



Review of Transitional Principles (Lex favor reo) in the Criminal Code

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Abstract - Changes in criminal law through the recodification process have resulted in the National Criminal Code. One of the main differences with the Wetboek van Strafrecht Criminal Code (WvS The application of the lex favor reo principle is connected to the Criminal Code. The National Criminal Code's Article 3's lex favor reo principle, which is applied as part of criminal law reform, is conceptually intended to safeguard all Indonesian citizens. In order to investigate legal ideas connected to the lex favor reo principle, this study employs normative juridical research using a conceptual approach. According to the study's findings, Article 3 of the National Criminal Code verifies that any modifications to the law made after a criminal conduct has been committed but before the verdict is handed down, then the provisions that are most favorable to the defendant must be applied. This arrangement is a concrete form of the lex favor reo principle, which aims to provide legal certainty and justice for the defendant.

Keywords: lex favor reo, certainty, justice, criminal law

I. INTRODUCTION

The transitory principle, also referred to as one important concept in criminal law is lex favor reo. This principle concerns the application of the law to the best advantage of the defendant in the event that statutory requirements alter (Frans, 2023). Due to Indonesia's normative legal framework, the implementation of the lex favor reo principle is highly significant to both the criminal justice and system law. Indonesian criminal law is certainly based on principles or principles Indonesian criminal law (Zulkipli, 2024).

Changes in criminal law through the recodification process have resulted in the Criminal Code of the Nation. Applying the lex favor reo concept is one of the primary distinctions between it and the Wetboek van Strafrecht Criminal Code (WvS Criminal Code). The goal of criminal law reform is to safeguard all Indonesians, including through the application of the lex favor reo concept found in Article 3 of the National Criminal Code (MULYADI & Sh, 2023, p. 19). The material of the national criminal law is adapted to the direction of legal policy, actual conditions and the dynamics of the life of the nation and state, with the aim of respecting human rights and creating a balance based on moral values, humanity, nationality, social justice and the interests of the Indonesian people as a whole. This reform of the criminal law has the meaning of being a means of protecting and improving the welfare of the Indonesian people.

This comprehensive overhaul of criminal law must include balance, not only in relation to public or state interests, but must also take into account real individual interests related to the protection of criminal perpetrators and crime victims, taking into account the relationship between actions and intentions, between justice and legal certainty, between written law and social law, between national and global ideals, and between fundamental human rights and

obligations (Sugiswati, 2011). This step aims to achieve the goals of decolonization of the Criminal Code which originates from the colonial period, democratization of criminal law, consolidation of criminal law, as well as adaptation and harmonization with developments in criminal law science and the values, standards and norms that develop in society. (Mahmud, 2018).

In practice, it is often found that there are many problems between certainty and justice, but basically these problems can be overcome if certainty and justice are interrelated to become fair certainty, in compliance with the stipulations of every person has the right to recognition, guarantees, protection, just legal certainty, and equal treatment under the law, according to Article 28D, paragraph (1) of the Republic of Indonesia's 1945 Constitution. When this issue is examined more closely, it becomes clear that the Republic of Indonesia's 1945 Constitution really requires that there be fair legal certainty; legal certainty without justice would violate this principle. Consequently, it is crucial to consider while applying criminal law balance and fair certainty.

In the national The *lex favor reo* principle, which is part of the criminal law system, seeks to give the defendant equitable legal protection by adopting the fewest restrictions between those in effect when the crime was committed and those in effect when the trial was held (Zulkipli, 2024). The implementation of this principle becomes very relevant, especially during the transition period of regulatory changes, such as the revision of the Criminal Code or the ratification of new laws which have a direct impact on criminal offenses and the sanctions applied.

When changes in the law occur, the principles of *lex favor reo* and *transitio in melius* underscore the need to apply transitional rules by making sure that the sections that are most advantageous to the defendant are applied. (Nadhir & Firmansyah, 2023). Even though the new Criminal Code won't take effect until 2026, three years after it was ratified, the *lex favor reo* doctrine can be used in situations where the previous Criminal Code still applies. It was previously underlined that the old and new Criminal Codes represented a fundamental and thorough change. Since the new Criminal Code is usually regarded as being more favorable for the defendant than the previous Criminal Code, legislation *lex favor reo* principle guides the application philosophy, concepts, and sanctions under it.

However, application the notion of *lex favor reo* in practice does not always run smoothly and often gives rise to debate among legal practitioners, academics and the public. The main challenges faced include various interpretations regarding the limits of the application of this principle, ambiguity in the transition from old laws to new laws, and potential conflicts between the interests of protecting the defendant's human rights and the goals of effective law enforcement.

The purpose of this study is to present a thorough analysis of how the transitory concept is applied in national criminal law, particularly with regard to Criminal Code legislation. This study aims to investigate the application of *lex favor reo* in many legal contexts and identify practical challenges by means of juridical analysis and case studies. In addition, this study will address how applying this principle will affect the criminal justice system in Indonesia in terms of justice and legal clarity.

It is hoped that the results of this research can make a significant contribution to the development of criminal law science and provide constructive policy recommendations for law makers and law enforcers. In this way, the principle of *lex favor reo* can be applied consistently and fairly, in order to create a criminal legal system that is just for all of society.

II. METHOD

The type of research that the author uses in this research is normative juridical legal research. Normative legal research is a study that focuses on positive law, namely the principles of *lex favor reo* related to justice and legal certainty. This study uses a type of approach which includes the Conceptual Approach, namely exploring legal concepts related to the principle of *lex favor reo*. This approach includes a review of legal literature and the theories underlying the transitory principle. Next, use primary legal materials in the form of applicable laws and regulations as well as secondary legal materials such as books, articles,

journals, scientific works and other related literature as support in answering research questions.

III. RESULT AND DISCUSSION

Implementation of the Lex favor reo principle in the Criminal Code in Indonesia

Eddy O.S. Hiariej explained that the Lex Favor Reo/Transitoir Principle is a principle that adheres to the principle of imposing sanctions based on the lightest punishment if there is a change in legislation (Frans, 2023). A notion of *lex favor reo*, or often called the transitory principle, is a legal principle that prioritizes the application of rules that are more favorable to the defendant when legislative changes occur. This principle is very important in the criminal law system because it functions as a mechanism for protecting human rights, ensuring that the defendant is not harmed by changes in the law that apply after the criminal act has been committed but before the verdict is rendered. (Siregar, 2022). The implementation of this principle in Indonesia is regulated within the most recent Criminal Code (KUHP), which seeks to accommodate modern legal developments and protect individual rights.

Article 3 affirms that the provisions most beneficial to the defendant must be applied if there is a change in the law after the criminal act has been committed but before the verdict is rendered. This is confirmed by section of the National Criminal Code. Aside from that, it is specifically stated in article 1 paragraph (2) Known as the Colonial Criminal Code, which is the piece of legislation most advantageous to the defendant would be enforced if a law changes after a crime has been committed. This article states, "If there are changes in the laws and regulations after the act has occurred, the provisions that are most favorable to the defendant are used." This arrangement is a concrete form of the *lex favor reo* principle, which aims to provide legal certainty and justice for the defendant. In applying this principle, the judge must consider all applicable regulations from the time the crime was committed until the decision was handed down. The judge must determine which of these rules most benefits the defendant. This interpretation requires an in-depth understanding of applicable legislation and the basic principles of justice in criminal law.

In practice, identifying when a regulation can be said to be beneficial for the defendant, or determining which regulation is more beneficial for the defendant, is often neither simple nor easy. Therefore, this determination in concrete cases must be done concretely and not abstractly. The most favorable definition must be interpreted as broadly as possible, and not only limited to the severity or lightness of a criminal sanction but also relates to everything in the legislation that has an impact on the evaluation of a criminal act. If a change in the law completely eliminates the criminal nature of an act (decriminalization) or reduces the criminal threat but still carries similar sanctions, there will be no difficulties. However, in the context of a criminal offense, the consideration between reducing the threat of a prison sentence and adding additional mandatory penalties, or increasing the threat of a prison sentence but suspending prosecution depending on the existence of a complaint, raises the question of which is more beneficial. The final determination must be made based on the specific situation of whether there is a complaint or not. If a complaint is filed, the old regulations apply because the threat of punishment is lighter. However, if there is no complaint, then new regulations apply so that the defendant cannot be prosecuted. Likewise, if changes, for example, increase the threat of imprisonment for an act and at the same time reduce or shorten the provisions regarding the time limit for prosecution, then it must be considered based on concrete situations that benefit the defendant. This means that if the defendant is charged before the prosecution time limit, the old regulations must be used, but if the shorter prosecution time limit according to the new regulations has passed then the defendant cannot be prosecuted.

Regarding this issue the author tries to use a theory known as "legislative change" or a theory related to the issue of changes in statutory provisions which are explained in this context including the following things :(Amir, 2012, p. 15)

- 1) The formal theory (*formele leer*) put forward by Simons states that changes in the law are considered to occur only if there is a change in the formulation or redaction of the criminal law. Changes in other laws, even if related to criminal law, are not considered changes to the law as intended in Article 1 paragraph (2).

- 2) The limited material theory (*beperkte materiele leer*) put forward by Van Ganus states that the change in law in question must be interpreted as a change in the legal beliefs adopted by the law maker. Changes arising from changes in time or other general factors are not considered changes in criminal law.
- 3) Unlimited material theory (*onbeperkte materiele leer*) refers to the Hoge Raad decision of 5 December 1921, stating that changes to law involve all legal regulations in a broader context, including changes in law that reflect the legal intentions of the law maker -laws and changes that arise due to changes in times or special situations in a certain period.

Of the three theories explained above, the author assesses that they all discuss changes in law. However, in particular the limited material theory states that changes in law must be interpreted as changes in the beliefs of the legislator, so that this cannot be separated from the impacts arising from changes in the law itself. Discussion of the phrase "legislative change" will be carried out by adhering to the three theories above and applying them to the current situation.

In the context of implementing the *lex favor reo* as stated The adoption and execution of the new Criminal Code in the Indonesian National Criminal Code aims to overcome the numerous difficulties that the application of the old Criminal Code created. It was believed that the antiquated Criminal Code did not fairly reflect Indonesian culture as a whole and was out of step with the quickly evolving legal environment of today. It follows that the new Criminal Code clearly modifies more than 80% of the content and spirit of the old one. Despite their fundamental differences, one similarity between the two is the existence of universal criminal law principles. The validation of the *lex favor reo* concept is one of these commonalities. This legal principle is very important in the study and development of legal science because it is the basis for the application of legal norms. Without clear legal principles, legal norms only become instructive rules without legal values that are recognized and appreciated by society (Perluasan, 2021).

- 1) Firstly, the *ultimum remedium* aspect of criminal law is emphasized by contemporary criminal law. Criminal law is therefore the "last resort" for settling disputes. Conflict resolution centers on fostering a cordial rapport between the criminal and the victim, with the criminal expressing "remorse" in order to change his behavior. In the meantime, victims experience proper healing or recompense due to the offense.
- 2) Secondly, the essence of restorative justice, which sees crime as a social problem with roots that must be found and addressed to stop crimes from recurring in society, is the emphasis of contemporary criminal law. Modern criminal law emphasizes the value of efforts to provide victims with compensation or restoration, rather than only imposing criminal terms, particularly in the context of restorative justice.

By considering Based on the two explanations provided for comprehending contemporary criminal law, it can be said that the emphasis on restorative and corrective justice is the primary feature of contemporary criminal law. There is a relationship between the application of the *lex favor reo* principle in criminal law and restorative justice, which focuses on compensating victims or restoring their losses rather than solely enforcing criminal penalties.

There is the application, there are at least three significant similarities between the content of corrective justice and the criminal law's *lex favor reo* principle. First off, as *Lex Talionis* notes, the main way to make amends for crimes is not by punishing the guilty; rather, the aim of corrective justice is to support victims in seeking healing rather than just imprisoning them and exacting revenge. All criminal law matters prosecuted under the previous Criminal Code will be settled using a corrective justice method following the ratification of the new Criminal Code. In this approach, criminal penalties under the previous Criminal Code are aimed at restitution or recovery for victims. This is due to the fact that the *lex favor reo* concept will apply to all criminal law matters prosecuted under the previous Criminal Code. The new Criminal Code incorporates the 'spirit' of corrective justice, which includes the continued use of criminal sanctions such as forced labor, even though criminal punishments still apply.

Second, The revised Criminal Code's Article 53 paragraph (2) emphasizes the necessity of prioritizing the defendant's justice where there is a balance between justice and legal certainty. This serves as the cornerstone for the new Criminal Code paradigm's application of the *lex favor reo* principle to corrective justice. The provisions of Article 53 paragraph (2) of the new Criminal Code, which emphasize justice through the judge's legal interpretation of the case, are a reflection of Radbruch's formulation. Therefore, the implementation of the *lex favor reo* principle is consistent with the heart of the new Criminal Code's corrective justice, (Yanuar, 2023).

Third, the goal of applying the *lex favor reo* principle to corrective justice is to provide the offender the most advantageous (in this case, least severe) penalty possible. This highlights the fact that the primary means of settling criminal law issues is not through criminal punishment. Rather, this strategy places a strong emphasis on the need for victims to receive healing and recompense, and it also encourages offenders to alter their behavior in order to stop them from making the same mistakes twice.

From considering the three connections between the core Considering *lex favor reo* and the application of corrective justice, it is evident that incorporating corrective justice as a paradigm into the new Criminal Code's substance has a significant impact. It is understandable that the criminal sentence under the new Criminal Code is more favorable to the offender and less harsh than it was under the old one. Stated differently, the *lex favor reo* idea guides the application of the new Criminal Code in criminal law practice, ensuring that it adheres to the principles of corrective justice.

The Ferdi Sambo case, in which the South Jakarta District Court sentenced him to death for premeditated murder, is an example of a criminal case that has garnered media attention. The death penalty against Ferdi Sambo will, however, be used in accordance with the *lex favor reo* principle, which refers to the current Criminal Code since it is thought to be more advantageous for the offender than the previous Criminal Code. This demonstrates that in situations such as these, the *lex favor reo* principle gives greater weight to the content of corrective justice.

Application of the *Lex favor reo* principle to certainty and justice in criminal law in Indonesia

Applying the *lex favor reo* principle to Indonesian criminal law presents a number of intricate issues, particularly in the context of attempting to maintain fairness and legal certainty. One of the goals of law is the principle of legal certainty, and it can be said that obtaining justice requires a high degree of legal certainty. (Nur, 2023) This legal certainty results in the implementation and enforcement of certain actions regardless of the perpetrator. Apart from that, legal certainty is also part of the rights of every citizen which must be upheld, as mandated in article 28D of the 1945 Constitution that all people have the right to recognition, guarantees, protection and fair legal certainty as well as equal treatment before the law. Apart from that, in criminal law there is a principle known as non-retroactive which is stated in article 1 paragraph (1) of the National Criminal Code and also article 28I paragraph (1) of the 1945 Constitution, basically saying that the law must not apply retroactively. Legal certainty allows anyone to anticipate the consequences they will face if they follow certain legal procedures. According to Gustav Radbruch's view, guaranteeing legal certainty must be emphasized on norms that actually function and are adhered to. In other words, legal norms must be fully obeyed to avoid violations of the law. Gustav Radbruch explains in his theory regarding legal certainty that there are four main issues that are closely related to the concept of legal certainty itself, namely as follows: (Astuti & Daud, 2023)

- 1) Law is something concrete, which means that positive law consists of statutory regulations.
- 2) Law is rooted in facts, which means that law is made based on reality.
- 3) The facts contained in the law must be formulated clearly to avoid confusion or wrong interpretation and can be implemented easily.
- 4) Positive law must remain consistent.

Gustav Radbruch's opinion about legal certainty is based on his understanding of the concept of legal certainty itself. Gustav Radbruch believes that legal certainty is the result of laws, or more precisely statutory regulations (Tektona, 2022). From Gustav Radbruch's opinion regarding the theory of legal certainty, it can be interpreted that the application of the principle of *lex favor reo* is part of the representation of legal certainty, because the principle of *lex favor reo* itself refers to regulatory provisions that have been promulgated, so that a person can apply provisions that are more beneficial to him if something happens. changes to legislation, then this is part of legal certainty so that it can then be implemented. Then besides that, the principle of *lex favor reo* provides a clear and predictable framework regarding how changes in the law will be applied to defendants. In this way, defendants and the wider community can understand that lighter laws will apply, providing certainty regarding the fair and humane application of the law. By adopting the principle of *lex favor reo*, the legal system shows consistency in the application of fair and equitable legal principles, regardless of changes in regulations. This shows that the legal system is not only static but also adaptive to more favorable social and legal changes. So, it can be concluded that in the context of statutory regulations, the principle of *lex favor reo* is recognized and applied as part of efforts to ensure that criminal law is applied fairly and consistently. Then, regarding laws that cannot be applied retroactively or commonly known as the non-retroactive principle, there are exceptions. According to Romli Atmasasmita, as quoted by Andi Sofyan and Nur Azisa in their book entitled *Criminal Law* (p. 24), the principle of non-retroactive law only applies to general criminal offenses. However, for serious human rights violations, the non-retroactive principle cannot be applied. The disregard for the non-retroactive principle in cases of human rights violations is explained in the Elucidation to Article 4 of the Human Rights Law, which reads: "...The right not to be prosecuted on the basis of laws that apply retroactively can be excluded in cases of serious violations of human rights which are classified as crimes against humanity." In addition, Article 43 paragraph (1) of the Human Rights Court Law states that serious violations of human rights that occurred before the enactment of the Human Rights Court Law will be examined and decided by an ad hoc human rights court.

-Many jurisdictions have codified this principle in their laws, demonstrating a commitment to the principles of justice and legal certainty. The principle of *transitoir* or *lex favor reo* is reflected in Article 3 paragraph (1) of the National Criminal Code (National Criminal Code), which states that if there are changes to statutory regulations after the act has been committed, then the regulations that are most beneficial to the defendant are applied, is an exception to non-retroactive enforcement. This shows that legal certainty is not something that is rigid, but must be able to adapt to changes that provide greater benefits to the individual being tried.

Apart from legal certainty, the principle of *lex favor reo* is often clashed with justice in criminal law. Some opinions say that the application of *lex favor reo* can harm justice in law, because it is considered to benefit the defendant and is always linked to the fact that this is not commensurate with the losses experienced by the victim. This problem has actually been answered by the vision in the National Criminal Code, including decolonialization, which is an effort to eliminate colonial nuances, by realizing corrective, rehabilitative and restorative justice (Joko & SH, 2023). So when we talk about justice, we cannot compare the losses experienced by the victim with the punishment received by the perpetrator of the crime, because this in the vision of the National Criminal Code has its own portion. For victims, the justice provided is in the form of restorative and rehabilitative, which means that what the victim needs in the recovery process will be provided through a mechanism for bringing the perpetrator and victim together for deliberation. If restorative justice belongs to the victim, then corrective justice is applied to the perpetrator, meaning that the perpetrator will be given sanctions for the actions taken as a corrective measure that his behavior was wrong. So it is clear that the application of the *lex favor reo* principle to justice has no correlation with the losses experienced by the victim, in fact the application of the *lex favor reo* principle will help in creating justice which is the aim of modern law (National Criminal Code), namely providing corrective justice that is adapted to developmental punishment. era. Thus, the principle of *lex favor reo* does not conflict with legal justice because legal justice is not only about punishing

the defendant, but also about how effectively the legal system can restore victims and rehabilitate perpetrators. Apart from the restorative and rehabilitative justice approach adopted in the National Criminal Code as a form of justice for victims (Irawan et al., 2022), In implementing the *lex favor reo* principle, it is an effort to achieve a fair balance between protecting the rights of the accused and restoring the victim, which overall increases the sense of justice in society.

IV. CONCLUSION

The conclusions that can be drawn regarding the principle of *lex favor reo* illustrate the complexity in the context of its application in the legal system. Although the principle aims to protect the rights of the accused, particularly in the criminal realm, careful analysis highlights its potential negative consequences for overall legal certainty and fairness. The issue that arises is the extent to which this principle guarantees the protection of the defendant's rights without sacrificing the interests and justice of the victim. The intense discussion regarding the principle of *lex favor reo* highlights a paradox. While this principle is designed to balance power between law enforcement officials and defendants, there is a tendency that excessive application of it can actually create new imbalances in the legal system, at the expense of justice for victims. This opens the door to critical questions about how legal certainty can be maintained without undermining justice, and how a balance between the rights of the accused and the need to uphold justice for victims can be effectively achieved.

The assumption that the application of the *lex favor reo* principle only benefits the defendant without paying attention to the victim is a potentially detrimental simplification. The victim's involvement and experience in the legal process is as important as the rights of the accused, and ignoring them in the application of this principle can lead to profound injustice. Therefore, the complex conclusions of this study highlight the need for a balanced approach in the application of the *lex favor reo* principle. Expanding the legal perspective to take into account the interests and needs of all parties involved in the legal process is an important step to ensure that justice is not marginalized in efforts to protect the rights of the accused. Thus, a comprehensive and inclusive discussion of the application of the *lex favor reo* principle is essential to ensure that justice remains at the core of a functioning legal system.

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