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Formulation of The Principle of Forgiveness of Judges (Rechterlijk Pardon) in Jarimah Ta'zir into Indonesian Criminal Law

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Abstract

The principle of pardon of judges (rechterlijk pardon) is a new idea in Indonesian criminal law as contained in the RKUHP. There are several countries today that apply the principle of judge pardon (rechterlijk pardon) in their criminal law, such as the Netherlands, Greece, and Portugal. However, long before these countries applied the principle of judge pardon (rechterlijk pardon), Islamic criminal law had already implemented it. The principle of pardon of judges (rechterlijk pardon) related to minor crimes in Islamic criminal law is contained in jarimah ta'zir. The value of judge pardons in Islamic criminal law has advantages when compared to other legal systems, namely the balance between the interests of the perpetrator and the victim. In Islamic criminal law, judge pardons are given to perpetrators who commit minor crimes and by looking at the personality or character of the perpetrator. Judges can grant pardons to perpetrators in court based on the forgiveness of victims with regard to the rights of fellow human beings or the protection of individual legal interests (individuale belangen). This research is a normative legal research with a statutory approach and a comparative approach. Legal materials consist of primary, secondary, and tertiary legal materials with the technique of collecting legal materials is library research. The legal material obtained is then processed based on qualitative descriptive analysis techniques with deductive reasoning. The findings in this study are urgent for changes to the Dutch heritage Criminal Code. The change is by regulating the principle of pardon of judges (rechterlijk pardon) in the First Book of the Criminal Code in the future. The principle of judge's pardon (rechterlijk pardon) is accepted from the value of judge's pardon in jarimah ta'zir.

Keywords: *Pardon of Judges; Minor Crimes; Jarimah Ta'zir*

Introduction

Hermann Manheim stated that criminal law is a mirror of a nation's civilization, where criminal law is *one of the most faithful mirrors of a given civilization, reflecting the fundamental values on wich latter rests* (Purwoleksono, 2014) . From this statement, it is clear that the criminal law that applies to a country is a reflection of the civilization of that nation, so that the existence of criminal law cannot be separated from socio-cultural, socio-religious, socio-political values, and so on.

This reality becomes contradictory when confronting the civilization of the Indonesian nation with the current Criminal Code, where the current Criminal Code is a translation of *Wetboek van Strafrecht voor Nederlandsch Indie* (WvSNI) which applies based on S.1915 No. 732. The current Indonesian Criminal Code is the Dutch-herited Criminal Code which was enforced based on the principle of concordance and the Transitional Rules of the 1945 Constitution of the Republic of Indonesia. Although there have been several changes to the Indonesian Criminal Code, these changes are only patchwork, namely replacing and revoking those that are not appropriate. So it can be said that the ideas and characteristics of the current Indonesian Criminal Code are derived from the ideas and characteristics of *Wetboek van Strafrecht* (WvS) which was formed in the Netherlands.

The Indonesian Criminal Code applies based on Law Number 1 of 1946 concerning the Enforcement of Criminal Law. Since the entry into force of the Indonesian Criminal Code based on the law which incidentally is a translation of WvSNI, no significant changes have been made, except for changes that are patchy in nature. Such changes include changes that are revoking/declaring invalid for several formulations of offenses in the Criminal Code, changing the formulation of offenses in the Criminal Code, and inserting new offenses into the Criminal Code. Even though changes were made to the Criminal Code, they are not significant to the substance of the Criminal Code because the essence of the current Indonesian Criminal Code is contained in Book One, which is about the principles of criminal law.

The Indonesian Criminal Code is divided into three books, namely Book One on General Rules, Book Two on Crime *(misdrijven),* and Book Three on Violations *(overtredingen).* If traced back, namely from the origin of its formation, the Indonesian Criminal Code is the Criminal Code originating *from the Dutch wetboek van strafrecht* (WvS), while the Dutch WvS cannot be separated from the *Penal Code* made by Napoleon Bonaparte.

In 1800 Napoleon Bonaparte made a code of law by appointing a codification commission consisting of four Juris *Bigot Preameneu, Malivelle, Potalis, Tronchet)* with the assistance of a number of experts. The project was completed within a period of four months, namely the first draft known as the *Napoleonic Code* which covers the Civil Procedure Code *(code de commerce of 1807), the Commercial Code (code de commerce of 1807),* the Civil Code Criminal Law *(penal code 1810),* and the Code of Criminal Procedure Code or *code delinstruction criminelle, 1808* (Bakhri, 2011) .

Napoleonic code was then applied in the Netherlands when Napoleon Bonaparte expanded the Netherlands. Furthermore, when the Dutch colonized Indonesia, WvS derived from *Code Napoleon was* enforced in Indonesia based on the principle of concordance, namely (Prodjodikoro, 2011) :

> *"De Nederlander, die over zeen en oceanen baan koos naar de coloniale gebieden, nam zijn eigenrecht mee"* (Dutch people who are across the seas and wide oceans have a way of settling in their colonies bringing their own punishments to apply to them).

Thus, it can be said that the embryo of the current Indonesian Criminal Code, namely the basic value or idea, comes from France. As mentioned earlier that criminal law is a reflection of the civilization of a nation, the enactment of the Criminal Code which incidentally comes from Mainland Europe is not in harmony with the values and personality of the Indonesian nation. The philosophical values adopted by the Mainland Europeans are individualistic and liberal, while the values adopted by the Indonesian people

are derived from the values contained in Pancasila, namely the value of divinity, the value of humanity, the value of unity, the value of deliberation and democracy, and the value of social justice.

Robert B. Seidman argued that the law of a nation cannot be transformed to another nation *(law of non-transferability law).* This statement is relevant to be used as an analytical tool that the law originating from the colonial nation with its individualistic nature and freedom cannot be enforced in Indonesia, which adheres to socio-religious values. The statement must be emphasized that it does not mean that the Indonesian Criminal Code originating from Mainland Europe must be rejected. However, there are positive values that can be adopted in Indonesian criminal law in the future (Zaidan, 2015) .

The First Book of the Indonesian Criminal Code regulates the principles of criminal law, namely Articles 1 – 103. These principles are the limits on the validity of criminal law, criminal matters, things that abolish, reduce or burden criminal, trial, participation, concurrently, propose and withdrawing the complaint, the abolition of the authority to prosecute and carry out a crime, and several terms used in the Criminal Code. Thus, it can be emphasized that the Indonesian Criminal Code does not adhere to the principle of judge pardon *(rechterlijk pardon).*

Several countries today have regulated the principle of judge pardon *(rechterlijk pardon)* in their criminal law, namely the Netherlands, Portugal, and Greece. The principle of pardon of judges *(rechterlijk pardon)* is a new principle that is not adopted in Indonesia. However, the idea of the principle of judge pardon is contained in the 2019 RKUHP, namely in Article 54 paragraph (1) 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 afterwards can be used as a basis for consideration not to impose a crime or not to impose an action taking into account the aspects of justice and humanity.

Furthermore, in the explanation of the RKUHP it is stated that:

The provisions in this paragraph are known as the *rechterlijke pardon principle* which authorizes judges to forgive someone who is guilty of a minor crime. this apology is included in the judge's decision and it must still be stated that the defendant is proven to have committed the crime he was charged with.

Indonesian criminal law adheres to the principle of *actus non facit, nisi mens sit rea* (an act cannot make someone guilty if the intent is not guilty). This principle was later shortened to the *actus reus mens rea principle*. *Actus reus* refers to the objective element, namely action, while *mens rea* refers to the subjective element, namely the perpetrator or the fault. Based on this principle, Indonesian criminal law adheres to the dualistic principle, namely separating the objective and subjective elements in a crime.

The Indonesian Criminal Code does not adhere to the principle of pardon of judges *(rechterlijk pardon),* but only recognizes excuses for forgiveness *(schulduitslutingsgronden* or *verontschuldingsgronden).* The principle of pardon of judges *(rechterlijk pardon)* is a new idea formulated in the RKUHP, however, the idea of the principle of pardon of judges *(rechterlijk pardon)* is actually has long been stated by Roeslan Saleh. Roeslan Saleh stated that *Pardon* is a statement about the guilt of the defendant without being sentenced (Saleh, 1987) .

The reasons for eliminating criminals *(strafuitlutingsgronden)* in the Indonesian Criminal Code are divided into justifying reasons *(rechtsvaardingingsgronden)* and forgiving reasons *(schulduitslutingsgronden* or *verontschuldingsgronden).* The Indonesian Criminal Code does not explicitly regulate the division between justifying reasons *(rechtsvaardingingsgronden)* and forgiving reasons *(schulduitslutingsgronden* or *verontschuldingsgronden),* but the division is contained in the doctrine of criminal law. The justification reason *(rechtsvaardingingsgronden)* is the reason that eliminates the unlawful nature of a criminal act, so that the actions taken by the perpetrator are not against the law. In the sense that the act committed by the perpetrator is a proper or justifiable act. The reasons for justification *(rechtsvaardingingsgronden)* are contained in several articles, namely Article 48 of the Criminal Code *(vis compulsiva* and emergencies), Article 49 of the Criminal Code (forced defense),

Article 50 of the Criminal Code (implementing statutory orders), and Article 51 paragraph (1) (executing orders). legal position).

Furthermore, excuses for forgiveness *(schulduitslutingsgronden* or *verontschuldingsgronden)* are reasons that eliminate mistakes. The reason that eliminates this error is the perpetrator's self or subjective element. There are several articles in the Criminal Code that regulate the reasons for erasing mistakes or excuses for forgiveness *(schulduitslutingsgronden* or *verontschuldingsgronden).* Article 44 of the Criminal Code (ability to be responsible), Article 48 of the Criminal Code *(vis absoluta),* Article 49 paragraph (2) (exceeding the forced defense), and Article 51 paragraph (2) (invalid position orders in good faith).

The legal implication due to the non-regulation of the principle of judge pardon *(rechterlijk pardon)* in Indonesian criminal law is the settlement of minor criminal cases in court. Judges in deciding cases are bound by three natures of decisions, namely sentencing decisions *(veroordeling),* acquittals *(vrijspraak),* and decisions free from all lawsuits *(onstalg val alle rechtsvervolging).* An acquittal *(vrijspraak) is* imposed if based on the results of the examination in court the defendant's guilt for the act he is accused of is not legally and convincingly proven. Meanwhile, the acquittal decision *(onstalg val alle rechtsvervolging) is* imposed if the alleged act is proven, but the act does not constitute an acquittal. a criminal act, while a sentence of *veroordeling is* imposed if the defendant is guilty of committing the crime he is accused of.

From the three natures of the decision, problems arise, namely against minor acts that do not cause bad excesses to the victim and the community. Especially in several cases that occurred in Indonesia where in minor crimes the victim apologized to the defendant, but the judge still handed down the sentencing decision. This is done because the judge cannot get out of the three natures of the decision. There is a dilemma in deciding because of the actions that have been proven to be against the law and against the perpetrators there are errors, the judge cannot give an acquittal or acquittal decision.

Sentencing decisions in whatever form is a form of grief that is not desired by anyone. Judging from its function, criminal law is an *ultimum remedium,* not a *primum remedium.* Therefore, the imposition of criminal penalties, especially imprisonment, is only carried out if it is deemed necessary and there is no way out other than imprisonment. By looking at the bad excesses of imprisonment, where prison is not a place to make prisoners convert to their actions so that when they return to society they will become good members of society again. Contrary to the reality that has happened so far, where prisons are schools for minor criminals to learn from chronic criminals. So that the prison is a fertile place for the birth of new criminals after getting out of prison by modifying the crimes they have learned in prison, namely by learning from these chronic criminals.

By looking at this reality, the imposition of imprisonment for minor crimes is not effective and the purpose of sentencing is not achieved as expected. The process of prosecuting minor crimes such as in Indonesia does not occur in the Netherlands as the mecca of Indonesian law. The Dutch material criminal law stipulates in the insertion article, namely Article 9a WvS of the Dutch Criminal Code that the judge may not impose a crime or any action by looking at the lightness of the act, the personal circumstances of the maker, and the circumstances after the crime was committed. Thus, judges in the Netherlands can grant pardons for minor crimes with a pardon decision. Changes in material criminal law by incorporating the principle of pardon of judges *(rechterlijk pardon)* in Dutch criminal law were then followed by changes to the formal criminal law. So that there are four types of decisions in the Netherlands, namely sentencing decisions *(veroordeling),* acquittal *(vrijspraak),* acquittal decisions *(ontslag van alle rechtsvervolging),* and judge pardon decisions *(rechterlijk pardon).*

The reality is different for handling cases of minor crimes in Islamic criminal law. Crimes based on their weight in Islamic criminal law are divided into three forms, namely *jarimah hudud, jarimah qisas-diyat,* and *jarimah ta'zir.* In *jarimah Tazi,* namely *jarimah* whose form and punishment are not

determined by the Shari'a, the authority to regulate and punish finger violators *is* in the hands of the ruler. In certain *cases*, the judge can forgive the perpetrators *whose* value is small and have received forgiveness from the victim. The suggestion to forgive minor mistakes is a representation of Islamic values and the nature of Allah, namely اَلْعَفْوُ(The Most Forgiving). While the judge's pardon is a representation of the nature of Allah, namely اَلْغَفَّار(The Most Forgiving). The suggestion to forgive was practiced by the Prophet Muhammad himself in his hadiths, even in the hudud case before it reached the hands of the judge, the Prophet Muhammad recommended to forgive each other.

The legal function as an *ultimum remedium* is not only contained in Indonesian criminal law which incidentally comes from Dutch criminal law. But the *ultimum remedium* was first practiced by Umar bin Khattab, where Umar bin Khattab advised that as much as possible to avoid litigation in court. Avoid enmity, let them be able to take it in a peaceful way, because the settlement by punishment can cause enmity between you (Jauziyah, 2007) .

The commandment to forgive one another over small things is problematic for mankind. The benefit is not only for human life in the world, but also in the hereafter, because forgiveness will bring you closer to piety. This benefit is the *maqasid of sharia*, namely the value of meaning in Islamic law in every command or teaching brought by the Prophet Muhammad as a blessing to all nature.

Formulation of the Problem

Based on the description in the background above, the formulation of the problem in this study is how to apply the principle of pardon of judges *(rechterlijk pardon)* in *jarimah ta'zir* to minor crimes and how to formulate the principle of pardon of judges *(rechterlijk pardon)* for minor crimes in Indonesian criminal law.?

Research Methods

This research is a type of normative research, namely research that uses secondary data as the main material. The secondary data is divided into primary legal materials, secondary legal materials and tertiary legal materials. The division of legal materials is based on their authoritative nature, namely primary legal materials consisting of material and formal criminal legislation in Indonesia. Secondary legal materials are legal materials that further explain primary legal materials such as books, journals, and so on. While tertiary legal materials are complementary legal materials such as dictionaries, encyclopedias, and so on. The approach in this study uses a statutory approach *and* a *comparative approach*. The technique of collecting legal materials uses *library research*. While the reasoning method in this study uses deductive reasoning and descriptive analysis techniques, namely the activity of describing and analyzing the collected materials in the form of a systematic, logical sentence narrative, and is the author's interpretation of the collected materials.

Discussion

Application of the Principle of Forgiveness of Judges *(Rechterlijk Pardon)* in *Jarimah Ta'zir* Against Minor Crimes

Islamic criminal law is a set of legal rules in Islam that regulate criminal matters or crimes. There are several fields in Islamic law such as inheritance law, Islamic civil law, the law of war, and so on. The division of Islamic criminal law based on its weight is divided into three types, namely *jarimah hudud, jarimah qishas-diyat,* and *jarimah ta'zir.*

Hadd literally means to prevent or hinder. *Hadd* punishments are called *hudud* because they prevent them from taking actions that could lead to punishment (Kattani & et al, 2011) . *Jarimah hudud* is

a *jarimah* whose form and punishment is determined by Allah SWT. The types *of hudud fingers* are adultery, accusing adultery *(qadzaf),* intoxicating drinks *(asy-syurbu),* theft *(as-syariqah),* robbery *(al-hirabah),* rebellion *(al-bagyu),* leaving Islam or apostasy *(ar- riddah).* Because the form and type of punishment has been determined by the Shari'a, this type of *jarimah* remains and will not change until the end of time.

Qishas is punishing the perpetrators of the crime of murder or physical violence by cutting off a limb or injuring intentionally with the same form of punishment as the perpetrator did to the victim. Meanwhile , *diyat* is compensation in the form of assets that must be paid as compensation for life (Kattani & et al, 2011) . *Qishas-diyat* is a type of *jarimah that* concerns the rights of fellow human beings, namely crimes related to body and life. The forms of this finger are intentional killing *(al-qatl al-amd), intentional* - like killing *(al-qatl syibh al-amd),* accidental killing *(al-qatl al-khata'),* intentional mistreatment *(al-jarh al- amd),* and unintentional mistreatment *(al-jarh al-khat').* The shape and type of this *finger is permanent* and will not change until the end of time.

Ta'zir literally means to prevent, prohibit, or hinder. *Ta'zir* is more popularly used to derive the meaning of giving lessons and punishments other than *hadd punishments.* Meanwhile, according to syara' *Tazi,* it means punishment that is applied to actions that are not threatened with *hadd* or kafarat punishment. *Jarimah ta'zir* is a type of *jarimah* that is not determined by the Shari'a. Therefore, the government has the authority to determine the types of actions that can be designated as *jarimah* and their sanctions. This type of *finger ta'zir* will continue to change and develop along with the times. The purpose of the establishment of this *jarimah* is to answer legal issues that continue to develop, in addition to the purpose of providing benefit and public order (Kattani & et al, 2011) .

Indeed, the principle of pardon of judges *(rechterlijk pardon)* in Islamic criminal law is not only contained in *jarimah ta'zir,* but also in *jarimah qadzaf* (accusing adultery) and *jarimah qishas-diyat.* However, because this study focuses on the principle of pardon of judges *(rechterlijk pardon)* in the *jarimah ta'zir,* the writer will only explore the principle of pardon of judges which is only found in the *jarimah ta'zir* . The principle of pardon of judges *(rechterlijk pardon)* contained in the *jarimah ta'zir* is based on the hadith of the Prophet Muhammad. The sound of the hadith stated by Ibn Hibban is as follows:

لُوا اَلْهَيْئَاتِ اتِهِمْ لَّا اَلْحُدُودَ

"Do not ignore the small mistakes made by good people, except those concerning hadd punishment." (Anwar & Etc., 2019)

Because the *ta'zir finger* is a type of *jarimah* whose form and punishment are determined by the government, the government can also abort the *ta'zir sentence.* The basis for the cancellation of the *ta'zir* sentence was because the victim had received forgiveness from the victim when it came to the rights of fellow human beings, or because the judge was of the opinion that the crime was trivial. So that for the benefit of the judge, the judge can pardon the perpetrator in the trial.

In this regard, Wahbah Az-Zuhaili stated that *ta'zir punishments* can sometimes be dropped because the offenses committed are trivial. If the perpetrator is sentenced, it will not get the purpose of the punishment. Meanwhile, if given a light sentence, it cannot provide a deterrent effect on the perpetrator. On the other hand, the perpetrator also cannot be given a heavy sentence because the crime is trivial or light. (Kattani & et al, 2011)

Formulation of the Forgiveness of Judges *(Rechterlijk Pardon)* Against Minor Crimes in Indonesian Criminal Law

As part of public law, criminal law functions to regulate human life so that public order is realized. In this regulatory function, criminal law can be said to be a special law because it has negative

sanctions. These negative sanctions are different from other legal groups such as administrative administration law, civil law, and other legal groups.

It has long been debated by experts about the usefulness of criminal law in crime prevention, especially the effect of short-term imprisonment on minor crimes. The facts show that the more countries regulate crime, the more crime continues to grow. On the other hand, the purpose of imposing criminal sanctions on perpetrators of crimes, especially minor acts, has not been achieved as expected.

The Criminal Code does not provide an explanation of minor crimes, but there is a close correlation between material criminal law and formal criminal law, namely in Article 205 paragraph (1) of the Criminal Procedure Code it is stated that:

Those examined according to the procedure for examining minor crimes are cases punishable by imprisonment or confinement for a maximum of three months and/or a maximum fine of seven thousand five hundred rupiahs and light insults except as provided for in paragraph 2 of this part (Pangaribuan, 2003) .

Minor crimes based on Article 205 paragraph (1) of the Criminal Procedure Code are criminal acts that are punishable by imprisonment or imprisonment for a maximum of three months or a maximum fine of seven thousand five hundred rupiah and light humiliation. Furthermore, Wirjono Prodjodikoro explained that minor crimes *(lichte misdrijven)* are crimes against property whose loss value does not exceed twenty-five rupiahs. These crimes are contained in the Criminal Code, namely Article 364, Article 373, Article 379, Article 401 paragraph (1), and Article 482 (Prodjodikoro, 2011) .

The negative excesses of short-term imprisonment imposed on perpetrators of minor crimes turned out to be more dangerous than the crime itself. The Correctional Institution, which is expected to be a place for inmates to be fostered to become good members of society again or to have a resocialization function, turns out to be a contrast in reality. Prison is a fertile place for petty criminals to thrive as chronic criminals, because the conditions in prisons that bring together veteran criminals with chronic criminals, so seasoned criminals can learn a lot from chronic criminals. It is no exaggeration to say that prisons are schools for criminals.

The purpose of criminal law is so that the community can be protected to achieve a way of life that is physically and mentally prosperous. In addition, the primary function of criminal law is to tackle crime and its subsidiary function is to keep in mind the negative nature of criminal sanctions, so that criminal sanctions are only applied if other efforts are no longer adequate. However, it should be emphasized that criminal law is only one of the means or efforts to tackle crime (Poernomo, 1986) . Therefore, there are other means or efforts that are not criminal in nature and do not cause negative excesses.

It must be admitted that the use of criminal law is an effort to overcome a symptom *(recurrence am symptom)* and not a solution by eliminating the causes (Sudarto, 1983b) . The imposition of criminal sanctions on criminals, especially for minor crimes is not the goal of eliminating the crime itself, because the causes of crime are not only related to criminal law, but also social systems, economic systems, political systems, and so on.

According to Leo Polak, criminal law is the most unlucky part of the law (Sudarto, 1983b) . Regarding the usefulness of the criminal law, Leo Polak stated that the criminal law is the saddest law. Basic problems regarding the basis of punishment for criminals are problems that cannot be solved, although it is realized that there are still many doubts about criminal law, but in fact we still need criminal law as a tool for crime prevention (Sudarto, 1981) .

Regarding the function of criminal law, Sudarto stated that criminal law has two functions. *First,* criminal law is expected to protect the public from crime. *Second,* criminal law can protect citizens from interference by authorities who use criminal law incorrectly (Sudarto, 1983a) . From the two functions of

criminal law, it is clear that criminal law does not only protect citizens from the perpetrators of the crime itself *(social defense).* But furthermore, criminal law also protects citizens from the authority of the authorities from using criminal law that is not correct. The use of criminal law arbitrarily is a form of despotism, especially against criminal law which has negative sanctions. Therefore, there must be controls and limitations in the use of criminal law so that there is no inflation of criminal law.

Criminal or sentencing is the giving of suffering or an unpleasant feeling felt by the perpetrators of the crime. Criminal is the final result of the perpetrator who commits a criminal act and is against the law, and there is an error in the treatment. The principle in criminal law, namely there is no crime without error *(geen straf zonder schuld)* is a principle that is firmly held in imposing a crime against someone. Thus, crime is a recompense given by the state to perpetrators of crime by taking into account the principle of legality and the principle of culpability.

Furthermore, the perpetrator of the crime who was sentenced to the crime was then placed in the Correctional Institution to receive guidance. The naivety of Correctional Institutions that should be a place for prisoners to receive guidance so that they are expected to be converted and can return to being good members of society again, is not so in reality. In this case, Barda Nawawi Arief stated that more and more prisons were provided for recidivists, but in reality prison society tends to be full of evil attitudes (Arief, 2003b) .

In fact, according to Sahardjo, SH, the purpose of the Penitentiary is to provide pain to the convicts because of the loss of independence, but also to guide the convicts to repent and educate them to become useful members of society. Sahardjo, SH emphasized that the purpose of imprisonment is correctional. In this regard, Sudarto stated that Sahardjo, SH has laid the foundation for the formation of the convicts, which is what is commonly called *"treatment philosophy"* or *"behandeling philosophy",* correctional can be equated with resocialization and or punishment (Sudarto, 1981) .

In this regard, Roeslan Saleh stated that there are three things that must be considered in imposing criminal sanctions, namely correction, resocialization, and protection. Corrective punishment is imposed on perpetrators of minor acts or crimes committed due to negligence as a warning so that the crime is not repeated. Roeslan Saleh further stated (Saleh, 1987) :

> "But the judge himself can also take corrective action. If the judge really wants to take such an action, there are also many possibilities for the imposition of a correctional sentence. Among them the suspect will feel pain at least once is the so-called *pardon.* This is a statement of the guilt of a person without being convicted."

By looking at the bad excesses of short-term imprisonment, the imposition of short-term imprisonment on perpetrators of minor crimes is not appropriate. According to Muladi and Barda Nawawi Arief, a crime can only be justified if there is a need that is useful to the community. On the other hand, a crime is unnecessary, not justified, and dangerous for society. HL Packer stated that criminal sanctions were once the best guarantor, and at one time the main threat to human freedom. Criminal sanctions are a guarantor if they are used sparingly, carefully and humanely. Criminal sanctions are threatening, if used indiscriminately and forcibly (Muladi & Arief, 1984) .

By looking at these reasons, ideas or ideas are needed to overcome these problems in Indonesian criminal law in the future. The idea or idea is the formulation of the principle of pardon of judges *(rechterlijk pardon)* in Indonesian criminal law. As mentioned earlier, that Indonesian criminal law as contained in Book One of the Criminal Code does not adhere to the principle of judge pardon *(rehcterlijk pardon).* The principle of pardon of judges *(rechterlijk pardon)* contained in Islamic criminal law, especially in *Jarimah ta'zir,* has advantages when compared to the criminal law of the Netherlands, Portugal, or Greece.

According to Barda Nawawi Arief, Article 9a of the Dutch Criminal Code which regulates the principle of judge pardon *(rechtellijk pardon),* states that judges may not impose a crime or act against a

crime that is considered light, the character or personality of the perpetrator, as well as the circumstances at the time of the act. the crime was committed or after the crime was committed. The formulation of Article 9a of the Dutch Criminal Code reads:

> *"The judge my determine in the judgment that no punishment or measure shall be imposed, where he deems this allowed, by reason of the lack of gravity of the offense, the character of the offender, or the circumstances attendant upon the commission of the offense or thereafter* (Arief, 2003a) *."*

In the Greek Criminal Code, for certain cases the court may not impose a crime if the crime is light in nature, considers the evil nature of the perpetrator, and the imposition of a criminal is considered useless as a means so that the perpetrator does not repeat the crime in the future *(special deterrence).* Judges in Greece also stipulate that the court may not impose sanctions if the victim's loss of life or injuries due to negligence is *the offender's next of kin.* Judges can also not impose sanctions if the perpetrator is psychologically traumatized because of the crime (Arief, 2003a) .

Likewise, in the Portuguese Penal Code where judges may not impose crimes against minor offenses, namely crimes with a penalty of 6 months in prison and a sentence punishable by a combination (cumulation) of imprisonment and a fine not exceeding 180 daily fines. In addition, there are other conditions, namely that there is minimal error, the loss has been paid by the perpetrator, and there are no factors (for rehabilitation or general prevention) that hinder the settlement in this way. Regarding the principle of pardon of judges *(rechterlijk pardon)* in the Dutch Criminal Code, according to Natangsa Surbakti, it is more oriented to the interests of the suspect or defendant (Arief, 2003a) .

The principle of pardon of judges *(rechterlijk pardon)* in Islamic criminal law is given to perpetrators of crimes based on direct advice from the Prophet Muhammad to forgive perpetrators of minor crimes. The pardon of judges in Islamic criminal law is granted for crimes involving the rights of fellow human beings. Even though there are also judges' pardons given to perpetrators of crimes who violate the rights of Allah SWT such as not fasting, not praying, and so on. However, this research focuses on minor crimes involving the rights of fellow human beings, because it is difficult to find criminal acts that are commensurate with the rights of Allah SWT in Indonesian criminal law. Meanwhile, crimes related to fellow human beings are crimes that violate individual legal interests *(individuale belangen).*

Efforts to overcome crime by using criminal law are a matter of criminal politics. However, efforts to overcome these crimes are not only carried out with criminal law, but also outside criminal law *(non-penal). These non-penal* efforts include equal distribution of education, economy, poverty alleviation and unemployment, and other legal remedies that are not criminal in nature. In this regard, Habiburrahman stated that if crime is seen as a product of society, then it is the people who need treatment or guidance and not the criminals themselves. (Arief, 2005) .

Efforts to overcome crime by using criminal sanctions are the oldest method, as old as human civilization itself (Arief, 2005) . The use of criminal sanctions in crime prevention is a tool that is often used in several countries in the world, including Indonesia. Imprisonment is a prima donna because based on reality, imprisonment is the most frequently imposed punishment when compared to other crimes such as capital punishment or fines.

Middendorf stated that in practice it is difficult to determine or accept logically about the length of the sentence that matches the crime and the personality of the perpetrator, because according to Middendorf there is no logical relationship between crime and the number of years of punishment. Thus, the length of imprisonment imposed on the perpetrator of a crime is not actually closely correlated between the crime and the total length of the sentence. Regarding the criminal sanctions, Barda Nawawi Arief stated (Arief, 2005) :

So far, criminal sanctions are not drugs *(remedies)* to overcome the causes (sources of disease), but only to overcome the symptoms/effects of the disease. In other words, criminal sanctions are not

“causative treatment”, but only “symptomatic treatment”. Symptomatic treatment through drugs in the form of "criminal sanctions" still contains many weaknesses, so its effectiveness is always questioned. Moreover, the (criminal) drug itself also contains contradictory/pradoxical properties and negative elements that are harmful or at least can cause negative side effects.

Efforts to prevent crime by using criminal law are part of criminal politics. Criminal politics can be interpreted as a rational effort from the community to tackle crime. The criminal politics is related to the formation of laws, the activities of the police, prosecutors, courts and criminal executives, in addition there are other efforts that do not use criminal law (Sudarto, 1981) . Sudarto further stated that the politics of criminal law as part of criminal politics is an effort to hold elections to achieve the best legislative results (Sudarto, 1983a) .

Criminal law politics will eventually lead to criminal law reform *(penal reform).* In reforming criminal law, it is not only related to changes in the Criminal Code, namely by changing the old Criminal Code to the New Criminal Code. However, the renewal of the Criminal Code is actually a change of ideas from the old philosophy of the Criminal Code to a new philosophy of socio-religious value. The sociological reason for accepting the principle of pardon of judges *(rechterlijk pardon)* in Islamic criminal law into Indonesian criminal law is because the majority of the Indonesian population is Muslim. The upholding of Islamic values in Indonesia by making Indonesian citizens obey the law will automatically uphold public order, which some Indonesians are Muslim.

In connection with these sociological reasons, Thohir Lut stated that the establishment of Islamic values in Indonesia which is based on the One Godhead is due to the fact that Muslims are the single majority group in this country. For this reason, Muslims get a larger portion to carry out Islamic law in daily life. This extra right is due to the desire to present true justice because it will have a positive impact on the development of the Indonesian nation towards a just and prosperous society in accordance with the Preamble to the 1945 Constitution of the Republic of Indonesia (Luth, 1431) .

The spearhead of criminal law reform is a legalist body. According to Barda Nawawi Arief, legislative policy is the most strategic stage of crime prevention and control efforts. Therefore, errors in the formulation stage are also strategic errors and weaknesses that can be an obstacle to crime prevention efforts at the application and execution stages. Furthermore, it is urgent to renew the national criminal law (KUHP) to explore Indonesian values originating from Pancasila, namely religious values as well as cultural values or customs (Arief, 2001) .

The formulation of the principle of pardon of judges *(rechterlijk pardon)* in Indonesian criminal law against minor crimes is urgent to be carried out. The urgency is caused by seeing the negative excesses of short-term prisons. In addition, the formulation of the principle of judge pardon *(rechterlijk pardon)* is in line with the purpose of punishment contained in the values of Pancasila. Regarding the minor crime, Moeljatno stated that although the act had fulfilled the element of offense, it was because the value was small and did not hinder or become a barrier to the achievement of the state's goals, namely a just and prosperous society (Moeljatno, 1985) . The formulation of the principle of judge pardon *(rechterlijk pardon)* is contained in the First Book of the National Criminal Code in the future. The values of forgiving victims in criminal acts that violate individual legal interests *(individuale belangen)* which is received from the values of the judge's pardon in *jarimah ta'zir.* Based on the victim's forgiveness, the judge can grant pardon to the defendant before the trial, namely with a pardon decision. The pardon decision is a decision in which the defendant's actions are proven legally and convincingly because they are against the law, and in the perpetrator there is an error, but the judge grants forgiveness because the perpetrator has received forgiveness from the victim.

Conclusion

Based on the description above, two conclusions can be drawn. *First,* the principle of judge pardon *(rechterlijk pardon)* is contained in Islamic criminal law, namely in *jarimah ta'zir. Jarimah ta'zir* is a type of *finger* that is determined by the government, so that for the benefit of the judge, the judge can grant pardons to the perpetrators of minor crimes. The forgiveness is based on the hadith of the Prophet Muhammad to forgive minor mistakes and the character of the perpetrator (not a resident). *Second,* the formulation of the principle of judge pardon *(rechterlijk pardon)* in Indonesian criminal law in the future is to perceive the value of judge's pardon as contained in *jarimah ta'zir.* The value of judge pardons in Islamic criminal law has advantages when compared to the principle of pardon of judges in the Dutch Criminal Code, the Portuguese Criminal Code, and the Greek Criminal Code. These advantages are that in Islamic criminal law, judge pardons are given if the perpetrator has received forgiveness from the victim, namely crimes related to the rights of fellow human beings, thus reflecting a balance between the interests of the perpetrator and the victim. The formulation of the principle of pardon of judges *(rechterlijk pardon)* in Indonesian criminal law in the future is to include the principle of pardon of judges *(rehcterlijk pardon)* in Book One of the Indonesian Criminal Code in the future.

Suggestion

It is recommended to the legislature to be able to interpret the values of judge pardons in Islamic criminal law. This is urgent to do because the value of judge pardons in Islamic criminal law has advantages when compared to other legal systems. The judge's pardon value derived from the Shari'a has a benefit value for human life, both in this world and in the hereafter. And also to the Government and DPR RI to immediately ratify the RKUHP as a law that reflects the civilization of the Indonesian nation.

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