

The Lex Favor Reo Principle After New Criminal Code: A Corrective Justice's Perspective

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The Lex Favor Reo Principle After New Criminal Code: A Corrective Justice's Perspective

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Abstract

The purpose of this study is to analyze the existence and implications of the lex favor reo principle after the ratification of the new Criminal Code in relation to aspects of corrective justice. This research is normative legal research by prioritizing conceptual and statutory approaches. The results of the study show that the existence of the lex favor reo principle after the ratification of the new Criminal Code, namely as formulated in Article 3 juncto Article 618 of the new Criminal Code, the existence and applicability of the lex favor reo principle can be immediately enforced. The implication of the lex favor reo principle in optimizing aspects of corrective justice after the ratification of the new Criminal Code is that the implementation of the lex favor reo principle has implications for the existence of criminal sanctions experienced by defendants in the old Criminal Code. Suggestions in this study are that for law enforcement officials, special attention is needed when trying a crime, especially by first paying attention to the lex favor reo principle to see which sanctions are more profitable for the accused.

I. Introduction

Criminal law reform is important to building an ideal law in a country. In Indonesia, who reformed criminal law by amending the old Criminal Code and formulating a New Criminal

Code, officially giving the nomenclature of Law no. 1 of 2023 on Indonesian Criminal Code (hereinafter referred to as New Criminal Code). (I Gusti Ngurah Bayu Pradiva, 2022) The ratification of the New Criminal Code is a "new chapter" in criminal law reform in which the old Criminal Code and the New Criminal Code have different philosophical and conceptual foundations. In simple terms, the old Criminal Code was a translation and redundancy of the provisions of the *Dutch Wetboek van Strafrecht* so that philosophically and conceptually, it emphasized the classic criminal law school whose orientation was retaliation against the perpetrators of criminal acts. (Nurisman, 2022) The New Criminal Code has a different orientation from the old Criminal Code where the New Criminal Code emphasizes the flow of modern criminal law and the ideals of Indonesian rule, which emphasizes that the most important thing is recovery for victims of criminal acts as well as providing an educational effect for perpetrators of criminal acts. So, they don't repeat their actions. (Leider, 2021) That difference in orientation in the context of criminal law can have implications for the practice of criminal law enforcement, especially concerning applying the *lex favor reo* principle.

The principle of *lex favor reo* or the principle of *transitoir* is a principle that emphasizes that transitional provisions are enacted, which state that if there is a change in the law, the most favorable requirements for the defendant will be applied to the defendant. (Hardianto, 2022) Even though the New Criminal Code has only been in force three years after it was ratified (the New Criminal Code will come into force in 2026), however, the implementation of the *lex favor reo* principle has the potential to be applied to cases that currently still use the Old Criminal Code. In contrast, previously emphasized there is a paradigmatic and comprehensive change orientation between Old Criminal Code with new Criminal Code. The *lex favor reo* principle has implications for applying philosophy, conception, and sanctions under the New Criminal Code because, in general, the New Criminal Code is considered more "beneficial" for the accused than the old criminal code. This research is urgent to analyze the existence and implications of applying the *lex favor reo* principle after the ratification of the new Criminal Code. The novelty of this research is in the conceptual analysis regarding the existence and implications of the *lex favor reo* principle after the ratification of the new Criminal Code.

This study aims to answer two legal issues: (i) the existence of the *lex favor reo* principle after the ratification of the new Criminal Code and (ii) the implications of the *lex favor reo* principle in optimizing aspects of corrective justice. Research on the new Criminal Code conducted by previous studies and research in general still discusses the substance, philosophy, and orientation of the new Criminal Code based on the school of modern criminal law. That can be seen from research conducted by (i) Sahyana (2020), which

focuses on analyzing the substance of legal pluralism in the new Criminal Code, which seeks to integrate state and non-state law, in this case, customary law. (Sahyana, 2020) Subsequent research was conducted by Khalimy (2020), who emphasized that the transitional provisions in the formulation of the new Criminal Code are important because the massive change in orientation from the old Criminal Code to the new Criminal Code requires socialization and equal perspectives among law enforcers. (Khalimy, 2020) Furthermore, research conducted by Irawan et al. (2022) focuses on analyzing several controversial articles in the new Criminal Code that require the study in aspects of Indonesian legal culture. (Helmalia Cahyani, Intan Nurul Firdaus, Julia Elisabeth, 2022) Of the three previous studies, studies discussing the existence and implications of the *lex favor reo* principle after the ratification of the New Criminal Code have never been carried out, so this research is original and has a novelty that can be accounted for.

Research that focuses on the existence and implications of the *lex favor reo* principle after the enactment of the new Criminal Code is normative legal research that focuses on the analysis and study of the *lex favor reo* principle and the concept of criminal law reform on the authoritative text in the form of the New Criminal Code. (Negara, 2023) The primary legal materials in this study are the 1945 Constitution of the Republic of Indonesia and the New Criminal Code. The secondary legal materials in this research are books, journal articles, and the results of studies that discuss the *lex favor reo* principle and the New Criminal Code. Non-legal materials use legal dictionaries to clarify definitions or vocabulary of legal terms as part of an analysis of legal issues in this study.

II. Research Method

The type of research used in this research is normative legal research. This research focuses on the existence and implications of the *lex favor reo* principle after the enactment of the new Criminal Code is normative legal research that focuses on the analysis and study of the *lex favor reo* principle and the concept of criminal law reform on the authoritative text in the form of the New Criminal Code. (Negara, 2023) The primary legal materials in this study are the 1945 Constitution of the Republic of Indonesia and the New Criminal Code. The secondary legal materials in this research are books, journal articles, and the results of studies that discuss the *lex favor reo* principle and the New Criminal Code. Non-legal materials use legal dictionaries to clarify definitions or vocabulary of legal terms as part of an analysis of legal issues in this study.

III. Results and Discussion

The Existence of the Lex Favor Reo Principle After the New Criminal Code

The New Criminal Code as a "new paradigm of criminal law in Indonesia" was enacted to realize the creation of reforms in Indonesian criminal law based on the substance of national law following the nation's personality. This is understandable considering that the old Criminal Code was a translation of the Dutch *Wetboek van Strafrecht* with substance and spirit following the conditions of Dutch law in the 19th century, namely the era in which *Wetboek van Strafrecht* was legalized in the Netherlands to be then implemented in the Dutch colonies, one of which was Indonesia. (Wirabakti & Rochaeti, 2022) The enactment of the Dutch *Wetboek van Strafrecht* in Indonesia was based on two juridical reasons that developed at the beginning of independence. *First*, it was based on the concordance principle, namely the enactment of colonial state law on the newly independent country solely to fill the legal vacuum. (Wignjosoebroto, 2014) That means that the implementation of the Dutch *Wetboek van Strafrecht* in Indonesia based on the concordance principle is based on a transitional character and has a dimension on the benefit aspect, which means that if one day the constitutional conditions have improved and are relevant to drafting a Criminal Code that is in accordance with the Indonesian spirit.

Then it is necessary to formulate a national Criminal Code that is replaced the old Criminal Code, which was a translation of the Dutch *Wetboek van Strafrecht*. *Second*, the implementation of the Dutch *Wetboek van Strafrecht* in Indonesia to become the old Criminal Code must be emphasized as something temporary and only to fill a legal vacuum (Disantara et al., 2022). What needs to be emphasized here is that at the beginning of independence, even though the orientation was towards implementing the substance of the old Criminal Code as the basis for the substance of the national criminal law, the founding leaders stressed that what was important was "the spirit of state administrators." (Kurniawan, 2022) That is true in elucidating the 1945 Constitution before the amendment, which emphasized the spirit of running the state as the spirit of implementing national law. In the context of criminal law, even though, in substance, the national criminal law is based on the Dutch *Wetboek van Strafrecht*, it is hoped that the Dutch *Wetboek van Strafrecht* can be applied following the legal culture of the Indonesian nation by optimizing the spirit of state administration which optimizes the Indonesian dimension as the spirit of a newly independent nation. (I Dewa Gede Atmadja, 2021)

Referring to the two arguments above regarding the enactment of the Dutch *Wetboek van Strafrecht* in Indonesia to become the old Criminal Code. In practice, there were various

obstacles regarding the implementation of the *Dutch Wetboek van Strafrecht* in Indonesia, one of which was because the substance of the old Criminal Code was not based on the structure and legal culture of Indonesian society. The same thing was agreed by Jonkers, who is an expert and practitioner of Dutch criminal law who, based on his experience in Maros, South Sulawesi, emphasized that the old Criminal Code. Which was based on the Dutch *Wetboek van Strafrecht*, in fact who could apply not all of it to Indonesian society because several substances in the old Criminal Code contradicted the local spirit of each community in Indonesia.(Bustomi, 2021) Jonkers' opinion mandates that for criminal law in Indonesia to apply and be applied optimally based on the ideals of Indonesian law, the formation of a new Criminal Code based on the character of the Indonesian nation is an urgent thing to fight for.(Fardiansyah, 2021) The presence and enactment of the new Criminal Code is an attempt to respond to various problems in the implementation of the old Criminal Code, which, in addition to being "obsolete" due to legal developments that are increasingly developing, also because the old Criminal Code does not substantively reflect Indonesian aspects.

Therefore, who can see that the substance and spirit of the new Criminal Code, which is more than 80%, overhauled the importance and confidence of the old Criminal Code. Even though, in general, there are comprehensive differences between the old Criminal Code and the new Criminal Code, there are similarities between the old Criminal Code and the new Criminal Code, which are part of the substantive aspects of the conception of criminal law that apply universally. One of the similarities between the old Criminal Code and the new Criminal Code is the affirmation of the *lex favor reo* principle in its substance.(Supardin & Syatar, 2021) The legal principle in the study and development of legal science occupies an important aspect because the legal principle is the "heart" of applying a legal norm or rule. In the absence of a legal basis, the enforceability of legal norms or rules is only instructional without being based on certain legal values and ideals that live and develop in society.(Sudarwanto & Kharisma, 2021) *Black's Law Dictionary* terms the principle of law as a principle (legal principle) that is a basic concept, basic assumptions, and a fundamental basis with a normative character of law.

Therefore, in the context of legal science, especially criminal law, the study of legal principles is important theoretically and practically (Pollock, 2020). Studying legal principles, especially in criminal law relating to the old and new Criminal Code, is important in studying the *lex favor reo* principle. The principle of *lex favor reo*, or in criminal law, is also commonly referred to as the principle of *transitoir*. It is a principle with a "transitional" character to bridge the enforcement of a criminal law norm already in force with a criminal law norm that has just been ratified.(Halim et al., 2020) This means that the principle of

transitoir is a "bridge" for enforcing the old criminal law rules with the new criminal law. According to Eddy O.S. Hiariej and Zainal A. Mochtar, (Zainal Arifin Mochtar, 2021) the principle of *lex favor reo* has the same spirit as the principle of *in dubio pro reo*, namely that justice is equally placed for the accused where if there is a change in the substance of the criminal law, provisions that are favorable to the accused shall apply. The difference between the *lex favor reo* principle and the *in dubio pro reo* principle is that the *lex favor reo* principle relates to enacting a favorable rule of law when there is a change in the substance of the criminal law. However, the *in dubio pro reo* principle focuses more on the judge's decision which, if the judge hesitates (dubious) is decided following the favorable provisions to the defendant. (Sayulina & Efendi, 2022)

The principle of *lex favor reo* in the old Criminal Code is actually as emphasized in Article 1 paragraph (2) of the old Criminal Code, which emphasizes that if there is a change in the substance of the criminal law, then what is applied is the rule that is most beneficial to the accused. Furthermore, in the new Criminal Code, the principle of *lex favor reo* is also formulated in Article 3 in conjunction with Article 618 of the new Criminal Code, which is substantially not much different from the formulation in Article 1 paragraph (2) of the old Criminal Code, namely the implementation of the rules that are most beneficial to the accused if there is a change in substance criminal law rules. (Kryvoi & Matos, 2021) The principle of *lex favor reo* in criminal law is important based on at least three objectives: first, the principle of *lex favor reo* aims to guarantee the rights of the accused in the form of legal guarantees and justice in an appropriate and proportionate manner. In this context, it would be unfair for a change in the substance of the criminal law rules to harm the defendant. What should happen is the opposite, that changes in the substance of criminal law rules must provide benefits for the defendant in the form of implementing rules that are beneficial to the defendant. (Yuli Asmara Triputra, 2022)

Second, the principle of *lex favor reo* aims to balance the aspects of justice and legal certainty as two aspects of basic legal values which sometimes negate each other. (Intan Audya, Jeanne D.N Manikb, 2021) In Gustav Radbruch's view, justice and legal certainty in criminal law are often antinomies, but it is the legal construction of law enforcement officials in certain cases that is the important point for resolving the antinomy between justice and legal certainty. (Bateman, 2019) In this context, the synergy of aspects of justice and legal certainty is embodied in the *lex favor reo* principle in which the accused gets guaranteed justice and legal certainty if there is a change in the substance of the criminal law rules.

Third, the principle of *lex favor reo* has an orientation to strengthen the substance of corrective justice, which in corrective justice in addition to optimizing light criminal

sanctions for the accused because it emphasizes recovery and compensation for a crime.(Allcock, 2019) This is the main characteristic of modern criminal law which emphasizes the relational relationship between the perpetrator and the victim of a crime to restore the situation to how it was before and does not emphasize the aspects of punishment and "revenge" for the perpetrators' crime. Referring to the three objectives of implementing the *lex favor reo* principle above, apart from the *lex favor reo* principle already regulated in the old Criminal Code, the *lex favor reo* principle is also the focus of the new Criminal Code as formulated in Article 3 in conjunction with Article 618 of the new Criminal Code. This confirms that the existence and enforceability of the *lex favor reo* principle can be immediately enforced, especially after the new Criminal Code officially comes into effect starting in 2026 before 2026, the *lex favor reo* principle also still exists and applies as stipulated in Article 1 paragraph (2) of the old Criminal Code. .

Based on the analysis above, the existence of the *lex favor reo* principle after the ratification of the new Criminal Code, namely because the *lex favor reo* principle has also become the focus of the new Criminal Code as formulated in Article 3 juncto Article 618 of the new Criminal Code. The existence and enforceability of the *lex favor reo* principle can be immediately enforced, especially after The new Criminal Code will officially come into force starting in 2026. Whereas before the new Criminal Code comes into force in 2026, the principle of *lex favor reo* still exists and applies as stipulated in Article 1 paragraph (2) of the old Criminal Code so that as part of the substance of universal criminal law. The applicability and existence of the *lex favor reo* principle is to protect the rights of the accused as a result of a change in a criminal law rule, integrating aspects of justice and legal certainty, and oriented towards the conception of corrective justice as a characteristic feature of modern criminal law

Implications of the Lex Favor Reo Principle in Optimizing Corrective Justice Aspects

.The existence and position of the *lex favor reo* principle, as previously emphasized, actually has an orientation to optimize aspects of corrective justice as one of the orientations of modern criminal law.(Srirejeki & Master, 2022) Modern criminal law developed after the events of the second world war ended and continued to develop in the era of the industrial revolution 4.0 and society 5.0.(Suharyo, 2021) This is at least based on two reasons modern criminal law is growing rapidly.(Naibaho, 2021) *First*, modern criminal law emphasizes the ultimum remedium characteristics of criminal law. This means criminal law is the "final solution" in settling a dispute. The main orientation of the existence of a dispute is a settlement that emphasizes harmonious relations between the perpetrator and

the victim of a crime where the perpetrator emphasizes the aspect of "repentance" so that he does not repeat his actions. In contrast, for the victim, proper healing or compensation is experienced as a result of an criminal act.

Second, modern criminal law is oriented towards the essence of restorative justice, and restorative justice sees crime as a "disease" of society that must be diagnosed with the root of the problem, and then the root of the problem is resolved so that similar crimes do not recur in society.(Rochaeti et al., 2023) Specifically, regarding aspects of corrective justice, modern criminal law has particular relevance to corrective justice efforts that place compensation or restoration of losses to victims rather than only in the form of criminal sanctions.(Ripstein, 2020) Based on the two reasons for developing the understanding of modern criminal law above,(Thornton, 2021) it can be concluded that the main characteristic of modern criminal law is its emphasis on corrective justice and restorative justice. In connection with the aspect of corrective justice which emphasizes placing compensation or recovery of losses on the victim rather than only in the form of criminal sanctions, the substance of corrective justice actually has relevance to the implementation of the *lex favor reo* principle in criminal law.

At least, there is three true relevance to the substance of corrective justice with the implementation of the *lex favor reo* principle in criminal law. *First*, the orientation and idea of corrective justice, which does not emphasize imprisonment and attempts at revenge (*lex talionis*) and instead emphasizes efforts to empower victims of criminal acts crime to get recovery has an orientation not to make the punishment of perpetrators as the "main solution" for solving crimes. With the implementation of the *lex favor reo* principle after the ratification of the New Criminal Code, any criminal law issues that are tried using the Old Criminal Code based on the *lex favor reo* principle will be resolved based on corrective justice in which the criminal sanctions contained in the Old Criminal Code are constructed to be oriented towards recovery or compensation for victims of criminal acts. Even though there are criminal sanctions, criminal sanctions in the New Criminal Code also constructively have a "soul" of corrective justice, one of which is evidenced by the existence of criminal sanctions in the form of forced labor.

Second, the implementation of the *lex favor reo* principle concerning corrective justice as in the paradigm of the New Criminal Code is also based on the implementation of Article 53 paragraph (2) of the New Criminal Code, which substantively Article 53 paragraph (2) of the New Criminal Code emphasizes the need to prioritize justice for the accused if there is a resilience between justice and legal certainty in practice. The provisions of Article 53 paragraph (2) of the New Criminal Code are a concretization of the formulation of the *Radbruchformula*, one of the orientations of the *Radbruchformula* prioritizing justice

through the discovery of judges' law in a legal matter. Thus, the substance of corrective justice, which animates the new Criminal Code's formulation, is in line with the implementation of the *lex favor reo* principle. Third, the direction of *lex favor reo* concerning corrective justice seeks to provide the most favorable (in this case, the lightest) sanction for the accused. This confirms that the imposition of criminal sanctions is not a solution to resolving a criminal law problem but instead fosters the essence of healing and compensation for victims while at the same time making the perpetrators of criminal acts "converted" and not repeating their actions. (Agus & Susanto, 2021)

Of the three relevance between the implementation of the *lex favor reo* principle and the essence of corrective justice, by making corrective justice a paradigm in the substance of the New Criminal Code. The simple logic is that the dominant criminal sanctions in the substance of the New Criminal Code are more mitigating and beneficial for the accused compared to the criminal sanctions contained in the Criminal Code. This means, with the implementation of the *lex favor reo* principle, the substance of the New Criminal Code will automatically be applied on its main basis, namely the practice of criminal law based on the substance of corrective justice. One example of a criminal case that caused an uproar in the community and with the implementation of the *lex favor reo* principle will be oriented towards corrective justice is the example of the Ferdi Sambo case in which the South Jakarta District Court sentenced Ferdi Sambo to death penalty from the premeditated murder case. (Bagaskara, 2023) However, concerning the enactment of the *lex favor reo* principle, the death sentence that Ferdi Sambo is serving will be based on the New Criminal Code because the substance of the death penalty in the New Criminal Code is considered more beneficial than in the Old Criminal Code for the accused. Therefore, with the implementation of the *lex favor reo* principle, which is oriented towards the substance of corrective justice.

In the future, the sanctions against Ferdi Sambo as stipulated in the New Criminal Code, namely the death penalty, will be carried out with probation for ten years and if within ten years Ferdi Sambo has good behavior. The death penalty imposed can be replaced by life imprisonment. The Ferdi Sambo case above is an example of how the implementation of the *lex favor reo* principle has relevance to a corrective justice orientation. So, that the implication of the *lex favor reo* principle in optimizing aspects of corrective justice after the ratification of the New Criminal Code. That's the implementation of the *lex favor reo* principle has implications for criminal sanctions being experienced by the accused in the Old Criminal Code it may be lower in line with the enactment of the New Criminal Code. Who can also see that one of the orientations of the New Criminal Code is the existence of corrective criminal sanctions as well as social work sanctions whose orientation

is to socialize the perpetrators of criminal acts as well as to make the perpetrators of criminal acts "conscience" and not repeat their actions.

IV. Conclusion

The existence of the *lex favor reo* principle after the ratification of the New Criminal Code, namely because the *lex favor reo* principle has also become the focus of the New Criminal Code as formulated in Article 3 *juncto* Article 618 of the New Criminal Code. The existence and application of the *lex favor reo* principle can be immediately enforced, especially after the New Criminal Code is officially enacted starting in 2026. Before the enactment of the new Criminal Code in 2026, the principle of *lex favor reo* also still exists and applies as stipulated in Article 1 paragraph (2) of the Old Criminal Code. So, that as part of the substance of universal criminal law, the applicability and existence of the principle of *lex favor reo* is to protect the rights of the accused as a result of changes in a criminal law rule, integrate aspects of justice and legal certainty, and are oriented towards the conception of corrective justice as a characteristic feature of modern criminal law. The implication of the *lex favor reo* principle in optimizing aspects of corrective justice after the ratification of the New Criminal Code is that the application of the *lex favor reo* principle has implications. For the existence of criminal sanctions experienced by defendants in the old Criminal Code it may be lower along with the enactment of the New Criminal Code. It can also be seen that one of the orientations of the New Criminal Code is the existence of corrective criminal sanctions as well as social work sanctions whose orientation is to socialize the perpetrators of criminal acts as well as to make the perpetrators of criminal acts "conscience" and not repeat their actions. For law enforcement officials, special attention is needed when trying a crime, especially by first paying attention to the *lex favor reo* principle to see which sanctions are more favorable to the accused.

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