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Judicial Pardon as an Alternative to a Judge's Decision

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ABSTRACT

There is a new concept in the renewal of criminal law, namely judicial pardon, this concept is also adopted by the Dutch legal system, in simple terms where the judge can forgive the defendant who is legally and convincingly proven to have committed a criminal offense. The formulation of the problem in this study is how the legal consequences of the enactment of the principle of judicial pardon in the Criminal Code 2023. From this research, the author analyzes that the legal consequences of the enactment of the principle of judicial pardon will largely have an impact on the character and nature of Indonesian criminal justice, and also has the potential to be one of the solutions to the current overcrowding problem. But the regulation of judicial pardon is still less specific, it also needs to be regulated in the Draft of the Criminal Procedure Code, such as in the form of a judicial pardon decision, there needs to be confirmation of the terms of judicial pardon, and it is also necessary to set limits or signs in order to obtain legal certainty and later not become a rubber article or become a multi-interpretation among judges.

Keywords: legal consequences, judicial pardon, Criminal Code 2023

Introduction

Drafting or implementing legal reform is forming or renewing the main ideas or basic thoughts, not only renewing or changing the formulation of articles (laws) in writing but also must be accompanied by conceptual discussion. In essence, criminal law reform is an effort to conduct a review and re-formation (reorientation and reform) of the law so that it is according to the general socio-political, socio-philosophical, and cultural values of the Indonesian nation.[1]

[1] Sahat Marisi Hasibuan, Kebijakan Formulasi Rechterlijk Pardon Dalam Pembaharuan Hukum Pidana, Universitas Diponegoro, Semarang. Vol. 9. No. 2. 2021. h. 112-113.

Indonesia adheres to the Continental European legal system as a former Dutch colony. The main principle of a country that adheres to the Continental European legal system is that the law has binding power because it is manifested in regulations in the form of laws and is systematically arranged in certain codifications or compilations. The basic principle of the Continental European legal system is that the main value that is the goal of law is legal certainty. Legal certainty can only be realized if all human legal actions in social life are regulated by written legal regulations.[2]

In the concept of judicial pardon, the judge can grant forgiveness to the accused. This means that the judge is given the authority and freedom to grant forgiveness to someone who has been found guilty of committing a minor crime. This pardon is stated in the judge's decision and must still be stated that the accused is proven to have committed the crime charged against him.[3]

According to Nico Ceizer, the concept of judicial pardon is that there is a defendant who has fulfilled the criminal offenses, but if punishment is imposed, it will cause a conflict with the sense of justice. Or it can be said that if a punishment is imposed, it will cause a conflict between legal certainty and legal justice.[4]

Furthermore, there are also unique judge's decisions that disturb the sense of justice in society, including the decision against grandmother Aminah, a thief of three cocoa pods in Banyumas who was sentenced to a conditional sentence of one month and fifteen days. The fruit was picked in the PT. RSA plantation. Based on the judge's decision, Grandmother Minah was guilty of violating Article 362 of the old Criminal Code which states, that anyone who takes something, that is wholly or partly owned by another person, to possess it unlawfully, is threatened with theft, with a maximum imprisonment of 5 (five) years or a maximum fine of Rp. 900,- (nine hundred rupiah). Although the court only imposed a conditional sentence on the perpetrator of the crime in the case, the problem lies in the conditions for imposing a sentence which is unable to determine the imposition of a sentence at a dynamic level by the legal feelings of society and the specific circumstances of the perpetrator of the crime.[5]

Judicial pardon is a very interesting concept, in the old Criminal Code inherited from the Dutch there is no regulation on judicial forgiveness. Andi Hamzah thinks that if judicial pardon is not aligned with the Criminal Procedure Code then it is clear that there will be many regulations that are difficult for judges to implement. In the Criminal Procedure Code (KUHAP) the judge in passing a verdict on a case only has 3 (three) possible decisions, namely:

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[2] Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, Prenandamedia Group, Jakarta. 2008. h. 17.

[3] M Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHP*, Sinar Grafika. Jakarta, 2006. h. 347.

[4] Nico Keizer dan D. Schaffmeister, Beberapa Catatan Tentang Rancangan Permulaan 1998 Buku I KUHP Baru Indonesia, yang dikutip oleh Adrey ARdhan Saputro, Konsepsi Rechterlijk Pardon atau Pemaafan Hakim dalam Rancangan KUHP, Jurnal Mimbar Hukum. Vol. 28. No. 1. Februari 2016. h. 63.

[5] Lukman Hakim, *Penerapan Konsep Pemaafan hakim (Rechterlijk Pardon) Dalam Sistem Peradilan Pidana di Indonesia*, Graha Ilmu, Yogyakarta, 2019. h. 11.

1. Criminal decision *(veroordeling tot enigerlei sanctie).*
2. Acquittal *(vrijs praak).*
3. *Decision* to be released from all legal charges *(onslag van recht vervolging).*[6]

Based on the description above, the question arises what will happen if based on Article 183 of the Criminal Procedure Code, the defendant is found legally and convincingly guilty and has fulfilled the elements of punishment, but the judge thinks that the defendant's actions do not require sentences other than an apology, and if a sentence is imposed it will bring injustice. Because as is known in the framework of law enforcement, judges in imposing sentences only have 3 (three) options mentioned earlier. This creates problems because the judge has no other options, and the judge is still struggling with the guidelines of the principle of legality, which is still one of the main foundations of criminal procedure law. In addition, it must also be clear what model will be imposed on the judge's verdict.[7]

Another thing that often gets input and attention in terms of enforcement in the world of criminal justice which still has a pattern of thinking of retaliation, of course often does not have a clear purpose of punishment in the retributive model. This new Criminal Code, referring to modern criminal law, no longer places criminal law as lex talionis or criminal law as (a means of revenge). The regulation of judicial forgiveness in the new Criminal Code is currently one form of implementing the restorative justice paradigm as part of the criminal justice system because, in the context of implementing judicial forgiveness, the criminal justice system and the restorative justice approach run hand in hand.[8]

This study will discuss the regulation of judicial pardon judges. The current National Criminal Code already recognizes the principle of judicial pardon which aims to avoid imprisonment as far as possible, especially in minor criminal cases involving short-term deprivation of rights. This principle can also be a foundation and a guideline for balancing justice in society. Efforts to improve material criminal law through the regulation of judicial pardon in the National Criminal Code are a serious problem that needs special attention. These regulations should be synchronized with the provisions of criminal procedure law in the Criminal Procedure Code so that the regulation regarding judicial pardon in the current National Criminal Code is not wasted or later it is feared that it will become a dead article.

Research Methods

This study uses a normative legal research type, with a statute approach and a conceptual approach. The primary legal materials used are also the legal regulations on judicial pardon, including the 1945 Constitution of the Republic of Indonesia, Law Number 1 of 2023 concerning the Criminal Code, Law Number 48 of

[6] Andi Hamzah, *Hukum Acara Pidana Indonesia*, Sinar Grafika, Jakarta. 2008. h. 36.

[7] M Yahya Harahap. *Op.cit.* h. 36.

[8] Nefa Claudia Meliala, Rechterlijk Pardon (Pemaafan Hakim) : Suatu Upaya Menuju Sistem Peradilan Pidana Dengan Paradigma Keadilan Restoratif, Universita Katolik Parahyangan Bandung. Vol. 8. 2020. h. 564.

2009 concerning Judicial Power, and Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. This is done by reviewing laws and regulations related to the legal issues being handled, while the conceptual approach starts from the views and doctrines that have developed in legal science.

Results and Discussion

Legal Consequences of the Implementation of the Principle of Judicial Pardon in the 2023 Criminal Code

The principle of judicial pardon, in general, will have an impact on the character and nature of Indonesian criminal justice, which used to be rigid with its legality principle that always punished people even though the case was very light, sometimes people who commit crimes do not necessarily have evil attitudes, rigidity in sentencing or sentencing results in overcapacity of correctional institutions. Even though someone commits a crime, seen from the benefits of punishing the person, if there is no benefit then the judge is better off deciding with a verdict called a pardon verdict, so that the orientation of future punishment in the Indonesian criminal justice system is towards the idea of restorative, not just revenge.

The article on judicial pardon is regulated in Article 54 paragraph (2) of Law Number 1 of 2023 concerning the Criminal Code with the following editorial text:

(2) "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 criminal penalty or to take action by taking into account aspects of justice and humanity.."

From the formulation of the article, there are elements that build the concept of judicial pardon, namely as follows:

1. The lightness of the act

The provisions on judicial pardons in the 2023 Criminal Code do not provide definite limitations or criteria regarding the meaning of "minor acts." This uncertainty is a form of weakness in the regulation of the judicial pardon institution which will conflict with the principle of legal certainty. However, Barda Nawawi Arief has a different view on this element, he thinks that the absence of concrete regulation of the meaning of "minor acts" aims not to limit the judge's authority in issuing pardon decisions, only for certain crimes.[9]

Article 54 paragraph (2) of the 2023 Criminal Code which regulates judicial pardons states that judges have the authority to pardon someone guilty of committing a minor crime. The 2023 Criminal Code does not regulate definite limits or criteria related to the "minority of the act." The Criminal Code only regulates the qualification of the severity of the crime that is threatened with a fine, which is

[9] Adery Syahputra. *Tinjauan Atas Non-Imposing of a Penalty/ Rechterlijk Pardon/ Dispensa de Pena dalam R KUHP serta Harmonisasinya dengan R KUHP,* Institute for Criminal Justice Reform, Jakarta, 2016. h. 19.

divided into 8 (eight) categories listed in Article 79 paragraph (1) of the 2023 Criminal Code. According to Barda Nawawi Arief, in the working pattern of the Criminal Code, there is still a qualification of the severity of the crime which can be a very minor, serious, and very serious crime.[10]

Article 79 paragraph (1) of Law Number 1 of 2023 concerning the Criminal Code states as follows:

(1) "The maximum criminal fine is determined based on:
a. Category I, Rp. 1.000.000,00 (one million rupiah);
b. Category II, Rp. 10.000.000,00 (ten million rupiah);
c. Category III, Rp. 50.000.000,00 (fifty million rupiah);
d. Category IV, Rp. 200.000.000,00 (two hundred million rupiah);
e. Category V, Rp. 500.000.000,00 (five hundred million rupiah);
f. Category VI, Rp. 2.000.000.000,00 (two billion rupiah);
g. Category VII, Rp. 5.000.000.000,00 (five billion rupiah); and
h. Category VIII, Rp. 50.000.000.000,00 (fifty billion rupiah)."

In the Academic Manuscript of the 2015 Draft Criminal Code, it is explained that the category of criminal acts (delicts) is qualified into 3 (three) weights, namely:

1) Very minor crime

It's a crimes that are threatened with a light fine (category I or II) individually. The crimes that are grouped here are crimes that were previously threatened with imprisonment or confinement of less than 1 (one) year or a light fine or new crimes that according to the assessment of their severity are less than 1 (one) year in prison.[11]

2) Serious crime

It's a crimes that are worthy of being threatened with imprisonment of more than 1 (one) year up to 7 (seven) years. The crimes grouped here will be alternatively punished with a heavier fine than the first group, namely category III and IV fines. There are also crimes in this group that have a special minimum threat.

3) Very serious crime

It's a crime that is threatened with imprisonment of more than 7 (seven) years or threatened with a heavier penalty (i.e. death penalty or life imprisonment). To show its serious nature, the prison sentence for crimes in this group is only threatened singly or for certain crimes can be accumulated with a fine of group V or given a special minimum penalty.[12]

In interpreting the phrase "lightness of the act" can also be based on the maximum demands (requisitor) from the public prosecutor against the defendant in court. As is known, in the field of criminal trial practice in court, public prosecutors in their indictments often use multiple charges with a criminal threat of more than 5

[10] *Ibid.*
[11] Lukman Hakim, *Op.cit.* h. 155.
[12] *Ibid.* h. 156.

(five) years, but in the end, the demands from the public prosecutor turned out to be below 5 (five) years.[13]

In this context, it is also necessary to consider in the formulation of the article regarding judicial pardon, especially in the phrase "lightness of the act" can be based on the demands (requisitor) of the public prosecutor for a maximum of 5 (five) years, not limited to only the provisions of the crime committed is threatened with a maximum imprisonment of 4 (four) or 5 (five) years, as explained above. This is also in line with the opinion of Barda Nawawi Arief as one of the members of the drafting team of the RKUHP, that the absence of concrete regulation of the meaning of the phrase "lightness of the act" aims to not limit the authority of judges in issuing pardon decisions only for certain crimes.[14]

2. Personal circumstances of the perpetrator (the perpetrator of the crime)

The 2023 Criminal Code does not provide a definition of personal circumstances. However, looking at Article 22 of Law Number 1 of 2023 concerning the Criminal Code, it states that as follows:

"the personal circumstances of the perpetrator as referred to in Article 20 or the assistant as referred to in Article 21 may eliminate, reduce or increase the punishment."

Based on Article 20 of Law Number 1 of 2023 concerning the Criminal Code, which reads as follows:

"Every person shall be punished as a perpetrator of a crime if:

a. Committing a crime by yourself;
b. Committing a crime using a tool or ordering another person who cannot be held responsible;
c. Participating in a crime; or
d. Motivating another person to commit a crime by giving or promising something, abusing power or dignity, committing violence, using threats of violence, misleading, or providing an opportunity, means, or information."

Based on Article 21 of Law Number 1 of 2023 concerning the Criminal Code, it explains as follows:

(1) "Every person shall be punished as an accessory to a crime if he intentionally:
a. Providing an opportunity, means or information to commit a crime; or
b. Providing assistance at the time the crime is committed.
(2) The provisions referred to in paragraph (1) do not apply to assistance in committing a crime which is only threatened with a maximum fine of category II.
(3) The penalty for assistance in committing a crime is a maximum of 2/3 (two thirds) of the maximum principal penalty for the crime in question.Pembantuan melakukan tindak pidana yang diancam dengan pidana mati atau pidana penjara seumur hidup, dipidana dengan pidana penjara paling lama 15 (lima belas) tahun.

[13] *Ibid.* h. 159.
[14] *Ibid.* h. 160.

(4) Additional penalties for assisting in committing a crime are the same as additional penalties for the crime in question..”

The phrase personal circumstances, based on the general explanation of Article 22 of the 2023 Criminal Code, namely the circumstances where the perpetrator or assistant is older or younger, has a certain position, is engaged in a certain profession, or has a mental disorder.

While in Article 74 of Law Number 1 of 2023 concerning the Criminal Code which reads as follows:

(1) “A person who commits a crime that is threatened with imprisonment due to personal circumstances, his actions can be sentenced to a closed sentence.
(2) The closed sentence as referred to in paragraph (1) can be imposed on a defendant who commits a crime because he is motivated by an intention that is worthy of respect.
(3) The provisions as referred to in paragraph (2) do not apply if the method of committing or the consequences of the crime are such that the defendant is more appropriately sentenced to imprisonment.”

In this case, the personal circumstances referred to in Article 74 of the 2023 Criminal Code are because the act is based on the motive of the act. Furthermore, according to Muhammad Irfan, there are criteria referred to as personal circumstances, namely:

a. Not old enough and cannot be held responsible.
b. Motive for committing the act.
c. As the first perpetrator.
d. Economic ability.[15]

The four points above that have been explained by Muhammad Irfan are actually described in Article 54 paragraph (1) of Law Number 1 of 2023 concerning the Criminal Code as follows:[16]

(1) “In criminal punishment it is mandatory to consider:
a. form of the perpetrator's mistake;
b. motive and purpose of the crime;
c. the perpetrator's mental attitude;
d. Whether the crime was committed with planning or not;
e. how to commit the crime;
f. the perpetrator's attitude and actions after committing the crime;
g. life history, social conditions, and economic conditions of the perpetrator of the crime;
h. the influence of the crime on the future of the perpetrator of the crime;
i. the influence of the crime on the victim or the victim's family;
j. forgiveness from the victim and/or his/her family; and/or

[15] Adery Syahputra, *Op.cit.* h. 21.
[16] *Ibid.*

k. legal values and justice that exist in society."

The placement of Article 54 paragraph (1) of the 2023 Criminal Code, before the existence of Article 54 paragraph (2), has answered the criteria regarding the "personal circumstances of the perpetrator" as desired by the article regarding judicial pardon.[17]

3. The circumstances at the time the act was committed or what happened subsequently

Adery Syahputra explained that the 2023 Criminal Code also does not provide a clear intention regarding this third condition, as well as the explanation of Article 54 paragraph (2) of the 2023 Criminal Code, there is no clear norm regarding what is meant by "circumstances at the time the act was committed or what happened later." It would be better if the 2023 Criminal Code had an explanation regarding the meaning of "circumstances at the time the act was committed or what happened later." This aims to create legal certainty in the implementation of the judicial pardon institution. In addition, it should also be noted that the meaning of "circumstances at the time the act was committed" should not be biased by the provisions in an emergency (noodtoestond).[18]

According to Lukman Hakim, even though in Article 54 paragraph (2) of the 2023 Criminal Code, there is no clear norm regarding what is meant by the phrase "circumstances at the time the act was committed or what happened later." However, if we return to the previous article, namely Article 54 paragraph (1) of the 2023 Criminal Code, then, in fact, the phrase "circumstances at the time the act was committed or what happened later" must be interpreted using Article 54 paragraph (1) of the 2023 Criminal Code which provides limitations related to considerations that must be made in terms of imposing a criminal sentence.[19]

In addition to the above, Lukman Hakim once again opined that basically, the Criminal Code has accommodated the regulation regarding the phrase "circumstances at the time the act was committed or what happened later" as referred to in Article 54 paragraph (1) of the 2023 Criminal Code, also with the provisions contained in Article 70 paragraph (1) of the 2023 Criminal Code, especially those contained in letters d, h, m, n, and o. As for the provisions of the judicial pardon institution as contained in Article 54 paragraph (2) junto Article 54 paragraph (1). According to Lukman Hakim, if it is associated with noodtoestand both in the old Criminal Code and in the new Criminal Code, it is also irrelevant, because noodtoestand falls into the area of criminal elimination, not into the area of the judicial pardon institution.[20]

4. Consider aspects of justice and humanity

[17] Lukman Hakim, *Op.cit.* h. 164.
[18] Adery Syahputra, *Op.cit*. h. 22.
[19] Lukman Hakim, *Op.cit.* h. 168.
[20] *Ibid.*

Regarding the phrase "considering aspects of justice and humanity," this basically has to be seen in the context of the polarization of justice that originates from the legalistic conception adopted in the old Criminal Code, however, it turns out that the new Criminal Code actually tries to collaborate legal certainty and justice in criminal law in its articles.[21] For example, in Article 53 of Law Number 1 of 2023 concerning the Criminal Code, which reads as follows:

(1) "In trying a criminal case, the judge is obliged to uphold the law and justice.
(2) If in enforcing the law and justice as referred to in paragraph (1) there is a conflict between legal certainty and justice, the judge is obliged to prioritize justice.."

Although the article does not describe a more concrete way to solve the conflict between legal certainty and justice, the substance of the article is to prioritize justice over legal certainty. In the conceptual level of criminal law, this can be resolved by connecting justice with the unlawful nature of the material, even though an act is formulated as a crime, the act is considered appropriate if based on the assessment of society the act is considered appropriate. In terms of normative error, even if someone intentionally or negligently commits a crime, the inner attitude cannot be blamed on the perpetrator of the crime when based on the assessment of society that certain circumstances cause the perpetrator to be unable to avoid the crime (unzumutbarkeit).[22]

The principle of judicial pardon can be set aside, as long as the judge has the right reasons, it is okay to set aside the principle of judicial pardon. There is something called ratio decided (the judge's rational reason or the judge's consideration in making a decision), why does the judge not use the pardon institution for certain cases? That is the judge's policy, the judge has the authority to set aside the principle of judicial pardon. The judge must have considerations of course why not apply the pardon or forgiveness institution... For example, the same as the case of Ferdy Sambo, Bharada E as a justice collaborator, the judge could have set aside to give a reduced sentence even though in the law to be a justice collaborator the requirement is that he is not the main perpetrator. Bharada E is the main perpetrator or not, but he is the executor of the murder of Brigadier Joshua and the public prosecutor said because he was the executor then he was the main perpetrator even though the legal advisor said that the main perpetrator was Ferdy Sambo, even though Ferdy Sambo was not the one who executed Brigadier Joshua. This raises differences of opinion about who is the main perpetrator.

From this, about the judicial pardon, the judge may give a different opinion from the prosecutor or legal advisor, so the judge has the authority to override the pardon institution. The judge also does not just give a decision without a clear reason until he concludes that he does not use this pardon institution. In reading the decision, what is read is not the final decision but what is read is the considerations and that is called ration decided (reasons why the decision was made to grant pardon or reduce the sentence according to the law or not). Although there is a principle of

[21] *Ibid.*
[22] *Ibid*. h. 169.

judicial pardon stated in Article 54 paragraph (2) of the 2023 Criminal Code which allows for the institution of judicial pardon if the judge does not use it, it is okay, but with the note that the judge must explain why not so that those who read the decision can understand the judge's thinking.

The shortcomings of the provisions of the principle of judicial pardon in the 2023 Criminal Code are that the regulations are too brief because judges only refer to the latest Criminal Code law, which is stated in Article 54 paragraph (2) to apply forjudicial pardon. After all, the old Criminal Code did not regulate judicial pardon at all. And it is not in line with the Criminal Procedure Code (Criminal Procedure Code).[23]

Referring to the characteristics of the Indonesian criminal system which refers to the old Criminal Code, as one of the products of Dutch heritage as a whole is based on classical school thinking which focuses criminal law on criminal acts or acts (daad- strafrecht). The Criminal Code itself is a rigid (substantive) criminal system and is based on three criminal law problems, namely offenses (strafbaarfeit), mistakes (schuld), and punishment (straf/punishment/poena). From that, with the 2023 Criminal Code, especially the existence of judicial pardon as an alternative answer to the problem of punishment in Indonesia, there is almost no, because it is limited by the types of crimes in Article 10 of the Criminal Code and Article 1 paragraph (11) of the Criminal Procedure Code which regulates the types of criminal decisions, there is no judicial pardon.[24]

In Article 1 Number 11 of the Criminal Procedure Code, the types of final decisions that can be issued are divided into three types, namely criminal decisions, acquittal decisions, and release decisions, while in judicial pardon cases what happens is that the elements of the crime are proven, but no criminal punishment is imposed. There is a critical question that arises, what type of decision will be imposed on a defendant who is considered proven but pardoned.[25]

If we categorize the type of judicial pardon decision as an acquittal, then it will conflict with Article 191 paragraph (1) which states that for an acquittal decision to be made, "the defendant's guilt for the act he is accused of has not been proven legally and convincingly, then the defendant is declared free." So it is very much in conflict with a judicial pardon decision. A judicial pardon is issued if a defendant is proven legally and convincingly to have committed a crime but is not sentenced to a criminal sentence (pardoned).[26]

The second possibility is to categorize the judge's pardon decision as an acquittal. The provisions regarding an acquittal decision are in Article 191 paragraph

[23] Anza Ronaza Bangun, Anza Ronaza Bangun, Rechterlijk Pardon (Pemaafan Hakim) Dalam Kitab Undang-Undang Hukum Pidana di Sistem Pemidanaan Indonesia, Universitas Sumatra Utara. Vol. 2. No 5. 2023. h. 374.

[24] M. Holy one, Mencari Kemungkinan Judicial Pardon Sebagai Salah Satu Alternatif Bentuk Pemidanaan, Jurnal Ilmiah Rinjani. Vol. 9. No. 1. 2021. h. 47.

[25] Adery Ardhan Saputro, Konsepsi Rechterlijk Pardon Atau Pemaafan Hakim Dalam Rancangan KUHP, Jurnal Mimbar Hukum. Vol. 28. No. 1. 2016. h. 72.

[26] *Ibid.*

(2) of the Criminal Procedure Code which states: "If the court thinks that the act charged to the defendant is proven, but the act does not constitute a criminal act, then the defendant is acquitted of all legal charges." In this possibility, the judge's pardon is considered the basis for the elimination of criminal penalties. The basis for the elimination of criminal penalties in the Criminal Code is only classified into justification and forgiveness reasons. If the judge's pardon decision is categorized as an acquittal decision, it will become a problem for certain cases that do not meet the qualifications for the basis for justification and forgiveness of criminal penalties. For example, in the case of Minah's grandmother who took cocoa fruit, does it meet the basis for justification and forgiveness? So it can be categorized as an acquittal decision. If someone has met the criteria for an acquittal decision, why should the panel of judges grant pardon when the acquittal decision is sufficient for the defendant not to be punished? So this second possibility is also not right.[27]

The third possibility is to impose a criminal sentence, but not impose a criminal penalty. This view is based on Andi Hamzah's opinion which states "that the form of the judge's pardon decision will be a guilty verdict without punishment." Andi Hamzah's opinion is in line with Chorus' statement which states that if the judge decides to grant pardon, the verdict is guilty without punishment (a guilty verdict without punishment).[28]

This view may be more reasonable, but if we review the requirements for the contents of a criminal sentence in Article 197 paragraph (1) of the Criminal Procedure Code, the criminal sentence letter must include, among other things: "a statement of the defendant's guilt, a statement that all elements in the formulation of the crime have been fulfilled, accompanied by its qualifications and the punishment or action imposed." In Article 197 paragraph (1) letter h of the Criminal Procedure Code there is a phrase "accompanied by qualifications and the punishment or action imposed," the regulation of this phrase is contrary to the concept of the judicial pardon institution to not impose any punishment or action. Whereas if we refer to Article 197 paragraph (2) of the Criminal Procedure Code, it contains: "failure to fulfill the provisions in paragraph (1) letters a, b, c, d, e, f, h, i, j, k, and l, this article results in the verdict being null and void by law."[29]

One thing that must be considered is that this element should not be equated with an emergency (noodtoestand) which is a justification that in the doctrine of criminal law is categorized as a reason for eliminating criminal penalties and if this condition is proven to occur, the case will result in an acquittal or release. As previously explained, the judge's pardon decision and the acquittal or release decision are three different things.

Currently, the new Criminal Code which has been ratified and enacted on January 2, 2023, does not specifically regulate the existence of judicial pardon. The regulation of judicial pardon would be better if it were aligned with the RKUHAP in

[27] *Ibid*.
[28] *Ibid.*
[29] *Ibid.* h. 73.

the future regarding the judge's pardon decision to obtain legal certainty. Unlike Indonesia in the Netherlands, the regulation of judicial pardon is not only addressed by material criminal law, but also by criminal procedure law. Criminal judges in the Netherlands can issue 4 (four) forms of final decisions, namely:

1. Criminal decision (*veroordeling tot eningerlei sanctie*).
2. Acquittal (*vrunjs praak*).
3. Decision to be released from all legal charges (*onslang van recht vervolging*).
4. judicial pardon.[30]

Judicial pardons cannot only be given in minor crimes because "minority of the act" is only one of the criteria for granting judicial pardons. There are still other criteria, namely, "the personal circumstances of the perpetrator," "the circumstances at the time the crime was committed and what happened afterward" and "considering aspects of justice and humanity." The regulation of judicial pardon (judicial pardon) in the 2023 Criminal Code must be synchronized with the regulation of criminal procedure law in the Draft Criminal Procedure Code (RKUHAP) so that it does not become something useless because it cannot be applied in practice. For that reason, the Criminal Procedure Code (RKUHAP) must add one more type of decision outside of criminal decisions, acquittals (vrijspraak) and decisions free from all legal charges (onslag van recht vervolging), namely the judge's pardon decision.

The legal consequences of the application of the principle of judicial pardon in the new Criminal Code are that there will be defendants whose charges have been proven legally and convincingly, but there is no criminal sentence or no punishment is carried out with consideration of the indicators so that they can be applied in handling criminal cases and so that the panel of judges can issue a judicial pardon decision. The four indicators are not cumulative, meaning that one of them can be chosen by the judge. The indicators in question are:

1. The lightness of the act;
2. The personal circumstances of the perpetrator of the crime;
3. The circumstances at the time the act was committed or what happened later; and
4. By considering the aspects of justice and humanity [31]

However, in the 2023 Criminal Code, there are no provisions explaining the technical application of the principle of judicial pardon, which then if the new Criminal Code is enforced without the new Criminal Procedure Law also about accommodating the principle of judicial pardon in the form of a judge's pardon decision (judicial pardon), in the practice of handling criminal cases in Indonesia it has the potential to become a regulatory stagnation, it would be better to design a provision regarding a judge's pardon decision in the RKUHAP to obtain a principle of legal certainty.

In addition, the consequences of the judicial pardon law in the 2023 Criminal Code have the potential to be a solution to the problem of overcrowding.

[30] *Ibid.*
[31] Lukman Hakim, *Op.cit*. h. 179.

The overcrowding situation that occurs in prisons or detention centers in Indonesia currently should receive attention from the government. Overcrowding has an impact on losses for both individuals who undergo it, such as the failure to fulfill the basic rights of every prisoner or convict including their families and the state as the party organizing it, which problem has been going on for years in Indonesia. However, it seems that at this time the right formulation has not been found to overcome this.[32]

The overcrowding status results in families and relatives of prisoners and detainees who want to visit having to spend more money. Because many prisoners and detainees have to be transferred (transferred), due to the fullness of prisons and detention centers. This practice then makes the families of the inmates another object that receives punishment due to the large number of inmates in prisons and detention centers. Thus, the prospect of the birth of the 2023 Criminal Code concerning the legal consequences of judicial pardon or judicial forgiveness can be a form of breakthrough in the criminal justice system in Indonesia which has undergone a transformation, which can then reduce overcrowding in prisons. The forgiveness of the judge in the form of a judge's decision, when applied to defendants who have met the requirements for the application of judicial pardon, the defendant may not undergo punishment but only be stated in the decision, a person who is legally and convincingly proven to have committed a certain crime, but is not sentenced to any form of crime but the judge only forgives the criminal act committed.

Conclusion

The legal consequences of the application of the principle of judicial pardon are that there will be defendants who legally and convincingly violate the law but are not sentenced to a criminal sentence by fulfilling the requirements in Article 54 paragraph (2) of the 2023 Criminal Code as follows:

a. The lightness of the act;
b. The personal circumstances of the perpetrator;
c. The circumstances at the time the crime was committed; and
d. By considering aspects of justice and humanity.

in general, it will have an impact on the character and nature of the Indonesian criminal justice, which used to be rigid with its legality principle which always punished people even though the cases were very light, sometimes people who commit crimes do not necessarily have evil intentions, rigidity in sentencing or sentencing results in overcapacity of correctional institutions. The application of judicial pardon in the 2023 Criminal Code is also a breakthrough or effort to reduce the overcrowding of Correctional Institutions that is currently occurring. Because the defendant does not need to serve a sentence, because the defendant's mistake has been forgiven by the panel of judges.

[32] Rully Novian, *Strategi mengenai Overcrowding si Indonesia: Penyebab, dan Penyelesaiannya*, Institute For Criminal Justice Reform, Jakarta, 2018. h. 4.

Bibliography

Andi Hamzah, Hukum Acara Pidana Indonesia, Sinar Grafika, Jakarta, 2008.

Adery Syahputra, Tinjauan Atas Non-Imposing of a Penalty/ Rechterlijk Pardon/ Dispensa de Pena dalam R KUHP serta Harmonisasinya dengan R KUHP, Institute for Criminal Justice Reform, Jakarta, 2016.

Lukman Hakim, Penerapan Konsep Pemaafan hakim (Rechterlijk Pardon) Dalam Sistem Peradilan Pidana di Indonesia, Graha Ilmu, Yogyakarta, 2019.

M Yahya Harahap, Pembahasan Permasalahan dan Penerapan KUHP, Sinar Grafika, Jakarta, 2006.

Peter Mahmud Marzuki, Pengantar Ilmu Hukum, Prenandamedia Group, Jakarta, 2008.

Rully Novian, Strategi mengenai Overcrowding si Indonesia: Penyebab, dan Penyelesaiannya, Institute for Criminal Justice Reform, Jakarta, 2018.

Anza Ronaza Bangun, Rechterlijk Pardon (Pemaafan Hakim) Dalam Kitab Undang-Undang Hukum Pidana di Sistem Pemidanaan Indonesia, Universitas Sumatra Utara. Vol. 2. No 5. 2023.

Adery Ardhan Saputro, Konsepsi Rechterlijk Pardon Atau Pemaafan Hakim Dalam Rancangan KUHP, Jurnal Mimbar Hukum. Vol. 28. No. 1. 2016.

M. Holy one, Mencari Kemungkinan Judicial Pardon Sebagai Salah Satu Alternatif Bentuk Pemidanaan, Jurnal Ilmiah Rinjani. Vol. 9. No. 1. 2021.

Nico Keizer dan D. Schaffmeister, Beberapa Catatan Tentang Rancangan Permulaan 1998 Buku I KUHP Baru Indonesia, yang dikutip oleh Adrey Ardhan Saputro, Konsepsi Rechterlijk Pardon atau Pemaafan Hakim dalam Rancangan KUHP, Jurnal Mimbar Hukum, Vol. 28. No. 1. Februari 2016.

Nefa Claudia Meliala. Rechterlijk Pardon (Pemaafan Hakim) : Suatu Upaya Menuju Sistem Peradilan Pidana Dengan Paradigma Keadilan Restoratif. Universita Katolik Parahyangan Bandung. Vol. 8. 2020.

Sahat Marisi Hasibuan, Kebijakan Formulasi Rechterlijk Pardon Dalam Pembaharuan Hukum Pidana, Universitas Diponegoro, Semarang, Vol. 9. No. 2. 2021.

Risano, A., Ningtias, A. D., & Yurita, R. (2021). Restotative Justice Policy Of Class I Drug Convicts Of Marijuana In Dealing With Over-Capacity Correctional Institutions In Indonesia. Jurnal Independent, 9(2), 13-21.

Ningtias, A. D., Nahdliyah, H., Nugroho, F. S., & Al Akbari, D. (2023). The principle of Restorative Justice in sentencingIn the 2023 Criminal Code. Jurnal Independent, 11(2), 563-574.