based on law. This principle is used because the principle of legality is a basic principle in criminal law. Therefore, the provisions of criminal laws or regulations that contain criminal threats must be in place before the criminal act is committed. This means that criminal provisions do not apply retroactively in order to prevent arbitrariness by law enforcers in prosecuting and trying someone accused of committing a criminal act.<sup>11</sup>

Furthermore, Article 1 paragraph (2) of the 2023 Criminal Code determines that in determining the existence of a criminal act it is prohibited to

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<sup>11</sup>Romli Atmasasmita, Op. Cit, p. 106





use analogies. The explanation of this paragraph states that the prohibition on the use of analogical interpretation in determining the existence of a criminal act is a consequence of the use of the principle of legality. An analogous interpretation means that an act which at the time it was committed did not constitute a criminal act, but to which the criminal provisions applicable to other criminal acts which have the same nature or form are applied, because the two acts are considered analogous to one another. By emphasizing the prohibition on the use of analogies, differences of opinion that have arisen in practice so far can be eliminated.<sup>12</sup>

However, Article 1 paragraph (3) of the 2023 Criminal Code determines that the provisions referred to in paragraph (1) do not reduce the validity of laws that exist in society determining that a person deserves to be punished even though the act is not regulated in statutory regulations. The explanation of this verse states as follows: it is a fact that in certain regions in Indonesia there are still unwritten legal provisions that live in society and apply as law in that region. This is also the case in the field of criminal law, namely what is usually called customary crime. To provide a solid legal basis regarding the application of customary criminal law, this matter has been explicitly regulated in this Criminal Code. The provisions in this paragraph are an exception to the principle that criminal provisions are regulated in statutory regulations. The recognition of these customary crimes is to better fulfill the sense of justice that exists in certain communities.<sup>13</sup>

Meanwhile, Article 1 paragraph (4) of the 2023 Criminal Code determines that the application of laws that live in society as referred to in

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<sup>12</sup>Lidya Suryani Widayati, Op. Cit, p. 315.

<sup>13</sup><https://jurnal.us.ac.id/ojs/index.php/jurnalUS/article/view/820>



paragraph (3) is as long as it is in accordance with the values of Pancasila and/or general legal principles recognized by the community of nations. The explanation of this paragraph states that this paragraph contains guidelines or criteria or signs in determining sources of material law (laws that exist in society) which can be used as sources of law (sources of material legality). The guidelines in this paragraph are oriented towards national and international values.<sup>14</sup>

In other words, Indonesian criminal law recognizes the existence of two principles of legality, namely the principle of formal legality as stipulated in Article 1 paragraph of the 2023 Criminal Code and the principle of material legality as stipulated in Article 1 paragraph (3) of the 2023 Criminal Code. which existed before the act was committed (written law). Meanwhile, the principle of material legality determines that the basis for an act to be punished is the law that exists in society (unwritten law).

The 2023 Criminal Code does not explain what is meant by law that exists in society. The explanation of Article 1 paragraph (3) of the 2023 Criminal Code only states that "...in certain regions in Indonesia there are still unwritten legal provisions that exist in society and apply as law in those regions. This kind of thing also exists in the field of criminal law, namely what is usually called customary criminal acts...". From this explanation, the 2023 Criminal Code only limits laws that exist in society to customary crimes. Thus, the drafters of the 2023 Criminal Code do not recognize religious law as a law that is also believed and lived in society. Regarding customary criminal acts, the 2023 Criminal Code also does not

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<sup>14</sup>Barda Nawawi Arief, *An Anthology of Criminal Law Policy – Developments in the Drafting of the New Criminal Code Concept*, Op. Cit, p. 75.



clearly regulate which customary criminal acts can be punished if the customary criminal act is violated.

Through the principle of legality, criminal law requires written and precise rules. Meanwhile, most of the laws that exist in society are not written. Basically, the emergence of legal terminology that lives in society in the 2023 Criminal Code is nothing more than to designate laws other than laws established by the state. Thus, in plain view, the 2023 Criminal Code seems to open up opportunities for legal pluralism even though the resolution mechanism still uses criminal justice. In other words, the principle of legality is faced with the implementation of laws that live in society

## **CONCLUSION**

The principle of judge's forgiveness is an effort towards a criminal justice system with a restorative justice paradigm. This understanding is regulated because it is a bridge or solution to giving short prison sentences and preventing unnecessary criminal impositions seen from the aspect of necessity related to the purpose of punishment in cases of criminal justice. cases or minor crimes. The regulation of rechterlijk pardon is not only to avoid short sentences of imprisonment but also to prevent wrongful convictions when viewed from the aspect of the need to protect society and rehabilitate the perpetrator. Thoughts related to a sense of justice and the benefits of the law, as well as Pancasila values regarding law enforcement objectives and criminal objectives.

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