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Implementation of Judicial Pardon in the Reformation of the Criminal Justice System Based on Legal Certainty

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Abstract. *The concept of judicial pardon is regulated in Article 54 paragraph (2) of Law Number 1 of 2023 concerning the Criminal Code. This article regulates the qualifications for imposing a judicial pardon as a basis for the judge to decide whether or not to impose a criminal penalty if the defendant's actions are included in the scope of the crime. The objectives of the research in this study: 1) to find out and analyze the implementation of judicial pardon in the current criminal justice system; 2) to find out and analyze the weaknesses in the implementation of judicial pardon in the renewal of the criminal justice system; 3) to find out and analyze the implementation of judicial pardon in the renewal of the criminal justice system based on legal certainty. The approach method in this study is by using the legislative approach, conceptual approach and case approach/comparative approach. The data used are primary and secondary data which will be analyzed qualitatively. The research problems are analyzed using the theory of legal certainty and the theory of the legal system. The results of the study concluded that: 1) The implementation of judicial pardon in the current criminal justice system reform, namely the problems surrounding the development of the current criminal justice system, shows that this system is considered no longer able to provide protection for human rights and transparency for the public interest. The individualistic and formal procedural criminal system has ignored the reality of the value of peace so that it is not used as a basis for the elimination of criminal punishment; 2) The weaknesses of the implementation of judicial pardon in the renewal of the criminal justice system based on legal certainty consist of weaknesses in the legal substance aspect, weaknesses in the legal structure aspect. The weakness of the substance aspect is that there are no regulations that clearly categorize crimes in the RKUHP into minor or serious crimes. The weakness of the legal structure aspect is that when judges experience a dilemma when making a decision, they can use Judicial Pardon, or the judge's forgiveness. The weakness of the legal culture aspect is that if the sense of justice based on this law is considered by the judge to have been fulfilled through the decision he made, then it is not necessarily felt to be fair by the community, or some even state that the decision is truly unfair, and vice versa; 3) The implementation of judicial pardon in the renewal of the criminal justice system based on legal certainty that the application or imposition of a judge's pardon decision must go through several considerations, such as the lightness of the act, the personal condition of the perpetrator, or the circumstances surrounding the*

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act at that time or afterward, as well as considering aspects of justice and humanity. The application of the judge's pardon decision must later be balanced with the integrity of law enforcers.

Keywords: *Criminal; Implementation; Judicial Pardon; Justice System.*

1. Introduction

The criminal justice system in Indonesia currently still refers to the Criminal Code (KUHP) which is an adoption of Dutch Criminal Law. The Criminal Code, a legacy of the Dutch, which seems rigid and emphasizes formal legal supremacy, gives rise to the assumption that criminal law was created and implemented with the aim of taking revenge for acts that violate the law. This is because imprisonment seems to be the main method of retribution as stated in Article 10 of the current Criminal Code. From this perspective, law enforcement officers often criminalize all acts that have fulfilled the elements of a crime in the Criminal Code by imposing a sentence through the courts. This Criminal Code tends to be positivist in nature, emphasizing the principle of legal certainty.[1] The criminal justice system consists of the principles and objectives of criminal justice, criminal law rules and also concerns the criminal law material. The basis of the criminal justice system in Indonesia cannot be separated from the Criminal Code (KUHP) which was stipulated through Law Number 1 of 1946, which is still a legacy of the Dutch East Indies government. According to the Criminal Code currently in force, it is not formulated in writing regarding the objectives and guidelines for criminal justice in Indonesia.[2]

Criminal law reform in Indonesia is an important issue in the context of improving the national criminal system so that it is in line with the development of values and principles that live in the lives of Indonesian society. The purpose of criminal law reform is in accordance with criminal law policy, so that the criminal system should be aimed at protecting society from crime and for the sake of balance and harmony in community life, while still paying attention to the interests of society, victims and perpetrators of criminal acts.[3]One form of criminal law reform is the existence of regulations related to the purpose of punishment and the existence of guidelines in the imposition of punishment by judges which are explicitly stated in the new Criminal Code. The purpose of punishment is not clearly stated in the Criminal Code inherited from the Dutch, so it seems that the purpose of punishment is outside the system. From a model like this, it seems as if the basis for justifying the existence of criminals is only in criminal acts and mistakes, so that punishment is considered as something absolute to repay

[1]Barda Nawawi Arief, 2014, *Baunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru*, Jakarta: Kencana Prenadamedia Group, p. 5

[2]Barda Nawawi Arief, 2016, *Kebijakan Formulasi Ketentuan Pidana Dalam Peraturan Perudang-Undangan*, Semarang: Pustaka Magister, p. 7

[3]Badan Pembinaan Hukum Nasional, 2015, *Naskah Akademik Rancangan Undang-Undang Tentang Kitab Undang-Undang Hukum Pidana (KUHP)*, Jakarta: Kementerian Hukum dan Hak Asasi Manusia, p. i

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the criminal acts committed by someone. This kind of thinking makes the reality that the Criminal Code inherited from the Dutch is currently very rigid and formalistic.[4]

The enactment of Law Number 1 of 2023 concerning the Criminal Code (new Criminal Code) will certainly have an impact on the implementation of criminal law in Indonesia. Where the law regulates new things that were not yet known in the old Criminal Code. One of the new regulations in question is the principle of rechterlijk pardon which is regulated in Article 54 paragraph (2) with the following wording "The lightness of the act, the personal circumstances of the perpetrator, or the circumstances at the time the crime was committed and what happened later can be used as a basis for consideration not to impose a penalty or not to impose action by considering aspects of justice and humanity" (Criminal Code, 2023). This principle allows the judge not to sentence the perpetrator even though the person concerned has been proven legally and convincingly guilty of committing a crime on condition that the elements in Article 54 paragraph (2) are met. Regarding the purpose of criminal punishment in the new Criminal Code, it is regulated in Articles 51 and 52, where Article 51 states that the purpose of criminal punishment is to:[5]

(1) Preventing criminal acts by enforcing legal norms for the protection and care of society.

(2) Socializing convicts by providing guidance and mentoring to make them good and useful people.

(3) Resolving conflicts caused by criminal acts, restoring balance, and bringing a sense of peace and security to society.

(4) Cultivate a sense of regret and free the convict from guilt

In addition to the objectives mentioned in Article 51 of the new Criminal Code, another objective of criminal punishment is to protect human dignity, as regulated in Article 52 which states that criminal punishment is not intended to degrade human dignity.[6]In order to realize the purpose of the punishment, the new Criminal Code regulation includes matters related to the guidelines for punishment. These guidelines are used, especially for judges as law enforcement officers who are given the authority to impose criminal decisions. In relation to the guidelines for punishment, they have been regulated in Articles 53 to 56 of the new Criminal Code. Reform in criminal law renewal basically means that there are efforts to reorient and renew criminal law that supports social policies, cultural policies, criminal policies, and law enforcement policies in Indonesia.[7]Efforts to form a new Criminal Code that is in accordance with the values of Indonesian society have given birth to several new

[4]Yosuki dan Dian Andriawan Daeng Tawang, 2018, "Kebijakan Formulasi Terkait Rechterlijk Pardon (Permaafan Hakim) Dalam Pembaharuan Hukum Pidana di Indonesia", *Jurnal Hukum Adigama Volume 1 Nomor 1*, p. 1-25
[5]Article 51 of Law Number 1 of 2023 concerning the Criminal Code
[6]Article 52 of Law Number 1 of 2023 concerning the Criminal Code
[7]Khilmatin Maulidah dan Nyoman Serikat Putra Jaya, 2019, "Kebijakan Formulasi Asas Permaafan Hakim Dalam Upaya Pembaharuan Hukum Pidana Nasional", *Jurnal Pembangunan Hukum Indonesia Volume 1 Nomor 3*, p. 285

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concepts that are not found in the old Criminal Code. Among these new concepts is related to judicial forgiveness (rechterlijk pardon) which is regulated in Article 54 Paragraph (2) of Law Number 1 of 2023 concerning the Criminal Code.[8]

The concept of judicial pardon is regulated in Article 54 paragraph (2) of Law Number 1 of 2023 concerning the Criminal Code. This article regulates the qualifications for imposing a judicial pardon as a basis for a judge to decide whether or not to impose a criminal penalty if the defendant's actions are included in the scope of the crime. The basis for the judge's consideration is the lightness of the act, the personal circumstances of the person committing the crime, and the circumstances at the time the crime occurred or what happened afterwards. These qualifications can be the basis for a judge's decision not to impose a criminal penalty or not by considering aspects of justice and humanity.[9] The concept of Judicial Pardon can be one of the ideas applied in the reform of criminal law renewal in Indonesia, especially to renew the type of legal protection from the original rigid and strict to more flexible. In addition, the implementation of Judicial Pardon can also be used to change criminal law that prioritizes suffering, or other negative consequences to criminal law that is oriented towards restorative justice in accordance with the purpose of punishment in Article 51 of the New Criminal Code.[10] The concept of Judicial Pardon, on the one hand, can indeed set aside the principle of legal certainty. However, this concept of Judicial Pardon needs to be applied in order to reform criminal law to be more flexible. Judicial Pardon needs to be applied to encourage the realization of legal justice in judges' decisions if through the application of existing laws it will actually harm the sense of justice of the community. There needs to be a limitation in the application of Judicial Pardon because this concept is only applied as an alternative when the imposition of a criminal sentence will cause injustice. The limitation is in the form of a judge's consideration as regulated in Article 54 Paragraph (2) of the new Criminal Code.

2. Research Methods

The approach method in this research is by using the legislative approach, conceptual approach and case approach/comparative approach. In this type of legal research, law is conceptualized as what is written in legislation or law is conceptualized as a rule or norm which is a benchmark for human behavior that is considered appropriate.[11]

3. Results and Discussion

3.1. Implementation of Judicial Pardon in the Current Reform of the Criminal Justice System

[8]Anisa Fitri Wibowo, Azriel Viero Sadam dan Muhammad Ramadavin, 2023, "Implikasi Pasal *Living law* dalam Undang-Undang Kitab Undang-Undang Hukum Pidana Terbaru Terhadap Kehidupan Masyarakat", *Jurnal SELISIK Volume 9 Nomor 1 June 2023*, p. 121

[9] hhttps://nasional.kompas.com/read/2018/05/08/06060061/konsep-pemaafan-di-rkuhp-dinilai-perlu-diatur-agar-tak-disalahgunakan, accessed on October 9, 2023 at 17.59 WIB

[10]Adery Ardhan Saputro, 2016, "Konsepsi Rechterlijk Pardon Atau Permaafan hakim Dalam Rancangan KUHP", *Jurnal Mimbar Hukum Volume 28 Nomor 1 February 2016*, p. 61

[11]Amiruddin dan H. Zainal Asikin, 2006, *Pengantar Metode Penelitian Hukum*, Jakarta:PT. Raja Grafindo Persada, p. 118

The Indonesian criminal law currently in force is a legacy of the Dutch (HetWetboek van Stafrecht) based on Law Number 1 of 1946, the criminal law in force in the Dutch East Indies became the Indonesian criminal law (KUHP).[12]This Dutch legacy law is very far behind the development of society and the need for better criminal law. Especially those related to criminalization, it is currently considered unsatisfactory to society. This has triggered a number of thoughts to make alternative efforts in answering problems related to handling criminal acts.

The problems surrounding the development of the current criminal justice system show that this system is considered no longer able to provide protection for human rights and transparency for the public interest. Its individualistic and formal procedural criminalization system has ignored the reality of the value of peace so that it is not used as a basis for the elimination of criminal penalties. The State's interest in resolving criminal cases is very large and strong to punish even though the Perpetrator and Victim have reconciled. It is as if the State would be guilty if the Perpetrator who has been forgiven and compensated the Victim's losses has his criminal penalty removed. The Criminal Code does not pay attention to the existence and application of the philosophy of deliberation and consensus (based on Pancasila) in peace as the basis for resolving conflicts between citizens, both individual and public order.

If the philosophy of punishment that ignores peace is allowed to continue, it is feared that there will be a shift in the legal culture in society. The culture of the Indonesian nation, which was originally a friendly nation, liked to socialize and like peace, is very unfortunate if this nation has become an emotional and selfish nation because the law does not place peace as an elimination of punishment. Based on the formulation in the fourth paragraph of the opening of the 1945 Constitution, it can be seen that there is a goal of protecting society (*social defense*) and public welfare (*social welfare*), which must be reflected in the objectives of national development. In addition to the need to harmonize the development of universal law for the sake of legal order between nations in the era of multidimensional globalization. Thus, there are two objectives that criminal law wants to achieve, namely community protection and community welfare. These two objectives are the cornerstone (*corner stone*) of criminal law and criminal law reform.

According to Al Wisnubroto and Widiartana, criminal law reform includes material criminal law and criminal procedure law and criminal enforcement law. The author argues that the meaning of criminal law reform is to follow the development of the times because the essence of criminal law is to follow the dynamics of increasingly complex crimes, this is in accordance with the adage het recht hinkt achter de feiten ann (the law is always behind the events).[13]

According to Satjipto Rahardjo, resolving cases through the judicial system that culminates in a court verdict is a law enforcement towards the slow lane. This is because law enforcement is through a long distance, through various levels starting from the Police, Prosecutor's Office,

[12]Kesatu, B., Umum, A., & Isi, D. (n.d.). *Kitab Undang-Undang Hukum Pidana (KUHP)*
[13]Wisnubroto, A & Widiartana, G. (2005). *Pembaharuan Hukum Acara Pidana*. p.60

District Court, High Court, even to the Supreme Court. In the end, it has an impact on the accumulation of cases that are not small in number in court.

Criminal law is ultimum remidium, which means a last resort taken when there are no other efforts to resolve the case.[14]To obtain legal certainty and protection of human rights, the law must also experience changes in form and content in accordance with the development of society. In the context of legal reform, the law can also make changes in the law itself.[15]There is a concept *Legal Pardon* (Judge's Forgiveness), then the judge in justifying the punishment of a person, the judge must consider the crime, the mistake and the purpose and guidelines of the punishment. If the judge considers that the person should not be sentenced to punishment, then the judge forgives the perpetrator of the crime. According to Chairul Huda, this principle of judicial forgiveness can be imposed as long as the judge is of the view that the weight of the defendant's mistake is sufficient, without having to further determine a certain time sentence, in fact it can only be implemented in certain cases and is a trivial case. Several other cases have occurred and are related to the application of the Principle of Legal Pardon in several case examples as follows:

1. The case of Samhudi, a teacher at Raden Rahmat Middle School who pinched his student, in which case the judge sentenced him to 3 months in prison.
2. Grandma Minah, who stole 3 cocoa or chocolate fruit from the PT Rumpun Sari Antan plantation, in this case the judge sentenced her to 1 month and 15 days in prison with a probation period of 3 months.
3. In the case of Kolil and Suyanto who stole watermelon in Kediri, the judge sentenced them each to 15 days in prison with a probation period of 1 month.

Law is a code that regulates human existence and must also be used as a way to achieve justice.[16]In the Republic of Indonesia Law Number 1 of 2023 concerning the Criminal Code, there is a principle that is directly stated in one of the Articles of the Criminal Code, namely concerning the Principle *Legal Pardon* (judge's forgiveness) is stated in the Criminal Code in Article 54 paragraph (2) part of the sentencing guidelines as follows "The lightness of the act, the personal circumstances of the perpetrator, or the circumstances at the time the act was committed or which occurred later can be the basis for consideration not to impose a penalty or to impose measures by considering aspects of justice and humanity". The article above is in accordance with what discusses the purpose of sentencing, Article 51 paragraph 1 of the Republic of Indonesia Law Number 1 of 2023 concerning the Criminal Code, namely:[17]

1. Prevent criminal acts by enforcing legal norms for the protection and care of society.
2. Socializing convicts by providing coaching and guidance to make them good and useful people.

[14]Rahardjo, S. (2003). *Sisi-Sisi Lain dari Hukum di Indonesia*. Kompas, Jakarta, p.32
[15]Rendra, K. . (2016). Diversi dan Pelaku Kecelakaan Lalu-lintas. *DIH Jurnal Ilmu Hukum*.Vol.1, No.1.
[16]Rezki, M. A. . . (2021). Implementasi Konsep Restorative Justice Dalam Penyelesaian Tindak Pidana Perspektif Hukum Pidana Islam. *DIH Jurnal Ilmu Hukum*, 2021, Universitas 17 August 1945 Surabaya
[17]Kesatu, B., Umum, A., & Isi, D. (n.d.). *Kitab Undang-Undang Hukum Pidana (KUHP).* Jakarta, P.21

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3. Resolving conflicts arising from criminal acts, restoring balance and bringing a sense of security and peace to society and 4. Cultivating a sense of regret and freeing the convict from guilt.

In Article 52 and Article 53 paragraphs 1 and 2 of the Republic of Indonesia Law Number 1 of 2023 concerning the Criminal Code, it states that criminalization is not intended to degrade human dignity, in trying a criminal case, the judge is obliged to uphold the law and justice. If in upholding 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.

Principle *Legal Pardon* This was originally only used in the Netherlands by revising *Wetbook van Strafrecht Nederland* and include it in Article 9a which reads

"de rechter kan in het vonni bepalen dat geen straf of maatregel zal worden opgeled, wanner hij dit raadzaam acht vanwege het gebrek aan zwaarte van de overtreding, het character van de dader of de omstandigheden die gepaard gaan met het plegen van de overtreding of daarna". (In his decision, if the judge believes that the act is minor, then the perpetrator's personality or the circumstances at the time the act was committed, and if he shows exemplary behavior, then the judge in his decision decides that no criminal penalty or action will be imposed).

Legal Pardon is a new institution that gives judges the authority to pardon someone who is guilty of committing a minor (not serious) crime, and/or has minor circumstances for their actions. *Legal Pardon* or forgiveness by the judge is also known as*non imposing of penalty, Judicial Pardon* or dispensa de pena is where a defendant is proven guilty, but is not sentenced by the Panel of Judges. The meaning of *Rechterlijk Pardon/Imposing of Penalty/dispensa de pen* has the same goal, namely to declare that someone has been proven legally and convincingly, but does not impose a criminal sentence, even though the philosophical meaning of *non imposing of penalty* not necessarily based on the judge's concept of forgiveness (it could be based only on the issue of short imprisonment) but all three have the same intention of not imposing a sentence even if the defendant is proven guilty.

The background to the inclusion of the concept of Rechterlijk Pardon, according to Prof. Nico Keizer, is that many defendants have actually fulfilled the requirements of proof, but if a punishment is imposed, it will be contrary to the sense of justice.[18]From the explanation above, it can be seen that Article 9A of the Dutch WvS is essentially a "sentencing guideline" which is based on the idea of flexibility to avoid rigidity. It can also be said that the existence of the judge's forgiveness guideline functions as a safety valve (*veiligheidsklep*) or emergency door (*noodeur*).

Currently, the Criminal Code in force does not regulate any general provisions regarding the possibility of forgiveness by a judge because in the process of deciding a case, it is only possible for the panel of judges to issue a verdict in the form of a criminal sentence, an acquittal, and a release. However, in Law of the Republic of Indonesia Number 1 of the

[18]Keizer, Nico dan Schaffmeister, 1990, *Beberapa Catatan Tentang Rancangan Permulaan 1998 Buku I KUHP Baru Indonesia*, Driebergen/ Valkenburg, Belanda.

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Criminal Code concerning the Criminal Code, there is a Judge's pardon guideline (Rechterlijk Pardon) in Article 54 of the Criminal Code:

1. In sentencing, the following must be taken into consideration:
a. Form of guilt of the perpetrator of the crime;
b. Motives and objectives for committing a crime;
c. The mental attitude of the perpetrator of the crime;
d. Criminal acts are committed with or without planning;
e. How to commit a crime;
f. The perpetrator's attitude and actions after committing a crime;
g. Life history, social circumstances and economic circumstances of the perpetrator of the crime;
h. The impact of criminal penalties on the future of perpetrators of criminal acts;
i. Impact of Criminal Acts on Victims or Victims' families;
j. Forgiveness from the Victim and/or the Victim's family; and/or;
k. Legal and justice values that exist in society;

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 afterwards can be used as a basis for consideration not to impose a criminal penalty or not to impose measures by taking into account aspects of justice and humanity. Article 70 (1) A prison sentence should not be imposed if the following circumstances are found:
1. The defendant is a child;
2. The defendant is over 75 (seventy five) years old;
3. The defendant has committed a crime for the first time;
4. The losses and suffering of the victims are not too great;
5. The defendant has paid compensation to the victim;
6. The defendant did not realize that the crime he committed would result in major losses;
7. Criminal acts occur due to very strong incitement from other people;
8. The victim of the crime encouraged or motivated the crime to occur;
9. The crime is the result of a situation that is unlikely to be repeated;
10. The defendant's personality and behavior convince him that he will not commit another crime;
11. Imprisonment will cause great suffering for the accused or his family;
12. Guidance outside of correctional institutions is expected to be successful for the defendant;
13. Imposing a lighter sentence will not reduce the serious nature of the crime committed by the defendant;
14. Criminal acts occur within the family;
15. Criminal acts occur due to negligence;

Exceptions to Article 70 (2):
1. Criminal acts punishable by imprisonment of 5 (five) years or more;
2. Criminal acts that are subject to special minimum penalties;
3. Certain criminal acts that are very dangerous or detrimental to society; or

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4. Criminal acts that harm the country's finances or economy.

The principle of judicial forgiveness or Rechterlijk Pardon is currently at the stage of formulation of the Criminal Code, which is regulated in Article 51 and Article 54 of the Criminal Code. The concept of judicial forgiveness has actually been carried out for a long time and is spread across various regions in Indonesia. This concept appears in various forms of implementation in Indonesian society, where it can be concluded that forgiveness in indigenous communities does not immediately eliminate criminal acts, there are still sanctions given but these sanctions are not only for the benefit of victims and perpetrators but also to restore the balance that has been damaged due to criminal acts.

There is a concept *Legal Pardon* (Judge's Forgiveness), then the judge in justifying the punishment of a person, the judge must consider the crime, the mistake and the purpose and guidelines of the punishment. If the judge considers that the person should not be sentenced to punishment, then the judge forgives the perpetrator of the crime. That according to Dr. Yovita Arie Mangesti, SH. MH., reflection of just and civilized Human Values as a moral standard "Judge's Forgiveness "Principles of legal morality in practice Judge's Forgiveness:
1.*Conscience*: Listen to your conscience
2.*Beneficence*: Do only what is useful
3.*Vulnerability principle* : Support for the vulnerable
4.*Harmony*: Justice as social harmony

Judge's Forgiveness (*Legal Pardon*) aims to produce justice (*justice*), recovery (*restorative*) to the perpetrators and victims, peace (*peace*) to all parties involved in the circle of causality of crime, and placing punishment as the last alternative (*ultimate remedy*).

Flexibility based on morality, solely to make the Indonesian nation a just and civilized nation, not for the arrogance of "power". Philosophically, the forgiveness of judges in the criminal justice system in Indonesia is based on the perspective of ontology, epistemology and axiology. In the perspective of ontology, it can be explained that in terminology forgiveness is also known as "*forgiveness", "pardon", "mercy", clemency", "indemnity*", And "*amnesty"*does not have a rigid (flexible) meaning, in general it can be interpreted as forgiveness for actions that are contrary to the legality of legislation, on the basis of justice in society. Jan Remmelink is of the opinion that the provisions regarding*Legal Pardon* was initially covered in the Dutch Criminal Procedure Code which can be interpreted as a statement of guilt, without the imposition of a criminal penalty in the form of pardon (forgiveness) by/on the authority of the cantonal judge (low-level judge). According to Andi Hamzah in the concept of Rechterlijk Pardon if an act is a crime but is socially insignificant, then there is no need to impose a criminal penalty or action.[19]
Furthermore, Pardon in Black's Law Dictionary is defined as*"The act or an instance of officially nullifying punishment or other legal consequences of a crime*". Furthermore, in the perspective of epistemology, this judicial forgiveness can be explained by using teachings/schools in philosophy, namely the teachings of the philosophy of natural

[19]Andi Hamzah, 2018, *Hukum Acara Pidana Indonesia*, Jakarta : Sinar Grafika, p.21

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law/natural law which emphasizes the issue of morality and the teachings of the philosophy of historical law which emphasizes the culture of the nation and the teachings of the philosophy of Pancasila which emphasizes Pancasila as the philosophy of life of the Indonesian nation. Furthermore, the philosophy of judicial forgiveness can also be found in various norms, including legal norms, religious norms and customary norms. Furthermore, in the perspective of axiology, the relationship to judicial forgiveness according to the context of axiology is that by including judicial forgiveness as part of one of the decisions, it will benefit the perpetrator, victim, society and the state. The existence of the values of forgiveness can be found in various norms, including religious norms, customary norms and legal norms. In practical terms, seen from Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code, the regulation of *Legal Basis* cannot only be regulated in the Criminal Code which only contains material criminal law, but also regulations *Legal Basis* must also be harmonized with the Draft Criminal Procedure Code in the future. So that the article on the judicial pardon institution can be implemented in real terms in accordance with the Pancasila philosophy above. Therefore, the provisions regarding criminal penalties contained in the judge's decision are more in conflict with formal criminal law (KUHAP).

Currently, judges have three possibilities when deciding a case according to the Criminal Procedure Code:
1. Criminalization or imposition of criminal penalties (verrordeling);
2. Acquittal (*free speech*);
3. Decision to be released from all legal charges (*the burden of law enforcement*);

Legal considerations are the basis of the judge's argument in deciding a case. If the legal argument is incorrect and improper, then the majority of the public can then judge that the decision is unfair. In the development of the theory of punishment associated with the judge's decision, in recent years it has received quite sharp criticism from criminal law experts. Because it is not uncommon for the judge's decision to be considered contrary to the meaning of justice because the decisions are solely based on the principle of legality.

This legality principle often positions judges as rigid and inflexible law enforcers. The existence of substantive questions regarding the reality of law in Indonesia clearly shows a disparity between what we as a society demand or expect in the substance of Indonesian law (das sollen) and the objective substantive facts in the reality of Indonesian law itself (das sein). Therefore, what is important is not only what the public knows about justice in the imposition of criminal sentences, but what they should know about justice in the imposition of criminal sentences. Regarding the disparity of judges' decisions in criminal trials which are suspected of hindering the purpose of punishment, according to Harkristuti Harkrisnowo, this criminal disparity is actually legitimate, because the law itself has given judges extraordinary decision-making authority. However, in the context of the application of the concept of judicial forgiveness (rechterlijk pardon), the judge's orientation in making decisions is carried out in order to realize this concept which must also be harmonized with the purpose of punishment, so that criminal disparity can be avoided. Some countries in the world have actually "applied" the first principle of Pancasila in their criminal justice system, even though these countries are based on secularism.

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These countries include France, the Netherlands, Greece, Greenland, Somalia, Uzbekistan and Portugal, have implemented a concept regarding the institution of forgiveness (Rechterlijk Pardon). Even the Netherlands itself as the country of "origin" of the Criminal Code and Criminal Procedure Code has implemented provisions regarding rechtelijk pardon since 1983 or only 2 (two) years since the enactment of the Criminal Procedure Code in Indonesia. In essence, this "institution" is a "sentencing guideline" which is based on the idea of flexibility to avoid the rigidity of the decision to be issued by the panel of judges. It can also be said that the existence of the judge's forgiveness guideline functions as a safety valve (veiligheidsklep) or emergency door. In addition, according to Andi Hamzah, 1 "that rechterlijk pardon in Article 9a WvS (Dutch Criminal Code), the Judge may not impose a sentence or significant action, the judge may also impose a sentence. This is the influence of the subsocial understanding (subsocialiteit).

According to this understanding, if an act is a crime, but is socially insignificant, then there is no need to impose a criminal penalty or action. Initially, the element of subsociality emerged in socialist countries such as China and Russia. In another view, the purpose of the Rechterlijk Pardon is not only to avoid the imposition of short prison sentences, but also to prevent unjustified/unnecessary punishments seen from the perspective of need, both the need to protect society and to rehabilitate the perpetrator. Thus, the purpose of the existence of the judicial pardon institution is twofold, namely: 1. In the context of an alternative short prison sentence (alternative penal measures to imprisonment) 2. Judicial correction to the principle of legality (judicial corrective to the legality principle).

In line with the preparation of the New Criminal Code Concept (RKUHP) which aims to replace the existing Criminal Code, because it is suspected that the basic ideas/concepts of thought and philosophical values during its preparation are no longer in accordance with the basic ideas/concepts of thought of Pancasila, whose interweaving of ideas in each of its principles reflects the Values of Divinity, Humanity and Community Values. In the end, the RKUHP has included regulations on the institution of judicial pardon. The September 2015 edition of the RKUHP has included the institution of pardon in the criminal justice system, according to Article 56 paragraph (2) of the RKUHP which reads: "The lightness of the act, the personal circumstances of the perpetrator, or the circumstances at the time the act was committed or which occurred subsequently, can be used as a basis for consideration not to impose a criminal penalty or to impose measures by considering aspects of justice and humanity".

This regulation provides the possibility of not imposing a criminal penalty on a defendant who has been proven to have committed a crime, even though it does not explicitly state that there is a decision in the form of a Rechterlijk Pardon (judge's forgiveness). However, there are several limitations so that the panel of judges can issue a decision in the form of a rechterlijk pardon, namely:
1. The lightness of the act;
2. The lightness of the personal circumstances of the maker and/or;
3. The lightness of the circumstances at the time the act was committed or which occurred subsequently; and;

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4. By considering aspects of justice and humanity;

However, in practical terms, seen from the existing Criminal Code, the regulation of rechterlijk pardon cannot only be regulated in the Criminal Code which only contains material criminal law, but the regulation of rechterlijk pardon must be harmonized with the Criminal Procedure Code 46 in the future. So that the article on the institution of judicial pardon can be implemented in real terms in accordance with the Pancasila philosophy above. Therefore, the provisions regarding criminal penalties contained in the judge's decision are more in contact with formal criminal law (KUHAP). So that in reality in the Draft Criminal Procedure Code, the Panel of Judges in a criminal case in Indonesia, based on the case, can only provide a limited verdict in 4 (four) types of decisions, namely:

1. Criminalization or imposition of criminal penalties (veroordeling);
2. Free verdict (vrijspraak);
3. Decision to be released from all legal claims (onslag van recht vervolging).
4. Judge's Pardon Decision (rechterlik Pardon)

The criminal sentencing process cannot be separated from the legal process that precedes it, starting from the investigation, inquiry, prosecution, to the examination before the trial. As the center of the criminal justice system, the court is tasked with testing the validity of the previous legal process. Meanwhile, in the context of criminal sentencing, the court considers a balance between the crime and criminal responsibility as a condition for sentencing.

The enactment of Law Number 1 of 2023 concerning the Criminal Code (new Criminal Code) will certainly have an impact on the implementation of criminal law in Indonesia. Where the law regulates new things that were not yet known in the old Criminal Code. One of the new regulations in question is the principle of rechterlijk pardon which is regulated in Article 54 paragraph (2) with the following wording "The lightness of the act, the personal circumstances of the perpetrator, or the circumstances at the time the crime was committed and what happened later can be used as a basis for consideration not to impose a penalty or not to impose action by considering aspects of justice and humanity" (Criminal Code, 2023). This principle allows the judge not to sentence the perpetrator even though the person concerned has been proven legally and convincingly guilty of committing a crime on condition that the elements in Article 54 paragraph (2) are met.

Talking about the principle of rechterlijk pardon in the new Criminal Code, of course it cannot be separated from the initial idea of its regulation which was apparently inspired by a similar regulation in article 9a of the Wetboek van Strafrecht (Dutch Criminal Code) which more or less translates as follows: "If the judge considers it appropriate due to the minor significance of an act, the personality of the perpetrator or the circumstances at the time the act was committed, as well as after the act was committed, he determines in the decision that no criminal or action will be imposed."[20]

[20] *Ibid*

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After looking at the wording of the two articles, the author found similarities, namely that both articles give the judge the authority not to sentence a defendant on the condition that the elements specified in the two articles are met. However, the author also found several differences between the principle of rechterlijk pardon in article 54 paragraph (2) (New Criminal Code) and article 9a of the Dutch Criminal Code, including:

a. Article 9a of the Criminal Code
The Netherlands uses the term “minority of the act” which refers to the impact of the crime. According to Andi Hamzah, the element of “minority of the act” in article 9a is influenced by the concept of subsociality (subsocialiteit) which explains that if an act is included as a crime but its impact is relatively small socially, then the perpetrator does not need to be given a sentence or action. Meanwhile, article 54 paragraph (2) uses the term “minority of the act” which refers to a crime of a minor nature. However, until now there has been no more specific explanation regarding the criteria for this minor crime, whether it is based on the criteria for minor crimes in general, the minimum prison sentence for serious crimes, the statute of limitations for prosecution for serious crimes, the meaning of serious crimes in Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System, or there is another basis used by the lawmakers (Academic Manuscript of the Draft Criminal Code);

b. In the provisions of Article 9a of the Dutch Criminal Code, judges are obliged to apply the principle of rechterlijk pardon when the elements in Article 9a have been fulfilled.
This can be seen from the use of the word "determine" which means to determine or ensure.[21]Meanwhile, Article 54 paragraph (2) of the New Criminal Code uses the word "can" in the wording of the article, which can be interpreted as permissible. So even though the elements in Article 54 paragraph (2) have been fulfilled, the judge still has the option to apply or not apply the principle of rechterlijk pardon to the case being handled even though the elements of Article 54 paragraph (2) have been fulfilled;

c. Article 9a of the Dutch Criminal Code does not include the elements of justice and humanity in its wording. Meanwhile, Article 54 paragraph (2) regulates the consideration of these two elements. Where the inclusion of the elements of justice and humanity in Article 54 paragraph (2) of the new Criminal Code is a manifestation of the implementation of Pancasila values, especially the 2nd (second) principle, into criminal law provisions.[22];

d. The regulation of the principle of legal pardon in Article 9a of the Dutch Criminal Code has been harmonized with the provisions of the procedural law in the Wetboek van Strafvorderingen (Dutch Criminal Procedure Code) in the form of the regulation of the legal

[21]Farikhah, M.. (2018). Rekonseptualisasi Judicial Pardon Dalam Sistem Hukum Indonesia (Studi Perbandingan Sistem Hukum Indonesia Dengan Sisitem Hukum Barat). *Jurnal Hukum & Pembangunan*, Vol. 48 (No.3), p. 556-588

[22]Yosuki, A. (2018). Kebijakan Formulasi Terkait Konsepsi Rechterlijke Pardon (Permaafan Hakim) Dalam Pembaharuan Hukum Pidana di Indonesia. *Jurnal Hukum Adigama*. 01- 25.

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pardon decision in Article 138 of the Dutch Criminal Procedure Code.[23](Marguery, 2018). Meanwhile, the regulation of the principle of legal pardon in Article 54 paragraph (2) of the new Criminal Code has not been accommodated in the current Criminal Procedure Code. On the other hand, the Draft Criminal Procedure Code (RKUHAP) has not yet accommodated the principle of legal pardon. This is evident in the types of decisions regulated in Article 187 of the RKUHAP which still consist of acquittal, acquittal and criminal decisions (RKUHAP).

e. Although the law regulating the principle of rechterlijk pardon has just been passed, in practice it turns out that the principle has been considered in several criminal case decisions. And because until now Indonesian criminal procedure law has not been able to accommodate the substance of the principle of rechterlik pardon as it should.

Apart from the period of these kingdoms, in modern times there are also countries that regulate the concept of pardon in their criminal law provisions and the Netherlands is the first country to regulate the concept of pardon in its criminal law provisions, specifically in Article 9a which is known as the principle of rechterlijk pardon.[24](Yosuki, 2018). The regulation of the principle of rechterlijk pardon in the Dutch Criminal Code which was carried out in 1984 was basically based on the rules of the Dutch Criminal Code in the previous period which were considered rigid, thus causing a conflict between the values of justice and the values of legal certainty in handling criminal cases in the Netherlands before 1984. At that time, it was often found that a defendant was proven guilty but if sentenced to a criminal sentence, it would actually harm the values of justice in society.[25]However, because at that time there were no other alternatives, the perpetrators were forced to be sentenced, even though it was very light.[26]

Since the principle of rechterlijk pardon is regulated in the Dutch Criminal Code, such conflicts can be minimized because judges are given the authority to forgive guilty defendants, so that justice can be realized even though it must set aside legal certainty. Thus, the implementation of the principle of rechterlijk pardon in a criminal case can be said to be a form of tolerance for the crimes committed by the perpetrator, and then functions to provide leniency to a person not to be punished or not to have to be punished.[27]

According to Prof. Nico Keijzer (a Dutch criminal law expert who was also a member of the team discussing the 1987 Indonesian Criminal Code Draft), the regulation of the principle of rechterlijk pardon in the Dutch Criminal Code is intended as a guideline for sentencing based

[23]Marguery, T. P. (2008). *Unity and diversity of the public prosecution services in Europe. A study of the Czech, Dutch, French and Polish systems.* Groningen: University of Groningen.
[24]Yosuki, A. (2018). Kebijakan Formulasi Terkait Konsepsi Rechterlijke Pardon (Permaafan Hakim) Dalam Pembaharuan Hukum Pidana di Indonesia. *Jurnal Hukum Adigama*. 01- 25
[25]Jatmiko, S. (2022). Rechterilijke Pardon (Pemaafan Hakim) Dalam Tindak Pidana Perpajakan. *HERMENEUTIKA*, Vol. 6 (No.1, February), p.120-133
[26]Saputro, A. A. (2016). Konsepsi Rechterlijk Pardon atau Pemaafan Hakim Dalam Rancangan KUHP. *Mimbar Hukum*, Vol. 28 (No.1, February), p. 69-79
[27]Hasibuan, S. M. (2021). Kebijakan Formulasi Rechterlijke Pardon Dalam Pembaharuan Hukum Pidana. *Jurnal Hukum Progresif*, Vol. 9 (No.2, October), p.111-122.

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on the idea of flexibility in order to avoid rigidity in the application of criminal law.[28]On the other hand, Prof. Nico also said that the principle of rechterlijk pardon also functions as an emergency door that can be used by judges when handling criminal cases that are likely to cause a conflict between the values of justice and the values of legal certainty.

In 1986, Prof. Nico Keijzer and Prof. Schaffmeister were invited to Indonesia as part of the Draft Criminal Code (RKUHP) response team. In the discussion that was held, the background of the drafting of the Indonesian RKUHP was discussed, one of the goals of which was to create a flexible criminal law product and reflect a balance between considering objective factors (actions/external) and subjective factors (people/inner/inner attitude) before imposing a sentence and/or imposing action.[29]

Hearing such an explanation, Prof. Nico Keijzer and Prof. Schaffmeister then provided views related to the principle of rechterlijk pardon regulated in article 9a of the Dutch Criminal Code. After hearing the explanation from the two professors, the drafting team of the RKUHP led by Mardjono Reksodiputro began to conduct studies related to the relevance of the principle of rechterlijk pardon with the background of the drafting of the RKUHP. In 1987, the team finally agreed to include the regulation of the principle of rechterlijk pardon in the RKUHP.

As a result of the discussions that have been carried out, the principle of rechterlijk pardon was first regulated in Article 52 paragraph (2) of the 1991 edition of the Criminal Code Bill and was most recently included in Article 54 paragraph (2) of the September 2019 edition of the Criminal Code Bill. On January 2, 2023, the Criminal Code Bill was officially enacted through Law Number 1 of 2023 concerning the Criminal Code (New Criminal Code). Regarding the background of the regulation of the principle of rechterlijk pardon in Indonesian criminal law, in short, Prof. Barda Nawawi Arief tried to explain it into several points, including:[30]
a. Prevent absolutism of punishment by positioning the principle of legal pardon as a "safety valve" (veiligheidsklep);
b. As a means of correcting the legality principle (Judicial corrective to the legality principle) which is one of the main principles in the implementation of criminal law in Indonesia;
c. As a means of integrating the values of "wisdom of wisdom" of Pancasila into the practice of enforcing Indonesian criminal law. Because in the provisions of current Indonesian criminal law, sentencing is no longer based solely on the existence of a crime and guilt, but also considers the purpose of sentencing. If the imposition of a sentence can be a means to realize the purpose of sentencing, then a sentence is imposed. Likewise, if the imposition of a sentence is unable to be a means to realize the purpose of sentencing, then the implementation of the principle of rechterlijk pardon in the criminal case in question can be an alternative that can be chosen. Although based on the results of the evidence in court, the

[28]Saputro, A. A. (2016). Konsepsi Rechterlijk Pardon atau Pemaafan Hakim Dalam Rancangan KUHP. *Mimbar Hukum,* Vol. 28 (No.1, February), p. 69-79
[29]Badan Pembinaan Hukum Nasional. (2019). Draf Naskah Akademik Rancangan UndangUndang tentang Kitab Undang-Undang Hukum Pidana (KUHP). Jakarta: Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia
[30]Hasibuan, S. M. (2021). Kebijakan Formulasi Rechterlijke Pardon Dalam Pembaharuan Hukum Pidana. *Jurnal Hukum Progresif*, Vol. 9 (No.2, October), p.111-122.

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defendant has been proven legally and convincingly guilty of committing a crime. This choice can be taken by the Judge/Panel of Judges examining the case solely for the purpose of realizing the purpose of sentencing which is one of the main focuses in Law Number 1 of 2023; d. Means of realizing the "purpose of punishment" as one of the conditions of punishment (before imposing a sentence or granting a pardon, the judge must consider the purpose of punishment);

The principle of legal pardon is regulated in Article 54 paragraph (2) of the New Criminal Code with the following wording: "The lightness of the act, the personal circumstances of the perpetrator, or the circumstances at the time the crime was committed and what happened later can be used as a basis for consideration not to impose a criminal penalty or not to impose action by considering aspects of justice and humanity". Then in the explanation section it is also explained that "The provisions in this paragraph are known as the principle of legal pardon or judicial pardon which gives the judge the authority to forgive someone who is guilty of committing a minor crime. This forgiveness is stated in the judge's decision and must still be stated that the defendant is proven to have committed the crime charged against him".

Based on the wording of Article 54 paragraph (2) and its explanation, it can be seen that the judge can grant forgiveness to the perpetrator who is proven guilty and then not impose a sentence on him. However, such a regulation in further developments will raise the question of what type of decision will result from the judge's forgiveness to the perpetrator who is proven guilty. If the perpetrator is given an acquittal (vrij spraak) then this will contradict the understanding of the acquittal itself which can only be imposed if the perpetrator is proven not guilty (Article 191 paragraph (1) of the Criminal Procedure Code). Meanwhile, in cases where the principle of rechterlijk pardon is applied, the perpetrator has been proven guilty but the judge grants forgiveness (Article 54 paragraph (2) of the New Criminal Code). Then if the perpetrator is given a verdict of acquittal from all legal charges (onslag van recht vervolging) it is also not the right choice because an acquittal can only be imposed when the perpetrator is proven to have committed an act, but the act is not a criminal act (Article 191 paragraph (2) of the Criminal Procedure Code). Meanwhile, in cases where the principle of legal pardon is applied, the perpetrator is proven to have committed a crime but the judge pardons him (Article 54 paragraph (2) of the New Criminal Code). Finally, if the perpetrator is sentenced to a criminal sentence (veroordeling tot enigerlei sanctie), it will certainly conflict with the criteria of the verdict itself which requires the judge to impose criminal sanctions on the defendant who is proven guilty (Article 193 paragraph (1) of the Criminal Procedure Code). Because if the imposition of criminal sanctions is not included in the verdict with the aim of being in accordance with the principle of legal pardon, then this will result in the verdict being null and void by law (Article 197 paragraph (1) of the Criminal Procedure Code).

From the description above, it can be concluded that the types of decisions regulated in the Criminal Procedure Code are not in accordance with the principle of rechterlijk pardon. Turning to the Draft Criminal Procedure Code (RKUHAP). almost the same as the Criminal Procedure Code, article 187 of the RKUHAP also classifies criminal case decisions into 3 (three) types, namely an acquittal (vrij spraak) (article 187 paragraph (2) of the RKUHAP), a decision of release from all legal charges (onslag van recht vervolging) (article 187 paragraph (3) of the

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RKUHAP) and a criminal decision (veroordeling tot enigerlei sanctie) (article 187 paragraph (1) of the RKUHAP). After considering the wording of article 187 paragraph (2), the author concludes that the wording of this article is still the same as the wording of article 191 paragraph (1) of the Criminal Procedure Code which regulates the acquittal. Then Article 187 paragraph (3) of the Criminal Procedure Code which regulates the acquittal verdict, has a slightly different wording to the wording of Article 191 paragraph (2) of the Criminal Procedure Code. Where Article 191 paragraph (2) regulates that if the defendant's actions are proven but not a criminal act, the defendant is acquitted. While Article 187 paragraph (3) states that an acquittal verdict can be imposed if a reason is found that can eliminate the criminal penalty.

According to the author, the decision resulting from the application of the principle of rechterlijk pardon can be included in the type of acquittal decision with the addition of one article explaining that the principle of rechterlijk pardon is included as one of the reasons for the elimination of criminal penalties in addition to the reasons for forgiveness and justification that have been regulated in the Criminal Procedure Code.

Based on the study that has been conducted, the author knows that Dutch criminal procedure law regulates 4 (four) types of decisions, namely:
a. Sentencing decision (Veroordeling Tot Enigerlei Sanctie);
b. Decision of acquittal from all charges (Vrijspraak);
c. A verdict of acquittal from all charges brought against him (Ontslag Van Rechtsvervolging);
d. Judge's forgiveness decision (Rechterlijk Pardon).

Due to such regulations, the practice of implementing the principle of rechterlik pardon in the Netherlands will not experience difficulties like in Indonesia. Because the Dutch Criminal Procedure Code has specifically regulated the types of decisions resulting from the application of the principle of rechterlijk pardon in criminal cases. In addition, with such regulations, it also provides more legal certainty in the application of the principle of rechterlijk pardon. Because the implementing regulations (formal law) are available, so that the principle of rechterlijk pardon (material law) can be implemented as the original purpose of its creation. Although the principle of rechterlijk pardon is needed in the practice of implementing criminal law in Indonesia, there are several things that need to be considered, including:

1. It has been discussed previously that the principle of rechterlijk pardon regulated in the New Criminal Code gives judges the freedom to apply or not apply the principle in the criminal cases being handled. This can be seen from the use of the word "can" in the wording of the article. On the one hand, such a regulation will support the independence of judges in handling cases if the judge in question has high integrity. However, the results will be different if used by a judge who does not have integrity. So it is not impossible that the resulting decision will be discriminatory and biased;
2. There are ambiguous article wordings such as the sentences “lightness of the act” and “principles of justice and humanity”. Where these abstract sentences are not further explained in the explanation of the article. So that such ambiguity is prone to giving rise to

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different interpretations in the practice of its application in the field which then may possibly give rise to differences in its application in various criminal case decisions;
Considering that the principle of legal pardon is a human-made legal product that is basically imperfect, then in its regulation and implementation in the field there will definitely be deficiencies. For this reason, cooperation is needed from all elements of society to oversee the implementation of the principle of legal pardon in handling criminal cases in Indonesia so that it can be in accordance with the initial purpose of its regulation in the provisions of Indonesian criminal law and so that the principle of legal pardon can function as a suggestion to minimize the imposition of unnecessary criminal sanctions;

3.2. Weaknesses in the Implementation of Judicial Pardon in the Reformation of the Criminal Justice System Based on Legal Certainty

1. Weaknesses of Legal Substantive Aspects

The legal basis for Judicial Pardon is contained in Article 54 (2) of Law Number 1 of 2023, namely the article on Judicial Pardon, which reads: "The lightness of the act, the personal circumstances of the perpetrator, or the circumstances at the time the crime was committed and what happened later can be used as a basis for consideration not to impose a criminal penalty or not to take action by considering aspects of justice and humanity."[31]The judicial pardon policy in the new Criminal Code seems to give judges the authority to refuse to sentence defendants who have been proven to have committed a crime. Although the verbis does not explicitly state that there is a decision on judicial pardon, the Panel of Judges can make a decision that is forgiving due to several rules. These restrictions are:[32]

a) The Lightness of Action

Article 54 (2) explains that minor crimes are considered minor. This provision is closely related to the categorization of types of crimes. It is stated otherwise, minor violations are violations in which the victim does not suffer adequate punishment. Furthermore, violations with a criminal threat have a maximum sentence of two years based on criminal penalties.[33]The following violations of the Criminal Code fall into the category of minor cases:[34]

- Article 373 minor embezzlement
- Article 379 minor fraud
- Article 482 light receiving
- Article 384 fraudulent acts by the seller, with the value of the loss being Rp. 250,- (two hundred and fifty rupiah)
- Article 352 Abuse that does not cause illness or obstacles to carrying out work or a career is considered as light abuse.
- Article 302 minor abuse of animals is punishable by a maximum imprisonment of three months or a maximum fine of three hundred rupiah.

This is emphasized in Article 205 (1) of the Criminal Procedure Code which states: "Those examined according to the examination procedure for minor crimes are cases which are threatened with imprisonment or detention of up to three months and/or a fine of up to seven thousand five hundred rupiah and minor insults except as specified in paragraph 2 of

[31]Law No. 1 of 2023 concerning the Criminal Code
[32]Muh. Iksan Putra Kai, dkk "*Asas Pemaafan Hakim*", p. 166-167
[33]Andi Hamzah, *Perbandingan Hukum Pidana Beberapa Negara*, (Jakarta: Sinar Grafika, 2008), p. 18
[34]Syamsul Fatoni, *"Pembaharuan Sistem",* p. 48

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this section."[35]Furthermore, the Supreme Court (MA) issued PERMA Number 2 of 2012 concerning Adjustment of the Limitation of Minor Crimes and the Amount of Fines in the Criminal Code. In Chapter I Minor Crimes Article 1 of the Criminal Code, the words "two hundred and fifty rupiah" were changed to Rp 2,500,000,- (two million five hundred thousand rupiah) in Articles 364, 373, 379, 384, and 482 of the Criminal Code.

b) Personal Circumstances of the Maker
This provision is similar to the one in Greece, namely related to the characteristics of the perpetrator mentioned above. This includes the perpetrator's mental attitude (mens rea), his age, his life history, his social and economic circumstances and the fact that the crime is a first offense and not a repeat offense.

c) The state at the time the act was committed or what happened subsequently
This provision is similar to the Judicial Pardon rule in the Netherlands. This rule relates to whether the crime was planned or not, the method and time of its implementation, and the attitude and actions of the perpetrator after committing the crime. This is supported by Article 70 (1) which states the conditions that form the basis for not imposing a prison sentence, including:[36]
1. The defendant is a child.
2. The defendant is over 70 years old.
3. The defendant has committed a crime for the first time.
4. The losses and suffering of the victims are not too great.
5. The defendant has paid compensation to the victim.
6. The defendant did not realize that the crime he committed would cause major losses.
7. The crime occurred due to strong incitement from another person.
8. The victim of the crime provoked or encouraged the crime to occur.
9. The crime occurred due to a situation that is unlikely to happen again.
10. The defendant's personality and behavior ensure that he will not commit another crime.
11. Imprisonment will cause great suffering to the accused or his family.
12. Guidance outside of correctional institutions is expected to be successful for the defendant.
13. Imposing a lighter sentence will not reduce the severity of the crime committed by the defendant.
14. Criminal acts occur within the family.
15. Criminal acts occur due to negligence.

d) Consideration of the aspects of justice and humanity
Judges must ensure that their decisions do not deviate from the judgments agreed upon by society.[37]This indicates that the new Criminal Code has undergone significant development, namely placing justice above legal certainty.

[35]Wirjono Prodjodikoro, *Asas-Asas Hukum Pidana di Indonesia*, (Bandung: Refika Aditama, 2009), p. 35
[36]Law Number 1 of 2024 concerning the Criminal Code
[37]W Van Gerven oleh Ahli Bahasa Hartini Tranggono, *Kebijaksanaan Hakim*, (Jakarta: Penerbit Erlangga, 1990), p. 64.

This provision is explicitly stated in Article 53 of the new Criminal Code, while the old Criminal Code tended to only prioritize legalistic aspects. However, when making a decision, the judge must pay attention to various things in accordance with Article 51 (1) of the New Criminal Code, namely:[38]

1. The level of guilt of the perpetrator of the crime
2. Motives and objectives for committing a crime
3. The intention of the perpetrator of the crime
4. Whether the crime was planned or not
5. How the crime was committed
6. The perpetrator's attitude and actions after committing a crime
7. Background, social and economic conditions of the perpetrator of the crime
8. The impact of criminal sanctions on the future of perpetrators of criminal acts
9. The impact of criminal acts on victims or victims' families
10. Forgiveness from the victim and/or victim's family
11. The value of law and justice that applies in society

In addition, Gunter Warda said, "Sicher isz zunàchst dass Ermessen kein freies Balieben bedeutet", which means that a judge must pay attention to the characteristics of the perpetrator, such as his age, level of education, male or female, place of residence, attitude as a citizen, and the circumstances of the act he committed.[39]The rules on Judicial Pardon aim to ensure the resolution of criminal cases based on aspects of justice and benefit.

The purpose of a Judicial Pardon is to prevent the imposition of short prison sentences and unnecessary or unjustified sentences in light of the need to protect society and rehabilitate the offender. Therefore, the institution of judicial pardon has two main purposes:[40]

1) In the context of alternative legal action of short imprisonment
2) Legal corrections to the principle of legality.

According to Barda Nawawi Arief, in the provisions of judicial pardon, the RKUHP does not provide definite limitations or criteria regarding the meaning of "minor acts". Actually, 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, a different view emerged from Barda Nawawi Arief, he argued that the absence of concrete regulation of the meaning of "minor acts" aims to not limit the judge's authority in issuing pardon decisions only for certain crimes.

In fact, the RKUHP does not explicitly provide qualifications regarding the weight of the crime. The RKUHP only regulates the qualification of the weight of the crime that is threatened with a fine as in Article 82 paragraph (3) of the RKUHP, namely dividing it into 5 (five) categories. However, there is no regulation that clearly categorizes crimes in the RKUHP into light or heavy crimes. However, according to Barda Nawawi Arief, in the working pattern of the

[38]Law No. 1 of 2023 concerning the Criminal Code

[39]Oemar Seno Adji, *Hukum Hakim Pidana*, (Jakarta Pusat: Penerbit Erlangga, 1984), p. 8

[40]Muhammad Rifai Yusuf, *Tinjauan Terhadap Konsep Pemaafan Hakim (Rechterlijk Pardon) Kaitannya Dengan Kepentingan Hukum Korban Tindak Pidana (Studi Konsep RKUHP 2019)*, Skripsi, p. 80-81. https://eprints.walisongo.ac.id/id/eprint/14325/1/1702056046_Muhammad%20Rifai%20Yusuf_Lengkap%20Tugas%20Akhir%20-%20Rivai%20Yusuf.pdf, accessed on September 27, 2024

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Criminal Code, there is still a qualification of the weight of the crime which can be a very light, heavy, and very heavy crime. The working pattern related to the qualification of the weight of the crime in the RKUHP can be written as follows:

1. very minor offense
   Offenses that are only threatened with a light fine (category I or II) individually. The offenses grouped here are offenses that were previously threatened with imprisonment/imprisonment of less than 1 (one) year or a light fine or new offenses that according to the assessment of their severity are less than 1 (one) year in prison.
2. serious crime
   Crimes which are basically punishable by imprisonment of more than 1 (one) year up to 7 (seven) years and accompanied by an alternative penalty of a fine in category III and IV.
3. very serious crime
   An offence which is punishable by imprisonment of more than 7 years or is punishable by a heavier penalty (death penalty or life imprisonment) individually, and the penalty can be accumulated with a category V fine.

Even though the working pattern related to the qualification of the weight of the crime in the RKUHP has been divided into three weights, the question remains "is the phrase lightness of the act in Article 56 paragraph (2) based on the division of the qualification of the crime?" There is no explicit regulation that stipulates that "lightness of the act" is interpreted from the magnitude of the value of the weight of the qualification of the crime. Whereas if it is based on the weight of the qualification of the crime, it still raises the question, is the qualification of a criminal act with a "lightness of the act" the same qualification as the category of a very light crime? The next problem is if the qualification of a criminal act with a "lightness of the act" is based on the categorization of a "very light crime", it still raises problems.

The problem is due to the lack of clarity in the RKUHP regarding the criteria for a crime to be categorized as a minor crime. As explained above, the types of crimes that are explicitly stated as minor in Book II of the RKUHP are Articles 543, 608, 617, and 614. Outside of these articles, there are actually many types of crimes that, when viewed from the maximum threat of punishment, are more or less the same as the crimes mentioned at the beginning. Such as Article 624 paragraph (1) which states:

"If the value of the profit obtained is not more than IDR 1,000,000.00 (one million rupiah), then the perpetrator of the crime as referred to in Article 623 shall be punished with a maximum imprisonment of 6 (six) months or a maximum fine of category II."

The term "considering aspects of justice and humanity" must be understood in the context of variations in the definition of justice taken from the Criminal Code (KUHP). However, Law No. 1 of 2023 attempts to align legal certainty with justice in criminal law through various existing articles. For example, Article 53 paragraph (1) of Law 1/2023 states that judges must uphold the law and justice in deciding criminal cases. Although this article does not describe in detail how to overcome the tension between legal certainty and justice, its substance emphasizes

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the priority of justice over legal certainty. In the context of criminal law, this relates to the concept of material unlawfulness and error in a normative context.

1. Weaknesses of Legal Structure Aspects

When judges experience a dilemma when making a decision, they can use Judicial Pardon, or the judge's forgiveness. When faced with minor cases that are delegated to judges to be examined, tried, and decided, the judge's conscience often cries out. So, there is anxiety and a difference between the voice of conscience about humanity and the enforcement of formal criminal law. Judges often experience inner conflict in cases of minor crimes. When they make an acquittal decision in this case, the decision will certainly conflict with the principle of legality that everyone who is proven guilty must be punished because they meet the elements of the article charged.

Part of the results of the comparison of national criminal law with criminal law in other countries then became the material for the renewal of Indonesian criminal law which was then outlined in the Draft Criminal Code. The judge can issue an acquittal against the defendant if his actions do not fulfill the elements of being against the law, issue an acquittal against the defendant if his actions do not constitute a crime and issue a prison sentence against a defendant if all elements of criminal responsibility are proven, so that it can be said to be a crime or in other words the defendant is proven guilty.

However, in the Draft Criminal Code 2016 concept there is an update where the judge can issue a verdict called judicial pardon (forgiveness by the judge) against the defendant who is clearly proven guilty of committing a crime. In this concept Based on certain considerations, the law gives the judge the authority to forgive or pardon the convict without imposing any criminal or action.

Law No. 1 of 2023 has regulated the existence of a pardon institution by judges in the criminal justice system. Article 54 paragraph (2) of Law No. 1 of 2023 states that "The lightness of the act, the personal condition of the perpetrator, or the circumstances surrounding the act at that time or afterward, can be used as a basis for consideration not to impose a criminal penalty or to impose measures by considering aspects of justice and humanity." This provision provides an opportunity for judges not to impose criminal penalties on defendants who are proven guilty, although this law does not explicitly use the term "judge's pardon" or rechterlijk pardon. However, there are several limitations that must be met before the panel of judges can decide to grant pardon.

Law No. 1 of 2023 has accommodated the regulation regarding the phrase 'minority of the act' as explained in Article 54 paragraph (2) through the provisions in Article 70. This provision can be linked to the term "minority of the act" as stated in Article 54 paragraph (2), especially in points c, g, and i. In this context, the term "minority of the act" is relevant to the provisions contained in Article 70 paragraph (2) of the RKUHP. This article provides a limitation that decisions taken based on a judge's pardon do not apply to criminal acts that are subject to imprisonment for five years or more, or to those who are subject to a special minimum sentence, as well as to certain criminal acts that are considered very dangerous to society or

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detrimental to the country's economy. Thus, judges are expected to assess each case individually in the process of applying a judge's pardon (rechterlijk pardon). Through this approach, the legal process can be more just by considering various factors related to the nature and impact of the crime committed. Individual assessment by the judge is important to ensure that each decision is taken by considering the context and conditions underlying the act.

2. Weaknesses of Legal Culture Aspects

After the United Nations Congress on Crime Prevention and Treatment of Offenders, the debate on criminal law underwent a major change. One of the developments that it made was a more "humanizing" approach to punishment for criminals by providing treatment rather than punishment. As mentioned above, the change in the approach to punishment prompted the idea of establishing a judicial pardon institution, also known as Judicial Pardon. The Indonesian criminal justice system has not yet used judicial pardon regulations. Various minor cases such as theft of cocoa, plates, sandals, and watermelons often receive disproportionate sentences and violate the principle of humanity in society. However, judicial pardon in Indonesia is included in the second principle of Pancasila, which is indirectly applied in several other countries. It is ironic that Indonesia has not yet implemented the second principle of Pancasila in its criminal system when other countries have. However, the way of life of these countries, which are mostly located in mainland Europe, is based on secularism. This is in accordance with the changes to Article 54 (2) of the Criminal Code, which reads as follows "The lightness of the act, the personal circumstances of the perpetrator, or the circumstances at the time the act was committed or which occurred later, can be used as a basis for consideration not to impose a criminal penalty or take action by considering aspects of justice and humanity".

In line with the ever-emerging hopes of the community for the achievement of Moral Justice, this has actually been previously thought of or expected to always be achieved by criminal judges. Judges recognize that there are two senses of justice that will apply after they make a decision or after imposing a sentence or criminal penalty on an individual member of society. The sense of justice of society and the sense of justice based on law. If the sense of justice based on law is considered by the judge to have been fulfilled through the decision he has issued, then it is not necessarily felt to be fair by the community, or even some say that the decision is truly unfair, and vice versa. Even though the judge's decision to sentence a perpetrator of a crime as lightly as possible, which according to the judge the decision is very appropriate, is still considered unfair by the defendant for various reasons.

3.3. Implementation of Judicial Pardon in the Reformation of the Criminal Justice System Based on Legal Certainty

The emergence of this new concept certainly requires further study where with this new concept various questions will arise not only about how it is implemented, what underlies the emergence of this concept, the suitability of this concept with the diversity and culture of Indonesian society, but also the judicial pardon model that can later be applied in Indonesia. The criminal justice system is one of the important instruments in efforts to protect human dignity through crime prevention and control mechanisms. In the process, efforts to prevent

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and control crime experience various obstacles and problems, ranging from the culture of law enforcement officers to the ineffectiveness of the sanctions system that has been created. That is what then gave rise to the abolitionist movement in several countries in Europe, in addition, among European academics, rejection is directed at the criminal justice system as a whole which sees the prison system as the repressive heart of the criminal justice system.
Lon Fullerin his book the Morality of Law put forward principles that must be fulfilled by law, which if not fulfilled, then the law will fail to be called law, or in other words there must be legal certainty.

Therefore, the urgency of renewing the Criminal Procedure Code by adding a judge's pardon decision in Article 191 is very important. The application or imposition of a judge's pardon decision must go through several considerations, such as the lightness of the act, the personal condition of the perpetrator, or the circumstances surrounding the act at that time or afterward, as well as considering aspects of justice and humanity. The application of the judge's pardon decision must later be balanced with the integrity of law enforcers. This is intended so that the judge's pardon decision which aims to further uphold justice is not used as a new playing field by certain individuals as we often encounter in the application of restorative justice at the police level. The addition of the judge's pardon decision must be carried out transparently so that public trust in the judicial institution does not decline further.

4. Conclusion

The implementation of judicial pardon in the current criminal justice system reform, namely the problems surrounding the development of the current criminal justice system, shows that this system is considered no longer able to provide protection for human rights and transparency for the public interest. Its individualistic and formal procedural criminalization system has ignored the reality of the value of peace so that it is not used as a basis for the elimination of criminalization. The weaknesses of the implementation of judicial pardon in the renewal of the criminal justice system based on legal certainty consist of weaknesses in the legal substance aspect, weaknesses in the legal structure aspect. The weakness in the substance aspect is that there is no regulation that clearly categorizes crimes in the RKUHP into minor or serious crimes. However, according to Barda Nawawi Arief, in the working pattern of the Criminal Code, there is still a qualification of the weight of the crime which can be a very minor, serious, and very serious crime. The weakness in the legal structure aspect is that when judges experience a dilemma when making a decision, they can use Judicial Pardon, or the judge's forgiveness. When facing minor cases that are delegated to judges to be examined, tried, and decided, the judge's conscience often screams. So, there is anxiety and a difference between the voice of conscience about humanity and the enforcement of formal criminal law. Judges often experience inner conflict in cases of minor crimes. When they make an acquittal decision in this case, the decision will certainly conflict with the principle of legality that everyone who is proven guilty must be punished because they meet the elements of the article charged. This is intended so that the judge's pardon decision which aims to further uphold justice is not used as a new playing field by individuals as we often encounter in the application of restorative justice at the police level. The addition of this

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