THE URGENCE OF RECHTERLIJK PARDON REGULATION IN CRIMINAL LAW RENEWAL

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Abstract
The Non-Imposing Concept of a Penalty/Rechterlijk Pardon/dispensa de pen is a new institution unknown in the current Criminal Code. Conceptually, Rechterlijk Pardon is a form of modification of rigid legal certainty, towards flexible legal certainty. This concept departs from several cases that have actually met the formulation of a criminal offense, however his actions do not deserve to be punished. Responding to this problem, the RKUHP made a new formulation by stipulating the possibility of pardoning judges for several cases that not worthy of punishment.
Keywords: rechterlijk pardon, KUHP, legal certainty.

INTRODUCTION

When talking about law, people often understand law as a set of rules made by the state and binding its citizens with the application of coercive sanctions. The question of "what is law" is a very basic question and the answer is very dependent on the concept of legal thought itself, and is also influenced by developments or community dynamics that make the law develop. The most important thing to understand the law is not limited to the definition of law, but more focused on the purpose of the existence of the law. The purpose of law in general is to create order so that humans can live happily. This goal will be achieved if there is harmonization between legal certainty and the realization of justice for the society.

The law that applies in a country consists of various fields of law. In general, the law is interpreted as a rule which is a guideline for determining what may/should not be done, and the logical consequence of violating the law is the imposition of sanctions. Whereas specifically, the law will cover the following matters: first, the history of the legal system, second: the legal system which includes state law, personal law, property law, family law, inheritance law, criminal law, and third: expertise or legal skills.

The whole field of law which is divided into general and special aspects then forms a system. The Indonesian legal system is a complex legal system because of its wide scope and interrelatedness. Criminal law is one part of the legal system in Indonesia, which is still a colonial legacy. Indonesia's positive criminal law is still guided by the Dutch colonial legacy law which was codified into the Criminal Code (KUHP), even though in its development the values in Dutch law are no longer in accordance with the values of Indonesian society. This is the factor that makes criminal law in Indonesia seem very rigid, because the Criminal Code adheres to the principle of formal legality which only recognizes written law, the law that lives in Indonesian society seems to be ignored and not recognized as a source of law. This is what requires efforts to reform the criminal law, namely reviving the law that lives in a society that seems to have been turned off by colonial law.

Barda Nawawi Arief stated that the effort to reform law in Indonesia had started since the birth of the 1945 Constitution and could not be separated from the foundation and at the same time the objectives to be achieved as also formulated in the Preamble to the 1945 Constitution. promote public welfare based on Pancasila". This general policy line is the basis

and goal of legal politics in Indonesia as well as the basis and goal of any legal reform effort, including reforms in the field of criminal law and crime prevention policies in Indonesia.

Criminal law that seems rigid and prioritizes the formality side creates a paradigm that criminal law is formulated and enforced with the aim of providing retaliation. Such as imprisonment which is impressed as a means of retaliation as stated in Article 10 of the Criminal Code. Starting from this view, law enforcement officers tend to always qualify an act as a crime if it has fulfilled the formulation of the articles in the Criminal Code only and must be resolved through criminal law which then leads to a prison sentence.

It must be admitted that the paradigm of law enforcement in Indonesia still assumes that criminal law is the most appropriate means to resolve behavior that is considered anti-social. Those who commit acts that meet the element of offense must be punished so that it creates the impression that criminal law only looks at the actions committed by the perpetrators. If so, then the criminal law will ignore human rights and prioritize retaliation. On the other hand, criminal law cannot only emphasize the interests of the perpetrators, because it will give the impression that criminal law is in support of the perpetrators and does not pay attention the interests of the community, the interests of the state and the interests of the victims.

One of the cases that can be an example that criminal law should pay attention to the interests of the perpetrator and also the victim of the crime is the case of Grandma Minah. Minah's grandmother who committed the theft of 3 (three) cocoa beans, was found guilty and sentenced to probation for 1 (one) month 15 (fifteen) days. The criminal prosecution of this trial is a manifestation of the balance of these interests and does not harm any of them. In legal certainty, every person who commits an act that fulfills the elements of a criminal act must declare guilty and be sentenced to criminal sanction. But on the other hand, when the crime does not cause significant losses, then there is no need for the perpetrator to undergo criminalization. So in the event of such an event, criminal trial is an appropriate solution.

The Criminal Code does not expressly provide arrangements regarding minor crimes, but in terms of formal criminal law there is a rule that regulates it. Supreme Court Regulation No. 2 of 2012 concerning Adjustment of Restrictions on Minor Crimes and The Amount of Fines in the Criminal Code determines that theft acts that cause losses below Rp. 2.500.000,- (two million five hundred thousand rupiah) are categorized as minor crimes. Based on these rules, criminal sanctions that can be imposed against the accused are criminal fines, criminal social work and so on. However, the Supreme Court rules only provide arrangements regarding the limitation of the value of losses and damages, one of which is minor theft. The rule does not necessarily abolish criminal sanctions or change the type of criminal sanctions that can be given to him, because the criminal sanctions have been determined in Article 10 of the Criminal Code.

Learning from the provisions of The Supreme Court Regulation No. 2 of 2012, cases such as Granny Minah, ideally do not need to be processed to the court because the value of losses suffered by victims is very small, even according to the perpetrator's confession is a common act done by the surrounding community. So in fact the act should not be considered a criminal act and should not be criminalized.

It is irony that those who commit such acts must be found guilty and sentenced to criminal sanctions by a judge. The State of Indonesia based on Pancasila should have practiced the values of Pancasila in all aspects / areas of people's lives. Not to go unnoticed, it should also be based on Pancasila. Sila 2nd and Sila 5th should be the basic idea of sanctioning them. The judge's verdict needs to pay attention aspects of "kemanusiaan yang adil dan beradab" and "keadilan sosial bagi seluruh rakyat Indonesia". This is very important, because in addition to being the basis of the

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state, Pancasila is also the source of all legal sources. So as a source of law in the implementation of the provisions of criminal law, it is also necessary to consider the existence of Pancasila.

Lebih ironi lagi jika KUHP yang berlaku saat ini yang merupakan terjemahan dari WvS NI tersesbut, justru tidak mencantumkan pasal sisipan yakni Pasal 9a yang sejatinya mencerimkan asas kemanusiaan dengan memberikan pengaaturan mengenai judicial pardon (rechterlijk pardon). Aas tersebut membuka peluang bagi hakim untuk memaafkan perbuatan terdakwa dan tidak menjatuhkan sanksi pidana kepadanya. Asas ini memiliki dimensi fleksibilitas jika diterapkan untuk kasus-kasus tindak pidana ringan. Selain itu, sisi positif jika ketentuan ini dicantumkan di dalam KUHP adalah dapat menjadi solusi dari over capacity di lembaga pemasyarakatan yang kian meresahkan.

More irony if the current Penal Code which is a translation of WvS NI mentioned, it does not include the insert article namely Article 9a which actually reflects the principle of humanity by providing regulation on judicial pardon (rechterlijk pardon). The Aas opened the opportunity for the judge to forgive the defendant's actions and not impose criminal sanctions on him. This principle has a dimension of flexibility if applied to cases of minor crimes. In addition, the positive side if this provision is listed in the Criminal Code is that it can be a solution of over capacity in correctional institutions that is increasingly troubling.

Starting from the description in this introductory section relating to the policy of the basic formulation of the judge's forgiveness in the efforts to reform the national law is the main issue that will be examined in this article. The problem arises because there is no explicit arrangement that gives the judge the authority to forgive the actions of the accused. So that the current Penal Code seems rigid and ultimately does not reflect the sense of justice that lives in the community. This issue is certainly a crucial issue in the current penal code.

METHODS

Writing this journal applies the library method or normative legal research methods, namely research with presents a problem that will be discussed later by using legal theories that are in accordance with the legislation.[1]

The type of approach used is a statutory approach that refers to regulations, conceptual approaches related with legal principles, and a comparative approach by comparing the law of a country with the law other countries.[2]

Collection of legal materials, the author uses a library technique. Analysis on this article uses a description technique on primary legal materials and secondary data that have been collected are then associated with theory and legal literature so that it can assist in writing this article.

DISCUSSION

The renewal of criminal law at the regulatory level has been pursued by the legislator since 1963, with the drafting of the Criminal Law Bill (hereinafter referred to as the Criminal Code Bill). But until now, the government has not also managed to codify the parent regulation of criminal law based on the values that exist in the Pancasila and the Opening of the 1945 Constitution. The consequence of the unan passed of the Criminal Code bill is that the State of Indonesia continues to use the Penal Code (Criminal Code) left by the Dutch East Indies government which has certainly been left behind by the progress that has occurred in people's lives.

The drafting of the new Penal Code aims to replace the Criminal Code / WvS because the basic ideas / concepts of thought, the value of philosophy in the preparation is no longer in accordance with the idea / concept of basic thinking and philosophical values of

[1] Soerjono Soekanto dan Sri Mamudji, 2015, Penelitian Hukum Normatif Suatu Tinjauan Singkat, PT Grafindo Persada, Jakarta, p. 13-14.

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concept. The basic ideas and philosophical values of the concept is Pancasila which intertwines values in each unfortunate reflects the "idea of balance". This basic idea of balance is a legal choice that can be called having a prismatic concept (good balance value). Given the basic idea of balance identifying combinative choices over the values that exist in indonesian society.

The Indonesian Penal Code in force today does not provide a regulations on the basis of judicial pardon or *rechterlijk pardon* because the Criminal Code is a product of the Dutch East Indies which is motivated by the value of individualism and liberalism, so that the needs and personal interests of individuals are not a priority but put the common interests first. A person getting justice or not is not an issue, all one sees is that someone has done an act that meets the formula of criminal act in the law then a person is convicted and must be convicted.

As stated by Barda Nawawi Arief that the formulation policy in the formulation of the material criminal system in Indonesia at this time, the Criminal Code (KUHP)/Wetboek van Strafrecht (WvS) originates from the Dutch colonial heritage, which is more oriented towards criminals. The philosophical values that are the background for the preparation of the Criminal Code/WvS are individualism and liberalism which are based on classical/neo-classical schools which are more oriented towards actions and perpetrators of criminal acts, whereas in the national goals (national goals) which are general policy lines that form the basis and at the same time the goal of achieving legal politics in Indonesia, there are two goals to be achieved by criminal law, namely "public protection" and "public welfare". These two objectives are the cornerstone of criminal law and criminal law reform.

The imposition of criminal sanctions on a criminal case is actually not a priority in resolving a criminal case. This is clearly seen in the provisions of Article 183 of Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP) which states, "A judge may not impose a crime on a person unless with at least two valid pieces of evidence he obtains the belief that an offense has been committed. crime actually occurred and that it is the defendant who is guilty of committing it." Based on the provisions of the article, it is clear that the imposition of criminal sanctions is only if there is a minimum of 2 (two) pieces of evidence that can make the judge believe that the defendant committed the act that the public prosecutor indicted in his indictment. The requirement for a judge's conviction beforehand for a judge to be able to make a verdict can be interpreted that even though the minimum requirements for evidence are met, if the judge is not sure that the defendant is guilty, there is no need to impose a verdict in the form of sentencing the defendant. This provision shows that formal criminal law is not rigid / flexible. Likewise, when the panel of judges has the opinion that the perpetrator does not need to be punished, there should be a rule that overshadows the judge's verdict to make a verdict in the form of forgiveness.

In line with this, the imposition of a criminal sentence for the defendant should also be directed / oriented to the purpose of the sentence. The purpose of the crime is inseparable from the flow of criminal law. Several streams that influence the purpose of the sentence include absolute theory, relative theory, and combination theory. The absolute theory appears in the classical theory of criminal law. According to this theory, retaliation is the goal of punishment. Meanwhile, according to the relative theory, it is determined that the basis of punishment is the enforcement of public order and for the prevention of crime. The combined theory becomes a middle ground between the two by giving rise to an adage that reads "*natura ipsa dictat, ut qui malum fecit, malum ferat*" (nature teaches that whoever commits a crime, will suffer suffering. However, not only suffering as a revenge but as well as public order.

Apart from these theories, in this modern era the theory regarding the purpose of punishment has shifted towards a new theory called contemporary theory. According to contemporary theory, the purpose of sentencing is to achieve justice based on recovery, known as restorative justice. Restorative justice is understood as a form of approach to resolving cases according to criminal law by involving the perpetrators of crimes, victims, families of victims or perpetrators and other related parties to seek a fair solution by emphasizing restoration to its original state and not retaliation.

In this regard, criminal law should be applied in practice by considering contemporary theory. The imposition of criminal sanctions is not a must and is not a consequence of committing a criminal act by someone. The imposition of criminal sanctions needs to consider the purpose of punishment, namely to achieve recovery-oriented restorative justice. The recovery referred to here is not only oriented to the interests of the victims who suffer losses due to criminal acts committed by the perpetrators. This aspect of recovery also needs to be considered for protection in the context of the perpetrator, namely fixing the deviant behavior of the perpetrator, and not just passing a verdict in the form of punishment in order to obtain a deterrent effect and emphasize retaliation.

This article will focus on the legal substance in which the criminal law reform carried out is to introduce the principle of judicial pardon (*Rechterlijk Pardon*) into the Draft Criminal Code. According to Barda Nawawi Arief, at the level of the criminal law policy system, the stage of formulating or formulating a criminal law legislation is the most strategic stage because the formulation stage is law enforcement in the abstract. mistakes at the formulation stage will be fatal at the next law enforcement stage, namely real law enforcement (in concreto).

In this policy formulation/legislative policy, it is hoped that the central values of the people who live and grow in society can be accommodated so that future laws or laws that are aspired to can be effective in society. The reform of the Criminal Law essentially implies an effort to reorient and reform the criminal law that underlies social policies, criminal policies and law enforcement policies in Indonesia.

The current Criminal Code does not regulate the issue of the principle of forgiveness of judges, so it needs to be formulated in the Criminal Code in the future. Because the principle of forgiveness of judges will reflect the principle of humanity in the nation's philosophy, namely Pancasila, and will change the rigid paradigm of the Criminal Code to be flexible and as an integral system, the renewal of this material criminal law will lead to the implementation of criminal law, namely the existence of the principle of pardon by judges. a solution to overcome the problem of over capacity in correctional institutions which has been a problem in Indonesia.

The principle of Judicial Pardon or Rechterlijk Pardon is currently at the formulation stage of the Criminal Code Bill, which is regulated in Article 55 and Article 56 of the Criminal Code Bill. The concept of forgiveness of judges has actually been carried out for a long time and is spread in various parts of Indonesia. This concept appears in various forms of implementation in Indonesian society, where it can be concluded that the forgiveness that exists in indigenous peoples does not necessarily eliminate the crime, there are still sanctions that are given but these sanctions are not only for the benefit of victims and perpetrators but also to restore the balance that has been created. damaged as a result of a crime.

The development of the RKUHP to date, namely the June 2019 RKUHP has not yet been ratified. Whereas in it is formulated the concept of forgiveness as stated in Article 55 and Article 56. In Article 56 Paragraph (2) of the Criminal Code Bill it is stated that the lightness of the act, personal circumstances, circumstances when a crime occurred or what happened later, can be considered by the judge not to impose criminal acts or take action taking

into account the aspects of justice and humanity. This is closely related to punishment system, in which with the concept of Rechterlijk Pardon (Judge's Forgiveness), the judge in justifying the conviction of a person, the judge must consider the crime, the error as well as the purpose and guidelines of punishment. If the judge considers that the person does not have to be sentenced to a crime, then the judge forgives the perpetrator of the crime. As a form of forgiveness, with forgiveness, someone who is guilty does not need to be punished or feel punishment. Provisions like this are basically almost similar to the conditional criminal provisions (voorwaardelijke veroordeling) regulated in Article 14a-14f of the Criminal Code.

In carrying out criminal law reform efforts, a comparative study of criminal law with other countries is needed. In this study, we will compare it with the Dutch Criminal Code. The formulation contained in Article 9a of the Dutch Criminal Code regulates the principle of forgiveness of judges or Rechterlijk Pardon, the following reads Article 9a of the Dutch Criminal Code: *"the judge may determine in the judgement that no punishment or measure shall be imposed, where he deems this advisable, by reason of the lack of gravity of the offense, the character of the offender, or the circumtances attendant upon the commission of the offense or there after".*

Based on the formulation of the article above, it is clear that the judge can not impose a criminal verdict or action by taking into account the severity of the act, the character of the perpetrator, the circumstances that occurred when the act was committed or after it. Very light/insignificant acts are not criminalized, as stated by I Ketut Sudira in his article "One modern influence in criminal law is a principle known as subsociality (Subsocialitet) meaning if a conduct is a delict but socially has a little significance, it is not necessary to involve punishment or further legal action. As we can see from the Article 9 of the Dutch Criminal Code".

The formulation of Article 9a above is a sentencing guideline for judges in making verdicts so that verdicts are oriented to human values and justice, namely by considering the severity of the act, the personality of the perpetrator, the circumstances at the time the act was committed and afterward. In the Netherlands today, 60% (sixty percent) of criminal cases are no longer resolved by the Court, but by the Public Prosecutor outside the court, in the Netherlands it is known as the afdoening buiten process (settlement of cases outside the court). Mild cases are settled out of court, the light cases in question are criminal acts that are punishable by imprisonment for under 6 (six) years and under by way of compensation by the perpetrator of the crime to the victim. In another form, if minor cases are still resolved in court, the judge can decide with judicial pardon (*rechterlijk pardon*) by taking into account the lightness of the act, the condition of the perpetrator of the crime and the circumstances before or after the crime was committed.

Even in the Netherlands there is a tendency to decrease the use or application of imprisonment, it can be seen in the practice of the court that there is a growing distaste for the crime of deprivation of liberty and fines. Starting from the explanation above regarding the Rechterlijk Pardon rule in the Dutch Criminal Code, it looks almost the same as the formulation of Article 56 of the RKUHP, the difference lies in the consideration of justice and humanity in the RKUHP.

It is an irony because the current Criminal Code in Indonesia does not regulate the principle of forgiveness of judges, it has only been formulated in the concept of the Criminal Code which has not yet been ratified. So that in cases that are not significant or too trivial, such as the Grandma Minah case, the judge will still be given a criminal verdict. If the RKUHP is immediately ratified and still includes the principle of forgiveness of the judge, then cases such as the case of grandmother Minah can be forgiven by the

judge and not only uphold the principle of certainty, but also humanity and justice.

CONCLUSION

Based on the discussion described above, the following conclusions can be drawn:

The current Criminal Code basically does not stipulate the principle of forgiveness of judges or rechterlijk pardon so that if there are trivial cases whose actions are very light/very minor/insignificant, the judge always imposes a criminal decision. It is as if there is no other choice that can provide room for the judge to forgive the defendant. Because judges are only guided by a very rigid Criminal Code which formulates a criminal act only if it has fulfilled the formulation of the articles in the law.

Ironically, while the current Criminal Code is a legacy of the Dutch colonial era, which does not regulate the principle of pardon for judges, in the Netherlands, Article 9a, which regulates the issue of judge forgiveness, needs to be pursued to reform the formulation policy in this regard. In this case, the Rechterlijk Pardon rule in the Dutch Criminal Code looks almost the same as the formulation of Article 56 of the RKUHP, the difference lies in the consideration of justice and humanity in the RKUHP. The formulation of the rechterlijk pardon concept is a concept that is in accordance with the values that live in Indonesian society and is in line with the sentencing objectives formulated in the RKUHP.

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