Judicial pardon as perfection of the implementation of legality principle in sentencing

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ABSTRACT

For more than 75 years of enactment of the Dutch Criminal Code (KUHP), the legality principle contained in Article 1 Paragraph (1) of the Criminal Code is applied rigidly in Indonesia. This rigidity is now perfected with the model of the Judicial Pardon which can be imposed after examination and proof that leads to the conclusion that the defendant is legally and convincingly proven guilty of committing the crime charged by the Public Prosecutor. However, because there are several basic considerations as guidelines for sentencing, namely the lightness of the act, the personal circumstances of the perpetrator, the circumstances at the time of the commission of the crime, the aftermath, and incapacity that can be forgiven, as well as aspects of humanity and justice, grant judges the authority not to impose a crime or impose action against the defendant, so that the decision model perfects the principle of legality in modern sentencing, and is expected to solve the problem of the excess number of inmates from prisons. This research was conducted using normative legal research (qualitative legal research) method by conducting a juridical study of data sources originating from the legal principles contained in the Criminal Code of several countries. This research is expected to find clearer arrangements and formulations of dictum decisions for fair legal certainty.

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Introduction

In a rule of law state, the principle of legality is a guarantee of individual rights and at the same time becomes the basis for the limitation of things that are prohibited by law. The principle of legality is not only found in criminal material law, but also in criminal procedural or formal law, state administrative law, and also other fields of law, as a general principle of law. In administrative law, the principle of legality (*wetmatigheid*) requires that the organs of government operate through law (Wirabakti & Rochaeti, 2022).

In criminal law, the principle of legality is the spirit and basic thought of criminal law. The descriptions of the history of the Legality Principle in the books and writings of well-known scholars generally began in an era when criminal law had not yet been written, namely when the arbitrariness of the rulers (kings or judges) was increasingly unbearable by the people. The sound of the Legality Principle in criminal law can be found in Article 1 paragraph (1) of the Indonesian Criminal Code, which reads as follows:

"No act shall be punished unless by virtue of a prior statutory penal provision." (Nahak, 2018)

Meanwhile, in the era of unwritten criminal law, where the king's power was absolute, the source of criminal law came from "customary law" or habits which then developed towards "personal belief or justice" from the ruler, which in the end became arbitrary. the authority of the authorities, where punishment is carried out according to the tastes of the authorities and legal uncertainty is increasingly widespread, so that the grip for the people becomes non-existent. Then the people became turbulent to demand fair treatment, legal protection, and guarantees for these rights (Ramadani et al., 2021).

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The most influential teachings on the formulation of criminal law regulations (the principle of legality) are those from Von Feurbach (1755-1833), a legal scholar from Germany in the 19th century, namely in his book Von Feurbach entitled *Lehrbuch Des Peinlichen Recht* (1801), which in Latin is formulated with the sentence, "*Nullum delictum nulla poena sine praevia lege poenali*." Which means: there is no offense (*nullum*), no crime (*poena*) without (*sine*) first being held (*praevia*) provisions (*lege poenali*) (Ramdani et al., 2021).

According to Von Feurbach's view, the *nulla poena* regulation was intended for public interest and was established to prioritize collectivity, and not the victory of individualism. Von Feurbach also said that the general basis for the existence of civil crimes (both in the law and in its implementation) is the necessity for everyone to maintain mutual freedom, by ending the human instinct to violate the law. From this provision arises as the highest principle for criminal threats in criminal law, namely that every sentence imposed by a judge should be in accordance with the law, which in turn is required to maintain rights that may be exercised by everyone (Dubber, 2005).

The teachings conveyed by Von Feurbach regarding the formulation of the criminal law (Principle of Legality) mentioned above, made the writer remember the words that were conveyed by the Apostle Paul (3-67 AD), formerly Saul, a Pharisee who was very knowledgeable about the Law. At that time Saul received a power of attorney from the High Priest of the Jews which contained the authority to arrest the followers of Jesus Christ. On his way to the city of Damascus, Saul suddenly had a "divine encounter", which eventually changed his whole life to become a follower of Jesus Christ. In his letter to the church in Rome (Romans 5:13 NLT), Paul wrote words about the relationship between sin and the law, which was actually the forerunner of the birth of the Principle of Legality, which is as follows:

"Yes, people sinned even before the law was given. But it was not counted as sin because there was not yet any law to break." (Witherington and Hyatt, 2004)

The legal consequences are generally in the form of a criminal penalty. However, there are times when a "punishment" is also imposed which is not actually a crime, but the perpetrator is subject to a certain action (*maatregel*), or an obligation similar to a form of civil punishment. Even in certain cases, the perpetrators are not subject to any punishment.

The type of research used is normative legal research (qualitative legal research) by conducting a juridical study of data sources originating from the legal principles contained in the Criminal Code of several countries, namely the Netherlands, Portugal, France, Greenland (Kingdom of Denmark), Uzbekistan, Somalia, Germany which adheres to the civil law legal system, and countries that follow the common law legal system, namely United States (Pennsylvania) and Australia, and are elaborated by empirical studies with data sources from interviews and developing judicial practices. Primary and secondary data obtained were then processed by qualitative methods.

Literature Review

In the context of criminal law laws, both the Criminal Code and outside the Criminal Code, Andi Hamzah is of the view that crime and action (*maatregel*) are contained in criminal law sanctions. This type of crime is stated under Article 10 of the Criminal Code. Furthermore, the Criminal Code does not mention the term *maatregel* (action). This action (*maatregel*) is intended to protect society and improve the maker, such as forced education, forced treatment, admitting to a mental hospital and handing over to parents. In laws outside the Criminal Code, in particular Emergency Law no. 7 of 1955 concerning Economic Crimes, this action (*maatregel*) is called the "disciplinary action".

- i. Closure of part or all of the perpetrator's company (suspect) where the Economic Crime is committed;
- ii. Placing suspects under custody;
- iii. Revocation of all or part of the suspect's rights or revocation that has been or may be granted by the government to the suspect;
- iv. So that the suspect does not commit certain acts;
- v. So that the suspect tries to make sure that the items in the order that can be confiscated are collected and stored at the place designated in the order.

In addition to the sanctions mentioned in the Criminal Code and laws outside the Criminal Code mentioned, for example, such as compensation (Article 95-101 of Law No. 8 of 1981 concerning the Criminal Procedural Code / KUHAP), as well as other civil consequences, such as divorce and separation due to adultery offenses. In addition, there are also coercive measures, such as taking hostage against witnesses who are not willing to give information, expulsion in immigration (deportation), administrative sanctions such as withdrawal of business licenses (in economic and environmental criminal law), as well as disciplinary penalties for the military (Hamzah and Abidin, 2010). Regarding the types of crimes listed in Article 10 of the Criminal Code, Hamzah and Abidin (2010) also believes that this type of crimes also applies to offenses that are outside the Criminal Code (*speciale delicten*), with the exception if the provisions of the special law differ from the things regulated in the Criminal Code as a general provision (*legi generali*), as stipulated in Article 103 of the Criminal Code. This type of crime is also distinguished between the main crime and additional punishment. For additional punishment, it is only imposed if the main punishment is imposed, except in certain cases. The types of crimes are as follows:

- i. Basic Punishments: Capital punishment, Imprisonment, Light Prisonment, Fine, and Undisclosed Penitential (Criminal Code Translation by National Law Development Agency, Law No. 20 of 1946)
- ii. Additional Punishments: Deprivation of certain rights, Forfeiture of specific property, and Announcement of judge verdict (Hamzah and Abidin, 2010).

In addition to the types of crimes above, there are also types of conditional crimes (*voorwaardelijke veroordeling*), as stated in Article 14 a to Article 14 f of the Criminal Code. The provisions regarding the imposition of conditional punishment are still applicable to the provisions of Article 10 of the Criminal Code, just that the limit of the punishment will not be more than one year in prison or confinement. The obstacle in the application of conditional punishment in Indonesia is the assumption from some people, especially from the victim of a crime, that it is as if a conditional criminal decision is the same (a synonym) as an acquittal (*vrijspraak*), because in fact the convict is still free to roam outside (Hamzah and Abidin, 2010). In the perspective of sentencing, criminal procedural law aims to seek and obtain or at least come close to the material truth, namely the complete truth of a criminal case by applying the provisions of the criminal procedure law in an honest and precise manner. With the aim, namely to find out who the perpetrators can be charged with committing a violation of the law (crime), and then request an examination and decision from the court to determine whether it is proven that a criminal act has been committed and whether the person accused can be blamed (Saragih, 2018).

This is in line with the provisions of Article 183 of Law no. 8 of 1981 concerning the Criminal Procedure Code ("KUHP"), which states that a judge may not impose a crime on a person, unless with at least two valid pieces of evidence he obtains the belief that a criminal act has actually occurred. and that the defendant was guilty of committing it. From the types of decisions of criminal judges, the provisions of Article 182 paragraph 5 of the Criminal Procedural Code may contain the dictum as stated below, alternatively.

- i. The act that was accused of was completely unproven, so the dictum reads "freeing the defendant from the charge" (*Vrijspraak*);
- ii. The act accused of is indeed proven, but the act is not a criminal act, but is included in the scope of civil law, so the dictum reads "releasing the defendant from all charges" (*Ontslag van alle recht vervolging*);
- iii. The alleged act is clearly proven legally and convincingly, then the dictum states the qualifications of the criminal act that has been declared proven (*Veroordeling tot enigerlei sanctie*) (Butt and Lindsey, 2020).

With only 3 (three) possibilities of imposing a judge's decision in a criminal case, a legal question arises, namely whether it is possible for a criminal judge to pass a guilty verdict without sentencing the defendant. Considering that based on the provisions of Article 183 of the Criminal Procedure Code, the defendant's actions have been proven by the presence of at least two valid pieces of evidence (sufficient preliminary evidence), and then a judge's conviction is obtained, namely that the defendant is guilty of the crime.

To answer the question above, it is not enough if we only rely on the implementation of Conditional Penalties/Probationary Sentences, as referred to in Article 14a of the Criminal Code, because Conditional Penalties/Probationary Sentences are too narrow in scope and are not even compatible with modern punishments. This is because the application of Conditional Penalties/Probationary Sentences is also very dependent on the discretion of the judge, and is also limited to imprisonment for a maximum of one year, or light imprisonment. In the enforcement of criminal law in Indonesia, the victim of an underage rape (15 years old) by Muara Bulian District Court, Jambi for aborting her fetus has shocked the international community, and did not escape the coverage of the Washington Post, which reported "Indonesian teen raped by her brother jailed for abortion" (Washington Post, 2018) Next, the case of Fidelis Arie Sudewarto who was arrested by the National Narcotics Agency (BNN) for planting 39 marijuana trees (*Cannabis Sativa*) for the treatment of cysts from his wife, Yeni Riawati. His wife finally died exactly thirty-two days after Fidelis was arrested by BNN (Tarigan and Naibaho, 2020). Another controversial case is the rejection of the Judicial Review submitted by Baiq Nuril to the Supreme Court (MA), which sentenced him to 6 (six) months in prison and a fine of Rp. 500 million subsidiary 3 (three) months in prison, for violating Article 27 paragraph 1 Jo. Article 45 of the Information and Electronic Transactions Law, for recording without permission of telephone conversations with their superiors containing indecent stories and then spreading (Manthovani and Tejomurti, 2019). In addition, there are also cases of "the poor", namely Grandmother Minah who stole 3 cocoa beans, the case of the theft of slippers by students in Palu, Central Sulawesi, and the case of "sonari worms" which caused Didin to be imprisoned (Herning, 2020).

In an Integrated Criminal Justice System, which starts from investigation, prosecution, examination, court decision and execution, in the end the convict will be placed in a Correctional Institution (*Lapas*). It is a general fact that is difficult to deny, the condition of prisons in Indonesia is far from the goal of socializing the convicts. It is not surprising that prisons in Indonesia are overcrowded and risky for prisoners, thus potentially creating transactional practices and stigma, for example, "chicken thieves" can become "ATM thieves" (or "too short for rehabilitation too long for corruption") (Herning, 2020). All of these phenomena is inseparable from their connection with the application of rigid legality principles in Indonesia as the basis for judges to try a criminal case.

Development of Subsociality Theory

The possibility for a judge to pass a guilty verdict without sentencing a defendant whose actions have fulfilled the elements of a criminal act and there is no reason for a criminal offence, originates from the Netherlands. This theory is quoted from Andi Hamzah's view regarding the application of Subsociality Theory (*Subsocialiteit*) introduced by modern criminal judges. The theory of

Subsociality (*Subsocialiteit*) implies that the behavior of (someone) the accused in a criminal case is of great importance to criminal law. The inclusion of the teachings of Subsociality (*Subsocialiteit*) is contained in the amendment (revision) of the *Wetboek van Strafrecht Nederland* (Dutch Criminal Code), namely with the provisions of Article 9a *Wetboek van Strafrecht Nederland*, which reads as follows:

“ If the judge considers appropriate, due to the small meaning of an act, the personality of perpetrator or the circumstances at the time the act was committed, as well as after that he shows an example, he can determine in his decision that no crime or action has been imposed.” (Hamzah and Abidin, 2010).

In his view, Andi Hamzah interprets the theory of Subsociality as "actions that have little meaning for society", which is similar to the term "actions that are less harmful to society" as contained in the Criminal Code in socialist countries. Socially dangerous according to the Criminal Code of socialist countries are given a different meaning, namely dangerous for socialist societies in the form of a social or state system, economy, socialist law and the socialist order. On this basis Andi Hamzah concluded that this element of subsociality cannot be included as the fourth element in the *mens rea*, in addition to the other three elements, namely being accountable, guilty (mistakes) and against material law, the reason being that in Article 91 WvS Ned it is said that "the judge cannot impose a crime or action", where the judge is also possible to impose a sentence, so that the element of sub-sociality cannot be used as an element which is a condition for imposing a crime (Hamzah and Abidin, 2010).

Judicial Pardon Models in Several Countries

In the perspective of Comparative Law, Bogdan (2018) is of the view that it is intended to put the comparable elements of two or more legal systems against each other and determine the similarities and differences, which includes the legal system and which elements to compare, by itself depends on the purpose of the comparison and the interests of the users of the comparison method. For this reason, the author will describe several models of judicial pardon or concepts that are at least the closest, namely:

Judicial Pardon Granted by Judge in the Netherlands

Forgiveness by judges was first recognized in the Netherlands when the Dutch revised the "KUHP" (*Wetboek van Strafrecht*) on March 31, 1983 by inserting an insertion article between article 9 and article 10 of *Wetboek van Strafrecht*, namely Article 9a *Wetboek van Strafrecht*. As for what it reads, "if the judge considers it appropriate to relate to the small meaning of the act, the personality of the perpetrator or the circumstances at the time the act was committed, as well as after that he shows an example, he (the judge) can determine in the decision that no crime or action has been imposed (Yuliawati, 2021)." In Criminal Code of the Kingdom of Netherlands (1881, amended 2012) explains that the court may determine in the judgment that no punishment or measure shall be imposed, where it deems this advisable, by reason of the lack of gravity of the offence, the character of the offender, or the circumstances attendant upon the commission of the offence or thereafter.

Dispensa De Pena Institution in Portugal

In comparison with the Criminal Code in Portugal which adheres to the Civil Law legal system, the author finds a conception of the *Dispensa De Pena*, namely in Article 74 of the Portuguese Criminal Code, which is for minor crimes (limited to criminal acts with a maximum penalty of 6 months in prison), a judge in a Portuguese court can pass a verdict of guilty without imposing further punishment on a defendant who has been legally and convincingly proven to have committed a minor crime (Dubber, 2000).

Subsociality in Sentencing in Greenland (Kingdom of Denmark)

One indication that Greenland adheres to the theory of subsociality can be found in the provisions of Article 14 of the Greenland Criminal Code, which states that an act that is normally punishable will not be punished if it is necessary to avoid the threat of damage to a person or property, and if the violation can be considered as only of relatively minor importance. In other words, there is a possibility for a judge in Greenland not to punish or impose criminal sanctions on someone who commits a crime because it is considered "as only of relatively minor importance" or is only trivial and if imposed sanctions can actually cause damage to the life of someone who does not bring benefits because the impact is very small for the wider community (Langsted et al., 2019).

Subsociality in Sentencing in Uzbekistan

Under Article 70 of the Uzbekistan Criminal Code, the element of "socially dangerous in nature" as contained in Article 7 of the Soviet Union Criminal Code is also emphasized as one of the reasons for not punishing the defendant, in addition to changes in certain situations and conditions after a criminal act was committed or the innocence of an act in the eyes of the social community. The full text reads: A person, who commits a crime can be released from punishment in a case if it is known that during an investigation or trial, for example due to a change in the situation, or a person's impeccable behavior, a trustworthy job or education, has lost its dangerous nature socially (Ochilov and Kamalova, 2020).

Judicial Pardon Granted by Judge in Somalia

Article 147 paragraphs 1 and 2 of the Somali Criminal Code is known as Judicial Pardon for Persons Under 18 or Over 70 Years of Age. In the event that a criminal offense is committed by a person under 18 years of age or above 70 years of age, the applicable punishment is imprisonment for a maximum of three years or a monetary penalty, or both, the Judge may abstain from entering a

conviction and grant a pardon by the court with due regard to certain circumstances and may not be given more than once (Girginov, 2019).

Exception to Sentence Due to Cessation of Public Disturbance in France

Under Articles 132-59 of the French Criminal Code, exceptions from sentencing may be granted if the reintegration of the accused party found guilty has been achieved, the damage caused has been repaired and that the public disturbance caused by the offence has ceased. A court granting an exemption from a sentence may decide that the verdict is not recorded in the criminal record. However, acquittal does not cover payment of processing fees (Elliott, 2001).

The author also interviewed Julius Singara with a doctorate in law from France regarding whether Judicial Pardon was ever known and applied in French law (French Criminal Procedural Code in 1975), given the long history where France had colonized the Netherlands (the principle of concordance), and the similarity of the existing legal system, and the author obtained information that Judicial Pardon used to exist in France, but now it is no longer applied, but there are exceptions in sentencing due to the cessation of public disturbances in France as mentioned in Chapter III. On the other hand, currently the closest model is the presidential pardon institution, similar to the granting of clemency in Indonesia.

Exemption of Sanctions for Improper Sentences in Germany

Article 60 of the German Criminal Code has provided the possibility for criminal judges not to impose penalties (criminal sanctions) on defendants who are proven guilty if the criminal sanctions actually make the perpetrators of the crime experience serious suffering, therefore the imposition of criminal sanctions is considered inappropriate to be applied to perpetrator. From this provision, it is certain that the German Criminal Code has accommodated the goals and guidelines of modern punishment. In other words, the Court acquits the sentence if the consequences of the offense suffered by the violator are so serious that the sentence is clearly inappropriate.

Criminal Judgments Without Sentencing in Australia

Under Article 7 of Sentencing Act No. 14 of 2007 in Australia, in the event that a court finds a defendant guilty of a criminal offence, the court may submit to the specific provisions relating to the offense (Australian Criminal Code) and also to the provisions of the Sentencing Act No. 14 of 2007, for example, the decision may include a dictum, for example without imposing a sentence, ordering the revocation of the indictment for the violation, without recording a punishment (criminal record), ordering the release of the perpetrator, ordering the perpetrator to pay, and providing public order services in connection with the violation.

In addition, the Sentencing Act also recognizes non-conviction penalties. For example, in the case that the court wants to decide whether to sentence the defendant or not, the court must pay attention to the circumstances in the case including the character, age, health or mental condition of the perpetrator. Furthermore, it is also considered the extent to which the violation is minor or in mitigating circumstances.

Guilty Judgment Without Sentence in Pennsylvania

In court decisions on criminal cases in Pennsylvania, a decision model is known in the form of determining that the defendant is guilty without further punishment. This can be found in the 2012 Pennsylvania Consolidated Statutes Section 9723 concerning Determination of guilt without further penalty. Given all circumstances, probation would be appropriate under section 9722 (with regard to probation orders), but it appears that probation is not required, the court may impose a guilty sentence without further sentence.

Purpose and Guidelines for Sentencing

In Article 52 of the Draft Criminal Code obtained by the author from the version dated September 16, 2019, it is stated that punishment is not intended to demean human dignity, but sentencing serves the purpose, namely to:

- i. Preventing the commission of criminal acts by enforcing legal norms for the protection and aegis of the society;
- ii. Socialize the convicts by conducting coaching and mentoring so that they become good and useful people;
- iii. Resolve conflicts caused by criminal acts, restore balance, and bring a sense of security and peace in society; and
- iv. Cultivate a sense of remorse and free the guilt of the convict (Butt and Lindsey, 2020).

With the inclusion of the "purpose" variable in the sentencing requirement in the Draft Criminal Code, in Barda Nawawi Arief's view (2007), there is a basis for justification for the existence of a crime not only on "criminal acts" (objective requirements) and errors (subjective requirements), but also on the purpose and guidelines for punishment, so that under certain conditions the judge is still given the authority to forgive (pardon), and also does not impose any crime or action even though the crime and guilt have been proven. Therefore, it can be said that the model of the concept of punishment mentioned above is not a rigid (absolute) model, but in the form of a flexible balance with the background, namely when the *Rechterlijke Pardon* provisions were included in Article 9 a of the Dutch WvS.

Furthermore, in Article 54 of the Draft Criminal Code, it is stated that the lightness of the act, the personal condition of the perpetrator, or the circumstances at the time the crime was committed, the aftermath, can be used as a basis for consideration for judges not to

impose a crime or not to take action against the defendant by considering the aspect of justice. and humanity. So that in carrying out a sentence, the judge is obliged to consider the following things:

- i. Criminal perpetrator's wrongdoing;
- ii. The motive and purpose of committing a crime; Inward attitude of the perpetrator;
- iii. Whether crime was planned or unplanned;
- iv. How the crime was carried out;
- v. Perpetrator's attitude and actions after committing the crime;
- vi. Biography, social status, and economic condition of perpetrator;
- vii. The effect of the sentence on the future of the perpetrator;
- viii. Effect of crime on the victim and the family of the victim;
- ix. Pardon from the victim and/or the victim's family; and/or
- x. Values of law and justice that apply in society.

The purpose and guidelines for sentencing in the Draft Criminal Code to not impose a crime or not to take action (*maatregel*) by considering the aspects of justice and humanity is known as Judicial Pardon, which in Jan Remmelink's view has been known since the enactment of the Criminal Procedure Code (*Wetboek van Strafvordering*) in the Netherlands in 1926, namely a decision containing a statement of guilt without imposing a crime against the defendant or known as pardon by a judge. The judge will take into account the low level of seriousness of the crime, the personality of the perpetrator, as well as the situation and conditions when the crime was committed so that they can consider that it would be better if a guilty verdict was handed down without a crime or action (*maatregel*) (Remmelink and Moeliono, 2003). So according to the author, this conception is broader in scope than the theory of Subsociality.

In imposing a pardon decision by a judge, its application can only be imposed after the process of examining the case and proof in court has been completed, where the defendant has been legally and convincingly proven to have committed a crime as charged by the public prosecutor, but is not subject to a crime or action, with some basic considerations determined by the legislators.

First, the lightness of the act, in the event that the defendant commits a minor criminal act or whose punishment is threatened, for example, according to the author's opinion, if the perpetrator commits a criminal act the threat of which is not more than 1 (one) year in prison. However, according to Andi Hamzah's view, the lightness of this act cannot be limited to how much the threat of criminal punishment is. The lightness of the act is for example a poor person steals a piece of bread because of hunger and then regrets his actions deeply. The lightness of this act is also not necessarily determined by the severity of the threat of punishment from an offense or criminal act regulated in the Criminal Code, but is determined by the level and nature of the act itself.

Second, the personal circumstances of the perpetrator, for example, relating to age, especially children based on the provisions of Article 40 of the Draft Criminal Code which states that criminal liability cannot be imposed on children who at the time of committing a crime have not yet reached the age of 12 (twelve) years, and for perpetrators who have reached the age of 12 (twelve) years, and above 75 years, so that imprisonment as far as possible is not imposed on those who are in the category of "private circumstances".

Third, regarding the situation at the time the crime was committed. This factor is external to the perpetrator of the crime. For example, the loss and suffering of the victim is not too great, the defendant is not aware that the crime committed will cause a large loss; a criminal act occurs because of a very strong incitement from another person, the victim of a crime encourages or drives the occurrence of the crime; and the crime is the result of a situation that cannot be repeated.

Fourth, "the aftermath" are things that arise after the crime has occurred, for example, the criminal influence on the future of the perpetrator of the crime or the forgiveness of the victim or the achievement of reconciliation or peace between the perpetrator and the victim that occurs after the case is transferred to the court. by the public prosecutor, as is the case with restorative justice practices for some crimes that are not broad in impact, and Diversion in the Juvenile Criminal Justice System or from examinations revealed in court it can be seen clearly that the perpetrator really feels guilty and regrets his actions which sourced from the culture of tolerance or the philosophy of customary law in Indonesia, namely to forgive each other's mistakes.

There is one other basis for consideration that has not been accommodated by the Indonesian RKUHP, namely Forgivable Incapacity. This the author obtained from the AVAS doctrine in the Netherlands, namely the case of a car crash as a result of a recurrence of diabetes which caused the defendant to fall unconscious and also the case of the driver who was unconscious due to the delay in taking 2 tablets of diacid which made the defendant sleepy while driving a vehicle.

The rest of the aspects of humanity and justice, the author argues that it is too abstract to explain the explanation, even though there is a mandate in the Law on Judicial Power where judges are obliged to explore the sense of justice in society as an embodiment of the principle of material legality.

Perfecting the Implementation of the Legality Principle

Judicial Pardon by Judges which is implemented in the decisions of judges is very much needed as a perfector to the implementation of the principle of legality in the modern sentencing execution in Indonesia, the goal is that judges do not have a tendency to "punish"

defendants as a consequence of the rigid application of the Legality Principle. This is in line with the adage in criminal law which reads "*Punier non necesse est*", which means "Punishing is not always necessary" (Hart, 2008).

With this pardon by the judge, the principle of legality contained in Article 1 paragraph (1) of the draft KUHP which reads, "There is no single act that can be subject to criminal sanctions and / or actions except for the strength of the criminal regulations in the legislation that existed before the deed was done." Instead, its nature and application have been perfected in modern punishment. This reminds the writer of the words of Indonesian legal expert, Satjipto Rahardjo, who stated, "*Law is for humans, not humans for law.*"

The consideration why the implementation of the legality principle has been perfected through a Judicial Pardon is due to the initial formulation put forward by Von Feurbach, namely "*Nullum delictum nulla poena sine praevia lege poenali*" which has been alluded to in Chapter II when examined, especially the expanded third phrase, namely "*nullum crimen sine poena legali*" (there is no criminal act without a crime according to the law) is a negative sentence.

In the opinion of Hiariej (2012), if the sentence is positive, then it reads, "All (criminal) actions 'must be punished' according to the law". Thus, in material criminal law, it means that no one can be convicted, except for the strength of the criminal rules in the legislation that existed before the act was committed. Meanwhile, in formal criminal law, the principle of legality means that every criminal act must be prosecuted.

On the other hand, this Judicial Pardon is also expected to solve the phenomenon of overcrowding from correctional facilities and prisons in Indonesia which is already increasingly worrying and creates new crimes, so that its implementation is expected to embody the theory of legal effectiveness as expressed by Anthony Allot. For this reason, the verdict of a judicial pardon by the judge proposed by the author in this study is:

Considering

1. "Declare the defendant alias has been legally and convincingly proven guilty of committing, which was conducted (together or individually), as referred to in the indictment"
2. Establishes that there is no punishment (.....) imposed or action (*maatregel*) charged on the defendant alias....., in connection with indictment which has been proven, on the basis of pardon by the panel of judges.
3. Charge the defendant a court fee of

In the author's opinion, the appropriate and relevant terminology used is judicial pardon and not with the term "forgiveness by a judge" which is mentioned in the explanation of the current RKUHP. The argument is that even though judges are referred to as "God's representatives" on earth to provide justice that renders decisions with the words "for justice based on the one almighty God", but the word "sorry" seems to make the context more of a personal relationship where someone commits a wrongdoing to the other party and therefore he must apologize from the person who was harmed, while the word "pardon" refers to release from punishment or prosecution, so it is more suitable to be used in a judicial context.

In the future, synchronization is needed between the draft Criminal Code as a material criminal law and the draft Criminal Procedure Code as a formal criminal law, so that the Judicial Pardon can be applied in an integrated criminal justice system as "*Nullum crimen sine poena legali*" which is the embodiment of the Legality Principle in formal criminal law.

Conclusion

Based on the explanation above, it can be concluded that the development of the Legality Principle has made it possible for a Judicial Pardon to be made in modern sentencing, so that it becomes the legal basis for judges to be able to pass a guilty verdict against a defendant without being accompanied by a (criminal) punishment or action in a criminal case. Although the Judicial Pardon introduced in the Draft Criminal Code is wider than the scope of the sub-sociality theory, in fact it is still not accompanied by an adequate explanation regarding the basis for its considerations, namely regarding what is meant by the lightness of the act, the personal condition of the perpetrator, the circumstances at the time of the criminal act and the circumstances surrounding the crime, the aftermath, and the incapacity that can be forgiven, as well as aspects of humanity and justice so as not to be misused by Judges and interested parties.

To achieve the ideal construction of the Judicial Pardon (Judicial Pardon) as a complement to the principle of legality in sentencing, it is necessary to reform the criminal procedure law and clear guidelines, so that the decision can realize fair legal certainty, so it is necessary to synchronize its arrangements with the draft Criminal Procedural Code as criminal formal law, so that the form and editorial of the dictum of the Judicial Pardon can be implemented in an Integrated Criminal Justice System. In addition, it is necessary to use the right legal terminology, namely "Pardon by Judge", rather than "Forgiveness by a Judge", because court decisions are in a judicial context and not a personal relationship.

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