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Overview of the Judge's Forgiveness Concept Its Relation to The Legal Interests of Criminal Victims (RKUHP Concept Study)

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Abstract

Judge forgiveness (*rechterlijk pardon*) is a new concept in the Draft Criminal Code (RKUHP) which authorizes judges not to impose a crime even though the defendant is proven guilty with several provisions as a condition of forgiveness. The position of the victim becomes important to discuss regarding the existence of this concept because the defendant who should be responsible for his actions can be released from the charge, on the other hand, the victim as the object of the crime, in general, is the party who has suffered losses for his legal interests. So, this concept ideally accommodates the interests of the victim adequately as a condition for forgiveness. The urgency of the victim's position in the concept was *rechterlijk pardon* further elaborated through a study entitled "An Overview of the Concept of Judge (*Forgiveness Rechterlijk Pardon*) concerning the Legal Interests of Criminal Victims (Concept Study of the 2019 RKUHP)". The focus of this research problem is to find out the history and concept of judge forgiveness in the RKUHP and to further review the concept of judge forgiveness about the legal interests of victims of criminal acts. This research is juridical-normative research using a historical approach, a comparative approach, and a conceptual approach. Sources of data used are data secondary consisting of legal materials (primary, secondary,

tertiary). The method of collecting data is through literature or document studies and presented in a descriptive-analytical manner. The results showed that the formulation of *rechterlijk pardon* since the first RKUHP (1993) was motivated by the desire to include the goals and guidelines of punishment as a general principle of the Indonesian criminal system. While the concept is based on the "idea of balance" from the main elements of public interest and individual interests (actor-victim), actions and inner attitudes, certainty, flexibility, and justice. The current formulation does not represent this idea because the formulation is incomplete and clear regarding the terms of forgiveness so that from the victim's side there is uncertainty about the protection of his legal interests.

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Pemaafan hakim (rechterlijk pardon) merupakan konsep baru dalam Rancangan Kitab Undang-Undang Hukum Pidana (RKUHP) yang memberi kewenangan kepada hakim untuk tidak mengenakan pidana meskipun terdakwa terbukti bersalah dengan beberapa ketentuan sebagai syarat pemaafan. Posisi korban menjadi penting didiskusikan terkait keberadaan konsepsi, sebab terdakwa yang seharusnya mempertanggungjawabkan perbuatannya dapat dibebaskan dari tuntutan itu, di sisi lain korban sebagai objek kejahatan secara umum adalah pihak yang mengalami kerugian atas kepentingan hukumnya. Maka konsep ini idealnya mengakomodir kepentingan korban secara memadai sebagai syarat adanya pemaafan. Urgensitas kedudukan korban tersebut dalam konsep rechterlijk pardon dielaborasi lebih lanjut melalui penelitian dengan judul "Tinjauan Terhadap Konsep Pemaafan Hakim (Rechterlijk Pardon) Kaitannya dengan Kepentingan Hukum Korban Tindak Pidana (Studi Konsep RKUHP 2019)". Fokus permasalahan penelitian ini adalah untuk mengetahui sejarah dan konsep pemaafan hakim dalam RKUHP serta meninjau lebih jauh konsep pemaafan hakim kaitannya dengan kepentingan hukum korban tindak pidana. Penelitian ini merupakan penelitian yuridis-normatif dengan menggunakan pendekatan historis, pendekatan perbandingan, serta pendekatan konseptual. Sumber data yang digunakan adalah data sekunder yang terdiri dari bahan-bahan hukum (primer, sekunder, tersier). Metode pengumpulan data dilakukan melalui studi kepustakaan atau dokumen dan disajikan secara deskriptif-analitis. Hasil penelitian menunjukkan bahwa perumusan rechterlijk pardon sejak RKUHP pertama (1993) dilatarbelakangi oleh kehendak memasukkan tujuan dan pedoman pemidanaan sebagai prinsip umum sistem pemidanaan Indonesia. Sedangkan konsepsinya

didasarkan pada "ide keseimbangan" dari unsur pokok kepentingan umum dan kepentingan perorangan (pelaku-korban), perbuatan dan sikap batin, kepastian, fleksibilitas dan keadilan. Rumusan saat ini belum merepresentasikan ide tersebut disebabkan formulasi yang tidak lengkap dan jelas perihal syarat-syarat pemberian maaf sehingga dari sisi korban terdapat ketidakpastian perlindungan atas kepentingan hukumnya.

Keywords: *Rechterlijk Pardon*; Victims' Legal Interests; RKUHP2019

Introduction

Among the most decisive parts in the whole process of the criminal justice system at the final stage is the judge's decision, which in general can be in the form of a sentencing decision and not a sentence. At this stage, various issues of justice often arise, both from the perspective of the perpetrator and the victim. However, in this context, it is more important to pay attention to the enforcement of criminal law, namely that the state must look at the benefits of being convicted of a criminal offense for the victim and can provide justice for the victim if a crime has occurred but the perpetrator cannot serve his sentence or is not convicted (Almendo 2016:62).

Nowadays, criminal law has experienced a shift in orientation, where the settlement of criminal cases is no longer focused on giving negative rewards or just as a means of revenge against criminals. Awareness of the excessive use of criminal sanctions will lead to conditions that are counter-productive to the objectives of the criminal justice system, so the developing thinking states that criminal sanctions are not the only tool that can be used for law enforcement (especially criminal law) (Darmawan 2015:6). More than that, attention to social benefits is also a priority, where the settlement of criminal cases, for example, can be carried out through peace. In the practice of criminal justice, peace can be a consideration for judges to provide forgiveness or what is now known as *rechterlijk pardon* through a decision while still paying attention to and considering the legal interests of the victim and the responsibility of the perpetrator of the crime in participating in redressing the loss.

The concept of judges (*forrechterlijk pardon*) itself is a new concept that is being tried to be accommodated in the Draft National Criminal Code (RKUHP). This concept gives a wider authority to judges in terms of making decisions. So that judges are not only bound to three types of decisions as regulated in the Criminal Code (KUHAP), namely in the form of acquittal, free from all lawsuits, and sentencing decisions. The types of decisions are sequentially regulated in Article 191 paragraph (1), Article 191 paragraph (2), and Article 193 paragraph (1) of the Criminal Procedure Code. (*Law Number 8 of 1981 concerning The Criminal Procedure Code* 1981). *Rechterlijk pardon is* intended as a renewal of a more adequate model of criminal case settlement for criminal acts that are deemed appropriate not to be sentenced or are not expected to provide benefits to the purpose of punishment if a criminal is imposed.

The existence of this concept reflects the value of collectivism and balance, where *rechterlijk pardon is* applied based on considering aspects within the scope of the perpetrator and his actions as well as the legal interests of the victim of a crime. The criminal law system adopted by the Criminal Code/WvS which originated from the colonial era, although it has been updated, is more oriented towards values *individualism* or *liberalism*. So that in the effort to reform Indonesian criminal law, especially in the context of the formulation of new legal norms, it is necessary to consider the existence of a legal family that is closer to the characteristics of society and legal sources in Indonesia that are oriented to the values that live in society, namely those that are sourced from the values of society. customary law and religious law. This is not only a necessity but also a necessity (Arief 1991:36).

Even in the international trend in carrying out "rethinking" and "legal exploration" efforts to strengthen an integral crime prevention strategy, there is an appeal to take a "rethinking approach" oriented to values" (*value-oriented approach*), both human values and values of cultural identity and religious moral values. So, it looks like an appeal to take a "humanist approach", "cultural approach", and "religious approach" which is integrated into arational approach (*policy-oriented policy-oriented approach*) (Arief 1991).

The integration of such values in the context of renewal the national criminal law is expected to be able to overhaul the criminal law system that is closer to the values that live in a society so that justice in the law enforcement process can be achieved. The concept of *rechterlijk pardon* leads to the usefulness and proportionality of the judge's decision. The idea of *rechterlijk pardon* contained in the formulation of Article 54 of the 2019 RKUHP in the sentencing guidelines requires judges to consider the severity of an act, the condition of the perpetrator, and the circumstances before and after the occurrence of a crime. This can be seen in Article 54 paragraph (2) of the RKUHP which states "The lightness of the act, the personal circumstances of the perpetrator, or the circumstances at the time the crime was committed and what happened afterward can be used as a basis for consideration not to impose a crime or not to impose an action by considering the terms of justice and humanity".

Several countries such as Greece, the Netherlands, and Portugal have adopted this concept with different formulations but have the same meaning, namely the authority given by law to judges to forgive a defendant who has been proven guilty of committing a crime with several provisions as conditions. there is an apology (Farikhah 2018:556). Among these conditions are related to the interests of the victim, such as compensation by the perpetrator or the victim has forgiven the perpetrator. Because the judge's forgiveness, apart from looking at the condition of the perpetrator and his actions, also pays attention to the condition of the victim, it must be ensured that these aspects have been substantially fulfilled before the judge gives a decision on forgiveness. Therefore, knowledge about victims (victimology) is also needed in this case to see to what extent *rechterlijk pardon* can be applied or not in terms of ensuring the fulfillment of substantive justice.

As can be seen in the *Crime Dictionary* which defines the victim as "a person who has suffered physical or mental suffering, lost property or resulted in death for an act or attempt of a violation committed by the perpetrator of a criminal act and others" (Waluyo 2019:9). Meanwhile, juridically, the definition of victim is contained in Law Number 13 of 2006 concerning the Protection of Witnesses and Victims which states that a victim is "a person who suffers from physical, mental, and/or economic losses caused by a criminal act". In addition to the conditions for the

decision *rechterlijk pardon* stipulated in the criminal law, the basic interests of victims that must be considered in a balanced manner in a criminal justice process are the principle of *equality before the law*, which is the main characteristic of the rule of law. Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia affirms that "all citizens are equal before the law and government and are obliged to uphold the law and government without exception".

In addition, the right to the protection and restoration of the legal interests of victims morally has been formulated in the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* which generally includes the right to obtain compensation both formally and informally, personal security guarantees and their families from intimidation and revenge, the right to restitution, compensation and relief assistance. This shows that the legal interest of the victim is an aspect that cannot be ruled out in the law enforcement process, especially within the framework of the concept of the judge's pardon or *rechterlijk pardon*.

The history and concept of the judge (*rechterlijk pardon*) in the Draft Criminal Code (RKUHP) needs to be understood as a basic part of the legal concept. No less important is how the concept of forgiveness of judges (*rechterlijk pardon*) relates to the legal interests of victims of criminal acts.

Research Methods

Rechterlij Pardon is one of the new concepts known in the practice of criminal justice which authorizes judges to grant pardons or pardons to criminals even though they have been proven guilty. This forgiveness is stated in the form of a decision that is conceptually different in character from several types of decisions as known in the Criminal Procedure Code, namely in the form of sentencing decisions, acquittals and acquittals of all lawsuits.

A sentencing decision (*veroordeling*) is handed down by the judge, if the judge believes that the defendant is guilty of committing the crime he is accused of. An acquittal (*vrijspraak vonnis*) is handed down if the court is of the opinion that based on the results of the examination at trial, the guilt of the defendant for the actions he is accused of is not legally proven. and convincing. This is due to three possibilities. *First*, the minimum evidence

set by law is not met. *The two* minimums of evidence have been met but cannot convince the judge of the defendant's guilt. *Third*, one or several elements of the criminal act charged with cannot be proven (Suryono 2005:208).

Meanwhile, the decision to be released from all lawsuits (*ontslag van alle rechtvervolging*) is imposed if the judge is of the opinion that the act charged with the defendant is proven, but the act is not a criminal act, or because there is a reason for eliminating the crime consisting of justification reasons (*rechtvaardigingsgrond*) as referred to in Article 48, Article 49 paragraph (1), Article 50 and Article 51 paragraph (1) of the Criminal Code and the reasons for forgiveness (*fait d'exuse*) as referred to in Article 49 paragraph (2) and Article 51 paragraph (2) of the Criminal Code. Or it could be due to the lack of accountability as regulated in Article 44 of the Criminal Code (Suryono 2005:209).

The *rechterlijk pardon* has qualifications that exceed the three types of decisions, namely, even though the defendant is proven guilty, the case is a criminal case, and there is no reason to erase the crime, either in the form of justification or excuse, the judge cannot impose a sentence. against him for certain reasons. So that the defendant is still found guilty, but the criminal sanctions are eliminated for him. Therefore, the author is interested in exploring more about the history and concept of the pardon of judges (rechterlijk pardon) in the Draft Criminal Code (RKUHP).

The author will use a descriptive analysis research method, which describes the history and concept of judge forgiveness (*rechterlijk pardon*) in the RKUHP and the concept of judge forgiveness (*rechterlijk pardon*) in relation to the interests legalof victims of criminal acts, then analyzed and concluded using a qualitative approach.

The Results of the Research

Historical and the concept of judge in the Draft Criminal Code

Rechterlijk pardon are basically motivated by the development of theory in sentencing, which means that the starting point is on the perpetrators of criminal acts. However, it is factually acknowledged that the factors that

surround the victim cannot be ignored at all, this is because criminal acts will always be related to the victim of a crime and the impact of the loss suffered by the victim or the community is often taken into consideration in the legal reform process (*criminal policy)*.) and criminal justice practices. We can see the table below, the formulation of *rechterlijk pardon* in the Criminal Code of several countries seems to explicitly mention the legal interests of the victim in it.

Tabel 01.

No	Country	Conditions for	Action
1	Greece	1. The offense is very light; 2. Considering the evil character of the perpetrator; Sentencing is deemed useless as a means to prevent the perpetrator from repeating the crime (special deterrence) Additional: If the victim of loss of life or injury due to negligence is *the offender's next of kin*, and If the perpetrator should not have been sentenced because of the psychological trauma he suffered because of the offense.	The judge may refrain from imposing a sentence
2	Portugal	1. There is minimal error; 2. The damage or loss has been repaired; 3. There are no factors (for rehabilitation or general prevention) that prevent the solving the problem in this way. Specifications of offense: Those who are threatened with a maximum sentence of 6 months in prison; and Those who are threatened with a combined (cumulative) sentence of imprisonment and a fine that does not exceed 180 daily fines	Judge from imposing a sentence.

3	Holland	1. The smallness of the meaning of an action; 2. The personality of the perpetrator; 3. Circumstances during or after done	The judge determines in the decision that no crime or action will be imposed

An additional condition of the Greek Criminal Code, the second condition of the Portuguese Criminal Code, and the third condition of the Dutch Criminal Code can be said to be a condition that allows the existence of the victim and his legal interests to be the basis of forgiveness. The first requirement for forgiveness in the three Criminal Codes above is in the form of a mild offense/the small meaning of an act, apart from referring to the perpetrator of the crime (the act) it can also refer to the victim (as a result). Likewise, the concept of *rechterlijk pardon* in the Indonesian RKUHP, although there are differences, generally has similarities.

The concept of *rechterlijk pardon* in Indonesia contained in the RKUHP as of September 2019 is formulated in Article 54 paragraph (2), namely "The lightness of the act, the personal circumstances of the perpetrator, or the circumstances at the time the crime was committed and what happened afterward can be used as a basis for consideration not to impose a crime or not. take action taking into account the aspects of justice and humanity.

Rechterlijk pardon itself is a new concept in the development of Indonesian criminal law which was then tried to be formulated in the National RKUHP. In the concept, the forgiveness of judges or *rechterlijk pardon was* only included as a sentencing guide in 1991/1992 with improvements in March 1993, namely in Article 52 paragraph (2) which later became Article 51 paragraph (2) (concept 2000-2002), Article 52 paragraph (2) (2004 concept), Article 55 paragraph (2) (2005-2006 concept), Article 52 paragraph (2) (2008 concept), Article 56 paragraph (2) (2015-2017 concept), Article 60 paragraph (2) (2018 concept) and finally Article 54 (2) (2019 concept).

The provisions of *rechterlijk pardon* in the RKUHP up to now basically have no significant differences, changes only occur in the use of editorials which have substantially the same meaning. Likewise, its placement

remains in the section on sentencing guidelines, only the articles that regulate it vary, this is more due to adjustments in the form of additions or reductions to articles in the RKUHP in each discussion. The difference was for instance the use of words makers to call the perpetrators and said deed to refer to criminal offenses which can be found in Article 55 paragraph (2) the concept of 2012, Article 56 paragraph (2) the concept in 2015 and 2016, Article 60 paragraph (2) the concept in 2018.

Following In the 2009 RKUHP Academic Paper, the idea of *inclusion of therechterlijk pardon* in the RKUHP is inseparable from the desire to include the goals and guidelines of punishment as part of the general principles of the Indonesian criminal system. The formulation of the objectives and guidelines for sentencing in the RKUHP itself starts from the idea that (*Academic Draft of the 2019 Criminal Code Bill*, n.d):

a. The criminal law system is a unified system with a purpose ("*purposive system*") and punishment is only a tool/means to achieve the goal;
b. "Criminal purpose" is an integral part (sub-system) of the entire criminal system (criminal law system) in addition to other sub-systems, namely the "criminal act", "criminal responsibility (error)" and "criminal" sub-systems.;
c. The formulation of goals and guidelines for sentencing is intended as a controlling/controlling/directing function as well as providing a philosophical basis/foundation, rationality, motivation, and justification for sentencing;

Seen functionally/operational, the criminal system is a series of processes through the "formulation" stage (legislative policy), the "application" stage (judicial/judicial policy), and the "execution" stage (administrative/executive policy); Therefore, so that there is intertwining and integration between the three stages as a unified criminal system, it is necessary to formulate the objectives and guidelines for sentencing. A clearer picture of the position/position of goals and guidelines for punishment in the substantive criminal system (or substantive criminal law system).

Viewed from the criminal system, the three main issues of criminal law in the form of crimes, errors, and crimes are not independent pillars, but are in a building system that is more commonly referred to as part a common(general part)or the rules/general provisions*(general rules)* which in RKUHP included in a book I. in the book I: the general rule is this conceptual building entered the criminal justice system (criminal system) which includes provisions on principles, objectives of criminal/criminal, rules and guidelines for punishment, as well as understanding/limitations juridical in general relating to the three main problems (crime, wrongdoing, and criminal). Doctrinally, this general conceptual building of criminal law is what is usually called "general teachings" ("*algemene leerstukken*" or "*alge-meine lehren*"), such as the problem of criminal acts, unlawful nature, errors, crimes and the purpose of punishment, principles of criminal law and so on (*Academic Draft of the 2019 Criminal Code Bill*, nd, 82–83; (Zuhri 2019).

Although general teachings or general conceptual constructions do not exist in the Criminal Code, they are all in the lessons/science of criminal law and are generally taught to law students. However, because it is not explicitly/explicitly stated in the Criminal Code, this general conceptual construction is often forgotten; even the possibility of "prohibited" in practice or court decisions. One of the court decisions that does not forbid the use of "punishment purposes" as the basis for the decision, is the decision of judge Bismar Siregar, SH in the case of Ny. Elda (Ellya Dato). (*North-East Jakarta District Court Decision No. 46/PID/78/UT/WANITA, 17 June 1978*). The same is the case with the problem of sentencing objectives and guidelines which may be forgotten, ignored, or prohibited simply because there is no explicit formulation in the Criminal Code. Even though viewed from the point of view of the system, the position of "goal" is very central and fundamental. This goal is the soul of the criminal system.

Scheme above will vary with the terms of punishment which is just opposite or three problems of principal focus on criminal law in the form of a criminal offense (TP), fault or criminal liability (K/PJP), and criminal. By just looking at the three main problems that the formula the terms of punishment that are often raised conventionally is Criminal=TP+K (PJP). In the model/conventional pattern above, look no variable "destination",

because it is not formulated explicitly in the Criminal Code today, so that it seems that the "goal" is outside of the criminal system. With this model, it is as if the basis for justification or justification for the existence of a crime lies only in criminal acts (objective requirements) and errors (subjective conditions). So that punishment is seen as an absolute consequence that must exist, if both conditions are proven. This is clearly seen as a rigid "certainty model". And it will look odd (according to this model), if both conditions are proven but the perpetrator is "forgiven" and not punished. Thus, the idea of "forgiving judges" (*rechterlijk pardon*) seems to have no or at least difficult to accept. (*Academic Manuscript of the 2019 Criminal Code Bill*, n.d., 85)

With the inclusion of the objective variable in the terms of sentencing, the basis for justification or justification for the existence of a crime does not only refer to "criminal acts" (objective requirements) and "errors" (subjective conditions), but also relying on the "purpose/guidance of punishment", hereby, under certain conditions the judge is still given the authority to forgive and not impose any crime or action, even though the crime and guilt have been proven. Thus, the punishment system is not a rigid/absolute model, but a flexible balance model. The background of this flexibility/elasticity of punishment can also be seen in the Netherlands when the provision of "included *Rechterlijk pardon*" wasin Article 9a of the Dutch WvS. According to the explanation of Prof. Nico Keijzer and Prof. Schaffmeister, in the past (before there was an article for pardoning judges), if in special circumstances a judge in the Netherlands was of the opinion that a sentence should not be imposed, the judge was forced to impose a sentence, even though it was very light. From this explanation, it can be seen that Article 9a of the Dutch WvS (*Rechterlijk pardon*) is essentially a "guidance for punishment" which is motivated by the idea of flexibility to avoid rigidity. It can also be said that the existence of a judge's forgiveness guide functions as a "safety valve" (*Veiligheidsklep*) or "emergency door" (*noodeur*).

Based on this, *pardon rechterlijk* kemudianmenjadi one of the basic ideas criminal system updates which include:

a. The idea of a monodualistic balance between the interests of society (general) and individual interests;

b. The idea of a balance between social welfare and social defense;
c. The idea of a balance between criminal oriented to the perpetrator/offender criminal individualization and victim;
d. The idea of using double track system (between criminal/punishment and action/treatment/measures);
e. The idea of making effective non-custodial measures (alternatives to imprisonment);
f. The idea of punishment elasticity/flexibility (elasticity flexibility of sentencing);
g. The idea of modifying criminal changes/adjustments (modification of sanction; the alteration/annulment/revocation of sancion, redertemining of punishment);
h. The idea of subsidiarity in choosing the type of crime;
i. Judge ideas (*rechterlijk pardon or judicial pardon*);
j. The idea of prioritizing / prioritizing justice over legal certainty;

Overall, such a conception of punishment cannot be separated from the RKUHP material to be compiled and formulated with an orientation to various basic thoughts and ideas of balance, which include: (*Academic Draft of the 2019 KUHP Bill*, n.d., 86)

a. Monodualistic balance between public interest or society and individual or individual interest;
b. The balance between the protection or interests of the perpetrator of a crime (the idea of criminal individualization) and the victim of a crime;
c. The balance between objective and subjective; elements/factors; the idea of *Daad-dader Strafrecht*;
d. A balance between formal and material criteria;
e. The balance between legal certainty, flexibility, elasticity, or flexibility, and fairness; and
f. A balance of national values and global, international, or universal values;

Starting from the idea of balance, the terms of punishment according to the concept also start from a monodualistic balance between the interests of the community and the interests of individuals. Therefore, the terms of punishment are based on two pillars/principles very fundamental, namely the principle of *legality* (which is a social principle) and the principle of guilt/*culpability* (which is a humanitarian/individual principle). To avoid the rigidity of applying the two fundamental principles (the principle of *legality* and the principle of *culpability*), the concept allows in certain

cases to apply the principle of *strict liability*, the principle of *vicarious liability*, and the principle of forgiveness/pardon by judges (*rechterlijk pardon* or *judicial pardon*). The authority of the judges to give pardon to not penalize/action, offset by the principle of *culpa in causa* (or principle of *action libera in* causa) as defined in Article 52 paragraph (2) Concept RKUHP 2000:

> "A*person who commits an offense is not freed from criminal responsibility based on the reason for the abolition of the crime if the person deserves to be blamed (reproached) as the cause of the situation that can be the reason for the abolition of the crime.*" (Arief 1931, 42)

Thus, specifically, the principle of *"rechterlijk pardon*" is motivated by the idea or main idea: (*Academic Draft of the 2019 Criminal Code Bill*, and, 33–34)

a. Avoiding the rigidity/absolutism of punishment;
b. Provide a "safety valve" ("*veiligheidsklep*");
c. The form of judicial correction to the legality principle ("*judicial corrective to the legality principle*");
d. Implementing/integrating values or the "wisdom of wisdom" paradigm in Pancasila;
e. Implementing/integrating the "purpose of punishment" into the terms of sentencing (because in granting forgiveness/pardon, judges must consider the purpose of sentencing);
f. So the conditions or justifications for sentencing are not only based on the existence of "criminal acts" (legality principle) and "errors" (culpability principle), but also the "purpose of punishment".

The Concept of Forgiveness of Judges Relation to the Legal Interests of Victims of Crime Criminal

Law as public law has the function of protecting legal interests from acts that want to attack or rape them. Legal interests (*rechtersebutelang*) themselves are all interests needed in various aspects of human life, both as individuals, members of society, and members of a country, which must be guarded and defended so that they are not violated/raped by human actions. All of this is aimed at implementing and ensuring order in society. Therefore, legal interests which include rights (*rechten*) will always be

required to be restored when there is confiscation, in this case there are victims due to the actions of the perpetrators of the crime.

When viewed from the aspect of its theoretical background, *Rechterlijk Pardon is* basically motivated by the development of theory in sentencing, which means that it starts with the perpetrators of criminal acts. However, it is factually acknowledged that the factors that surround the victim cannot be ignored at all, this is because criminal acts will always be related to the victim of a crime and the impact of the loss suffered by the victim or the community is often a good consideration in the legal reform process (*criminal policy*). and criminal justice practices.

The concept of *rechterlijk pardon* in Indonesia contained in the RKUHP as of September 2019 is formulated in Article 54 paragraph (2), namely "The lightness of the act, the personal circumstances of the perpetrator, or the circumstances at the time the crime was committed and what happened afterwards can be used as a basis for consideration not to impose a criminal or not. take action taking into account the aspects of justice and humanity."

This formulation basically still leaves problems, both from the aspect of formulation and the possibility of its application, of which the most crucial, especially in relation to the legal interests of the victim, according to the author, are the phrases "the lightness of the act" and "the circumstances at the time of the act. crime and what happened afterwards" which has not been clearly defined. Regarding the phrase "lightness of action", when referring to the explanation of Article 54 paragraph (2), what is meant by lightness of action is "a light crime", but in the RKUHP itself there are no provisions regarding limits or measures to what extent a crime can be said to be light. moderate, or severe. When referring to the science of criminal law, minor offenses are criminal acts whose consequences are not significant enough for the victim. When viewed in terms of criminal sanctions, as Andi Hamzah said, it is an offense with a criminal penalty of not more than two years, so the qualifications can refer to either the consequences of the criminal act or the criminal sanctions (Hamzah 2018). However, this description is a general reference and is not binding, so the RKUHP is appropriate to determine its own boundaries.

Although the Criminal Code does not have a specific article that contains categories or types of minor crimes, the Criminal Procedure Code and currently even Perma No. 2 of 2012 concerning Adjusting the Limits of Minor Crimes and the Number of Fines in the Criminal Code has provided a categorization and explanation of minor crimes based on their criminal sanctions. As for the articles that regulate criminal acts with minor categories in the Criminal Code as referred to in Article 205 paragraph (1) of the Criminal Procedure Code, including:

a. Article 302 paragraph (1): Minor abuse of animals;
b. Article 352 paragraph (1): Minor mistreatment;
c. Article 364: Minor theft;
d. Article 373: Light embezzlement;
e. Article 379: Minor fraud;
f. Article 384: Fraud in sales;
g. Article 407 paragraph (1): Destruction of goods;
h. Article 482: light detention; and
i. Article 315: Minor insults The

RKUHP actually has several such articles, for example Article 484 light theft, Article 493 light embezzlement, Article 500 light fraud, Article 477 light persecution, Article 442 light insult and several other crimes with the same criminal threat, namely imprisonment for a maximum of 6 months or a fine of category II. However, there is no certainty of the categorization of minor crimes in it, there is no separate provision that mentions the types of minor crimes.

At first glance, the problem of minor crimes only has implications for criminals, not at all. This also relates to victims, especially in the context of the decision to forgive. In *rechterlijk pardon, the* emphasis is on the release/release of the perpetrator from a criminal charge where the perpetrator should have formally and materially qualified to be sentenced (through a sentencing decision), this is the starting point where the victim must be involved in the consideration.

Basically, the judge in deciding does not necessarily only look at the provisions in the law but also considers the facts that are presented to him. The Court's decision is also inseparable from the basis of the judge's behavioral capacity called the *code of ethical conduct* which contains a

commitment to moral integrity based on 3 (three) principles of inner attitude (character), namely accuracy, innovation, and persistence in determination; the basis of the "*mental process*" of judges in the trial process through 3 (three) minds, namely: rational, practical, actual; as well as the operational basis through the application of 3 (three) elements of the court's intuitive considerations as described by Sudikno Mertokusumo, namely:

a. The element of legal certainty (*rechtssicherkeit*), which guarantees that the legal material is carried out so that such decisions can also be applied for the same kind of thing.
b. The element of expediency (*zweckmassigheit*), that the content of the decision is not only beneficial for the litigants but also for the wider community, the community has an interest in the judge's decision because the community wants a balance of order in society.
c. The element of justice (*gerechttigkeit*), which provides justice for the party concerned, even if the opposing party considers it unfair, the community must be able to accept it as fair. As the legal principle: "*lex durased tamen scripta*" which means the law is cruel but that's what it says. In the event of a conflict between justice and certainty as well as the benefits of law, the element of justice takes precedence (Wati 2016).

The capacity of judges based on the 3 (three) professional foundations of the Judges above will be used as an assessment parameter for the role of judges in applying the law of evidence as a process to obtain justice (Wati 2016:42; Wulandari et al. 2020). However, within the frame work reform of criminal law, which being discussed is the formulation in written law, especially in the form of a law book, it is necessary regarding the form of authority determined in writing to be formulated as clearly as possible.

Victimologically, actually the provisions as stated in Article 70 paragraph (1) represent the interests of the victim, both what he should get (the rights and protection of the victim) and his involvement in the occurrence of the crime (the role in victimization). For example, it can be seen that conditions such as the loss and suffering of the victim are not too large; the defendant has paid compensation to the victim; the victim of a crime encourages or encourages the occurrence of the crime. Compensation in this case is seen as one type of victim's rights that deserves to be obtained

and therefore also formulated in several laws and regulations. For the record, the provision of compensation as stated by Arif Gosita must be in accordance with the ability to compensate the perpetrator and the level of involvement of the victim in the occurrence of the crime and delinquency. The compensation also included in the forms of legal protection where the victim if the perpetrators totally unable to meet the state can take over that responsibility.

So far can be seen that the legal interests of victims of crime at the level of the formulation is guaranteed in the context of Article 70 paragraph (1) mentioned above, there is even a limitation on criminal acts as referred to in paragraph (2), namely "The provisions as referred to in paragraph (1) do not apply to criminal acts punishable by imprisonment of 5 (five) years or more, crimes punishable by imprisonment of 5 (five) years or more. specific minimum crime, or certain criminal acts that are very dangerous or detrimental to the community, or financially or detrimental to the country's economy", thus the conditions proposed are very clear and can be used as a reference for judges in deciding.

Clarity and certainty which is actually expected to exist and support for the existence of the authority of *rechterlijk pardon* in Article 54 paragraph (2) of the RKUHP as a formulation or idea that can be said to have a progressive legal perspective. As a country that bases its legal system on written law, such a spirit will be difficult to realize if its norms still bring problems, especially the world of criminal justice practice is a complex process because this system seeks material truth in the hope of achieving substantive justice. Substantive justice is justice that is substantial, essential and felt by the public as real justice, a sense of justice that is recognized and "lives" in society. Substantive justice refers to a substantial issue in a dispute. In other words, it relates to the rights, specificities, obligations, powers, responsibilities, immunity and incompetence of the parties in a dispute. The benchmark is on the principle of "property" (Rubaie 2018:122). This substantive justice is what justice seekers are looking for.

Although substantive justice is often juxtaposed with procedural justice which is certain, and therefore tends to go beyond normative provisions or is more often said to prioritize justice and expediency rather than just legal

certainty. This type of justice is closer to progressive justice, but it does not mean that the provisions of positive law are simply ignored, in fact this type of justice should be supported as much as possible by legislation or laws that have a progressive perspective as well. Progressive law as said by Satjipto Rahardjo is interpreted as a law that is able to keep up with the times, is able to respond to changing times with all the basics in it, and is able to serve the community by relying on the morality aspect of the human resources of law enforcement itself (Harun 2019; Rahardjo 2006). So, in the context of the authority of *rechterlijk pardon*, progressiveness can be supported and achieved through a clear, adequate formulation that minimizes the possibility of injustice and this formulation can be critically supported through the perspective of the victim (victimology).

If you look at some of these problems, it is necessary to make adjustments to the formulation of the concept, *rechterlijk pardon* especially related to the clarity of the requirements as the basis for reference or the supporting norms. One of the principles that must be adhered to in the formation of good laws and regulations as legally determined in Article 5 of Law Number 12 of 2011 concerning the Formation of Legislations is "clarity of formulation" justice that is really expected, especially for the victims, whereas the victims generally suffer losses. It can be seen in the opinion of John S. Carol as quoted by Imron Rosyadi (Candra and Imron 2020). With his rational-analytical approach that the crime is basically the realization of a rationally taken decision, in other words, the perpetrator acts by considering the benefits he gets which in the opposite implication means losses for the victim.

Attention to victims in this issue is also basically inseparable from the purpose of punishment, which is currently being put forward a lot (one of which also gave birth to the idea of an institution of forgiveness) namely resolving conflicts caused by criminal acts, restoring balance and bringing a sense of peace in society. This Idea of balance is actually the background or idea of reforming the National criminal law which in Barda Nawawi Arief's terms is a monodualistic balance between "public/community interests" and "individual/individual interests" in which the idea of protection/victim interests is also included (Arief 2003). So that the formula *rechterlijk pardon* itself must be able to critically represent this background.

The next thing that also deserves attention is the issue of adjustment in criminal procedural law. Because *rechterlijk pardon* is an authority concerning decisions and issues of decisions are included in the scope of procedural law. If there is no harmonization in the Criminal Procedure Code, the provisions of *rechterlijk pardon* will become a dead article that cannot be implemented in trial practice, procedural law must regulate the forms of decisions that can be handed down to the defendant. As has been described in Chapter II, that thedecision *rechterlijk pardon* has a different character or characteristic from the three types of decisions as known in the Criminal Procedure Code in the form of an acquittal, an acquittal decision, and a sentencing decision.

An acquittal is regulated in Article 191 paragraph (1) of the Criminal Procedure Code. which states "If the Court is of the opinion that from the results of the trial examination, the guilt of the defendant for the actions he is accused of is not legally and convincingly proven, then the defendant is acquitted". The guilt of the defendant was not proven due to three possibilities:

a. The minimum evidence stipulated by law was not fulfilled;
b. Minimum evidence has been met but cannot convince the judge of the defendant's guilt;
c. One or several elements of the criminal offense charged cannot be proven (Suryono 2005).

The decision to escape all lawsuits is regulated in Article 191 paragraph (2) which states "If the Court is of the opinion that the act that has been charged against the defendant is proven, but the act does not constitute a criminal act, the defendant is acquitted of all legal charges." It can also be in conditions where the act is a criminal act but then there is a reason for eliminating the crime in the form of justification reasons (*rechtvaardigingsgrond*) as referred to in Article 48, Article 49 paragraph (1), Article 50 and Article 51 paragraph (1) of the Criminal Code and excuses (*fait d'exuse*) as referred to in Article 49 paragraph (2) and Article 51 paragraph (2) of the Criminal Code. Or it could also be due to the absence of accountability as regulated in Article 44 of the Criminal Code.

The sentencing decision itself is regulated in Article 193 paragraph stating "If the Court is of the opinion that the defendant is guilty of committing

the crime he is accused of, the Court shall impose a criminal verdict". enough if someone has committed a mere criminal act. However, it must also be proven that the person is guilty and can be held accountable (Suryono 2005:72).

So, the punishment is imposed if the perpetrator's actions are criminal acts, and through proof he is found guilty of his actions, there is no reason to erase the crime and is able to be responsible. Meanwhile, thedecision *rechterlijk pardon* can be said to be a form of negation of a sentencing decision, where a person who has met the requirements for imposing a criminal sentence is not subject to a criminal or released from his criminal charges. In this case, the elements accused have been fulfilled, either on the basis of the minimum limit of evidence or the principle of negative evidence according to the law. Therefore, this decision must still state in its decision that the defendant is proven guilty of committing the crime as alleged against him. Therefore, the criminal procedure law should recognize four types of decisions, namely:

a. Free (*verdictsvrijspraak*);
b. The decision is free from all lawsuits (*ontslag van alle rechtvervolging*);
c. Decisions (*Sentencingveroordeling*); and
d. Judge's (*pardon decisionrechterlijk pardon*).

This has also been done by the Netherlands, where the regulation of *rechterlijk pardon is* not only a material content in the material criminal law, but also the formal criminal law. Thus, judges in the Netherlands are currently able to impose 4 (four) types of final decisions as mentioned above. With the introduction of the type of decision recently in Indonesia, which is still in the concept requires the alignment of the Criminal Procedure Code to come so that it can be implemented in the practice of criminal justice

The need for a review of the provisions *rechterlijk pardon* and harmonization arrangements in criminal procedural law becomes a logical consequence of the effort to reform the criminal law as part of the criminal policy/politics (*criminal policy*) which in essence as stated by Barda Nawawi Arief is also an effort to review and reassess (reorient and reevaluate) main ideas, basic ideas, or socio-philosophical values, socio-

political, and socio-cultural that underlies criminal policy and criminal law (enforcement) policies so far (Arief 2011:3). So that the result is a re-establishment of criminal law in accordance with the basic values of Indonesian society, one of which is pursued through the formulation of this *rechterlijk pardon*, and this kind of criminal law reform process includes *criminal policy* in the broadest sense, which is defined as a whole policy, carried out through legislation and official bodies aimed at enforcing the central norms of society (Sudarto 2010:113–14). The ultimate goal or main goal of criminal politics is "protection (socialsocial defense) to achievesocial welfare" (Arief 2008:4).

By reviewing the provisions of Article 54 paragraph (2) *rechterlijk pardon* based on the various problems described above, it is hoped that the basic ideas behind the formulation of the new Criminal Code can be concretized, one of which is through the concept of this pardoning authority, and of course only through the victim's approach, it can be seen that a wider perspective will achieve community protection so that justice can be felt by all parties.

Conclusion

First, the history of the formulation of *rechterlijk pardon* is inseparable from efforts to reform the Criminal Code in total which have been initiated since 1963 until the RKUHP concept in 2019, including the formulation of the chapter on sentencing guidelines which had changed several parts of the provisions of *rechterlijk pardon*. The formulation of the objectives and guidelines for sentencing as part of the general principles of the Indonesian criminal system. The concept of *rechterlijk pardon* in the RKUHP is based on the "idea of balance", in particular the balance between public interest and individual interests, perpetrators and victims, inner actions and attitudes, certainty, flexibility and justice. punishment guidelines have a role as a counterweight to the principle of legality, while still paying attention to victims of criminal acts.

Second, the concept of forgiveness of judges (*rechterlijk pardon*) is related to the legal interests of victims of criminal acts as a means of resolving criminal cases which in addition to referring to the purpose of punishment

also to the legal protection of victims of crime, the role of the victim as an apology to the defendant, makes conditions that must be met. However, the provisions of *rechterlijk pardon contained* in Article 54 paragraph (2) of the RKUHP itself are currently not supported by an adequate formulation where the factors attached to the victim have not been explicitly accommodated as conditions for the imposition of a pardon decision.

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