



Pardon's Judicial Urgency in Renewing Criminal Law in Indonesia

Satria Fajar Putra Dipayana¹, Eva Achjani Zulfa²

^{1,2} Program Studi Magister Ilmu Hukum, Fakultas Hukum, Universitas Indonesia, Indonesia

E-mail: satriaafjarputradipayana@gmail.com

Abstract

This paper will examine the concept of judicial pardon (forgiving judges) as a solution to the existing legal problems, which are perceived as an attempt to avoid incarceration. The law gives the judge the authority to forgive or pardon the convict without imposing a crime or action if they are influenced by certain factors. This article aims to convey the importance of the RKUHP's concept of judicial pardon to the future renewal of the criminal justice system. This article's research employs a normative, statutory, and conceptual approach to the law. The findings of this study indicate that the concept of judicial pardon can be viewed as the final gatekeeper for a case that disrupts social justice, or as a guide for the forgiveness of judges that functions as a safety valve or emergency door. Then in accordance with the noble values that exist in Indonesian society, such as those of the people of Jambi province, the Batak Karo, the Balinese, and many others. In order for future generations of Indonesians to realize the welfare and protection of the community, as a form of legal certainty in sentence execution.

Keywords: *Urgency, Judicial Pardon, Criminal Law Reform*

A. Introduction

The face of criminal law which tends to work rigidly and formally, seems to accompany criminal law as a tool with the aim of retaliation, plus the logic used by judges in a deductive-mathematical manner, stems from legal certainty. (Anwar, 2013) Qualification of a judge's decision in deciding a criminal act, if it has fulfilled the formulation of the article in the Criminal Code and must solely be resolved through criminal law, which in turn leads to a prison sentence. On the other hand, the formal legal process is very costly, lengthy, tiring, does not solve the problem, and is even full of practices, corruption, collusion and nepotism. The face of justice like this is what makes the form of justice polluted. In addition, the Indonesian legal system has not been able to accommodate the position of victims and their families, and even tends to be forgotten by the state (Hutabarat et al., 2022).

Satjipto Rahardjo, said that modern law is at a crossroads. The situation between "justice has been decided" and "law has been applied" there is a considerable margin. (Rahardjo & Dimiyati, 2014) In the same situation, according to Topo Santoso, the use of criminal law must be controlled because more and more laws in Indonesia contain criminal threats contained in the criminal provisions chapter. Correctional inmates are increasing even to the point of being over-loaded or over-populated. While every time there is a change in the law, there is an increase in criminal threats (Santoso, 2020).

The aforementioned facts compel a number of legal experts to seek alternative legal dispute resolution outside of judicial procedures, which is recommended to benefit and facilitate the community in dealing with legal processes, as well as to

control awareness not to immediately decide cases with a win-lose perspective, but rather to resolve cases with a solution that is mutually beneficial.

The presence of the concept of legal reform of the Draft Criminal Code, equipped with political values as a reflection of the independence that has been achieved by the Indonesian people, two sociological values as a reflection in line with the culture and characteristics of the Indonesian nation, the three philosophical/ideological values as a reflection of the values contained in Pancasila contained in each of its precepts reflects divine values, human values and societal values (Santoso, 2020).

So far, positive legal products have no alternative punishment other than the three sentencing decisions, acquittals and acquittals. This is indeed in line with the principle of legality as the crown of criminal law, where law enforcement officers are obliged to apply the law in accordance with statutory orders. (Harahap, 2012) So it has become a logical consequence, if the perpetrator of the act is proven guilty of committing a crime with the fulfillment of the article formulation, so that there is no reason for the judge not to impose a sentence on the defendant, so that imprisonment is the only remedy for the perpetrators of crime.

In contrast to the Draft Criminal Code, the concept of judicial pardon (forgiveness by judges) cannot be applied to defendants who have been conclusively proven to have committed a crime. The law gives the judge the authority to forgive or pardon the convict without imposing a crime or action if they are influenced by certain factors.

This paper examines the concept of *rechterlijk pardon* (forgiving judges) in the RKUHP, as an alternative to punishment in the renewal of Indonesian criminal law, which basically tries to suppress and avoid imprisonment as far as it is needed, especially for defendants who have been proven and guilty of committing a crime, but the imposition of a criminal offense creates injustice for the defendant.

B. Method

This type of research is normative, descriptive, and analytic, employing a statute approach, conceptual approach, and case approach that refers to a particular problem that is applied to the literature and legal expert opinions. This study relies on secondary data derived from primary legal materials, secondary legal materials, and tertiary legal materials. Then, document study or library research is used to collect data for this research (Asikin, 2016).

C. Research Results And Discussion

1. The Criminal System in the Current Criminal Law Policy

The concept of punishment in the Criminal Code, which as previously mentioned, the law only formulates 3 alternative judges' decisions, namely criminal decisions, acquittal (*vrijspraak*) and acquittal decisions (*onslag van recht vervolging*). (J. Efendi, 2018) Especially, the punishment as stated in the form of punishment or commonly referred to as the Indonesian criminal system refers to the provisions of Article 10 of the Criminal Code, which stipulates that the punishment consists of the main and additional penalties. The main punishment itself consists of the death penalty, imprisonment, imprisonment, and a fine, while the additional punishment consists of revocation of certain rights, confiscation of certain goods, and announcement of judge's decision.

As according to Roeslan Saleh, who stated that punishment is a reaction to an offense and takes the form of a misery deliberately inflicted by the state on the maker of the offense. (J. Efendi, 2018) In line with Fitzgerald's definition, punishment is the authoritative infliction of suffering for an offense (J. Efendi, 2018), or crime is the imposition of a patient by an authorized institution for or caused by a crime. Then the criminal characteristics are always attached to the element of suffering or sorrow for the defendant, the form of deprivation of liberty is felt where the freedom of movement of the convict is restricted, and the convict is placed in a certain place so that he cannot leave that place at any time.

Then the characteristics of the criminal, received a response from the perspective of utilitarianism pioneered by Jeremy Bentham and John Stuart Mill, it was stated that a crime has absolutely no justification value if it is merely imposed to add more suffering/loss to society (Harkrisnowo, 2013). Jean-Paul Sartre, from existentialists who expect individual and absolute freedom, argues that crime has no benefits, and is a limitation on freedom which is a human right (Harkrisnowo, 2013).

In accordance with the passage of time, the nature of punishment constantly shifts, and what is considered to be suffering or misery undergoes modifications. Among them are those who describe punishment as a moral education for criminals, with the hope that they will not repeat their actions in the future and will be accepted by society. In accordance with Wesley Craag's opinion that there are four aspects of punishment in contemporary society, the first is that punishment is something that can be understood and cannot be avoided. Second, the implementation of sentencing reflects the evolution of the criminal justice system, and the types of crimes that can be imposed cannot be separated from the nature and type of the crime committed. Third, the implementation of the crime was significantly revised in comparison to its implementation in Western Europe and North America. Fourthly, a number of punishments provide criteria for determining whether the commission of a crime is consistent with the goals of the punishment (Hiariej, 2014).

Currently, criminal decisions made by judges against perpetrators of crimes will have the potential to bring about more systematic crimes, the stigmatization of society against perpetrators has a negative impact on the survival of the perpetrators which will lead to the instillation of evil traits for the perpetrators. In the perspective of criminology, labeling theory is known, that crime is not an evil person who is involved in wrongdoing but they are individuals who previously had evil status as a gift from the criminal justice system and social society. The criminal act is not too significant, but it is the public reaction that affects the behavior of the perpetrator in the future (Zulfa, 2015).

So according to the author, so far the crime is still very much needed, the need for punishment must be measured from the purpose of the crime. The alternative offered is to synchronize the most important parts of various sentencing philosophies and modify these parts in line with the development of society. Then the principle of expediency becomes the benchmark for determining the direction of the application of the philosophy of punishment. Determining the most appropriate philosophy for Indonesia is the task of the government which must be based on the values that live in society, which are then obliged to be poured into laws.

2. The Urgency of *Rechterlijk Pardon* Concept Formulation (Forgiveness of Judges) in Criminal Law Reform

The Draft Criminal Code has established the concept or function of sentencing. The change in the concept of punishment illustrates the dynamics of the evolution of Indonesian criminal law thought in pursuit of the ideal sentencing objective. In accordance with the mandate of Pancasila and the direction of contemporary criminal law, Article 51 of the 2019 Criminal Code Bill formulates the purpose of sentencing that is oriented towards the values that exist in society, as well as creating a wise and wise judge design in imprisoning defendants. The passage above focuses more on the perpetrators' rehabilitation than on their actions. (Barlian & Arief, 2017) In addition, the next article states that punishment is intended to uphold human dignity, which is consistent with the philosophy of punishment, namely Restorative Justice, which is defined as a problem-solving approach involving victims, perpetrators, social networks, judicial institutions, and society (Zaidan, 2016).

Even though Hazairin stated that a society and a state without prisons is not an impossibility, a utopia, or a pipe dream, the stigma associated with ex-convicts will persist until the state is deemed incapable of eradicating it. A society without prisons is an ideal with a high level of philosophical value and enormous spiritual and material benefits. Even a single stay in a super-modern prison suppresses the soul, emotions, and personality (Zaidan, 2016).

Answering the legal problems above, in the Draft Criminal Code there is a new idea/concept in Indonesian positive law, namely the Judicial Pardon (judge's pardon) conception, this concept is essentially motivated by the idea of flexibility to reduce the rigidity and formality of criminal law. This conception, can also be seen as the "last gatekeeper" for a case that disturbs justice in society, can also be said as a "safety valve" (*Veligheids-klep*) or "emergency door" (*nooddeur*). In terms of its own terminology, the words "pardon", "forgiveness", "mercy", "clemency" can broadly be interpreted as a pardon, for actions that are contrary to the law, on the basis of social justice (Saputro, 2016).

Pardon's judicial conception in Article 54 paragraph (2) has its own criteria for the judge's decision (Meliala, 2020), namely:

1) The light of action

In his explanation that the judge has the authority to forgive someone who is guilty of committing a crime which is categorized as a light act. Meanwhile, the formulation of the RKUHP does not provide an explanation of concrete limits or criteria, what is the meaning of "lightness of action". Meanwhile, Article 79 of the RKUHP only regulates criminal acts that are punishable by a fine which consists of 8 categories (Pardon, 2020).

2) Personal circumstances of the perpetrator

In personal circumstances the perpetrator also did not provide a clear explanation of the elements. However, if you look at the formulation of Article 54 of the RKUHP related to sentencing guidelines, the perpetrator's personal condition can be interpreted as the motive for committing the act, economic capacity, the perpetrator is not old enough, the perpetrator cannot be held accountable.

- 3) The situation at the time the crime was committed and what happened afterwards can be used as a basis for consideration not to impose a crime or not to impose an action. It also does not explain what is the benchmark for "the situation at the time the act was carried out or what happened later. What needs to be considered is that this element should not be equated with an emergency which is a justification for criminal law studies as a reason for eliminating a crime and if it is proven, a case will be based on an acquittal and acquittal.
- 4) Considering the aspect of justice and humanity.
The last element is also not given further explanation of the meaning of "justice and humanity". Further elaboration is needed so that judges are guided and provide benefits.

In simple terms, forgiveness can be interpreted as a form of liberation from mistakes that individuals have made, so that those who have made mistakes do not need to be punished, even to the point of experiencing corporal punishment, which should be the last resort. In the concept of judicial pardon, the judge grants a decision of forgiveness, but still includes a statement that the defendant is found guilty of committing the crime for which he is charged.

According to the author, the concept of judicial pardon is a very good one from a criminal law perspective; however, there needs to be more specific rules in controlling and supervising the concept so that it is not abused, especially in handling serious cases. The need to pay attention to the formulation of the article, the lightness of the act, the personal condition of the perpetrator, or the circumstances at the time the act was committed or subsequent events, as well as the humanitarian and justice considerations, require a firm grasp on the prerequisites. The lack of firmness in Pardon's formulation of his judicial philosophy has ramifications for multiple interpretations that can undermine and conflict with legal certainty.

3. The Urgency of Pardon's Judicial Conception in the Paradigm of Values of the Indonesian Society.

The judicial concept of Pardon (Forgiveness of Judges) needs to be seen not only from a policy, rule, and norm. But more trying to explore what is in the values of the Indonesian people themselves. If viewed from the perspective of the diversity of society and various Indonesian cultures, the concept of forgiveness of judges is expected to be a promoter of achieving the ideals of a sense of community justice in the state. According to the author, this can be used as a reference and basis, looking at the concept of forgiveness of judges, into a whole concept, which is not only interpreted from a juridical perspective, but can also be seen from a philosophical and sociological perspective of Indonesian society.

Even the need to look at the development of Indonesian criminal law does not always reflect on the comparison of the laws of each country, but can also reflect on the noble values that exist in Indonesian society itself. The participation of the customary law community is quite instrumental in determining the policy direction for the development of criminal law in Indonesia. Even sociologically and historically, its existence and application support the formation of national law. So with this existence, it seems that the concept of pardoning judges is in line with the values contained in customary law as a complement to national law. In several regions in Indonesia, the concept of pardoning judges has long been known, a concept that is often applied by

traditional leaders to indigenous peoples who commit violations of adat as one of the sanctions.

As is known, the customary law system is always based on the values contained in the principles of kinship, communal, religious magic, which are based on mutual justice. As a consequence of the settlement of customary cases, it is based on harmony, harmony, and togetherness. Therefore, customary criminal law is more likely to seek to restore the conditions of the community that have been disturbed by the perpetrator's violation. According to Soepomo, it was stated that the purpose of imposing customary sanctions was not retaliation, but an effort to restore the legal balance that was disturbed by the occurrence of an offense violation (Soepomo, 1966).

In customary law practice, a restoration of a relationship damaged by a criminal act, or an action aimed at restoring the situation to its original state before the conflict occurred. In fact, the context, "restoring the balance" as we know it, both in indigenous peoples in Indonesia and in other traditional societies is the organizer of a jointly owned judiciary. If a community member submits his case to the customary/tribal head, it is not only for the interests concerned but the interests of the community, all of which are really at stake, so that the indigenous community wants a harmonious life, the balance of the relationship between humans and natural forces and property must be maintained. (Yusuf, 2017) So if every balance disturbance occurs due to a crime, the balance must be restored by paying a sum of money or part of the property to the injured party. However, because the life of traditional people is still simple, the restoration of balance is not too expensive and is even completed with the concept of forgiveness. Most parts of the archipelago are known for shame, so that through peace talks or punishment, the perpetrators of customary offenses give, "covering shame" by apologizing.

The following is a description of various customary laws that are still in effect in society, including those in which the concept of forgiveness is practiced on a daily basis: Forgiveness of Criminal Cases in Jambi and South Sumatra Provinces

In the Malay community of Palembang, a customary crime can be resolved amicably. One of them is the dispute resolution known to the people of South Sumatra as fresh flour. Fresh flour is a peaceful or familial way of resolving disputes in the community. In the Malay community of Jambi City, the procession of plain flour is also still practiced in resolving criminal cases, although only in certain cases and is increasingly rarely applied, especially in urban areas. With the intention of becoming a family (becoming a family), both parties forgive each other after doing alms (recitation). This solution method can be used in small to large problems (E. Efendi, 2018).

Forgiveness in the Karo Batak Society, The life of the Batak Karo people is closely related to the mindset and pattern of structured kinship (*delikan si telu*) which describes a basic structure of kinship, based on blood or marital relations. The moral values of the Batak Karo people from generation to generation teach the internalization of moral, social and cultural values, which is carried out in a special meeting in the family and in everyday life. So if a dispute occurs in the Batak Karo community, it is directed to a family settlement. The Batak Karo family relationship is very strong so that the resolution of conflicts that occur are always resolved amicably.

In general, community conflict resolution will be led by sangkep enggeluh who is still a relative of the dispute. Sangkep enggeluh will come to the house of each disputing family to invite in purpur sage. Then after all gathered, proceed with discussing the dispute. In this case, everyone listens to the wisdom of sangkep enggeluh which is expected that the parties are aware of the violations that have been committed. This peace process will come to actually admitting guilt and the availability of the parties promising to forgive each other (Farikhah, 2018).

Forgiveness in Balinese society, A customary offense or what is known as speech in Balinese society is a case that arises because of a violation of Balinese customary norms, both written and unwritten (*catur dresta*) which is noble and imbued with Hindu religious values. According to I Ketut Sudantra, criminal cases and disputes that disturb the balance of the Balinese people, which are based on the concept of *Tri Hita Karana* as a customary case, can be resolved through mechanisms that have been recognized in the customs of the Balinese customary law community. Therefore, the purpose of the settlement of the case is to create peace for the litigants and the community in general and to find the truth based on the noble Balinese customary law and based on Hindu religious values (Iswara, 2013).

Then the method taken in resolving a case is to use informal habits, it can be seen that village authorities have a traditional system of tiered case settlement, starting with the family, Banjar, and Village (*Adat and Service*) spheres through a family settlement mechanism based on the principle of deliberation and consensus.

Then it is intended to reconcile the two disputing parties, after which a forum for submitting an apology is formed and the delivery of compensation to the injured party. So the result achieved through this peace is the restoration of the imbalance that occurred due to a criminal act (Iswara, 2013).

D. Conclusion

Based on the discussion that has been explained above, it can be concluded that the presence of the judicial pardon concept can be seen as the "last gatekeeper" for a case that disturbs justice in society, or it can also be said, that there is a guideline for pardoning judges that functions as a " safety valve/valve" (*Veligheids-valve*) or "emergency exit" (*nooddeur*). Therefore, punishment always shifts in line with the passage of time, as a moral education for criminals with the intention of not repeating their actions and being accepted in society in the future. It is necessary to see the development of the study of the judicial pardon concept on the noble values that exist in Indonesian society itself. Sociologically and historically, its existence and application support the formation of national law. So with this existence, it seems that the concept of forgiveness of judges is in line with the values contained in customary law as a complement to national law.

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