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## Can Judges Ignore Justifying and Forgiveness Reasons for Justice and Human Rights?

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Article	Abstract
<p><b>Keywords:</b> Disposal of criminal punishment; Judge's decision; Justice; Human rights.</p> <p><b>Article History</b> Received: Feb 1, 2021; Reviewed: Jan 5, 2022; Accepted: Jan 30, 2022; Published: Jan 31, 2022.</p> <p><b>DOI:</b> 10.28946/slrev.Vol6.Iss1.1054.pp122-142</p>	<p>In the criminal law system in Indonesia, there are two reasons why an individual suspected of having committed a crime must be released. These two reasons are justifying and forgiveness reasons. In practice, these two reasons are linked to the elimination of criminal acts based on legal justice and human rights. This article discusses the legal consequences when the judge rejects the justifying and forgiveness reasons that can eliminate the sentence. The method used in this research is normative juridical by analysing norms, principles and rules of law with a case approach. As a result, this research shows that judges in practice have the authority given by law to determine whether an action can be categorised as justifying and forgiveness reasons that eliminate punishment by referring to the principles and legal regulations for justice and human rights. However, when the judge ignores these two reasons due to considerations of lack of justice and respect for human rights, this practice can be carried out by the judge with the consequence that this decision will cause harm, suffering and misery for the accused. This article argues that to protect the public interest from wrong decisions is necessary to reform the Criminal Procedure Code (KUHAP) to provide objectivity, honesty, and justice that rely on legal principles and rules.</p>

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### INTRODUCTION

The enforcement of criminal law starts with an early and strategic step, in which criminal law is passed into legislation. In its early process, law enforcement is called a policy formulation. Then, in the following process, criminal law enforcement is conducted by or in a system called the criminal justice system. This is a working mechanism to overcome crimes by approaching the

systems. The systems overcoming crimes refer to the inter-cooperated institutions or bodies, generally known as Police, Prosecutor, Court, and Correction Institution.<sup>1</sup>

When executing their duties, the above institutions or bodies claim that everybody is equal before the law. This principle is one of the doctrines in Rule of Law, which spreads in developing countries such as Indonesia. The regulations in Indonesia have adopted this principle since colonial period through *Burgelijke Wetboek* (Civil Code) dan *Wetboek van Koophandel voor Indonesie* (Commercial Code) on 30 April 1847 on Stb. 1847 No. 23.<sup>2</sup> Martiman Prodjohamidjojo, in his views, states that the principle of equality before the law does not differentiate social level, group, religion, colour, and wealth before the law.<sup>3</sup> Meanwhile, Ramdon Dasuki states that equality before the law means that both parties are treated equally, without irrelevant considerations such as wealth, family line, and colour.<sup>4</sup>

The equal domicile in law and government is admitted normatively and executed empirically. In this frame of equality, any discriminative attitudes and conducts in any form or manifestations are claimed to be forbidden actions.<sup>5</sup> Equality before the law for every person in Indonesia is an aspiration to manifest justice on one side. At the same time, it is a legal norm system. The articles, which include only the nationals and citizens, contain desires to develop a democratic nation and execute social and human justice.<sup>6</sup> Therefore, the principle of equality before the laws should mean the equality of justice seekers' right to obtain legal protection and equal justice for justice seekers before the judge and the court.<sup>7</sup>

In the context of law enforcement, we frequently see that equality before the law is not well implemented. This is not executed as it should be. Meanwhile, in Indonesia Criminal Law Procedure Code (hereinafter referred to as KUHAP), this principle encourages Human Rights by putting aside any kinds of differences. Thus, total and actual enforcement laws will be precious work to maintain the existence in social life from a person or a group trying to ruin the existence. Thus, totality in enforcing the law by clinging to the legal provision is necessary.

Muladi views that law enforcement must be interpreted into three concepts. First total enforcement concept. This insists that all values within the legal norms must be enforced, with no exception. Second, the whole enforcement concept. In this concept, the total enforcement concept should be restricted by the law of procedure for the sake of individual protection. The third is the actual enforcement concept. This concept emerges because it is believed that there were

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<sup>1</sup> Mulyono, 'Penegakan Hukum Pidana Dalam Sistem Peradilan Militer Di Indonesia', in *St. Laksanto Utomo Dan Lenny Nadriana, Penerapan Hukum Pidana Kini Dan Masa Mendatang* (Yogyakarta: Genta Publishing, 2014), 128.

<sup>2</sup> Nurstepy N and Apita, 'Kepentingan Umum Dalam Mengenyampingkan Perkara Pidana Di Indonesia', *Lex Et Societatis*, II.5 (2014), 79.

<sup>3</sup> Mr. Martiman Prodjohamidjojo, *Penjelasan Sistematis Tanya Jawab KUHAP* (Jakarta: Indonesia Legal Center Publishing, 2008).

<sup>4</sup> Muhamad Ramdon Dasuki, *Teori Keadilan Sosial Al-Ghazali Dan John Rawls* (Ciputat: Cinta Buku Media, 2015).

<sup>5</sup> Fajlurrahman Jurdi, *Teori Negara Hukum* (Malang: Setara Press, 2016).

<sup>6</sup> Zainuddin Ali, *Sosiologi Hukum* (Jakarta: Sinar Grafika, 2005).

<sup>7</sup> Mukti Arto, 'Penemuan Hukum Islam Demi Mewujudkan Keadilan "Penerapan Penemuan Hukum, Ultra Petita & Ex Officio Hakim Secara Proporsional', in *Buku Kedua* (Yogyakarta: Pustaka Pelajar, 2018), 303.

discretions in enforcing the law. There are limitations related to facilities and infrastructure, quality of human resources, regulations, and less social participation.<sup>8</sup>

Still, Romli Atmasasminta explains why law enforcement in Indonesia is ineffective. First, the substances of laws and regulations are still incomplete and weak. Second, the substances of laws and regulations overlap. Third, there are substances in both laws and regulations situating that the government's interest is much more important than society's. Fourth, the executive, judiciary, and legislative functions are not firm yet. Fifth, awareness and responsibility to produce laws and regulations are still weak. This arises because of the weak implication and chain in other aspects, such as social, culture, economy, and politics.<sup>9</sup>

Soerjono Soekanto contends that "law and law agency is inevitable factors to enforce the law. The expected law enforcement is the dream of everyone in the society".<sup>10</sup> When the law is well enforced by the authorities or law agencies, it reflects the justice and use of laws in a nation of laws. The authorities or law enforcers cannot run the laws arbitrarily—no laws without rules. Thus, the rules and regulations can restrict and limit individual and authority freedom.

According to Marcus Tullius Cicero, as an instrument, the law is a rule that can preclude the authorities from arbitrary actions. Laws are boundaries of freedom in interactions between individuals and the authorities, so they can be protected and secure to create a peaceful society. If there are no laws, chaos and arbitrariness are going to rise. In an International Congress of the law experts in Rio de Janeiro, Brazil, in 1962, Vivian Bose stated that "the rule of law is the heritage of all mankind."<sup>11</sup>

From the experts' views above, it can be said that law enforcement and justice accomplishment are two interconnected elements

"*Conditio sine qua non,*' however, in reality, the fair justice process is still far from reality for many people. Legal processes are conducted not in line with the existing laws and regulations. Thus, the implemented laws are not adequate to provide justice, legal certainty, and legal benefits. This condition leads to unattainable respect for human rights."

In KUHAP, the law agencies cling to respect human rights. This means that the law agencies cling and highly uphold all the Criminal Code's provisions (hereinafter referred to as KUHP). In every court mechanism, the agencies refer to every article in the KUHP when they determine the punishment for a suspect or someone proven guilty.

The mechanisms on criminal court involve gradual activities, from the investigation, prosecution, inspection in the court, and the execution of judge's verdict, which the Correction Institution does.<sup>12</sup> The law agencies enforce the laws according to the messages contained in the provi-

<sup>8</sup> Imam Suroso, *Hukum Acara Pidana Karakteristik Penghentian Penyidikan Dan Implikasi Hukumnya* (Yogyakarta: Laksbang, 2016).

<sup>9</sup> Romli Atmasasminta, *Reformasi Hukum, Hak Asasi Manusia Dan Penegakan Hukum* (Bandung: Mandar Maju, 2001).

<sup>10</sup> Soerjono Soekanto, *Faktor-Faktor Yang Mempengaruhi Penegakan Hukum*, Cet Kelima (Jakarta: Rajawali, 2004, 2004).

<sup>11</sup> Marcus Tullius Cicero, 'Tentang Hukum Dan Keadilan, No 1 Th. I, p. 7', in *Juniarso Ridwan Dan Achmad Sodik Sudrajat, Hukum Administrasi Negara Dan Kebijakan Layanan Publik* (Bandung: Nuansa Cendikia, 2019), 49.

<sup>12</sup> Fikry Latukau, 'Kajian Progres Peranan Kepolisian Dalam Sistem Peradilan', *Jurnal Tahkim*, XV.1 (2019), 2.

sions and laws, which later lead to the substance of justice for both parties.<sup>13</sup> For example, in executing their duty as a law enforcement agency, Police are not only subject to the applicable laws as the external aspect. They also equip themselves with police ethics, the police internal aspect. Police ethics belong to the norms about behaviours. These ethics become the guide for executing their duty to enforce the law, public order, and people security.<sup>14</sup>

Besides the Police, the prosecutor also runs the criminal court system. According to Friedman, the prosecutor has a position as part of the legal structure, which determines whether the laws can be well implemented or not. Prosecutors should be positioned as independent bodies by refereeing to the central roles (pivotal position) in the criminal justice system.<sup>15</sup> As the law agency, the prosecutor is demanded to play roles in enforcing law supremacy fairly.<sup>16</sup>

In executing a duty, a Public Prosecutor is demanded to provide justice for the parties facing the legal process. To do this, all public prosecutors must carefully learn the Police Investigation Report (BAP) from the Police before filling the indictment. An indictment is truly the core of a court investigation because the judge is going to investigate through the indictment the public prosecutor has compiled. Thus, the judge is going to decide based on certainty and a sense of justice.

Meanwhile, a judge is the last agency in the process of enforcing the law. She or he is demanded to decide a case by upholding the sense of justice for the society. Juridically, the judge is an integral part of the law supremacy system. Without a well-behaved, good attitude and full integrity judge, many parties' massive campaign on good government and good governance cannot be actualised and end up merely as wishful thinking.<sup>17</sup>

When deciding on a criminal case, a judge is not justified to render punishment if the judge is not entirely sure that someone is guilty. The judge's decision must be based on legal evidence, so she or he can entirely render the punishment in faith. Judges of criminal cases play full roles when executing the duties. They are different from judges of the civil case, whose duties are restricted by binding or forcing evidence such as an authentic deed, acknowledgement before the judge, and oath. In a criminal case, the judge is seeking the factual truth “(*materiele waarheid*)”. Meanwhile, in the civil case, the judge only seeks for formal truth “(*formiel waarheid*).”<sup>18</sup> The judge for the criminal case cannot contravene the indictment. A judge can only render the punishment if the accused, brought before the court, has conducted criminal acts as mentioned by the prosecutor in the indictment.<sup>19</sup> Judge, however, must consistently apply the criminal laws.

<sup>13</sup> Agus Raharjo dan Angkasa, ‘Profesionalisme Polisi Dalam Penegakan Hukum’, *Jurnal Dinamika*, 11.3 (2011), 389.

<sup>14</sup> Kunarto, *Etika Kepolisian* (Jakarta: Cipta Manunggal, 1997).

<sup>15</sup> Mufrohim and Ratna Herawati, ‘Independensi Lembaga Kejaksaan Sebagai Legal Structure Didalam Sistem Peradilan Pidana (Criminal Justice System) Di Indonesia’, *Jurnal Pembangunan Hukum Indonesia, Program Studi Magister Ilmu Hukum*, 2.3 (2002), 374.

<sup>16</sup> Hartanti, *Tindak Pidana Korupsi* (Jakarta: Sinar Grafika, 2005).

<sup>17</sup> Ali Imron, ‘Peran Dan Kedudukan Empat Pilar Dalam Penegakan Hukum Hakim Jaksa Polisi Serta Advocat Dihubungkan Dengan Penegakan Hukum Pada Kasus Korupsi’, *Jurnal Surya Kencana Dua: Dinamika Masalah Hukum Dan Keadilan*, 6.1 (2016), 93.

<sup>18</sup> R. Subekti, *Hukum Pembuktian* (Jakarta: Pradnya Paramita, 2008).

<sup>19</sup> Suparmono R, *Kewenangan Hakim Dalam Memutus Perkara Di Luar Dakwaan Jaksa Penuntut Umum* (Jakarta: Puslitbang Hukum dan Peradilan Mahkamah Agung, 2014).

A judge must definitely and consistently<sup>20</sup> execute the criminal laws. Thus, when there are other reasons to free someone who is claimed to be the accused, the judge must free him or her. This is intended to enforce legal justice fully.

In reality, justice seekers frequently go through unfair procedures. Thus, it is not surprising if the laws themselves scare society. Law supremacy that is massively campaigned is a mere symbol without meaning. The texts about laws are even the only language of the game that tend to be deceiving and disappointing.<sup>21</sup> In the theory of equitable justice, Gustav Radbruch states that the aspiration of law is justice. Furthermore, justice is not a classical math problem. It is a growing problem that goes along with civilisation and intellect. There is always the essence of justice in human life.<sup>22</sup>

Daniel Webster states that justice is the aspiration and purpose of laws. They are the most sublime human's interest. Justice is something people always seek and fight for. People wait for it faithfully, and they oppose it if justice is not manifested or does not exist.<sup>23</sup> Justice has always been the object and purpose, especially the court institution. Justice is the foundation of how a legal system works. The legal system refers to a comprehensive structure to achieve the concept of justice that have been agreed on.<sup>24</sup>

To be able to reach justice, a judge must not ignore the reasons that can dispose of criminal cases for the accused in the process of criminal justice even though all written elements of a formulated complaint are already met. Provisions and laws justify the reason for the disposal of the criminal case. One of the provisions in Article 48 of KUHP states, "Not punishable shall be the person who commits an act to which force majors compel him." Another article, which is Article 49 (1), states, 'Not punishable shall be the person who commits an act necessitated by the defence of his own or another one's body, chastity or property against direct or immediate threatening, unlawful assault.' Meanwhile, Article 44 clearly mentions that someone with defective development or sickly disorder of mental capacities is not punishable. The person is not punished by criminal law due to forgiveness reasons. Even though he does something breaking the law, which means his or her conduct is against the law, he or she is not liable due to defective development or sickly disorder.

In some occurred cases, those articles have reasons of justification and forgiveness to dispose of the criminal sentence in the perspective of legal justice and human rights. The judges in the court have ever ignored those articles. Some of the cases are going to be described in the following discussion.

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<sup>20</sup> Denis Lanser Mike Molan, Duncan Bloy, *Modern Criminal Law* (London: Cavendish Publishing Limited, 2003).

<sup>21</sup> Lilik Haryadi dan Suteki, 'Implementasi Nilai Keadilan Sosial Oleh Hakim Dalam Perkara Lanjar Sriyanto Dari Perspektif Pancasila Dan Kode Etik Profesi Hakim', *Jurnal Law Reform, Program Studi Magister Ilmu Hukum, Universitas Diponegoro*, 13.2 (2017), 165.

<sup>22</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2008).

<sup>23</sup> Notonegoro, *Beberapa Hal Mengenai Falsafah Pancasila* (Jakarta: Pancuran Tujuh). In Juniarso Ridwan Dan Achmad Sodik Sudrajat, *Hukum Administrasi Negara Dana Kebijakan Layanan Publik* (Bandung: Nuansa Cendikia, 2019).

<sup>24</sup> Suteki, *Desain Hukum Di Ruang Sosial* (Yogyakarta: Thafa Media, 2013). In Lilik Haryadi dan Suteki, 'Implementasi Nilai Keadilan Sosial Oleh Hakim Dalam Perkara Lanjar Sriyanto Dari Perspektif Pancasila Dan Kode Etik Profesi Hakim', *Jurnal Law Reform, Program Studi Magister Ilmu Hukum, Universitas Diponegoro*, 13.2 (2017), 168.

Based on the previous explanations, the researcher formulated two problems. How do judges determine the reasons for justification and forgiveness that dispose of criminal sentences in the perspective of legal justice and human rights? What are the legal effects if the judges, in their decisions, put aside the reasons of justification and forgiveness that can dispose of criminal sentence for the accused?

## RESEARCH METHOD

In this research, the researcher applied the normative juridical method. According to Bachtiar juridical normative method focuses on rules and principles in which laws are conceptualised as norms and rules coming from regulations, laws, court decisions and doctrine from reputable legal experts.<sup>25</sup> Next, the data were collected through a library study by gathering the data from various references related to the research problems. The secondary data in this method consists of primary, secondary, and tertiary legal materials.<sup>26</sup> Primary legal material is binding legal material such as legal regulations, norms, and principal rules. Meanwhile, the secondary legal materials include exploring primary legal material, such as the legal opinion from the experts. The last one, tertiary legal material, refers to any material that provides direction and explanation on primary and secondary legal materials, such as a law dictionary.<sup>27</sup>

Basically, data refer to anything known as facts, which describe a situation or a problem.<sup>28</sup> According to Silalahi, data are facts about specific characteristics of a phenomenon that we obtain from observation.<sup>29</sup> To reach the research purpose, research data must be searched and collected comprehensively. The data were collected and analysed to answer the research problems.

## ANALYSIS and DISCUSSION

### Review on Justice and Human Rights

A nation of law embraces legal principles and requires normative and empirical acknowledgement of the principle of law supremacy. To achieve legal justice, all problems must be settled within the laws as the highest foundation. Normative acknowledgement of the supremacy of law is manifested in establishing legal norms, which in the hierarchy has the supremacy of the constitution at its peak. Meanwhile, empirically, it is manifested in the behaviour of government and society, which ground their actions on legal rules.<sup>30</sup>

The behaviour of people who hold the highest law proves that in a nation of law, the law is the only rule to obey to create justice. Nobody is above the law since the law itself rules over everything. With all its components, even a nation is subject to the law. A nation with all the components must execute the duties and responsibilities based on laws.

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<sup>25</sup> Bachtiar, *Metode Penelitian Hukum* (Pamulang: Umpam Press, 2018).

<sup>26</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: UI Press, 1984).

<sup>27</sup> Amiruddin and Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: Rajagrafindo Persada, 2012).

<sup>28</sup> Amiruddin and Asikin.

<sup>29</sup> Ulber Silalahi, *Metode Penelitian Sosial* (Bandung: Rafika Aditama, 2012).

<sup>30</sup> Tim Kajian Amandemen Fakultas Hukum Universitas Brawijaya, *Amandemen UUD 1945 Antara Teks Dan Konteks Dalam Negara Yang Sedang Berubah* (Jakarta: Sinar Grafika, 2000). In Hufron, *Pemberhentian Presiden Di Indonesia Antara Teori Dan Praktik* (Yogyakarta: Laksbang Pressindo, dan Kantor Advokat "Hufron & Rubaie, 2018).

Indonesia can be likened to a house project as a nation of law. She must be constructed, maintained, and inherited to the next generation. An identity is required when she is established. From the aspect of history, Indonesia adopted the *Rechtsstaat* or civil law since The Netherland colonised her for a very long time. However, the concept of civil law will not incur happiness for the nation of Indonesia if it is completely implemented. The laws will move more slowly than the dynamic Indonesian society. Even it may be worse. The government monotonously move and tend to be repressive.<sup>31</sup>

In his view, Abdul Maukhie Fadjar states that a nation of law refers to a nation whose components are clearly arranged in the laws. All of the power from the components of government is based on the existing laws. People cannot conduct anything they like and act against the laws. A nation of law is a nation ordered not by people but by-laws (state the not governed by men, but by-laws). This is because when enforcing the laws, the nation fully guarantees the right to obtain legal justice.<sup>32</sup> People seek justice endlessly, and they persistently fight for justice. People wait for justice from the authorities. People will oppose if they are not provided justice and if justice does not exist.

In the law dictionary, “just” is defined as not one-sided and sticking to the truth.<sup>33</sup> Just law can only be defined widely (material) in British terms, including written and unwritten laws. Just law cannot be narrowly defined as the laws and written regulations formally legalised by the authorities or legislature. Even cruel authorities can make or possess laws to have their actions justified. According to Krabbe, the broad definition of law is in line with the feeling and awareness over the laws by the individual and society. This kind of law will bring the truth in and manifest a sense of justice.<sup>34</sup>

In the legal context, justice is also strongly related to the legal meaning. It is just or fair when the regulations are issued to apply the same or equal, without discrimination. The laws should be applied to all legal cases demanding the implementation.<sup>35</sup> The legal principle is the main element in a nation of law.

According to Sudarto, the legal principle contains two ideas. First, a criminal act should be formulated in the regulations. *Second*, these regulations should exist before there are criminal acts. From the first idea, it can be seen that there are two consequences. Namely, criminal laws do not potentially charge someone's criminal acts, and criminal laws cannot charge the criminal acts. As formulated in the laws, there is a prohibition against using an analogy to make an action to be a criminal act. Meanwhile, the second idea raises the consequence that criminal laws were retroactively effective.<sup>36</sup>

As part of non-retroactive laws, criminal laws are the living regulation within the society. These laws can force someone to obey the conduct regulations in society and provide strict sanc-

<sup>31</sup> Achmad Irwan Hamzani, ‘Menggagas Indonesia Sebagai Negara Hukum Yang Membahagiakan Rakyatnya’, *Jurnal Yustisia*, 90 (2014), 140.

<sup>32</sup> Abdul Mukhtie Fadjar, *Sejarah, Elemen Dan Tipe Negara Hukum* (Malang: Malang: Setara Press, 2016).

<sup>33</sup> Sudarsono, *Kamus Hukum* (Jakarta: PT. Rineka Cipta, 2005).

<sup>34</sup> Moh Koesnardi and Hermaily Ibrahim, *Pengantar Hukum Tata Negara Indonesia* (Jakarta: Pusat Studi HTN FH UI, 1983).

<sup>35</sup> Hayat, ‘Keadilan Sebagai Prinsip Negara Hukum: Tinjauan Teores Dalam Konsep Demokrasi’, *Padjadjaran Jurnal Ilmu Hukum*, 2.2 (2015), 392.

<sup>36</sup> Sudarto, *Hukum Pidana* (Yogyakarta: Fakultas Hukum Universitas Diponegoro, 1990).

tions for those who break them. In this perspective, the law has the highest supremacy to reach justice. The justice achieved, of course, must obey all the existing laws, no exception. Thus, regulations on criminal laws and justice are inseparable. Laws, especially criminal laws, serve the values of justice.

In Hans Kelsen's view, justice means legality. Public regulation is said just when it is truly implemented. It is unjust when only implemented in one case but not in other cases.<sup>37</sup> Serving the value of justice, Radbruch states that laws become the benchmark for both justice and injustice in legal procedures. Still, the value of justice also becomes the foundation of law to be a law. Thus, justice is not only normative but also constitutive for the laws. The law is normative because it is a transcendental requirement underlying every dignified positive law. It becomes the legal, moral foundation, and benchmark of positive law because justice is the root of positive laws. The law is constitutive because justice is a fundamental element. Without justice, a rule is not appropriate to become a legal case.<sup>38</sup>

Considering justice and legal regulation as the same is the easiest way to understand justice. Legal regulations are used to promote justice in two ways. First, legal regulations introduce some moral norms as legal norms and enact norms in the legal system as the justice system. Second, the justice system is established through some agencies appointed by the legal regulations to run and enforce the legal regulation to achieve justice.<sup>39</sup>

Justice should be a characteristic adhered to criminal sanction. Each criminal sanction must embrace the principle of justice, which is applicable to society. Thus they are treated fairly. A criminal sanction must employ an order that makes the people feel justice. If they are unjustly positioned, they certainly reject the criminal sanctions.<sup>40</sup>

The concept that justice refers to legal justice, as it has prevailed in legal science *Fiat Justitia, ruat coelum* (let justice be done, though the heavens should fall), must always exist in law enforcement. Even the world will end, every judge or court is expected to provide justice based on the laws. In his view, Lord Denning states that if justice is done, the heavens should not fall. They should rejoice.<sup>41</sup> In Indonesia's criminal court system's law, legal justice is the spearhead of all court processes, which use written regulations as the principles. Legal justice in the criminal court process can be fought for by clinging to human rights. Referring to the 1945 Constitution of the Republic of Indonesia, the nation is most responsible for protecting human rights. This is accentuated on Article 28I paragraph 4: The protection, advancement, enforcement and fulfilment of human rights shall be the state's responsibility, particularly the government.

In Indonesia, problems on human rights are strongly related to the criminal court system. Therefore, to manifest the just and right criminal court system as the people expect, it is essential to guarantee and protect human rights.<sup>42</sup> Respecting fundamental rights and freedom is one of the

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<sup>37</sup> Marwan Effendy, *Teori Hukum Dari Perspektif Kebijakan, Perbandingan Dan Harmonisasi Hukum Pidana* (Ciputat: Gaung Persada Press Group, 2014).

<sup>38</sup> Bernard L Tanya Dkk, *Teori Hukum Strategi Tertib Manusia Lintas Ruang Dan Generasi* (Yogyakarta: Genta Publishing, 2013).

<sup>39</sup> Jonlar Purba, *Penegakan Hukum Terhadap Tindak Pidana Bermotif Ringan Dengan Restoratif Justice* (Jakarta: Jala Permata Aksara, 2017).

<sup>40</sup> Purba.

<sup>41</sup> Purba.

<sup>42</sup> N and Apita.



constitutional principles of criminal law.<sup>43</sup> When someone breaks the law, all the legal processes must comply with the normative principles and regulations existing in the regulations and laws. The legal process must guarantee individual freedom by upholding the principle of innocent presumption. Anybody breaking the law must be sanctioned. Furthermore, the sanction cannot ignore the elements of laws and the existing principles, especially when the courts are ready to decide.

Thus, some elements should be met and obeyed. For example, an act is claimed to break the law and can be sanctioned. This act must meet the elements; there is an act, there is the inner nature of the actor. The criminal act happens because of the inner nature of the doer. Even though mistakes meet the requirement of breaking the law, the actor should be discharged from all legal sanctions. This is because there are reasons to dispose of the criminal responsibility, which makes the actor unable to be sentenced for what he acts. This is the manifestation of fundamental human rights.

Protecting human rights is absolute. It is not negotiable in the context of law enforcement. People's trust in charging sentences for law enforcement is achieved when the purpose is manifested at its maximum without putting aside human rights. Thus, law enforcement is expected to provide justice to society, who owns the proper justice to protect human rights.

### **Judges in Determining the Justification Reasons which Disposed of Criminal Punishment Based on the Laws**

In Indonesia, the court investigation on criminal cases based on (KUHAP) is not designed to settle problems interpersonally. Instead, the criminal court system merely determines whether it breaks a criminal law or not. Moreover, the actor should be punished based on criminal law when it does. Alternatively, if it does not, the accused is separated from all charges.<sup>44</sup> Actually, this is what a judge can give when adjudicating a case. The judge executes the decision of legal effect, so everyone feels the manifestation of justice when the law is enforced.

In establishing laws, a judge's decision reflecting just cannot be seen as a regular thing. This is because the judge's decision is related to how the law is enforced. Actually, the law enforcement by the judge through his or her decision is a process to manifest the purposes and ideas of laws, which is accurate.<sup>45</sup>

A judge must pay attention to guidance when deciding a case. Thus, the sentence is neither too much nor too less. When a case is investigated in the criminal court, the judge must submit himself or herself to the parent regulations contained in Law no. 8 of 1981 of KUHAP. This investigation step is arranged in detail in KUHAP, which principally grants authorities to the parties involved in running the system, mechanism, rule and guaranteeing the accused's rights when the criminal case is settled. To guarantee the rights of the accused, the principle of non-criminal punishment without mistake should strongly be upheld.

The disposal of criminal punishment by the judge in the court must be preceded by proven mistake, so the judge can claim whether some is innocent or not. When someone commits a

<sup>43</sup> Andrew Ashworth, *Principles Of Criminal Law* (New York: Oxford University Press).

<sup>44</sup> Purba.

<sup>45</sup> Warassih P. Esmi, *Lembaga Prana Hukum Sebuah Telaah Sosiologis* (Semarang: Suryandaru Utama, 2005).

crime, he or she can only be legally sanctioned if the criminal act is committed with a mistake.<sup>46</sup> Only the actor who commits a criminal act, which has the element of breaking the law, can be sentenced because forgiveness and justification reasons are absent. A crime can also be said as an act, and this act is related to the laws broken, and it meets the legal principles to claim whether an act belongs to a criminal act or not.

In the court process, proving mistakes is vital because a mistake is a key for someone to be responsible for his or her actions.<sup>47</sup> Prodjodikoro states that the element of mistake is absolute. It must exist, so it can be enacted that the actor is responsible for the prohibited act. When there is a mistake in someone's act, intentionally and negligently, the actor can be sentenced with criminal punishment.<sup>48</sup> Unless the mistake someone commits has justification and forgiveness reasons, which can dispose of the punishment.

Justification reason means that the actor cannot be sentenced based on criminal law. This reason can omit someone's criminal sentence. However, it is found that judges may ignore this reason. For example, Fidelis case. The accused possessed 39 *cannabis sativa*. He has sentenced to 8-month imprisonment and fined IDR 1 billion or a 1-month imprisonment subsidiary by the judge of Sanggau Court. Meanwhile, Article 48 of KUHP mentions that someone who commits an act to which majors compel him is not punishable. Fidelis act can be categorised as a forced act. He was encouraged because there was an emergency condition to cure his wife while the nation had not provided health access for his wife to survive. He was forced to do that because he had no other choices. From the aspect of criminal law, yes, the Fidelis act met the element of breaking the law, but the existing justification reason can omit the criminal punishment. Therefore, the judge should have freed Fidelis and had not sentenced him with punishment.

This is in line with *Memorie van Toelichting* on establishing Article 48 of KUHP. Overmatch is "an external cause which makes the actor unable to be responsible for his actions". Still, E. Utrecht states that *memorie van toelichting* on the bill of KUHP in The Netherland, overmatch means an irresistible power, desire, and force.<sup>49</sup> He later adds that based on the bill of the Dutch KUHP, *overmacht is een kracht een drang, een dwang waaran men geen weerstand kan bieden* (an irresistible power, push, or even force).<sup>50</sup>

Additionally, Hazewinkel-Suringa states these are not clear yet; what an overmatch is; why it makes a sentence cannot be charged; and what it means by related to the act or related to the actor.<sup>51</sup> Based on the citations from E. Utrecht and P.A.F Luminang & F.T. Lamintang in the previous notice, force major belongs to irresistible power (*kracht*), desire (*drang*) or force (*dwang*).<sup>52</sup>

The broad coverage of force majors includes absolute force major, relative force major, and *noodtoestand* force major. These three are explained as follows: First, absolute force major. Ac-

<sup>46</sup> Roeslan Saleh, *Perbuatan Pidana Dan Pertanggungjawaban Pidana, Dua Pengertian Dasar Dalam Hukum Pidana* (Jakarta: Aksara Baru, 1988).

<sup>47</sup> Sakti Aminullah, 'Asas Strict Liability Dalam Tindak Pidana Narkotika', *Jurist-Diction*, 1.2 (2018), 735.

<sup>48</sup> Wirjono Prodjodikoro, *Asas-Asas Hukum Pidana Di Indonesia* (Bandung: Eresco, 1981).

<sup>49</sup> P.A.F. Lamintang dan C.D Samosir, *Hukum Pidana Indonesia* (Bandung: Sinar Baru, 1983).

<sup>50</sup> Frans Maramis, *Hukum Pidana Umum Dan Tertulis Di Indonesia* (Jakarta: Rajagrafindo Persada, 2016).

<sup>51</sup> P.A.F. Lamintang, *Dasar-Dasar Hukum Pidana Indonesia* (Bandung: Penerbit PT. Citra Aditya, 1997).

<sup>52</sup> Desy Rebecca Ratu, 'Keadaan Terpaksa Sebagai Bagian Dari Daya Paksa Pasal 48 KUHP (Kajian Putusan Peninjauan Kembali Mahkamah Agung Nomor 13 Pk/Pid.Sus/2014)', *Lex Crimen*, IV.10 (2017), 50.

ording to E. Utrecht, in absolute force major, someone forced does nothing. Wirjono Prodjodikoro states they “do not commit any acts”. They are just the instrument (*manus ministra*) of people who force them. We can presuppose this as a machete on someone’s hand. The machete does not have any intention to do anything. It is why E. Utrecht contends that *absolutely* does not belong to the force major (*overmacht*) mentioned in Article 48 of KUHP. Second, relative force major. If in absolute force major, the actor cannot do other options. At the same time, in relative force major, someone actually can still do something. However, the person is not expected to do other options due to the situation. J. E. Jonkers states that relative force major only exists when there is massive power so that public opinion sees that as something not to oppose. The force should also be viewed from many aspects. For example, is the person forced weaker than the person forcing? is there any other choice? is the force worth to follow?<sup>53</sup>

Now let's see the justification reason in Article 49 of KUHP. Paragraph 1 says, “Not punishable shall be the person who commits an act necessitated by the defence of his own or another one's body, chastity or property against direct or immediate threatening, unlawful assault.”

This article does involve not only self-protection but also others' protection. In the view of Soesilo illustrated that if a thief steals someone's belongings, the thief then attacks the belongings owner with his dagger. In this case, the belonging owner may fight for self-defence and protect his belonging not to be stolen. The thief strikes the owner's right. That must be a sudden and threatening strike. This is different if the thief and the belongings stolen have been caught. In this case, people should not defend the owner by beating up the thief. This is because the thief does not strike anymore, both to the owner and the belongings.

ZA also committed another case of self-defence in Malang. At that time, with her female friend, ZA got a ride on a motorcycle. They were blocked by a gang of *begal* (street robbers who ride motorcycles armed with bladed weapons or guns). To defend himself and his female friend, ZA fought with the gang of *begal*. In the end, ZA stabbed one of them, which caused death. Unfortunately, ZA was convicted of persecuting, which had caused death (Article 351 (1) of KUHP), and he was sentenced to a 1-year fostering.

Muhammad Irfan Bahri also committed forceful self-defence in Bekasi. He fought with two *begals* who tried to usurp his and his friend’s phones. The *begals* slashed Irfan using a sickle. Irfan won the fight, and the *begals* died. Irfan was a suspect once, but he was convicted not guilty by the court. This is because the death case is similar to ZA's.

The absence of forgiveness reasons on the disposal of criminal sentence can also be observed on the Decision of District Court No. 575/ Pid.B/ 2013/ Pn. KIS. The court decided the case of Imanuddin Saragi aka Bangbang, the resident of Desa Pematang Sijago, Kecamatan Sei Suka, Kabupaten Batu bara, North Sumatera. He was indicted for having distributed narcotics type one containing metamfetamina, which is subject to Article 114 (1) Law no. 35 of 2009 on narcotics. In this case, the Public Prosecutor sued Imanuddin Saragih Aka Bangbang for 5-year imprisonment and a fine for 1 billion rupiahs. Moreover, if the fine cannot be paid, it can be replaced with 6-month imprisonment. In this case, Saragih could not be asked to be responsible for

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<sup>53</sup> Ratu.

the criminal act. This is because he had a severe mental disorder, chronic Schizophrenia.<sup>54</sup> Unfortunately, the prosecutor kept indicting him with 5-year imprisonment.

As mentioned in the examples above, justification and forgiveness can be the ground principle for the judge, so he will not sentence the actor with criminal sanction. In this case, the judge is authorised according to the laws and regulations. The reasons for disposal cause the people whose acts meet the requirement of a criminal offence are not punished by criminal law regarding the Court Decision even though the Police, as the law enforcement agency, is mandated to investigate the activities that meet the requirements of breaking the law.

Later, the public prosecutor is prohibited from filing a suspect to be brought to court. This is because the right to sue is only attached to the public prosecutor. This is based on the provision on Articles 13 and 14, Law No. 8 of 1981 of KUHAP.

In Profession Ethics of Law Enforcement Agencies, Umar bin Khattab states that prosecutor is a profession authorised by society. This profession works for and on behalf of society. They file cases that disadvantage the public's interest. In legal terms, it is called prosecution duty.<sup>55</sup> The authority to sue is going to appear when the public's interests are harmed, and the actors will be sued even though they do not want to do it. However, in the criminal case process, before the notice of complete investigation on a case (P-21) is issued, a prosecutor would be better first to analyse the evidence and make sure the power of the evidence. It is essential for the public prosecutor that it cannot be based on the investigator's assumption when suing a particular case. The public prosecutor must meticulously analyse the case he is handling. This means an act accused to someone must be clear. It must tell what he or she does wrongly. Thus, the prosecutor can sue for the actor's liability.

By this, if someone is going to be blamed for the infringement, the prosecutor must sue responsibility from the person who breaks the criminal law. This means that the criminal act can only be blamed on someone if he is guilty.<sup>56</sup> In criminal law, this concept of mistake or wrongdoing really matters. This is because there is a legality principle in criminal law: *nullum delictum nulla poena sine lege*, no wrongdoing, no punishment. It can be said that the principle in criminal law to require wrongdoing to be sued for criminal responsibility is a universal principle.<sup>57</sup>

According to Hazewinkel-Suringa, and in line with Andi Hamza's statement, the idea contained in the formulation of the legal principle is also found in Montesquieu's teaching on separation of powers. In this separation of powers, the judge does not determine what wrongdoing can be charged by criminal law. This, however, implies that lawmakers do not only enact norms. They also have to announce the norms before they are implemented.<sup>58</sup> All the enforcement processes assert that the wrongdoing reaches the end of the judge. The judge himself possesses the authority to determine if someone is guilty because of the criminal act or not and to punish him. The judge executes this duty by upholding the disposal of criminal punishment. This can be implemented to the suspect of criminal activity through the verdict. The judge determines the deci-

<sup>54</sup> Pengadilan Negeri, 'Putusan Pengadilan Negeri No. 575/ Pid.B/ 2013/ PN. Kis'.

<sup>55</sup> Muhamad Erwin, *Filsafat Hukum: Refleksi Kritis Terhadap Hukum Dan Hukum Indonesia (Dalam Dimensi Ide Dan Aplikasi)* (Jakarta: RadjaGrafindo Persada, 2016).

<sup>56</sup> M.H. Tirtaamidjaja, *Pokok-Pokok Hukum Pidana* (Jakarta: Fasco). In Hasbullah F. Sjawie, *Pertanggungjawaban Pidana Korporasi Pada Tindak Pidana Korupsi* (Jakarta: Kencana, 2017).

<sup>57</sup> Sjawie.

<sup>58</sup> Andi Hamzah, *Asas-Asas Hukum Pidana Di Indonesia* (Jakarta: Rineka Cipta, 2004).

sion. Therefore, the judge is expected to consider the provisions on the disposal of criminal sentences as clearly stated in Articles 48 and 49 of KUHP. This is for the sake of legal certainty and justice. The judge must be able to manifest justice, which is the enforcement and implementation of laws. Suppose the provisions and laws employed as the basis to enforce the laws and regulation do not reflect either the current development or demands on the sense of justice or in case the laws do not regulate. In that case, the judge is obliged to explore, follow up, and understand the living legal values and sense of justice in the society. This is committed to maintaining the decision quality. The qualified decision cannot rely only on the judge's skills in interpreting and implementing the laws. This is because the law is not always identical to justice in real life. For the justice seekers, a qualified decision means the same with quality that reflects justice through the proofs in the court process.

In both criminal and civil cases, a judge requires proof. In criminal law, as public law primarily, a negative system is employed according to the laws. This system is found in Article 294 (1) on a RIB (Amended Reglemen Indonesia).<sup>59</sup> By the presented proof, the judge's decision must always regard the applicable provisions and laws. Suppose, in adjudicating a case, the judge ignores the existing laws. In that case, it is undoubtedly challenging for the judge to dispose of a criminal act when an act committed by someone contains justification reasons.

Therefore, laws are the first reference for a judge to charge punishment. However, the judge cannot be trapped only by legal approaches. It is highly possible that some regulations are not as relevant as expected to anticipate the dynamic society demands legal development and awareness. Therefore, these regulations and laws need 'actualisation'. In this case, the judge may switch to the sources of solid normative values, which align the change on awareness value that is happening.<sup>60</sup>

A judge will enforce the justice required if he has absolute autonomy to decide based on his thought and understanding. Nobody can interfere with his duty, and nothing should influence his decision. To achieve this, the judge's independence in making a decision is crucial.<sup>61</sup>

Jeremy Bentham once said that criminal laws should not be implemented or employed when they are groundless, needless, unprofitable, inefficacious.<sup>62</sup> Moreover, the criminal court system cannot request either the suspect to bear all the risks of crimes she or he commits or the victim to play passive roles in the court process.<sup>63</sup> This is because the criminal court system is subject to the applicable norms and provisions. It cannot be justified when an act has reason to dispose of the criminal punishment, but the judge keeps charging punishment to the actor as part of the criminal court system. This happens in the following cases.

Based on the explanation and some cases above, the judge has the authority to decide the cases he adjudicates without a decision of criminal punishment. These are based on the provi-

<sup>59</sup> Syaiful Bakhri, *Sistem Peradilan Pidana Indonesia Dalam Perspektif Pembaruan, Teori Dan Praktik Peradilan* (Yogyakarta: Pustaka Pelajar, 2015).

<sup>60</sup> Ahmad Mujahidin, *HAM Dalam Perspektif Penerapan Asas Peradilan Perdata Agama. In Muladi, Hak Asasi Manusia: Hakikat, Konsep Dan Implikasinya Dalam Perspektif Hukum Dan Masyarakat* (Bandung: Refika Aditama, 2009).

<sup>61</sup> Abdul Manan, *Politik Hukum Studi Perbandingan Dalam Praktik Ketatanegaraan Islam Dan Sistem Hukum Barat* (Jakarta: Prenadamedia Group, 2016).

<sup>62</sup> Nigel Walker, *Sentencing in a Rational Society* (London: Pelican Book, 1992).

<sup>63</sup> John Harding, *Reconciling Mediation With Criminal Justice, Dalam Galaway Burt, Criminal Law, Justice Administration, Mediation*, ed. by Newbury Park (California, 1989).

sions existing in criminal laws. Based on the existing proof, the judge determines that the actor has a mental illness, commits the act because he has no other options, and defences himself in force major. Therefore, the reasons to dispose of the criminal punishment are the basis of his consideration to free the actor as regulated in KUHP. Justification and forgiveness reasons are their pleading over the suits on the criminal acts they commit. Thus, they can avoid the punishment.

Therefore, a judge should employ the written rules: laws, firstly investigating, adjudicating, and deciding a case. Based on the laws, judges have the authority to determine justice through its decision. Related to the disposal of criminal punishment, the judge determines why the disposal of criminal punishment in his decision is implemented into someone even though the actor or the accused has met all the criminal acts formulated in the criminal laws. This authority can be embodied if the judge investigating, adjudicating, and deciding the case obeys the principles of criminal laws and employs the written rules, which are laws and regulations, to create justice and respect for human rights. By clinging to the existing regulations and laws, only the actor who commits criminal acts, which contains the element of breaking the law, can be charged with criminal laws when there are no justification and forgiveness reasons.

### **The Legal Effects of Judge Puts Aside the Forgiveness Justification Reasons**

In criminal laws, it is explained that there are two acts that criminal laws can charge, namely criminal acts and infringement acts. A crime or criminal act committed by someone or a group of people typically results in contravening the legal interest. Meanwhile, infringement refers to acts that do not obey the prohibitions enacted by the national authority.

Criminal acts or crimes stress the prohibition or threat for the criminal law. Next, can the actor be punished under criminal law, as threatened by the laws, really depends on whether the actor makes a mistake or not when he or she commits the act. The basis for criminal responsibility is the mistake found in the relation between the actor's mental and his punishable criminal act, which can be denounced for his act. In other words, inner relations are the only reason the actor should be responsible for the prohibited act.<sup>64</sup>

According to Kartini Kartono, there are some reasons why criminal actor commits a crime. *First*, there is a change in social life. *Second*, the weak and corrupt government. *Third*, there is cultural conflict. *Fourth*, vertical mobility is hampered and impossible to distribute the desire to increase self-status. *Fifth*, culture turns out to be complex gambling. *Sixth*, the wrong development of mental and attitude.<sup>65</sup>

In KUHP, someone is indicted with criminal laws when she or he meets two requirements. First, his or her act is against the law. The act indicted is proven to meet the formulation of a criminal act (against the formal law), in contrary with legal values and norms applied for the society (against the material law), and the absence of reason to dispose of the characteristic of the act, which contravenes the law (justification reason). Second, the actor of the crime can be responsible for the act indicted (there is the wrongdoing of the actor), or the act can be denounced at the actor, and there is no forgiveness reason.

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<sup>64</sup> Harrys Pratama Teguh dan Usep Saepullah, *Teori Dan Praktik Hukum Acara Pidana Khusus* (Bandung: Pustaka Setia, 2016).

<sup>65</sup> Kartini Kartono, *Petologi Sosial*, Jilid 1 (Jakarta: Raja Grafindo Persada, 2003).

Still, in Wirjono Prjodikoro's view, a criminal act can be divided into two. First is the material crime act. Material Crime act refers to the criminal act formulated in laws that cause a particular effect without formulating the manifestation of the act. The second is the formal crime act. Formal crime act belongs to and is formulated as the manifestation of the act without mentioning the effect.<sup>66</sup>

A criminal act (crime) is "*any act or omission prohibited by the public for the protection of the public, and made punishable by state in a judicial proceeding in its name*". (William Lawrence Clark, William Lawrence Marshall & Herschel Bouton Lazell, *A Treatise on the Law of Crimes*, 1996: 1). In other words, a criminal act includes all acts, both active and passive, which are prohibited to protect society. The nation threatens the acts by using criminal law through a legal process. From the definition, we can conclude three things. Firstly, prohibition is aimed at legal protection for the public interest. Secondly, the one breaking it is threatened by criminal law for the sake of public interest. Thirdly, the nation can only commit the execution as the authorised sovereign through a court process. A criminal act requires these three requirements simultaneously. On the contrary, a criminal act cannot happen if it does not meet one of the mentioned factors.<sup>67</sup>

A crime committed by someone is generally contrary to the provisions of material criminal law. Here, the act committed by someone or a group of people harms another's or the public's interest. The act is considered against the law, and it contravenes the justice values. Because there is a law broken, someone must be responsible for his or her criminal act. Responsibility for criminal acts belongs to an individual or personal. Someone is charged with criminal law for his own mistake, not others. The responsibility on criminal act shows laws must be enforced on anybody committing the criminal act. Enforcing the regulations means enforcing the laws. Laws must be executed and enforced. They should deviate. However, these ways provide legal certainty to create public order.

The precept about attitude contravening the material law explains an act or attitude that is not formally formulated as a crime in the provisions of laws. If this is considered an inappropriate attitude or act against the developing values, the act clearly has the characteristic of intervening in the law. In this context, all the existing and growing values in society can be utilised as the sources of positive laws.<sup>68</sup>

Therefore, even though an act is formally formulated as a criminal act in the laws, it is clear. If some people assume it is appropriate and even does not oppose the living values, thus the act is claimed as the non-contravening-law act (not a criminal act). In this context, the values living in the society are used to make the act negative (to dispose of) the against-the-law nature, which has been formally formulated as a criminal act.<sup>69</sup>

However, the against-the-law nature, which is formulated in the laws or KUHP, can dispose of criminal sanction within some reasons: *firstly*, justification reason. This reason disposes of the

<sup>66</sup> Wiryono Prodjudikoro and Wiji Rahayu, 'Tindak Pidana Pencabulan (Studi Kriminologis Tentang Sebab-Sebab Terjadinya Pencabulan Dan Penegakan Hukumnya Di Kabupaten Purbalingga)' (Purwokerto: Universitas Jenderal Soedirman, 1986), p. 19.

<sup>67</sup> William Lawrence Clark, William Lawrence Marshall, and Herschel Bouton Lazell, 'A Treatise On The Law Of Crimes', 1996, p. 1.

<sup>68</sup> Tongat, *Dasar-Dasar Hukum Pidana Indonesia Dalam Perspektif Pembaharuan* (Malang: UMM Press, 2008).

<sup>69</sup> Tongat.

against-the-law nature of an act. Thus, what the accused does turns into a right and appropriate act. The details are as follows: The acts committed in 'force major' (Article 48 of KUHP); the act committed for necessitated self-defence (Article 49 (1) of KUHP); the act committed to executing the statutory provisions (Article 50 of KUHP); and the last one, an act to execute official order from specific authority (Article 51 of KUHP). Secondly, the forgiveness reason is the reason to dispose of the accused's wrongdoing. The act committed is against the law, and it remains contrary to the law. This means it is still a criminal act, but the accused is not charged with criminal sanction because there is no wrongdoing. In this case, we can see the following details: an act committed by people 'who are not able to be responsible for the act' (Article 44 of KUHP); an act committed because there are 'force major' (Article 48 of KUHP); an act because of 'forced defence which exceeds the limit' (Article 49 (2) of KUHP); an act committed because of an official order issued incompetently (Article 51 (2) of KUHP). Thirdly, the reason to dispose of the sue. In this case, both justification and forgiveness reasons are not considered anymore. Thus, there is no consideration of either the nature of the act or the person who commits the act. Based on the consideration of the utility, the government suggests there should be no sue. Public interest is the primary consideration here. Moreover, if the case is not sued, then the actor cannot be indicted with criminal law.

Related to the disposal of the criminal case above, the law enforcement agency must notice and implement them. In other words, nobody is punishable unless the laws determine the punishment over the act. Based on the laws, if someone commits something and the laws state he is unpunishable, the law enforcement agencies should consider disposing or abolishing the punishment.

As the researcher explains above, there are reasons for justification and forgiveness which requires the actor to commit the criminal act. Alternatively, there are reasons to dispose of the criminal punishment, but in actual practice, the judge decides to punish the actor with criminal laws. The researcher explains this through some court criminal cases.

If the judge puts aside the justification and forgiveness reasons, this will raise harm, suffering, and misery in someone's life. A sense of justice and respect for human rights cannot be achieved if a judge puts aside the reasons of forgiveness and justification, which actually can dispose of the charge of criminal punishment for the accused. They are the legal effects. By putting aside the reasons that can dispose of the punishment of a criminal act, there will be losses, suffering, and misery for someone to undergo. In the end, it is seen that the judge denies the actual purposes of laws. Thus, laws cannot fail to manifest the certainty and justice for the accused, whose act has the reasons for disposal of criminal punishment. The judge's failure to process effective punishment in line with principles of legal benefits for the justice seekers will cause a lot to suffer for the accused. His failure, however, results in law enforcement without upholding law supremacy.

The judge's verdict is expected to consider the legal certainty and justice. This means that a judge must consider the reasons to dispose of criminal punishment for the accused. Many judges fail to preserve their faith, so their decisions are frequently found to cause massive damage to certain parties. As professionals, it is sufficient for the judge to argue that the accused's wrongdo-



ings are not intentional, but it is something beyond their range. It can happen anytime and anywhere. This view seems to justify mistakes committed.<sup>70</sup>

From here, we can say that a criminal act, which is prohibited, is committed within the existence of justification and forgiveness reasons, which are the reasons to dispose of the nature against-the-law act, is not punishable. Even though laws prohibit and threaten the one committing it, she or he cannot be punished. In this case, the judge must see laws as the highest authority with all written provisions.

In the provision of Article 1 (3) of The 1945 Constitution of The Republic of Indonesia, it is clearly stated that Indonesia is a rule of law state. As the rule of law states, there are legal provisions everybody must obey without exception. Every saying and act, both by individual, group, society, and government, must be based on the existing legal provisions. Anyone breaking the law must be legally proceeded according to the legal provision, without differentiating. Even when someone is investigated as a suspect, the presumption of innocence must be respected

from the beginning process. Presumption of innocent means that everyone suspected, detained, and sued, or brought before the court, must be considered innocent until a court decision decides the person is mistaken.<sup>71</sup> There are legal acknowledgement and protection. Acknowledging and guaranteeing protection, legal certainty, and equality before the laws are the fundamental legal principles, especially in upholding human rights.

The criminal court system must settle the criminal acts committed by any parties by always prioritising legal certainty and justice. This system runs the criminal law as the primary means.<sup>72</sup> To support the principles above, the legal enforcement agencies must never forget one thing: they must reinforce the criminal court process according to the existing norms, regulations, and legal principles. By upholding the legal purposes, the criminal court process can successfully function to respect human rights.

## CONCLUSION

The judge has the authority provided by the laws to determine the reasons to dispose of the criminal act in his decision, even though the accused has met all the elements of criminal act formulated in criminal laws. The authority is manifested if the judge in investigating, adjudicating, and deciding a case assigned to him obeys the principles of criminal laws and employs the written rules, which are laws and regulations, to create justice and respect human rights. By upholding the existing laws, only the actor who commits a crime which has the element of breaking the laws and the actions can be charged by criminal laws when there are no justification and forgiveness reasons.

Regarding the legal effect, a sense of justice cannot be achieved, human rights are oppressed, and the principles of criminal laws are ignored if the judge puts aside the justification and forgiveness reason in his every decision. In the end, it is found that the judge denies the supremacy and purposes of the law. Ignoring law's supremacy and purposes equally contravene the rule of law principle. Ignoring the reasons to dispose of criminal punishment and deciding that

<sup>70</sup> Anthoni F. Susanto, *Hukum Dari Consilience Menuju Paradigma Hukum Konstruktif-Transgresif* (Bandung: PT. Refika Aditama, 2007).

<sup>71</sup> H.M.A Kuffal, *Penerapan KUHAP Dalam Praktik Hukum* (Malang: Universitas Muhammadiyah Malang, 2004).

<sup>72</sup> Kadri Husin Husin and Budi Rizki, *Sistem Pradilan Pidana Di Indonesia* (Jakarta: Sinar Grafika, 2016).

someone is guilty also means robbing someone's freedom. This causes suffering for the accused. Thus, to protect the people from the judge's erred decision, it is necessary to amend the KUHAP. KUHAP has not been able to address problems in actual practice. The judge's decision that ignores the disposal of criminal punishment, especially in the judge's early investigation, reflects the need to amend the existing criminal code. Within the amendment of the KUHAP, a judge does not merely orient on punishing. Instead, the judge turns into an objective, honest, and fair process by upholding the existing principles. The judge must carefully and thoroughly notice every case within the existing legal provisions. In the future, the amendment of KUHAP must confirm the legal effects for the judges who ignore the principles, provisions, and legal processes existing in each investigation of a criminal case.

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