

# Reconstruction Of The Criminal System As A Fair Law Reform

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**Abstract.** Due to its rigidity and the certainty with which the law is written, today's criminal justice system has a chilling effect on people's perceptions of fairness. The existing concept of punishment only gives weight to objective factors, such as breaking the law, and subjective ones, such as making a mistake. So, not only do we need to restructure the appropriate criminal system, but we also need to alter the criminal legislation based on these two elements to condemn a person. This article seeks to further progress toward that goal by proposing changes to the legislation governing the criminal system that is in line with the knowledge and principles held dear by the people of Indonesia. In this work, a qualitative (legal-normative) literature review was conducted. According to the findings of the research, not only are sentencing terms based on subjective and objective factors, as previously explained but also the prerequisites for punishment are included as a condition for a person to be punished with a preset legal framework.

**Keywords:** Legal Reconstruction, Criminal System, Legal Reform, Justice

## 1. Introduction

The principle of legality as formulated in the criminal law or the constitution of each country is one of the fundamental principles that must be maintained for the sake of legal certainty. The meaning of the principle of legality must be interpreted wisely within the framework of law enforcement and justice. When viewed from the situation and conditions of the birth of *asas* legality, then the principle is to protect the interests of the individual as the main characteristic of the purpose of criminal law according to the classical tradition. In later developments, the principle of legality was perverted in several countries, including Russia, Germany, and even the Netherlands. As it is understood, the meaning contained in the principle of legality is that an act can be punished only if it is regulated in criminal legislation, the power of criminal provisions should not be retroactively enforced. From some differences in the meaning of the principle of legality, it can be concluded that in principle the meaning of the principle of legality: first, no act is prohibited and threatened with a criminal offense before it is stated in a statutory rule; second. All prohibited deeds shall be contained in the clearest formulation of the criminal; third, the rules of criminal law should not apply retroactively[1].

No action is forbidden and threatened with criminality until it is expressly banned and criminalized in the law, as stated by Moeljatno's concept of legality (Principle of legality). The legal principle of "*nullum delictum, nulla poena, sine praevia lege*" would apply in this situation (no criminal, no criminal without regulation first). Wirjono Prodjodikoro, which translates to "no crime, no punishment," holds that there is neither crime nor penalty without first having a criminal law in place.

Meanwhile, there are four interpretations of this idea, as stated by Groenhuijsen, as cited by Komariah Emong Sapardjaja. The first two are instructions for legislators, whereas the first two are rules for the bench. To begin, policymakers shouldn't apply criminal laws retroactively. Second, a precise definition of "criminal" must include every conduct that is outlawed. Third, the court may not rule that the defendant's actions constitute a crime under common law or judicial precedent. As a fourth rule, you can't use an analogy to justify breaking the law.

According to Schaffmeister and company, criminal law was established in accordance with the Principle of Legality to safeguard citizens against the abuse of government authority. This is what we mean when we talk about the purpose of criminal law as a safeguard. Another purpose of criminal law is to ensure that the government is able to exercise its authority within the bounds established by law[2].

However, the enactment of this principle of legality makes criminal law rigid. If there are acts and the acts have been pre-regulated that they are crimes, so they must be punished, then the person who violates them will be subject to criminal sanctions. Regardless after the deed has occurred a recovery back to the victim, or peace between the victim and the perpetrator, or because of other motives that alleviate the actions of the perpetrator. Thus, the act can still be punished on the condition that there is no reason for criminal removal of the perpetrator. Therefore, there will be a conflict between justice, certainty, and expediency of the law itself and the human values of the feasibility of the perpetrator being convicted or whether it is not worthy of punishment.

Nature classical literature put forward an antinomy between legal certainty and justice. Both of these things are very impossible to realize in a concurrent situation. Therefore, in this case, the law is a compromise, namely at the expense of justice in order to achieve legal certainty. In the face of such an antinomy, the role of law enforcement is indispensable. This role will be seen when the application of the law is faced with concrete problems. There the application of the law must be able to do alternatives which should be sacrificed, legal certainty or justice[3], and what is the reference is moral. If the legal certainty put forward by the law enforcer must be good at providing interplays against the law[4].

If it is related to the current criminal system, it requires several things to be able to convict a person, that is because it has fulfilled the following:

1. The existence of criminal acts that violate the applicable legal rules
2. The presence of errors (*dolus and culpa*)
3. There is no criminal removal reason (justification reason/forgiving reason)

That with this model of punishment, it makes the current system of punishment very rigid which only reflects legal certainty, and reduces the sense of justice in society. This is based on the condition that punishment does not include the philosophy of punishment as a condition of punishment. That a person can be punished if there is a governing rule of law that is interpreted on the principle of legality and there is a misunderstanding that can be reproached so that one can be criminally accounted for his actions. However, when a person can indeed be convicted but is humanly contrary to the purpose of punishment, this will hurt the sense of justice and humanity in society. The current criminal model only prioritizes subjective conditions in the form of errors and objective conditions in the form of criminal acts committed in violation of the positive legal rules that have been made.

That as a result of the penal system a person who has fulfilled the element of a criminal offence in accordance with the violated Article, and indeed subjectively (element of guilt) can be reproached (there is no forgiving and justifying reason) then such a person may be convicted on the basis thereof. For example, in the criminal act of persecution in the case of

Ade Kurniawan, verdict number 338/Pid.B/2021/PN.Bls was charged with Article 351 paragraph (1) of the Criminal Code, chronologically the case of Ade Kurniawan tried to calm an angry person, but Ade Kurniawan was actually strangled by the victim. That is because Ade Kurniawan was emotional, then beat the victim to the point of being injured. In the facts of the trial, Ade Kurniawan has been proven to have committed abuse, but there has been peace between Ade Kurniawan and the victim and Ade Kurniawan has provided medical assistance to the victim so that the victim forgives Ade Kurniawan. This is indeed fulfilled by the elements, but in terms of the purpose of conviction, it is humane whether it is feasible to be convicted while there has been a reinstatement of the victim. In terms of criminal threats, Article 351 paragraph (1) of the Criminal Code, criminal threats are not severe, and in terms of the motives of the perpetrator only because of momentary emotions so as to commit the persecution. Therefore, it is necessary to reform the criminal law that not only bases these three conditions on the possibility of a person's conviction, but it is necessary to reconstruct the applicable criminal system. The reconstruction is carried out on the terms of punishment which not only concern the principle of legality and the principle of culpability as described above but also in terms of punishment. Thus, the author takes the title reconstruction of the criminal system as an effort to reform the just law

## **2. Method**

This Dissertation will use a type of normative juridical research, namely legal research methods carried out by examining library materials This normative legal research focuses more on existing laws and regulations. The author will draw on secondary and tertiary legal materials in addition to primary sources. For the purpose of normative judicial research, legal library resources may be broken down into three major categories: primary legal materials, secondary legal materials, and tertiary legal materials. This legal research is carried out using several research approach methods. Literature studies, especially of primary legal materials like laws and regulations like the 1945 Constitution of the Republic of Indonesia (UUDN RI 1945), international conventions that bind Indonesia, laws, and regulations in force in Indonesia, and so on, will be used to examine the topic from a legal perspective. This is done by researching previous court cases that dealt with similar circumstances and resulted in binding precedent. Multiple case law interpretations pertinent to the issues at hand will be compiled for the judge's perusal.

## **3. Results And Discussion:**

### **3.1 Ratio decidendi of court decisions in Indonesia in passing judgments of courts that are fair and humane**

Taking into account the Panel of Judges' viewpoint in making decisions is essential for applying the law equitably in the modern day. Ade Kurniawan, the defendant in case 338/Pid.B/2021/PN.Bls, was accused with violating Article 351, paragraph (1) of the Criminal Code.

On Monday, January 25, 2021, at around 21.45 WIB when the ASIONG victim went to the bird shop owned by HERMI Als AGUN's brother in Jalan Jenderal Sudirman, Damon Village, Bengkalis District with the aim of meeting HERMI Als AGUN's brother as the owner of the bird shop. When we arrived in front of the bird shop owned by HERMI Als AGUN's brother, there was already HERMI Als AGUN's brother, VETRIADI's brother Als ADI MIN and the defendant who was sitting around. Then the victim met HERMI Als AGUN's brother and told HERMI Als AGUN's brother to take his iron basket to the victim's house, but HERMI Als AGUN's brother said if the

victim still wanted to use it, then use it first. Then the victim told HERMI's brother Als AGUN "yes then you don't force me to return it, from now on don't call me my brother anymore". After that, the victim was about to leave the place but the defendant headed towards the victim and said "what exactly do you want SIONG", to which the defendant replied, "I have nothing to do with you do, I am dealing with AGUN, why are you the one who interfered? ". Then the defendant immediately got emotional and immediately hit the victim using his right hand towards the victim's left eye, causing bruises/bruises and bleeding profusely from the temple of the victim's eye. After that, the victim was immediately separated by MOHD's brother TARMIZI Als UCOK who lived not far from the crime scene assisted by several other residents. That as a result of the defendant's actions, the victim suffered abrasions and bruises on the victim's face[5].

In the facts of the trial, Ade Kurniawan has been proven to have committed abuse, but there has been peace between Ade Ade Kurniawan has helped Kurniawan and the victim by ensuring that the victim receives medical attention, and as a result, the victim has forgiven Ade Kurniawan. This is the verdict of the Panel of Judges based on the evidence presented at trial:

1. Declaring Defendant **Ade Kurniawan als Ade Bin Amrizal** to have been validly and conclusively proven guilty of committing the crime of "knowingly committing persecution" as per the sole indictment of the Public Prosecutor
2. Sentence the Defendant therefore to imprisonment for 9 (nine) months provided that the sentence **shall not be carried out** unless in the future there is another order with the judgment of the Judge punishing the Defendant for committing another crime before the expiration **of the probationary period for 10 (ten) months**[6].

The *ratio decidendi* of the panel of judges in judgment number 338/Pid.B/2021/PN.Bls gave the trial judge because it considered the improvement of the defendant Ade Kurniawan and the recovery back to the victim with the following considerations :

*The purpose of this criminal conviction is to provide an opportunity for the convict so that during the probation, he can improve himself or the circumstances resulting from the crime, including providing accountability to the victim*[7].

On the basis of decision number 338/Pid.B/2021/PN.Bls, it can be concluded that there are things that can be taken, including:

1. Consideration of the perpetrator in order to improve himself
2. Considering the responsibility of the perpetrator to the victim to recover from the victim

The other criminal cases, namely in the case of persecution of the accused Irmawati Tamba at the Sibolga District Court are as follows:

*There was a Friday, October 23, 2020, at around 11.30 pm when witness Yenni Rotua Nababan alias Yeni came to the IRMA's Coffee shop after which witness Yenni Rotua Nababan alias Yeni asked a man who was a customer of the Coffee shop and said "where is the brother who sells durian ?" directly replied the man "I am the one who sells durian" then witness Yenni Rotua Nababan alias Yeni said "is there a brother throwing garbage in the yard my house ?" then in the man replied " I am not there to throw garbage in the yard of the mother's house" next from inside the stall the accused told witness Yenni Rotua Nababan alias Yeni "I AM DEFENDING MY CUSTOMERS" dan defendant The other criminal cases, namely in the case of persecution with the accused Irmawati Tamba at the Sibolga District Court are as follows:*

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In the case, Irmawati Tamba was found guilty of committing the crime of persecution under Article 351 paragraph (1) of the Criminal Code, but the Panel of Judges imposed a criminal offense of probation or criminality on condition. The consideration of the Panel of Judges passing the judgment is as follows :

*Considering, that under Article 14 (c) of the Penal Code that "by the order referred to in Section 14 (a), unless a penalty of fine is imposed, in addition to establishing the general condition that the convict shall not commit a criminal offense, the judge may establish a special condition that. convicted of a criminal offense, the judge may apply a special condition that the convict within a certain time, which is shorter than his probationary period, shall reimburse him for any or part of the harm caused by the offense";*

*Considering, that based on the Annex to the Decree of the Director General of Badilum Number: 1691 / DJU / SK / PS.00 / 12/2020 dated December 22, 2020, concerning Guidelines for the Application of Restorative Justice in the General Judicial Environment, that in examining and deciding cases of women facing the law as victims, judges must consider about the harm suffered by the victim and the impact of the case and the need for recovery for the victim;*

*Considering, that taking into account the above description of the specific conditions, the Panel of Judges will consider the interests of the victim, namely the cost of treatment. Based on the facts of the trial, the Defendant initially wanted to give the substitute money for treatment to Witness Yenni Rotua Nababan in the amount of Rp300,000.00 (three hundred thousand rupiahs), but Witness Yenni Rotua Nababan considered the Defendant to be lightly looking at Witness Yenni Rotua Nababan by giving such a large sum of money. Witness Yenni Rotua Nababan asked the Defendant for a peace fee of Rp2,500,000.00 (two million five hundred thousand rupiahs) on the*

*pretext that it was the right of Witness Yenni Rotua Nababan to determine and request the amount. However, based on the facts of the trial, it has been found that as a result of the defendant's actions, Witness Yenni Rotua Nababan has spent personal money for post-consumption costs of Rp. 100,000.00 (one hundred thousand rupiahs) and medical expenses, but the cost is not up to Rp. 2,500,000.00 (two million five hundred thousand rupiahs) and most importantly to treat the legs of Witness Yenni Rotua Nababan. Considering, based on the above consideration by prioritizing a sense of justice for both the Victim and the Defendant, the Panel of Judges will impose a special condition on the Defendant to pay medical expenses to Witness Yenni Rotua Nababan in the amount of Rp1,000,000.00 (one million rupiahs) within a period of 14 (fourteen) days after this verdict has permanent legal force. With this payment, the Panel of Judges considers that the interests of the victim have been fulfilled and at the same time provides lessons for the Defendant not to repeat the criminal acts that have been committed[9].*

From this decision, there are several things that can be taken against the consideration of the Sibolga District Court Panel of Judges, including the following:

1. The Panel of Judges based the decision on Article 14 of the Criminal Code (KUHP) as the basis for imposing a conditional probation/criminal conviction.
2. The panel of judges also based on the Annex to the Decree of the Director General of Badilum Number: 1691 / DJU / SK / PS.00 / 12/2020 dated December 22, 2020, concerning Guidelines for the Application of Restorative Justice in the General Judicial Environment.
3. The Panel of Judges considered the intention of Irmawati Tamba as the defendant to reimburse the medical expenses of Rp.300,000,- (three hundred thousand) to Yenni Rotua as the victim of abuse.
4. The Panel of Judges considered the reinstatement by imposing a special condition on Irmawati Tamba to pay medical expenses to Witness Yenni Rotua Nababan in the amount of Rp1,000,000.00 (one million rupiahs) within a period of 14 (fourteen) days after this verdict has permanent legal force

Irmawati Tamba's case, starting from the Sibolga District Court to the Cassation, was decided by probation or conditional sentences, but only the decision was different. The cassation decision with Number: 43 K / Pid / 2022 The Panel of Judges tried with the following decision:

*Rejecting the appeal application from the Applicant for Cassation/PUBLIC PROSECUTOR at the SIBOLGA DISTRICT ATTORNEY'S OFFICE and Amending the Decision of the Medan High Court Number 1257/Pid/2021/PT MDN dated September 22, P2021 which corrected the Sibolga District Court Decision Number 166/Pid.B/2021/PN Sbg dated July 26, 2021, regarding the sentence imposed on the Defendant into imprisonment for 1 (one) month with the provisions of the imprisonment **does not need to be served**, unless in the future there is a judge's decision that determines otherwise because the Defendant committed a criminal act before completing **the trial for 2 (two) months**, with special conditions, namely paying the medical expenses of Witness Yenni Rotua Nababan alias Yeni in the amount of Rp. 1,000,000.00 (one million rupiahs) within a period of 14 (fourteen) days after this verdict has permanent legal force;*

Another case is the case of M.Asraf Ghazi with the chronology of the case of M.Asraf Ghazi committed motorcycle theft at night because M.Asraf Ghazi was interested in the motorcycle. That M.Asraf Ghazi is qualified as a child, so his procedural law is included in the Juvenile Criminal Justice System (SPPA). At the time before the trial, a peace agreement was made with M.Asraf Ghazi with the victim. That then the judge in his decision number 2/Pid.Sus-Anak/2021/PN.Rgt the judge ruled based on Article 70 of Law No.11 of 2012 concerning the Juvenile Criminal Justice System in which M.Asraf Ghazi was found guilty but negated criminal sanctions and actions, with the following considerations:

*Considering, in restorative justice the focus in resolving cases is no longer on retribution but on the **restoration of the original situation**. In this approach, all parties, both victims, child perpetrators, and related parties are involved to jointly seek a fair solution so as to cause a **win-win solution**. Based on these considerations, in this case, based on the recovery, it has been carried out with peace between the family of the perpetrator's child and the victim and the request from the victim so that the perpetrator's child is not punished, which is enough reason for the implementation of **Rechtelijk Pardon**[10].*

From this decision, there are several things that can be taken against the consideration of the Rengat District Court Judge, including the following:

1. Judge considers restorative justice for the child
2. The judge considered the peace between the victim, the perpetrator's child, and the families of both parties.
3. The judge considered that the victim who pleaded for the perpetrator's child was not punished so the judge forgave the perpetrator's child by not imposing a verdict of conviction against the perpetrator's child

### **3.2 Weakness in court decisions so that they have to reconstruct the criminal system in Indonesia**

In the previous description, it has been discussed about court decisions have the value of justice and humanity. However, this is not enough because there is a limitation that judges who try adult cases cannot impose a verdict of release on the perpetrator if the perpetrator is proven to have committed a criminal act, but the panel of judges considers the sentence to be useless if given to the perpetrator. This is a legal vacuum that must be given the right solution and can benefit the wider community of justice seekers. The weaknesses of the judgment include:

#### **a. Judges have limitations in imposing judgments on cases where there is already peace or reinstatement between the perpetrator and the victim which if sentenced will not be beneficial to the perpetrator.**

Judges have limitations because they are only limited to 3 (three) forms of judgments that can be handed down. If you look at the authority of the judge in passing a decision according to the Criminal Procedure Code, the judge can only impose 3 (three) forms of decision regulated in the Criminal Procedure Code, including:

##### **1. The free judgment is provided for in P191 paragraph (1) of the Criminal Procedure Code which reads:**

If the court is of the opinion that from the results of the examination at the hearing, the guilt of the accused in the acts charged against him, was not validly and conclusively proved, then the defendant was **acquitted**".

**2. The verdict of punishment is regulated in Article 193 paragraph (1) of the Criminal Procedure Code which reads:**

If the court is of the opinion that the defendant is guilty of committing the criminal act charged to him, then the court **imposes a criminal sentence.**

**3. The decision to escape all claims is regulated in Article 191 paragraph (2) of the Criminal Procedure Code which reads:**

If the Court is of the opinion that the act charged to the accused is proved, but the act does not constitute a criminal act, then the defendant is dismissed **from all legal claims.**

The ruling has not given the judge authority if there is a case as outlined in the previous discussion that if given a conviction against the perpetrator does not provide expediency. Even if it is proven, if the judge wants to give an apology to the perpetrator **there is no rule of law that regulates it.** One of the things that are regulated is only related to criminal probation. In this case, the judge can only give a criminal verdict with conditions or criminal probation as stipulated in Article 14a paragraph (1) of the Criminal Code which reads:

Paragraph (1) of the Criminal Code:

If the judge imposes a maximum sentence of one year or imprisonment, excluding the substitute imprisonment, then in his decision the judge may also order that the sentence should not be served, unless in the future there is a judge's decision that determines otherwise, because the convict committed a criminal act before the probation period specified in the aforesaid order expires, or because the convict during the probationary period does not meet any special conditions that may be specified otherwise in that order.

The thing that can be taken is to apply the criminal probation / conditional sentence to cases for which the Panel of Judges imposes a maximum sentence of one year or imprisonment (excluding substitute imprisonment). If so, on the case decided by the criminal if the judge is of the opinion that it has no merit, it can impose a suspended sentence as in the case of Ade Kurniawan, and Irmawati Tamba mentioned above.

**b. The panel of judges so far seems to be only a mouthpiece of the law that only implements the written rule of law that prioritizes legal certainty without consideration of justice, humanity, and expediency.**

Judges and other law enforcement officials shouldn't only parrot the formalistic and rigorous terms of the law. However, if the victim's health has improved and the victim has not requested (forgiven) the offender, the relevant rule of law must be enforced even if the victim's condition has returned to pre-incident levels. Therefore, if the perpetrator is viewed to gain from the law's original aim, punishment meant as punishment for the perpetrator is less effective. However, the judge is constrained by the governing law and cannot take action of acquittal against the offender; the judge can only give a free verdict if the defendant's actions are not proven in the trial; acquittal if the defendant's actions are proven but not a criminal offense; and a criminal conviction if the defendant's conduct is found to meet the elements of the article.

Irmawati Tamba and Ade Kurniawan both had their offenders confirmed, but the judge took it easy in their cases because he lacked the jurisdiction to acquit the offender if the offender was determined to have satisfied the requirements of the article accused in the trial and the case actually was a criminal case. Thus, the only remedy is that the case is proved, but decided lightly or determined probation by the court. Therefore, a new law must be found, one



that offers forgiveness to those who have done illegal crimes notwithstanding the judge's belief that doing so would provide no advantages and run counter to the sense of justice. This is important for breaking through the rigidity or certainty of the present rule of law that now exists since there is no rule of law connected to the forgiving of judges.

**c. The purpose of punishment at this time is not the main condition for the conviction of the perpetrator, but what is only a condition is the subjective requirement (principle of legality) and the requirement of objective (principle of culpability) only**

There is a function for every system. Because of this, it is accurate to argue that the legal system (including the criminal law system) is a system that aims to. The Criminal Code Bill states the goal of punishment in detail in order to establish a fair and effective system. Furthermore, the explicit phrasing is meant to be remembered, and notably to underline that punishment serves a role within the criminal justice system [11].

The intent to punish is not a prerequisite for a conviction under the existing Criminal Code. According to the Draft Criminal Code's Academic Text, "purpose" does not seem to be an external variable. This approach makes it seem as if only criminal deeds (objective circumstances) and mistakes may justify a criminal's existence (objective conditions). Thus, it seems that illegality is assumed to be a necessary result if the two premises are established. The "model of certainty" appears to be rather inflexible in this case. If both of these requirements are met, the model predicts that it will be uncomfortable. However, the offender was "forgiven" and not held accountable. Thus, the idea of "pardon/pardon" (*rechterlijk pardon/judicial pardon/dispense de Pena*) seems to have no place or is at least difficult to accept [12].

In addition to illegal conduct (objective conditions) and mistakes (subjective conditions), the purpose/guidelines of punishment are now now relied upon to justify or explain away the presence of a criminal. Even though the offense and guilt are confirmed, the court may nonetheless apologize and refrain from imposing any punishment under specific circumstances. That is to say, the concept of "pardoning or forgiving the judge" is given some kind of formal recognition. This model may be thought of as a flexible equilibrium model rather than a rigid/absolute model. This background of flexibility/elasticity of punishment was also seen in the Netherlands during the inclusion of the *rechterlijk pardon* provisions in article 9a of the Dutch WvS [13].

The judge's apology has not been realized in his case Zuda Erik Septiawan with the following chronology :

I was on Saturday, March 26, 2022, at the house of witness Helmi Fatchur Rozy Bin Moh.Ro'i Dusun Ngrangkok, RT.01/RW.01, Klampisan Village, Kandangan District, Kediri District, the defendant along with witness Helmi Fatchur Rozy Bin Moh.Ro'i and FAHMI's brother consumed drinks hard type red wine as many as 3 (three) bottles. On Sunday, March 27, 2022, at around 01.00 WIB on Jl. Umum, Tertek Village, Pare District, Kediri Regency, the defendant was driving a Honda Jazz AG 1760 PT car at a speed of about 70-80 Km/hour from west to east while there was a Jupiter Z AG 3865 EB motorcycle driven by witness Moh. Eko Cahyono Bin Suyut walked in the same direction in front of the vehicle that the defendant was driving. At that time because the defendant was in a drowsy condition and affected by alcoholic beverages, the vehicle that the defendant was driving went zig-zag and crashed from behind the Jupiter Z AG 3865 EB motorcycle driven by witness Moh.Eko Cahyono Bin Suyut. The collision hit the right side body of the Jupiter Z AG 3865 EB motorcycle, causing witness Moh. Eko Cahyono Bin Suyut fall off the motorcycle he was riding.

As restitution for Moh.Eko Cahyono Bin Suyut's losses, Zuda Erik Septiawan and the victim, Moh.Eko Cahyono Bin Suyut, were able to put the accident behind them and go on with their lives. According to the evidence presented in court, Moh.Eko Cahyono Bin Suyut was Zuda Erik Septiawan's uncle. Zuda Erik Septiawan was given a one-month jail term by the Kediri Regency District Court, notwithstanding the fact that the victims' lives had returned to normal. As you'll see if you look into the reasoning behind this judgment, restorative justice in Indonesia's courts is hampered by the lack of clear purpose statements and judicial standards for how punishment should be meted out. It is also included in this case that there is no rule regarding the pardon of judges if it occurs as in the case *quo* above.

### **3.3 Proper legal reconstruction of criminal justice system as an effort to law reforms that are justice and humanity**

Indonesia itself is more familiar with "restorative justice" where the principle of restorative justice that is the basis is that justice is best served if each party receives fair and balanced attention, actively involved in the judicial process. **Helen Cowie and Dawn Jennifer** identify the main aspects of restorative justice as follows:

1. Repair is not about gaining victory or accepting defeat, accusations, or revenge, but about justice.
2. Rapprochement, not in the nature of punishment criminals bear responsibility for mistakes and correct them in a number of ways, but through a process of open and direct communication, between the victim and the criminal, which has the potential to change the way they relate to each other.
3. Reintegration, at its widest degree, provides an arena where perpetrators can obtain a fair process. The intent is for them to learn about the consequences of violence and criminality and understand the impact their behavior has on others [14].

*Restorative Justice* is an approach to make punishment and institutionalization compatible with justice. *Restorative Justice* is built on the traditional values of a positive community and sanctions implemented in respect of human rights (HAM). The principles of Restorative Justice are, making the offender responsible for proving his capacity and quality as well as he overcomes his guilt in a constructive way, involving the victim, parents, family, school or playmates, creating a cooperative forum, also in issues related to crime to overcome it. **Watchel and McCold**, who practice restorative justice in the school environment, conceptualize a fair and equitable cultural framework based on positive and caring relationships [15].

According to Reinhold Zepelius's theory of justice, in which he explains the presence of mutual justice that arises when people of a society engage in contractual transactions, this is the case. Restoring a person's rights after they have been violated, such as by compensating them, is an act of justice. Restorative justice is now being developed in countries like Indonesia. However, restorative justice only emerges when peace is achieved outside of the judicial system amongst several parties, such as victims, offenders, and their families, and third parties as mediators or facilitators. Considering the need to establish restorative justice in light of judges' power in sentencing cases, it's clear that this is an area where more research is necessary. The judge shouldn't impose a punishment if the goal of the conviction has been met.

Restorative justice may be used in the situation described above, as in the cases of Ade Kurniawan and Irmawati Tamba, and it can also use an example like minah's grandma, who is known to a cocoa plantation foreman at PT RSA for stealing three cocoa fruits from the company's property. Although Minah's grandma expressed remorse for her behavior after realizing the gravity of the situation, the judicial processes against her grandmother proceeded until a final verdict was reached. The Purwokerto District Court Judges Panel imposed this

judgment on Minah's Grandmother on that day: 1 month and 15 days in jail, followed by 3 months of probation. The judge's verdict of 1 month and 15 days with 3 months probation was welcomed by the family, neighbors, and NGO activists who mengikuti sidang tersebut. Mereka segera menyalami nenek Minah karena wanita tua itu tidak harus merasakan dinginnya sel tahanan [16].

Judging from the results of research on several court decisions judges impose light judgments on several criminal acts that are considered not severe with several *ratio decidendi* /judge considerations, including:

1. Considering the self-improvement of the offender
2. Considering the severity or lightness of the threat of a criminal act
3. Considering whether peace has been implemented or not
4. Considering whether there has been a recovery of the victim or not
5. Based on probation/conditional criminality Article 14 of the Criminal Code (KUHP).
6. The panel of judges also based on the Annex to the Decree of the Director General of Badilum Number: 1691 / DJU / SK / PS.00 / 12/2020 dated December 22, 2020, concerning Guidelines for the Application of Restorative Justice in the General Judicial Environment
7. Based on Article 70 of Law No.11 of 2012 concerning the Juvenile Criminal Justice System not to impose special sentences on children

In *a quo* case, the panel of judges has considered the purpose of punishment even though so far it has not been rigidly regulated in the rule of law in Indonesia. From some of the rulings, there are several weaknesses in the existing rule of law so there is a legal vacuum in the current rules it is necessary to improve this by providing guidelines for the Panel of Judges before passing the criminal verdict. A basic bag of this requires a reconstruction of the criminal system so that there are criminal guidelines that have a sense of justice and humanity that it has the value of expediency for criminal offenders. The results of the study obtained the terms of punishment are not only based on subjective conditions (culpability) and objective requirements (the principle of legality) as previously described but also need to be added conditions for the purpose of punishment as a condition that a person can be convicted with established legal construction. The appropriate formulation for reconstructing the current modern criminal law is as follows:

Paragraph (1) :

No act can be subject to criminal sanctions and/or actions except for the strength of the criminal regulations in the laws and regulations that existed before the act was committed.

Paragraph (2) :

Criminal acts can be done with two things, namely done intentionally or with negligence that has been regulated by criminal sanctions/actions in existing laws and regulations

Paragraph (3) :

A criminal conviction may be imposed if there is no justification and forgiving reason as a reason for criminal removal

Paragraph (4) :

Judges must consider the purpose of punishment in terms of justice, expediency, and legal certainty as well as humanitarian reasons and in the event of a criminal act but there is a conflict between justice, expediency, and legal certainty to prioritize justice and humanity.

Paragraph (5) :

The judge in passing judgment must consider the purpose of the sentence and the sense of humanity by considering the following:

- a. The form of guilt of the perpetrator of the Criminal Act;

- b. The motives and purposes of committing a Criminal Act;
- c. The inner attitude of the perpetrator of the Crime;
- d. Criminal Acts committed premeditated or unplanned
- e. Cara committed a Criminal Offence;
- f. Attitude and the actions of the perpetrator after committing a Criminal Act
- g. History of life, social circumstances, and economic circumstances of criminals
- h. Criminal conviction of the future perpetrator of the Crime
- i. Criminal Acts against the Victim or the victim's family
- j. Forgiveness of the Victim and/or his/her family;
- k. Value law and justice that live in society.
- l. There has been peace between the victim and the perpetrator
- m. The severity or severity of the criminal threat in the rule of law that is violated
- n. Recovery has been carried out from the perpetrator to the victim

#### 4. Conclusion

That the ratio decidendi in some court decisions considers several things to arrive at the judgment of the court, including considering the motive, the circumstances in which the criminal act occurred, the severity of the criminal threat, the occurrence of peace, the recovery of the victim, the perpetrator has been convicted or not, and other considerations as outlined above.

That what is currently happening is that there is no rule of law that regulates the feasibility of a perpetrator worthy of being convicted or not, so in practice what happens only prioritizes legal certainty based on the principle of legality and the principle of ignorance only so that the verdict is rigid and has no benefit and human value. Judges are only considered to be mouthpieces of laws that only carry out existing rules of law without being given the freedom to release the offender if the judge considers the offender unfit for conviction even if it is proven in court.

Condition punishment is not only based on subjective conditions (culpability) and objective conditions (the principle of legality), but also needs to be added the condition for the purpose of punishment as a condition of being able to convict a person with the established legal construction as outlined above.

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