

## **Legal Analysis of Criminal Guide lines for Reform Based on Law of The Republic of Indonesia Number 1 of 2023 Concerning the Criminal Code)**

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**Abstract.** *The 1945 Constitution of the Republic of Indonesia affirms that Indonesia is a state of law. One of the important principles of a state of law is the existence of an independent judicial power and free from the influence of other powers in administering justice in order to uphold law and justice. The approach method used in this study is the normative legal approach. The normative approach, also known as legal studies, positive legal studies, doctrinal law, and pure law, focuses on written regulations or prevailing community norms. Based on the results of the research and discussion conducted by the Author, the following conclusions are drawn: 1. Law of the Republic of Indonesia Number 1 of 1946 concerning Criminal Law Regulations (Old Criminal Code) and Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code (New Criminal Code) have different types of criminal penalties and purposes of punishment. The independence and freedom of judges in trying and deciding criminal cases can be divided into 2 (two) points, namely the freedom of judges in accepting, assessing, and constructing every evidence presented in the trial to determine the guilt of the Defendant and the freedom of judges in sentencing the Defendant. The presence of sentencing guidelines in the New Criminal Code has reduced the judge's "absolute discretion", especially in terms of sentencing.*

**Keywords:** *Analysis of Reform Law; Criminal Code; Law of the Republic of Indonesia.*

### **1. Introduction**

After the Proclamation of Independence in 1945, Indonesia inherited the Dutch colonial legal system based on Continental European law or civil law. The adoption of the Criminal Code (KUHP) and the Civil Code (KUHPer) which are Dutch legacies shows that the legal basis used by Indonesia still originates from the Dutch colonial era. This includes the process of law formation, law enforcement, and enforcement of justice. Thus, the legacy of the Dutch colonial legal system still influences the legal framework of Indonesia to this day. Changes such as the ratification of the new Criminal Code are significant steps in an effort to adapt to the developments of the times and the needs of modern society.

Master of Law, UNISSULA

The 1945 Constitution of the Republic of Indonesia affirms that Indonesia is a state of law. One of the important principles of a state of law is the existence of an independent judiciary that is free from the influence of other powers in administering justice in order to uphold law and justice.

The importance of the principle of the rule of law in Indonesia means that the rule of law must be the main foundation in running community life. The existence of an independent judiciary protects the judicial process from interference or influence from other parties that can disrupt its independence and objectivity. Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia mandates that the judiciary must be independent so that it can carry out its duties fairly without pressure from any party. Thus, the principle of the rule of law becomes the foundation underlying the Indonesian judicial system in its efforts to uphold law and justice for all citizens.

In the criminal law system, the criminal justice system in the Indonesian legal system emphasizes the central position of the criminal justice system in enforcing law and justice. Decisions taken in the realm of criminal justice have a broad impact, both on perpetrators of criminal acts and society as a whole. The criminal justice system functions as a criminal law enforcer that involves at least 3 interrelated factors, namely the legislative factor, the apparatus or law enforcer factor, and the legal awareness factor.<sup>1</sup> Legislative factors, both in terms of material criminal law (substantive) and formal criminal law (criminal procedure), are the main basis in the criminal justice process. The quality of criminal justice decisions can be measured based on two important aspects, namely the suitability of the content or results of law enforcement with substantial justice (substantive justice) and the suitability of law enforcement procedures with the principles of procedural justice (procedural justice)<sup>2</sup>. Thus, the criminal justice system has an important role in maintaining a balance between fair and effective law enforcement and the protection of individual rights in the criminal legal process. Changes or improvements in the criminal justice system can contribute to increasing the effectiveness and fairness of law enforcement in Indonesia.

Criminal law enforcement itself involves the following factors:

1. Legislative Factors: This factor includes the legal framework that governs the entire criminal justice process, both in terms of substance (material) and procedure (formal). Material criminal law determines what actions are considered criminal acts, while formal criminal law determines the legal procedures that must be followed in criminal trials.
2. Law Enforcement Factors: Law enforcement officers include police, prosecutors, judges, and other law enforcement elements tasked with investigating, prosecuting, and passing judgment in criminal cases. The quality, independence, and professionalism of law enforcement officers greatly influence the integrity of the criminal justice system.

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<sup>1</sup>Nimerodi Gulo and Ade Kurniawan Muharram, Disparity in Criminal Sentencing, Undip E-Journal of Legal Issues, Volume 47 No. 3, 2018, p. 216.

<sup>2</sup>Apri Yanti, The Relevance of Judicial Professionalism and Imperfect Procedural Justice in Criminal Cases, accessed from <https://siganisbadilum.mahkamahagung.go.id/arunika/baca-artikel/relevansi-profesionalisme-hakim-dan-keadilan-prosedural-tidak-sempurna-dalam-perkara-pidana/a-74arnZoJ1Z>, accessed May 18, 2025.

Master of Law, UNISSULA

3. Legal Awareness Factor: Public legal awareness is an important factor in criminal law enforcement. People who have a good understanding of the law tend to be more obedient to the rule of law, so that it can encourage the effectiveness of law enforcement.

Good integration between these three factors is needed to ensure effective, fair, and just criminal law enforcement. A strong criminal justice system requires synergy between clear legislation, professional and independent officers, and high legal awareness in society as the main foundation in maintaining justice and effective law enforcement.

The old Criminal Code that is still in force does not provide concrete sentencing guidelines for judges in sentencing defendants. The lack of clarity in the old Criminal Code makes it difficult to determine proportional and just sentences. Because the old Criminal Code does not provide clear guidelines, there are often significant disparities or differences in the imposition of criminal sentences on defendants. This creates legal uncertainty and potential injustice in the criminal justice system. The existence of problems caused by the old Criminal Code shows the need for changes or updates in the Indonesian criminal law system. This legal update is needed so that law enforcement can be carried out more accurately, fairly, and in accordance with the demands of justice in modern society.

Some concrete examples of cases where differences or disparities in decisions in the criminal justice system can occur:

1. Drug Cases: In some drug abuse cases, there are sometimes significant differences in sentencing for perpetrators who commit similar drug crimes. Some judges may tend to give lighter sentences while others tend to be harsher, causing a striking disparity in sentences.

2. Theft Cases: In theft cases with similar circumstances, different judges may impose different sentences. This can lead to inequity in law enforcement and sentencing that is in accordance with justice.

3. Domestic Violence Cases: Differences in judges' approaches and assessments in domestic violence (DV) cases can also lead to disparities in verdicts. Sometimes, the sentences given do not reflect the seriousness of the violent acts committed, especially when there are other factors such as the perpetrator's social, economic, or positional status.

4. Corruption Cases: In corruption cases, there are sometimes differences in sentencing for corruptors who commit similar corruption crimes. This disparity in sentences can be influenced by factors such as pressure from certain parties, the quality of evidence presented, or different interpretations of the law.

With the examples of cases above, it is seen that differences or disparities in decisions in the criminal justice system can cause legal uncertainty, diversity of justice, and inequality in law enforcement. Efforts to reduce these disparities in decisions are an important step in maintaining the integrity and justice of the criminal justice system, where the form of such efforts is not only through internal decisions of the Supreme Court through the Circular of the Supreme Court regarding the Results of the Chamber Meeting issued annually, but also by reforming criminal punishment through the new Criminal Code.

Master of Law, UNISSULA

With the enactment of the new Criminal Code through Law Number 1 of 2023, there is an update in the provisions of the sentencing guidelines contained in Chapter III of the Law. The new Criminal Code is expected to provide clearer direction for judges in sentencing defendants based on more in-depth and proportional considerations. The new Criminal Code presents significant changes that reflect efforts to always follow the development of society and the evolving legal needs. The involvement of legal experts, legal practitioners, and other related parties in the process of drafting the new Criminal Code is expected to strengthen the legal basis that is more relevant and responsive.

With a three-year deadline since its enactment, the government and various related institutions must make thorough preparations in implementing the new Criminal Code. The implementation of the new Criminal Code is expected to run smoothly and its sustainability is guaranteed to improve justice and effectiveness in enforcing criminal law in Indonesia. It is hoped that the new Criminal Code can resolve the problems in the old Criminal Code, such as legal uncertainty, disparity in decisions, and the need for clearer sentencing guidelines. With the new Criminal Code, it is hoped that it can increase public trust in the criminal justice system and provide better legal protection for all citizens.

However, does the existence of the new Criminal Code that regulates the guidelines for sentencing, if associated with the principle of the freedom of judges in trying and deciding cases become limited or no longer independent to make decisions based on existing factors? Based on the description of the background, the author feels the need to study and research more deeply by taking the title ANALYSIS OF THE REFORM LEGAL GUIDELINES FOR CRIMINAL SENTENCE BASED ON LAW OF THE REPUBLIC OF INDONESIA NUMBER 1 OF 2023 CONCERNING THE CRIMINAL CODE.

## **2. Research Methods**

The approach method used in this study is a normative legal approach. The normative approach, also known as legal studies, positive legal studies, doctrinal law, and pure law, focuses on written regulations or prevailing social norms. In this writing, First, the data sources used are only secondary data, such as primary legal materials, secondary legal materials, or tertiary data. Second, the use of secondary data in full (such as library materials) may eliminate the need for a tentative theoretical framework, but the preparation of a conceptual framework is still necessary. Third, normative legal research does not require a hypothesis; if there is one, it is usually a working hypothesis. Fourth, because the study only uses secondary data, sampling is not necessary because secondary data has a unique weight and quality that cannot be replaced by other types of data.<sup>3</sup>

## **3. Results and Discussion**

### **3.1. Comparison of Criminal Procedure Regulations Based on the Republic of Indonesia Law Number 1 of 1946 Concerning Criminal Law Regulations with Criminal Procedures Based on the Republic of Indonesia Law Number 1 of 2023 Concerning the Criminal Code**

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<sup>3</sup>Amiruddin and Zainal Asikin, *Introduction to Legal Research Methods*, Rajawali Press, Jakarta, 2006, pp. 118-120

Master of Law, UNISSULA

The state has the authority to guarantee security and order in society. One of the tools to guarantee this is the provision of criminal law that provides justice and legal certainty for citizens. Talking about criminal law, it cannot be separated from punishment which is a complex and dynamic topic, because it reflects the state's efforts to enforce the law and protect the rights of citizens.

In general, criminalization is a series of actions or processes carried out by the state through law enforcement officers to impose legal sanctions on someone who is proven to have committed a crime. The main goal is not only to punish the perpetrator, but also to prevent crime, rehabilitate the perpetrator, and provide justice for the victim.

So far, the punishment adopted is based on the old Criminal Code (KUHP), known as the *Wetboek van Strafrecht (WvS)*. *Wetboek van Strafrecht (WvS)* is a legacy from the Dutch colonial era and has been used for more than 1 (one) century in Indonesia. Referring to the old Criminal Code which is still adopted until the preparation of this writing, provisions related to punishment can be seen in Chapter II on Punishments, namely in Article 10 of the old Criminal Code which determines:

The penalties are:

1. Principal penalties:

- a. Death penalty;
- b. Prison sentence;
- c. Imprisonment;
- d. Fines;

2. Additional penalties;

- a. Revocation of certain rights;
- b. Confiscation of certain goods;
- c. Announcement of the judge's decision

However, the old Criminal Code does not provide an explanation regarding these penalties, so the explanation can be found based on the opinions of experts that can be found in various Criminal Code books written by these experts. Regarding the explanation of article 10 of the old Criminal Code above, the author uses the opinion of R. Soesilo's book, one of the reference books for many judges in Indonesia in compiling decisions.

R. Soesilo in his book *Criminal Code (KUHP) and its complete comments*, article by article, explains that what is meant by punishment is an unpleasant feeling (misery) imposed by a judge with a sentence on a person who has violated the criminal law.<sup>4</sup> Furthermore, in its explanation it is explained that the law distinguishes two types of punishment, namely the

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<sup>4</sup>R. Soesilo, *Criminal Code (KUHP) and its complete comments*, Article by Article, Politeia, Bogor, 1988, p. 35.

Master of Law, UNISSULA

main punishment and additional punishment. For one crime or violation, only one main punishment may be imposed. Cumulative more than one main punishment is not permitted. In addition to one main punishment, in several cases stipulated in the law, one of the additional punishments is also imposed (added). The use of additional punishment is to add to the main punishment, so it cannot be imposed alone<sup>5</sup>.

Both the main punishment and the additional punishment are divided into several types, namely as follows:

The main penalties are:

1) the death penalty is regulated in Article 11 of the old Criminal Code which basically regulates "The death penalty is carried out by the executioner at the place of hanging, by using a noose around the neck of the condemned person and tying the noose to the gallows and dropping the board where the person himself is;

2) imprisonment is regulated in Article 12 to Article 17 of the old Criminal Code, which in essence regulates that the term of imprisonment is life imprisonment or temporary, where temporary imprisonment is intended to be at least 1 (one) day and a maximum of 15 (fifteen) consecutive years. Temporary imprisonment can be imposed for a maximum of 20 (twenty) consecutive years, in the case of crimes that according to the judge's own choice may be punished by death, life imprisonment, and temporary imprisonment, with the provision that temporary imprisonment may not exceed 20 (twenty) years;

3) imprisonment and fines are regulated both individually and together in Article 18 to Article 34 of the old Criminal Code, which in essence regulates that the minimum imprisonment is 1 (one) day and the maximum is 1 (one) year, where the sentence may be imposed for a maximum of 1 (one) year and 4 (four) months and may not exceed that. The amount of the penalty in the form of a fine is at least 25 (twenty five) cents, with the provision that if the fine is not paid, it will be replaced with imprisonment.

Regarding the 3 (three) types of additional punishments, they are regulated starting from Article 35 to Article 43 of the old Criminal Code, which in essence determine several rights that can be revoked and the confiscation of goods which are described as follows:

1) the right to hold any position or designated position;

2) right of entry into armed forces;

3) the right to vote and the right to be elected in elections conducted according to general law;

4) the right to be an advisor or guardian of the Address (a guardian legally recognized by the state), and to be a guardian, a supervising guardian, a curator, or a supervising curator, over someone other than one's own child;

5) father's power, guardian's power and custody (curatele) over one's own child;

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<sup>5</sup>Ibid., p. 36.



Master of Law, UNISSULA

6) the right to perform specified work;

7) regarding the confiscation of goods, goods that can be confiscated are goods belonging to the convict which were obtained through crime or intentionally used to commit a crime;

The types of punishment mentioned above have long been a reference for judges in handing down criminal sentences, until finally Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code was enacted on January 2, 2023 (hereinafter referred to as the New Criminal Code) and will come into effect after 3 (three) years from the date of enactment, which is approximately 8 (eight) months since the preparation of this article.

To impose a criminal penalty on someone, there are several theories adopted, both by the state through its regulations and by judges through decisions based on the principles they adopt, namely:

- 1) Retributive or retribution theory, which emphasizes retribution and a deterrent effect that is commensurate with the crime that has been committed;
- 2) Relative or objective theory, which emphasizes punishment as a means to achieve certain goals that are beneficial to society in the future;
- 3) Combined theory, which emphasizes combining the best elements of absolute theory and relative theory.

Although the Old Criminal Code does not explicitly mention the theory of punishment, based on the provisions contained, it is clear that the retributive or retribution theory has a strong influence on the punishment system it adopts. This can be seen from:

- 1) The tendency of the Old Criminal Code to emphasize the crime committed by the perpetrator as the main basis for sentencing. The severity of the punishment is often directly linked to the level of guilt and loss caused by the crime;
- 2) The imposition of a "criminal" sentence as an absolute consequence is often seen as something that cannot be separated from a criminal act. This is because the main idea is that the perpetrator who has violated the law must pay for his actions. Based on the author's experience, this idea is still the principle of many judges, especially young judges;
- 3) The types of criminal penalties regulated in the Old Criminal Code reflect punishment as a form of suffering or loss caused to the perpetrator as retribution for his actions;

Unlike the Old Criminal Code, the presence of the New Criminal Code provides a new nuance that has reformed the criminal justice system, thus changing the perspective of law enforcement officers, especially judges, in trying and sentencing someone who has committed a crime. This is explicitly stated in Article 51 and Article 52 of the New Criminal Code regarding the objectives of criminal punishment as described above. The 4 (four) objectives in Article 51 show that the relative theory or objectives are the main basis for the philosophy of punishment in the New Criminal Code. This is illustrated by the important points contained in the four objectives, namely prevention (preventive), rehabilitation

Master of Law, UNISSULA

(guidance), restorative (recovery), balance, and reducing guilt in the perpetrator. This is in line with the views of Eddy OS Hiariej and Topo Santoso who stated that:<sup>6</sup>

"Based on the formulation of Article 51, several objectives are seen that are in accordance with the theory in the literature on criminal law, criminology, and criminal justice, namely: specific prevention, namely in objective d, general prevention, namely in objective a, rehabilitation, namely in objective b, resocialization, namely in objective b, restorative, namely in objectives c and d, community protection, namely in objectives a and c."

Another interesting thing found in the criminal reform in the New Criminal Code is the regulation of "legal values and justice that live in society" as one of the guidelines for sentencing for judges, which is not found in the Old Criminal Code. "Values that live in society" are the embodiment of living law as one of the legal assets that are still adhered to by the Indonesian people. The accommodation of living law in the New Criminal Code shows that the law is in harmony with the life of the Indonesian people with the complexity of tribes and cultures and customs in it. In addition to provisions related to living law, Article 52 of the New Criminal Code also regulates other purposes of sentencing, namely "sentencing is not intended to degrade human dignity" which is not found in the provisions of the Old Criminal Code, the implementation of which has so far caused many violations of Human Rights (HAM) in the judicial process.

The absolute or retaliatory theory, as adopted in the Old Criminal Code, places great emphasis on the value of justice, especially iustitia vindicative (justice of revenge) as put forward by Saint Thomas Aquinas. The idea of equitable retribution is a manifestation of an effort to restore the balance of justice that is disturbed by criminal acts. Law is considered a way to pay for mistakes that have been made. Other legal objectives, in the form of utility values, are less emphasized because the main focus is retribution for past actions, so that space for crime prevention and rehabilitation for perpetrators is less open. Regarding the value of legal certainty, this value is seen by the absolute or retaliatory theory as having been fulfilled by the reciprocity between criminal acts and the punishment imposed, in accordance with the principle of no punishment without fault.

The purpose of punishment in the New Criminal Code as an embodiment of the relative theory or purpose, tries to balance the achievement of justice, benefit, and legal certainty, by including the objectives of prevention, balance, restoration, rehabilitation, community protection, and reducing guilt in the perpetrator (deterrent effect). When viewed from the perspective of justice, benefit, and legal certainty, it can be described as follows:

1. Rehabilitation and restoration are related to corrective justice and restorative justice, which do not only see punishment as retribution, but also as an effort to repair the harm caused by the crime, restore relationships, and reintegrate the perpetrator into his/her environment;

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<sup>6</sup>Eddy OS Hiariej and Topo Santoso, Annotation of the National Criminal Code, PT Raja Grafindo Persada, Depok, 2025, p. 66.



Master of Law, UNISSULA

2. Prevention and protection of society are related to preventive justice, because through prevention, criminal law can prevent criminal acts from occurring, protect potential victims of criminal acts, and create a safe and orderly community environment;
3. The deterrent effect is related to substantive justice, which is similar to the justice desired in the Old Criminal Code, where by having an appropriate punishment, it can provide appropriate justice for both the victim and the perpetrator;
4. In terms of benefits, the objectives to be achieved in the form of prevention, restoration, rehabilitation, community protection and deterrent effects can provide positive consequences for all parties, including victims, perpetrators and the community in accordance with the philosophy of utilitarianism, namely providing the greatest possible benefits for everyone;
5. In terms of legal certainty, the sentencing guidelines regulated in the New Criminal Code are very rigid, which can provide clear direction in sentencing by judges so as to prevent disparities in decisions, but these rigid regulations have the potential to limit the judge's room to elaborate on the values of justice they adhere to;

The balance between justice, utility, and legal certainty that is attempted to be built through the New Criminal Code does not necessarily indicate that all three can be achieved simultaneously, because conflicts between them will certainly occur. The selection of one of the three values is also agreed to by the New Criminal Code through the provisions in Article 53 paragraph (2) which in essence regulates that if there is a conflict between legal certainty and justice, the judge must prioritize justice. This is in line with Gustav Radbruch's priority scale concept which emphasizes the importance of justice in solving legal problems. Judges are tasked with ensuring that the decisions taken reflect the values of justice that underlie the justice system.<sup>7</sup>

### **3.2. Implications of the Sentencing Guidelines in the New Criminal Code on the Principle of Judicial Independence in Trying and Deciding Criminal Cases**

The independence and freedom of judges in examining, trying, and deciding a case is a universal principle. It is said to be universal because the principle is adopted by various countries in the world, as stated in the Basic Principles on Independence of the Judiciary proposed by the United Nations General Assembly and the Beijing Statement of Principles of the Independence of the Law Asia Region of the Judiciary in Manila on August 28, 1997. Referring to the Beijing Statement, the essence of the independence of judges is as follows:<sup>8</sup>

"The judiciary is the highest value institution in every society. The independence of judges requires that judges decide a case entirely on the basis of understanding the law and free from any influence, either directly or indirectly, judges have jurisdiction over all issues that require justice."

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<sup>7</sup>Ibid., p. 69.

<sup>8</sup>Dahlan Sinaga, Independence and Freedom of Judges in Deciding Criminal Cases in the Pancasila Legal State, Nusa Media, Bandung, 2020, p. 6.

Master of Law, UNISSULA

The principle of judicial independence is also adopted by Indonesia, with various histories that accompany it. During the Old Order, the principle of judicial independence can be observed from the intervention of President Soekarno in judicial affairs and also judges who were formerly tools of revolution. This can be seen in the excerpt of the explanation of Article 19 of Law of the Republic of Indonesia Number 19 of 1964 concerning the Main Provisions of Judicial Power in Indonesia, namely "The court is not free from the influence of executive power and the power of law. However, sometimes, the President / Great Leader of the Revolution must be able to step in or intervene in both civil and criminal cases". The dynamics of the principle of judicial independence were also felt during the New Order government, where the conflict between the judge's decision and the law itself was often influenced by the number of judges who followed the government's political steps<sup>9</sup>.

The implementation of judicial independence in both regimes shows similarities in the restraint of judicial independence which is packaged in different ways. The judicial power in both regimes equally serves the ruler, if in the old order the devotion was directed to the great leader of the revolution, while in the new order the devotion was directed to the laws and development controlled by the executive leader.<sup>10</sup>

Over time, the public yearns for the freedom of the judiciary from the pressure and influence of other powers, especially the executive, so that the guarantee of this freedom is manifested in Article 1 of the Republic of Indonesia Law Number 48 of 2009 concerning Judicial Power which regulates "Judicial Power is the power of the state that is independent to organize trials in order to uphold law and justice based on Pancasila, for the sake of the implementation of the Republic of Indonesia's Constitutional State". The phrase "Freedom to organize trials" means that the judicial power in upholding law and justice is free from the influence of the executive or all other state powers, as well as other influences, both internal and external.

A deeper understanding can be gained through the opinion of Effendi Lotulung who stated:<sup>11</sup>"What is meant by an independent and independent judicial power in a Pancasila constitutional state has 2 (two) meanings: First, free and independent from intervention by any party. In the sense that the judicial power is not only free from intervention by the executive and legislative powers, but also free from intervention by the parties to the case, the press, public opinion and so on. In fact, the judicial power must also be free from intervention by the judicial power itself, namely from the power of a higher court. Second, free and independent power is only intended for the function of the judiciary as an executor of judicial power, namely when the judicial power carries out its judicial function in determining concrete laws or in other words free and independent in deciding a case."

In the context of criminal justice, the author tries to describe the concept of judicial independence into several points which will be described as follows:

### **1) Judicial Independence and the Criminal Justice System**

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<sup>9</sup>Ibid., p. 22.

<sup>10</sup>Ibid., p. 17.

<sup>11</sup>Teachers Pangaribuan and Arie Purnomosidi,

Master of Law, UNISSULA

The freedom of judges, especially in deciding criminal cases, is closely related to the criminal justice system. The criminal justice system was introduced by Remington as a result of dissatisfaction with law enforcement and the increasing crime rate in the United States in the 1960s. Remington addressed public dissatisfaction with the engineering of criminal justice administration known as the "criminal justice system". This system includes arrests to the implementation of criminal penalties, is open, has goals, value transformation, and control mechanisms. This system aims to create legal awareness, order, and public welfare. which emphasizes the values of justice, truth, and honesty, and has a control mechanism to combat crime.

The criminal justice system emphasizes the coordination and synchronization of criminal justice components, namely the police, prosecutors, courts, and correctional institutions, supervision and control of the use of power by criminal justice components, prioritizing the effectiveness of crime prevention, and the use of law as an instrument to strengthen the administration of justice. The criminal justice system has a different understanding from the criminal justice process, where the criminal justice system is the relationship between the decisions of each agency involved in the criminal justice process while the criminal justice process is each stage of a decision that confronts the perpetrator in the process that leads him to the imposition of a sentence.

From the understanding above, it can be understood that the implementation of criminal justice is systematic and integrated, and the implementation of the independence and freedom of judges is included in it. Therefore, the functions that must be carried out by free and independent judges are to provide protection to the community, rehabilitate perpetrators of crimes, and make incapacitation efforts against people who are threats to society. Free and independent judges also uphold and advance the rule of law and respect for the law by ensuring due process and fair treatment for perpetrators, prosecuting and freeing innocent people. Another function, judges through the implementation of their free and independent decisions maintain law and order, punish perpetrators of crimes in accordance with the philosophy of criminal law adopted, and help provide advice to victims of crime.<sup>12</sup>.

## **2) Judicial Freedom in Determining Guilt**

The guilt of the perpetrator of a crime, whether an individual or a corporation, is one of the main measures for a judge in determining a sentence. However, the imposition of a sentence remains limited to applicable law, whether based on statute or precedent (in the common law system). This concept is related to the principle of legality, which determines not only the prohibition of an act, but also the form and amount of the sentence imposed, all of which must be regulated by law. Mistakes placed in the context of statutory provisions regarding the form and amount of the sentence only have meaning if the formulation system opens up the possibility of being discretionary.

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<sup>12</sup>FH-UI TEAM, Synchronization of Legislative Provisions Concerning the Integrated Criminal Justice System Through the Application of General Principles, Faculty of Law, University of Indonesia, 2001, pp. 4-6.

Master of Law, UNISSULA

Regarding the criminal limitations in the law, the existence of specific minimum and maximum limits, as well as alternative or cumulative forms of punishment allow judges to freely determine the sentence based on the defendant's guilt. The freedom granted by the law becomes the object of the judge's discretion in terms of imposing a sentence. However, the relationship between guilt and the imposition of a sentence must be carried out proportionally, because the imposition of a sentence by a judge gives rise to judicial accountability, especially in terms of integrity and transparency.

### **3) The Value of Judicial Freedom in Deciding on Criminal Sentences**

The purpose of sentencing in the judicial institution in Indonesia is to uphold the law and justice, both for individuals and for society, nation and state. This is reflected in every judge's decision, which begins with the religious value "For Justice Based on the Almighty God". Decisions in the trial process are stated in the judge's decision or court decision. Based on Article 1 number 11 of the Republic of Indonesia Law Number 8 of 1981 concerning the Criminal Procedure Code, a judge's decision or court decision is a judge's statement pronounced in an open court session, which can be in the form of a criminal sentence or acquittal or release from all legal charges in terms of and according to the procedures regulated by law. As for Lilik Mulyadi, the judge's decision is a decision pronounced by a judge because of his position in a criminal trial that is open to the public after going through the procedural process of criminal procedure law which generally contains a criminal sentence or acquittal or release from all legal charges made in written form with the aim of resolving the case<sup>13</sup>.

In order to ensure law enforcement and justice, judges are given free and independent power in every stage of the trial in order to produce decisions that are not influenced by various interventions, both from within and outside the court, especially interventions from the authorities related to political and economic interests. However, the value of the judge's freedom in imposing this sentence is often influenced by subjective factors from the judge himself, namely the perspective or attitude of a judge in viewing a criminal case and the moral values adhered to by each judge.

### **4) Judicial Independence and the Method of Legal Discovery in Making Decisions**

Based on their independence and freedom, judges in deciding cases do not only refer to laws and regulations, but are also required to explore the values that live in society. Sometimes, in applying the law, judges find it difficult because laws and regulations have not regulated the cases they face. This situation requires judges through their independence to make legal discoveries. Legal discoveries have a crucial role, because they are a means of implementing the independence and freedom of judges to decide cases in Indonesia as a country based on law based on Pancasila.

According to Dahlan Sinaga, weaknesses in the legislation that ultimately require judges to make legal discoveries include:<sup>14</sup>

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<sup>13</sup>Lilik Mulyadi, Judge's Decision in Criminal Procedure Law, Citra Aditya Bakti, Bandung, 2007, p. 121.

<sup>14</sup>Dahlan Sinaga., Op.Cit., p. 174.

Master of Law, UNISSULA

- a. Legislation is never complete as a consequence of being a human product, so that gaps are often found;
- b. The descriptions contained in the laws and regulations generally reflect the conditions at the time they were created, while the life of society continues to run dynamically, thus creating a gap between the law and society;
- c. Its written nature produces a rigid nature;
- d. The formulation in statutory regulations is sometimes unclear, which can lead to uncertainty.

If these weaknesses are not addressed, it can result in the judge's decision not reflecting justice. The judge's decision always considers legal justice, moral justice, and social justice. Roscoe Pound proposed 3 (three) steps that can be taken by a judge in trying a case in order to obtain a just decision or reflect the implementation of the judge's freedom, namely:<sup>15</sup>

- a. Finding the law, namely choosing which to apply from the various rules in the legal system, or looking for a rule for the case at hand if none can be applied;
- b. Interpreting established or selected rules;
- c. Apply to the case at hand based on the rules that have been established or chosen and that have been interpreted;

As previously mentioned, judges are required to explore, follow, and understand the legal values and sense of justice that exist in society. The room for judges to move is regulated in Article 5 paragraph 1 of the Judicial Power Law, which is intended so that judges can deviate from the provisions if the provisions are clearly contrary to the sense of justice in society. However, it should be understood that the correlation between legal discovery and decision-making is closely related to activities that are sequential and continuous with the evidence process in the trial. The evidence process in the trial begins with qualifying the legal event, where the judge must first know the facts of the case. After understanding the case, the judge assesses and constructs all the evidence presented, then considers all the evidence until reaching a verdict.

Based on the explanation above, it is known that in the context of trying and deciding criminal cases, the independence and freedom of judges are divided into 2 (two), namely the freedom of judges in accepting, assessing, and constructing every evidence presented in the trial to determine the guilt of the Defendant and the freedom of judges in sentencing the Defendant. Both of these things, when connected with the concept of sentencing guidelines in the New Criminal Code, raise the question, does this regulation affect the freedom of the judge in trying and deciding criminal cases?

Criminalization, as has been described in the previous discussion of the formulation of the problem, has been regulated in Chapter III of the New Criminal Code with the title

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<sup>15</sup>Roscoe Pound, Introduction to the Philosophy of Law, translated by Drs. Mohammad Rodjab, Bhartara, Jakarta, 1996. P. 52.



Master of Law, UNISSULA

Criminalization, Criminal Procedure, and Actions, which in essence contains provisions on the purpose of criminal punishment, guidelines for sentencing for judges in imposing criminal penalties, and the addition of classifications of types of punishment, in the form of criminal penalties and actions.

Based on Article 51 of the New Criminal Code, it is known that there are 4 (four) objectives of punishment, namely preventing the commission of Criminal Acts by enforcing legal norms for the protection and care of society, socializing convicts by organizing, coaching and mentoring to become good and useful people, resolving conflicts caused by Criminal Acts, restoring balance, and bringing a sense of security and peace in society, and fostering a sense of regret and freeing the convict from guilt. In achieving these objectives, the lawmakers have prepared guidelines for sentencing for judges in imposing sentences, as stated in Article 54 paragraphs (1) and (2) of the New Criminal Code, which still lead to justice as referred to in Article 53 paragraph (2) of the New Criminal Code. This regulation is fundamental, which greatly distinguishes it from the Old Criminal Code, which is still the guideline to this day.

In the Old Criminal Code, there were no regulations regarding the objectives and guidelines for sentencing, so that judges had absolute discretion to determine the objectives of sentencing in each case they faced. Judges had absolute freedom to accept, assess, and construct every piece of evidence presented in court to determine the guilt of the Defendant and to sentence the Defendant. The assessment of the Defendant's guilt and sentencing was left to the subjective justice of each judge. The subjective justice of the judge can be seen from the behavior patterns and outlook on life of the judge, one example of which is if from the beginning the judge had considered that the Defendant being tried was a person who was indeed guilty and therefore had to be punished, then it is not impossible that the output of sentencing produced by a judge reflects retributive justice (justice that is oriented towards punishing the perpetrator of a crime that is commensurate with the mistake committed). Likewise, if the judge has a outlook on life that is in line with the utilitarianism or utility values, then the resulting decision will be different. This seems reasonable, because judges are God's representatives and are therefore seen as wise individuals in providing justice for society, but this is also one of the causes of disparities in decisions made by judges.

The New Criminal Code brings significant changes to the criminal justice system, especially regarding sentencing guidelines and is one of the most discussed aspects among judges because of its direct impact on the independence and freedom of judges in trying and deciding criminal cases, especially in determining the sentencing of defendants. If previously, the Old Criminal Code gave very broad freedom to judges, in the New Criminal Code the "absolute discretion" is reduced so that the purpose of sentencing which was initially submitted based on the judge's subjective sense of justice, is now "directed" to the purpose of sentencing in accordance with the provisions of the law, which is oriented towards the principles of justice expected by society. The role of the judge is transformed, from being the sole determinant to being the interpreter and implementer of guidelines. The guidelines are summarized in Article 54 paragraph (1) of the new Criminal Code which requires judges to consider 11 (eleven) points which are cumulative alternatives, namely: the form of the



Master of Law, UNISSULA

perpetrator's mistake, the motive or purpose of committing the crime, the perpetrator's mental attitude, whether the crime was planned or not, the method of committing the crime, the perpetrator's attitude and actions after committing the crime, the life history, social and economic conditions of the perpetrator of the crime, the influence of the crime on the victim or the victim's family, forgiveness from the victim and/or the victim's family, and/or the legal and justice values that exist in society. Can the reduction in the judge's freedom be said to be a restriction on the judge's freedom in sentencing the Defendant?

In response to this, the author quotes the opinion of Efendi Paulus who stated that even though the meaning of the power of a free and independent judge has been given, the judge in making a decision cannot make it as he pleases. The judge is still limited by the guidelines that must be followed. The limitations or guidelines that must be considered in the implementation of this freedom are the legal rules themselves. Legal provisions, both in terms of procedure and material, are already limitations for the judicial power so that in carrying out its independence it does not violate the law and act arbitrarily. Efendi Paulus's view shows that the freedom of judges is not the absolute freedom, but this view should not make judges the mouthpiece of the law.

However, the existence of these sentencing guidelines does not eliminate the principle of judicial independence completely. The Sentencing Guidelines do not regulate the substance of evidence and assessment of legal facts, so the principle of judicial independence in reasoning and legal discovery is still relevant, especially the freedom of judges to accept, assess, and construct every piece of evidence presented in the trial to determine the guilt of the Defendant. The presence of sentencing guidelines in the New Criminal Code aims to avoid disparities and create consistency in decisions. This is in line with the views of Eddy OS Hiariej and Topo Santoso who stated:<sup>16</sup>

“Sentencing guidelines are a guide or frame of reference used by judges in determining the punishment to be given to a defendant who has been proven guilty of a crime. Sentencing guidelines usually regulate the factors that must be considered in determining the punishment. Sentencing guidelines aim to assist judges in ensuring that the punishment given is in accordance with the severity of the crime committed and considers justice for all parties involved. These guidelines also aim to create consistency in sentencing in various criminal cases, so that justice can be upheld fairly and proportionally.”

The implementation of the New Criminal Code is just a matter of time. Significant changes will be felt when this regulation comes into effect. Regarding the guidelines for sentencing by judges, because the provision contains the word "mandatory" so that it is imperative, the implementation of this obligation must be the main concern of the government, especially the Supreme Court. However, the word mandatory in the provision is not accompanied by the consequences that arise when this obligation is neglected by the judge. The provisions of Article 54 of the New Criminal Code do not explain the legal consequences of negligence in implementing this guideline. As in the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System which clearly regulates the obligation of judges to consider the Bapas Report in the decision, which if not considered then the

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<sup>16</sup>Eddy OS Hiariej and Topo Santoso., Op.Cit., p. 71.

Master of Law, UNISSULA

decision is null and void by law. Likewise, regarding the technical rules in implementing the guidelines, is it sufficient to include them in aggravating and mitigating circumstances, or do they need to be included as a separate consideration in the decision. This will determine changes to the format of the decision that will be used as a guideline by the judge. These things seem to need new attention before this law is enacted.

#### **4. Conclusion**

Based on the results of the research and discussion conducted by the Author, the following conclusions are drawn: 1. Law of the Republic of Indonesia Number 1 of 1946 concerning Criminal Law Regulations (Old Criminal Code) and Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code (New Criminal Code) have different types of criminal penalties and purposes of punishment. In the Old Criminal Code, the types of criminal penalties are in the form of principal and additional criminal penalties, and the purpose of punishment is not explicitly regulated and the model of provisions that are regulated indirectly leads to the purpose of punishment which is absolute, as in the theory of the purpose of punishment, namely the absolute theory or retaliation. In the New Criminal Code, the types of criminal penalties are divided into criminal and action, with more diverse choices. The purpose of punishment in the New Criminal Code is more clearly regulated, which is oriented towards corrective justice, rehabilitative justice, and restorative justice (relative or objective theory). From these differences, it can be seen that the essence of the Old Criminal Code which is oriented towards criminal law as a form of retribution and deterrent effect emphasizes more on justice as one of the objectives of law, especially on retributive justice, and legal certainty is viewed narrowly, which only looks at reciprocal relationships, where there must also be retribution for every act. The value of utility is less emphasized in the Old Criminal Code. The essence of the New Criminal Code which is oriented towards 3 (three) justices shows an effort to harmonize justice, utility, and legal certainty, by emphasizing justice if there is a conflict between the three values. 2. The independence and freedom of judges in trying and deciding criminal cases can be divided into 2 (two) points, namely the freedom of judges in accepting, assessing, and constructing every piece of evidence presented in the trial in order to determine the guilt of the Defendant and the freedom of judges in sentencing the Defendant. The presence of sentencing guidelines in the New Criminal Code has reduced the "absolute discretion" of judges, especially in terms of sentencing. If previously, the Old Criminal Code gave very broad freedom to judges, in the New Criminal Code the "absolute discretion" is reduced so that the purpose of sentencing which was initially submitted based on the judge's subjective sense of justice, is now "directed" to the purpose of sentencing in accordance with the provisions of the law, which is oriented towards the principles of justice expected by society. However, the existence of these sentencing guidelines does not eliminate the principle of judicial freedom completely. The Sentencing Guidelines do not regulate the substance of evidence and assessment of legal facts, so the principle of judicial freedom in reasoning and legal discovery remains relevant.

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