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COMPARISON OF THE JUDICIAL FORGIVENESS (RECHTERLIJK PARDON) BETWEEN CIVIL LAW SYSTEM AND ISLAMIC LAW SYSTEM (FINDING THE FORMULATION OF THE PRINCIPLE OF RECHTERLIJK PARDON IN INDONESIAN CRIMINAL LAW)

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Abstract

This study falls under the category of normative legal research or doctrinal legal research. Primary legal resources, secondary legal materials, and tertiary legal materials are all used library research techniques for gathering legal materials (library research). In contrast, the descriptive analysis approach is used for data processing. According to the conclusions of this study, various civil law system nations, like the Netherlands, Greece, and Portugal, use the principle of judicial forgiveness (rechterlijk pardon). However, long before these nations implemented the principle of forgiveness (rechterlijk pardon) in their criminal law, Islamic criminal law used principle of forgiveness first in jarimah qadzaf (accusing adultery), jarimah qishas-diyat, and jarimah Ta'zir. Compared to the principle of forgiveness (rechterlijk pardon) in the civil law system, the principle of forgiveness (rechterlijk pardon) in Islamic criminal law offers benefits. The formulation of the principle of judicial forgiveness (rechterlijk pardon) in Indonesian criminal law in the future is to prescribe the principle of judicial forgiveness in Islamic criminal law since it is seen to have advantages. Furthermore, incorporating the notion of judicial forgiveness (rechterlijk pardon) from Islamic criminal law into Indonesian criminal law is sociologically consistent with the legal knowledge of the Indonesian people, the majority of whom are Muslims.

Keywords: ***judicial pardon, civil law system, islamic law system.***

1. INTRODUCTION

When speaking to Achilles, King Priam mentioned forgiveness as the predecessor of the feature of forgiveness, stated: "Have compassion on me, remembering your father, but I am more deserving of your mercy, for I have persevered in doing what no other mortal on Earth has done: I have lifted to my mouth the hand of the One Who Killed My Son." The development of the retributive tradition in modern criminal philosophy has been referred to as the 'just desert' or 'justice model. In this concept, punishment is the harsh retribution to the wrongdoer according to his 'desert' or deserving. In turn, the appropriateness of blame demands that the offender can be accountable institutions: at a minimum, cognitive and volitional capacities so that they know what they are doing when they commit a crime and employ enough alternatives and degrees of control in doing so. This tradition holds that a conviction is only valid if the criteria of the responsible body are satisfied and that the penalty must be appropriate to the culpability.

According to Barda Nawawi Arief, various variables impact a nation's mindset (fundamental notion) about its criminal law principles. Among these elements are philosophical ideals, sociopolitical, socioeconomic, sociocultural, historical experience, empirical conditions, Community Development in national and international relations, scientific developments/theories, and comparative materials. The statement stressed that there is no static criminal law by remaining mute while global criminal law evolves. Crime evolves in tandem with the evolution of society, which is constantly changing. On the other hand, if criminal law remains mute and does not adapt

to the growth of global criminal law, then a nation's criminal law would constantly lag behind the development of crime. Furthermore, the criminal law will not meet the legislation's goals of justice, utility, and legal clarity.

Today, there are several sources of national criminal law, including the continental European legal system, customary law, Islamic law, and the development of global criminal law. Because the present criminal code is the Dutch criminal code, the continental European legal system is a source of law that cannot be separated from Indonesian criminal law. The Indonesian criminal code is a translation of the Wetboek van Strafrech voor Nederlandsch-Indie (S.1915 No. 732), which is applicable under Law No. 1 of 1946 governing criminal law regulations. Since the implementation of the criminal code drawn from the WvSNI, there has never been a significant modification, except for the patchwork nature. Meanwhile, the Dutch Wetboek van Strafrech (WvS), the source of WvSNI, has evolved swiftly and has been softened in response to the evolution of worldwide criminal law. Patchy revisions to the criminal code include amendments that revoke/declare various void formulations of offenses in the Criminal Code. Changes in the Criminal Code's formulation of criminal offenses/norms. Changes to the Criminal Code by adding/inserting new offenses.

As with law and society in general, there is a deep-seated tendency within moral philosophy to fundamentally link the concept of responsibility with morality, claiming that its purpose or objective is moral evaluation: the judgment of others and their behavior as good or bad, right or wrong. Furthermore, such moral judgments are frequently thought to be a fundamentally affective form manifested and expressed in our emotions and reactive attitudes toward those whose actions demonstrate ill will toward others. Muladi believes that future reforms to Indonesian criminal law (penal reform) must be uniquely Indonesian. Penal reform is motivated by social, political, practical, and ideological factors. Penal reform should not disregard characteristics of humanity, the environment, and Indonesian cultural traditions. Furthermore, criminal law reform (penal reform) must include the growth of global criminal law and the Association of Civilized Nations. Criminal law reform (penal reform) must also be sensitive to advances in science and technology and criminal policies to avoid crime.

In the future, Indonesian criminal law must be consistent with the philosophical beliefs of the Indonesian people. The value is found in Pancasila, especially divinity, humanity, unity, democracy, and social justice. Pancasila is Indonesia's ultimate source of law and the wellspring of all sources of law. The five values become the guiding stars of all laws and regulations. Therefore legal goods that contradict Pancasila's ideals cannot be justified. Laws under people's legal consciousness will be simple to apply because the law is simply a transformation of living legal values into written law wrapped in a blanket of the legality principle. Despite these variations, the concept of duty that emerges from this picture is profoundly linked to moral judgment via our behavior of responding to others with affective guilt. Criminal law theories that criminal proceedings and punishment as a form of institutionalized hatred (along with other attitudes) are frequently supported by this construct, with law understood to serve to enforce morality as well as judge offenses and convict offenders through institutional processes that represent our collective emotions and reactive attitudes toward wrongdoing.

An independent nation must undoubtedly adopt its criminal law distinct from the colonial criminal code. Because the law is a nation's will or political expression, the National Criminal Code is a shared goal that must be achieved in the future. The established National Criminal Code is a

country's pride and existence because a country that proclaims independence but continues to employ the colonial criminal code would lose its identity as a nation. The colonial penal code can only be justified for a transitory period; it cannot be allowed for an indefinite period; instead, it must cease with the introduction of a national penal code. In terms of the economy, there has been rather substantial inflation since the Criminal Code was adopted today. Inflation undoubtedly impacts law enforcement since there are values that no longer apply to the present circumstances, such as the fear of fines, victim losses, and many more. As a result, significant changes to the present criminal law are required to adapt to the expanding economic development. This problem is exacerbated by the rapid evolution of the mode of operation of crimes in economic law. As a result, such fast changes should be quickly adapted to changes in National Criminal Law.

The ideals embodied in Indonesian criminal law are those of mainland European nations. These principles are only sometimes in sync with the different socio-cultural values of the Indonesian people, who cherish unity, religion, civility, and many more. Strictly speaking, the original value of the Indonesian nation is based on socio-religious principles and cooperation. In contrast, mainland European ideals promote independence and individualism. Standards of decency, morality, appropriateness and the ideals of social freedom cannot be fully recognized in Indonesia because the Indonesian people continue to regard religious beliefs as social control, even whether these values exist in the form of living law or unwritten law. The historical experience of the Indonesian country conquered by the Netherlands, such that Dutch criminal law was implemented in Indonesia based on the concordance principle. Dutch criminal law is still in effect at this time, based on the transitional laws of the Indonesia Constitution of 1945, before a new one was written. The historical experience gained through implementing criminal legislation based on the Dutch Penal Code cannot be sustained indefinitely. Although we cannot be entirely free of WvSNI's influence, the reform to replace the National Criminal Code is unavoidable. As a result, the future formation of Indonesian criminal law cannot be wholly separated from the Dutch criminal code because there is a situation where it must be interpreted by the historical method, and the historical interpretation method that will be used later will also return to the Dutch criminal code in terms of the historical reasons for the establishment of a rule. In the sense that revisions to the Dutch legacy Criminal Code must still be made with an eye toward the principles and major concepts (ideas) based on Pancasila's ideals and the advancement of global criminal law.

This fact does not imply that we must always live in the shadow of Dutch criminal law, yet beneficial principles are to be drawn from the Dutch legacy Criminal Code. These exemplary aspects include, for example, criminal law principles, legal certainty, justice, expediency, how to create offenses, and others. The good ideals of the Dutch Criminal Code must be preserved as long as they provide advantages to the community because benefits can come from any legal system, and we cannot limit ourselves to one, in the sense that the future growth of criminal law must embrace maslahat values from any system, as long as they are consistent with Pancasila ideals. National boundaries are collapsing due to the rapid flow of globalization and the advancement of Science and Technology. In the abstract, there are no longer any barriers separating one country from another. What is happening today will impact the development of Indonesian criminal law, such as the growth of current criminal activities, such as cybercrime, cyberspace, and others. The evolution of society, both global and international, will impact a nation's criminal law. As previously stated by the author, the root of current Indonesian criminal law is the evolution of worldwide criminal law.

In Indonesia, judicial pardon (rechterlijk pardon) is a novel legal principle. The causes for forgiveness (schulduitslutingsgronden) specified in Article 44 (ability to be accountable), Article 48 (vis absoluta), Article 49 paragraph (2) (a forced defense that exceeds the limit), and Article 51 paragraph (2) are recognized in Indonesian criminal law (carrying out orders of unauthorized positions in good faith). The articles govern the cause for forgiveness, that is, the basis for the removal of the criminal owing to the elimination of the perpetrator's fault so that the perpetrator cannot be held criminally liable (subjective element). In contrast to judicial forgiveness (rechterlijk pardon), if the perpetrator's activities are unlawful, there is a mistake against the perpetrator. Therefore there is no justifying cause in his conduct and no forgiving reason in the perpetrator. According to Roeslan Saleh, a pardon is a statement regarding the accused's guilt without being sentenced.

However, there is no foundation for a judge's pardon in the existing criminal code (rechterlijk pardon). However, the rule on the principle of Judge pardon (rechterlijk pardon) is incorporated in the 2019 Criminal Code Draft. The notion of Judge Forgiveness is stated in Article 54, paragraph (2) of the 2019 Criminal Code Draft: The levity of the conduct, the perpetrator's circumstances, or the circumstances at the time the crime was done and that happened subsequently can be used as a reason for consideration not to impose a crime or not to impose an action in light of justice and humanity. Further on in the explanation: Further on in the explanation, This rule is known as the concept of rechterlijk pardon, allowing the judge to apologize to someone who has committed a minor offense. This apology is part of the judge's ruling, and it must still be noted that the offender was shown to have committed the offense for which he was charged.

The notion of Judge forgiveness is mentioned in Article 54, paragraph (2) of the 2019 Criminal Code Draft, which is substantially the same as the regulation of the principle of forgiveness (rechterlijk pardon) in Dutch criminal law. Today, numerous nations' civil law systems govern the notion of judicial forgiveness (rechterlijk pardon) in criminal law. The nations in question are the Netherlands, Greece, and Portugal. However, long before these countries regulated the principle of judicial forgiveness (rechterlijk pardon) in their Criminal Law, Islam regulated the principle of judicial forgiveness (rechterlijk pardon) in several jarimah, including jarimah qadzaf (accusing adultery), jarimah qishas-diyat, and jarimah Ta'zir.

As described by Barda Nawawi Arief, Marc Ancel classified the world's legal families into five categories. The legal family consists of:

1. The legal systems of continental Europe and Latin America (civil law).
2. Anglo-American system (common law).
3. The legal system of the Middle East such as Iraq, Jordan, Saudi Arabia, Lebanon, Syria, Moroco, Sudan, and others.
4. The legal system of the Far East such as Japan and China.
5. The legal system of the socialist state (socialitst law).

According to Barda Nawawi Arief, compensation materials are factors that impact the formation of a nation's principles of criminal law. In conjunction with these comparative resources, this research investigates the notion of judicial forgiveness (rechterlijk pardon) in nations that adhere to civil and Islamic law systems. The Netherlands, Portugal, and Greece are examples of countries that have adopted the civil law system. While the writers of the Islamic legal system investigate the explanation as contained in Shari'a and jurisprudence. The comparison aims to identify how different nations regulate the principle of judicial pardon (rechterlijk pardon).

Furthermore, it takes the values of goodness and advantages from the arrangement of the judge's pardon (rechterlijk pardon) and then formulates them into Indonesian criminal law in the future.

2. RESEARCH QUESTIONS

The formulation of the research questions in this study is based on the description in the background above, namely:

a. How is the arrangement of principle of rechterlijk pardon in the civil law system?
b. How is the formulation of the princile of judicial pardon (rechterlijk pardon) in Indonesian criminal law in the future?

3. RESEARCH METHOD

This study falls under the category of normative legal research or doctrinal legal research. In this study, secondary data are classified as primary legal materials, secondary legal materials, and tertiary legal materials, with the differentiation between the three legal materials based on their authoritative nature. Primary legal materials are rules and regulations, namely material criminal law in Indonesia, whereas secondary legal materials are literature that explains primary legal materials. The literature is relevant to criminal law principles, the principle of judicial forgiveness, comparative law, criminal law politics, criminal law reform, and other related literature. Tertiary legal materials include dictionaries-encyclopedias, catalogs, and other materials that explain primary and secondary legal texts. The legal content is discovered through library research and analyzed using qualitative descriptive approaches and deductive reasoning.

4. DISCUSSION

4.1 The Principle of Judicial Forgiveness (Rechterlijk Pardon) in Civil Law System and Islamic Law System.

a. Netherland

Comparative studies with the Dutch legal system are critical, not just in criminal law but other fields of law, because the Indonesian legal system is inextricably linked to the Dutch legal system. The Indonesian criminal code is based on the Dutch criminal code, issued under Law No. 1 of 1946 on criminal law rules. Indonesian criminal law is a copy of WvSNI, whereas WvSNI is a modified copy of WvS. There have been variations since the establishment of the Indonesian criminal law, which is based on the Dutch criminal code. The distinction is because the Dutch criminal code specifies that criminal law applies in the Netherlands, but the WvSNI applies in the Netherlands Indie area, which is now Indonesian territory. The second distinction is that the death sentence is still listed in Indonesian criminal law but has been abolished in the Dutch criminal code since 1870. Furthermore, numerous offenses have harsher penalties in Indonesia than in Dutch criminal law. For example, a theft offense, a fraud offense, an embezzlement offense, and many others. This is because Indonesian society has distinct geographical and socio-cultural factors from the Netherlands. The other distinction concerns the conditional criminal, the prospect of fines, and many others.

The Dutch criminal code has undergone various revisions, with the Dutch criminal code becoming more lenient in terms of criminal activities, offenses, and convictions. The softening is due to global criminal law adaptation in the Netherlands. One not included in Indonesian criminal law is the notion of judicial pardon (rechterlijk pardon). The flow of current criminal law impacted the evolution of the Dutch Penal Code. The principle of subsidiarity is one of the principles that

influenced the development of the Dutch criminal code, where the principle of subsidiarity adheres to the principle that against an act that is included in the offense but is socially small in meaning, the judge can impose a criminal or any action. Furthermore, the impact of this idea is shown in the Dutch criminal code Article 9a. Article 9a of the Dutch criminal law is written as follows:
(Indien de rechter dit raadzaam acht in verband met de geringe Ernst van het feit, de personlijkheid van de dader of de omstandigheden waaronder het feit is began, dan wel zich nadien hebben voorgedaan, kan hij in vonnis bepalen dat geen straf of maatregel zat worden opgelegd. Suppose the judge believes it is acceptable in connection to the minor signs of an act, the personality of the offender, or the circumstances at the time the act was performed, as well as after the act was committed. In that case, he rules in the decision that no crime or action will be imposed.

The notion of a Judge's pardon is defined in Article 9a of the Dutch criminal law (rechterlijk pardon). The article's core is that the court cannot impose a criminal or other action if he sees parts of the perpetrator's conduct and blunders. The act's aspect is that the perpetrator's act is a minor crime, and the state after the act is completed. In the sense that the unlawful conduct does not cause social excesses or tensions. While the subjective part is the culprit's fault is light, specifically, there is no evil character in the criminal (not recidivist), and see also see the reason for the crime. In criminal justice, the offender who talks about the offense represents the community to the court. On the other hand, victims rarely appeared in court, and all who spoke were warned not to talk beyond the judge to the opposing party but to speak straight to the judge. As a result, communication in criminal justice lawsuits (and similar youth justice processes) is made to the community rather than the victim. In restorative justice, communication is planned between the parties (between the victim and the perpetrator) and is mediated when necessary by a facilitator.

Changes in the article based on judicial forgiveness (rechterlijk pardon) are distinct from the Indonesian criminal code, which does not accept the notion of judicial forgiveness (rechterlijk pardon). As the foundation of the Indonesian criminal code, the Dutch criminal code has experienced various revisions, particularly in terms of criminal law principles and punishment purposes. There are other broad principles for punishment in the Dutch criminal code that are not yet included in Indonesian criminal law.

b. Greece

Although it is not specified in the general requirements, the notion of judicial pardon (rechterlijk pardon) is established in Greek penal law. The principle of the judge's pardon is enforced by including provisions in the Greek criminal code that allow the court not to impose any sanctions on the accused, namely if the victim and the loss of life or injuries due to forgetfulness are the offender's immediate family (the offender's next of kin), and the offender should not be convicted because of the psychological trauma he suffered as a result of the offense. Furthermore, in some situations, the court may decline to impose a criminal offense if the crime is minor in comparison to the wicked character of the offender and the imposition of a criminal offense is not deemed effective in preventing the perpetrator from repeating the crime (special deterrence). The conditions for not imposing any punishment on the culprit based on the crime's mildness and the perpetrator's sinful nature are the same as those specified in Article 9a of the Dutch criminal code. However, the last requirement is a particular criterion that differs from Dutch criminal law in that the judge does not impose a crime since he will not understand the substance of the goal of the conviction if he judges in a criminal conviction.

This approach is a progressive principle compared to the Indonesian criminal code, where judges impose a crime if the objective and subjective criteria are satisfied. Judges in Greece cannot impose a crime even if the objective and subjective conditions are satisfied since they regard the petition's ideology as more than just retaliation or deterrence. If the court believes that imposing a criminal crime would not achieve the goal of the conviction, the judge may not impose any criminal sanctions or proceedings against the offender.

c. Portugal

When compared to other countries, Portugal's criminal law is relatively recent. As a result, it is logical that the Portuguese criminal code reflects the evolution of contemporary criminal law. The Portuguese Penal Code went into effect on January 1, 1983, but the Penal Code arrived later. The process of developing Portugal's Penal Code and Criminal Procedure Code began in 1961, with the appointment of Eduardo Correia by the Minister of Justice. The previous penal law has been in effect since 1886, while the earlier Penal Code of Portugal dates from 1852. One of the suggestions of the Council of Europe's Commission of Ministers (in Resolution No. 10/76 of 9 March 1976) was to consider the idea of providing judges the power not to impose any criminal consequences for minor infractions. Portugal was one of the nations that embraced this advice, and the Portuguese Penal Code of 1983 included two types of dispensa de pena or non-imposition of punishment.

In Portugal, judges are not allowed to impose criminal punishments on offenders of offenses punishable by a maximum of six months in jail or a combined penalty of imprisonment and a fine not exceeding 180 daily fines. The requirements for non-conviction are that there is limited culpability, the culprit has already compensated for the injury, and there are no factors (for rehabilitation or general prevention that prevent solving the problem in this way). Suppose the guilt conditions are modest and no considerations (rehabilitation or general prevention that limit settlement of the matter in this manner) are present. In that case, the court may postpone his judgment for a year. The notion of judicial pardon (rechterlijk pardon) is not explicitly established in the Portuguese Penal Code. However, in some instances, the judge may postpone the criminal's death. So the difference between Article 9a of the Dutch Penal Code and Article 9a of the Portuguese Penal Code is that the court does not impose a criminal or any action in the Dutch Penal Code. However, in the Portuguese Penal Code, criminal judgments are postponed.

The judge considers that the postponed criminal decision is sufficient to prevent the convicted person from committing the crime again and is consistent with general prevention. Consideration of personal, personal circumstances, and at the time after the crime is committed and indemnify the victim or provide a guarantee for it, make moral improvements, and payment of a certain amount of money to the victim to the state equivalent to the amount of the fine listed in the offense violated. The goal of dispensa de Pena is to avoid short-term incarceration and convictions that are unwarranted or unneeded in terms of necessity. The fundamental reason for punishment is to protect the community (social defense) and to rehabilitate the offender. Dispensa de Pena serves as a judicial corrective to the legality principle and an alternative to short-term incarceration.

d. Islamic Law System.

Islamic criminal law is classified into three types based on its weight: jarimah hudud, jarimah qishas-diyat, and jarimah Ta'zir. Hadd literally means to prohibit or block, and punitive penalties hadd is known as hudud because the sanctions might keep individuals from performing

things that could lead to punishment. Hadd punishment is classified into seven categories: theft (al-sariqah), murder, hirabah, adultery, adultery accused (al-qadzaf), consuming wine (syurb al khamar), and riddah (apostasy).

Qishas punishes the perpetrator of murder and willful damage in the form of limb cutting and wounding with the same kind of punishment as the victim. Ta'zir, on the other hand, literally means to forbid, prohibit, or obstruct. In syara'Ta'zir, punishment is administered on an act that is not threatened with penalty hadd and expiation. The division of jarimah is based on the right to punish, namely the rights of Allah Swt, the general public, and fellow human beings. Except for qadzaf (accusing adultery), Allah SWT has the power to punish in jarimah hudud since human rights are more prominent. Jarimah qishas-diyat is jarimah that, is the right of fellow human beings. Hence there is forgiveness in jarimah qishas-diyat. While the kind of jarimah Ta'zir is determined by the ruler, the type of jarimah Ta'zir is not included in the jarimah hudud and jarimah qishas-diyat. Jarimah Ta'zir will continue to evolve in order to achieve Public Order. Jarimah Ta'zir is separated into two parts: Allah SWT's rights, such as not fasting or praying, and those that are not. While jarimah Ta'zir is the right of others, such as theft, embezzlement, fraud, and so on.

The notion of judicial forgiveness (rechterlijk pardon) has long been used in Islamic criminal law. The principle's applicability is as old as Islamic criminal law, where the Prophet Muhammad preached and practiced forgiveness for situations he faced. The associates, Tabi'in and Tabi'tabi'in, continued the practice till now in Islamic-law nations like Brunei Darussalam, Saudi Arabia, Jordan, and others. In Islamic criminal law, the principle of judicial forgiveness (rechterlijk pardon) is found in jarimah, which is the right of fellow human beings or human rights, namely jarimah qazdaf (accusing adultery), jarimah qishas-diyat, and jarimah Ta'zir. However, there is also forgiveness of judges in jarimah Ta'zir related to Allah SWT's rights, such as not fasting. Compared to artificial law, Islamic criminal law offers advantages, notably the value of genuine justice and benefits for human life in this world and the next. Allah SWT, as a lawmaker, understands the significance of the law's purpose.

In this regard, Moh. Tolchah Mansoer declared that no God's commandments or teachings are contradictory to man's best interests. Furthermore, Moh. Tolchah Mansoer claims that it is precisely human interests or artificial laws that violate God's precepts. The declaration acknowledges that Islamic rules contain significant values and that meaningful values are for the good of humanity. Applying the notion of judicial forgiveness (rechterlijk pardon) in jarimah qazdaf (accusing adultery), qishas-diyat, and jarimah Ta'zir has a genuine value of benefit and justice. The principle of the pardon of judges (rechterliijk pardon) in civil law nations differs significantly from the notion of the pardon of judges in Islamic law countries. In the Netherlands, Greece, and Portugal, a judge's pardon is awarded to the offender for a minor offense, the culprit's person or disposition, and the circumstances after the crime's commission. Under Islamic criminal law, judges forgive minor offenses and significant crimes, such as crimes against the body and life. In Islamic criminal law, the judge's forgiveness is allowed if he receives the victim's or his heirs' forgiveness. However, in the event of Allah SWT's right, it is the judge's power to forgive.

Concerning the judge's ability to grant pardon in the jarimah Ta'zir of Allah SWT's rights, Wahbah Az-Zuhaili underlined that Ta'zir's penalty could be annulled even though the punishment is considered compulsory. The penalty is null and void because the offense is minor, insignificant, or trivial, so if it is sentenced, it will not achieve the objective of the punishment itself (the purpose of the conviction). The crime of being punished lightly will also not have a deterrent impact on the

offender. On the other hand, because the offense is minor, the criminal cannot face harsh punishment. Furthermore, the School of Hanafiah considers Ta'zir punishment compulsory when it involves the rights of fellow human beings. The judge will not pardon unless the person has the right to forgive. If the verdict is against God, it is also against the judge. If the judge believes the punishment is justified, it is mandatory to carry it out. However, if the judge's decision provides no advantage, it might be overturned and the culprit pardoned. Ibn Al-Hamam emphasizes that carrying out ta'zir punishments related to Allah SWT's rights is obligatory unless there are no maslahat for the perpetrator himself and the judge can grant forgiveness. In jarimah Ta'zir, the right of fellow human beings, if the offender obtains forgiveness from the victim and the ratio is less than 1/4 dinar, the court can award forgiveness. The principle of judicial forgiveness (rechterlijk pardon) has been practiced in Islamic justice as a depiction of Allah's most forgiving character (al-ghoffar) and the Hadith of the Prophet Muhammad, who constantly advocates forgiveness, especially if the wrong is little. In the instance of hudud, the Prophet Muhammad pushed for forgiveness before the problem reached the hands of the court, but if it reached the front of the judge, it was obliged to carry it out. The judge's pardon is awarded due to the insignificance of the perpetrator's offense, the perpetrator's status or person, and the benefit of the culprit and the larger community.

The arguments that advocate to forgive mistakes that are small are as the Hadith of the Prophet Muhammad which reads:

أَقِيلُوا ذَوِي الْهَيْئَاتِ عَثَرَاتِهِمْ إِلَّا الْحُدُودَ

Pay no heed to the misdeeds of the righteous, except those concerning the punishment of hadd.

أَقِيلُوا ذَوِي الْهَيْئَاتِ عَثَرَاتِهِمْ إِلَّا الْحُدُودَ

Furthermore, the command to forgive hudud cases if the case has not reached the judge is strengthened by the hadith which reads:

نِي مِنْ حَدٍّ فَقَدْ وَجَبَتَعَافُوا الْحُدُودَ فِيمَا بَيْنَكُمْ ، فَمَا بَلَغَ

Be forgiving of others. When the hadd matter has reached me, it must be implemented.

رِدَاءَهُ فَشَفَعَ فِيْهِ : هَلاَّ كَانَ أَنْ لَّذِيْ سَرَقَعَنْ صَفْوَانْ بِنْ أَمَيَّةْ أَنَّ النَّبِيَّ صَلَىَّ اللهُ عَلَيْهِ وَسَلَّمَ قَالَ لَهُ لَمَّا أَرَادَ أَنْ يَقْطَعَ يَدً اَ تَأْتِيْنِى بِهِ ؟

Hadiths received from Shafwan bin Unayyah that the Prophet Muhammad said to him when he gave tolerance to those who stole his turban. The Prophet (peace and blessings of Allah be upon him) said: Why not before this matter is brought down to me?. The Prophet (peace and blessings of Allah be upon him) was known for being forgiving and gentle. However, the Prophet Muhammad praised the judicial process, noting that once the matter had reached the judge, the sentence must still be carried out. Thus, the Prophet advanced the notion of ultimum remedium aimed toward the welfare of the culprit.

Because human rights are more important in the tale of qadzaf (accusing adultery), judges are pardoned. The accused (victim) is provided a unique area to express forgiveness for the offender's wrongdoing. If victims absolves the offender's guilt, the judge might grant a pardon, and the punishment is commuted. Qadzaf (accusing adultery) is an act that assaults a person's honor and dignity, Islam is particularly protective of a person's honor, and fitna is crueler than murder. According to Wahbah Az-Zuhaili, qadzaf (adultery accusation) might be executed for three reasons. First, the requirement of witness or acknowledgment from maqdzuuf that he has committed adultery can substantiate the allegation of qadzaf (accusing adultery). Second, according

to Shafi'iyah thinkers, maqdzuuf grants pardon since qadzaf (accusing adultery) covers the rights of other human beings. Third, the presence of Li'an between the husband and wife.

The following principle of rechterlijk pardon is contained in jarimah qishas-diyat because it is ultimately the right of fellow human beings. In the jarimah qishas-diyat, forgiveness is provided by the victim or his heirs so that the judge also forgives the criminal. Qishas can only be enforced for purposeful offenses, whereas those done accidentally are condemned to diyat. Intentional homicide, semi-purposeful homicide, accidental homicide, intentional injury, and unintentional harm are the categories of conduct covered under the qishas-diyat jarimah. Qishas might be dismissed if the victim or his heirs do not forgive them. While intentional murder can result in punishment if the heir forgives the perpetrator, intentional harm can result in punishment if the victim forgives the perpetrator. In the case of deliberate homicide, the heir may suit for qishas or abort it by substituting a diyat or eliminating the qishas-diyat, allowing the offender to be acquitted without the qishas-diyat. The judge then forgives the criminal before the trial, using the forgiveness granted by the victim or heir.

This is corroborated by Wahbah Az-Zuhaili, who claims that diyat is just a replacement for forgiven qishas. If the victim forgives without requesting diyat, the offender is not required to pay it; nonetheless, the perpetrator may provide diyat on his behalf even if the victim does not request it. The advice to forgive in qishas is found in Surah Al-Baqarah 178 and ash-Shura verse 140. The word of Allah in Surah Ash-Shura verse 40 reads:

وَجَزٰٓؤُا سَيِّئَةٍ سَيِّئَةٌ مِّثْلُهَا ۚفَمَنْ عَفَا وَاَصْلَحَ فَاَجْرُهٗ عَلَى اللّٰهِ ۗاِنَّهٗ لَا يُحِبُّ الظّٰلِمِيْنَ

The advice to forgive in qishas is found in Surah Al-Baqarah 178 and ash-Shura verse 140. The word of Allah in Surah Ash-Shura verse 40 reads. (QS. Asy-Syura: 40). Regarding the culprit's release from punishment, because he has achieved forgiveness from the victim or his heirs, scholars disagree on whether the perpetrator is entirely released or can be sentenced to Ta'zir. Some academics say that the court can impose punishment Ta'zir as a sort of policy to dissuade the culprit and teach the more prominent community not to repeat the same mistake jarimah.

4.2 Formulation of the principle of judicial pardon (rechterlijk pardon) in Indonesian criminal law.

The future formulation of the principle of judicial forgiveness (rechterlijk pardon) in Indonesian criminal law is a topic of criminal law reform (penal reform). While criminal law reform (penal reform) cannot be divorced from criminal law politics (penal policy) and criminal politics (criminal policy). In the larger framework of Criminal Law Reform (penal reform), the politics of community protection (social Defense policy) and the politics of public welfare (social welfare policy), both of which are elements of social politics, cannot be separated (social policy).. Criminal politics, according to Sudarto, is a logical effort to combat crime that encompasses the formulation of laws and regulations, the activities of police agencies, prosecutors, courts, and criminal executors, as well as other initiatives that do not employ criminal law. Criminal law politics endeavors to run elections to attain the most advantageous legislative outcomes.

Criminal law politics is an endeavor to run elections based on the consequences of effective legislation to combat crime. Criminal law politics aims to lead to criminal law reform (penal reform). Penal reform in the future must be viewed through the lens of criminal law's ultimate remedial role. In the sense that additional criminal consequences are imposed when existing non-criminal initiatives, such as civil and administrative sanctions, are deemed inadequate

in combating crime. As a result, the formulation of criminal sanctions policy in law must be done with caution, especially by making criminal sanctions the last resort. Concerning the role of criminal law, Sudarto remarked that it has two aspects: safeguarding the public from crime and protecting citizens from authorities that apply criminal law inappropriately. According to Sudato, the primary objective of criminal law is to combat crime. However, another equally essential goal is to safeguard the people from the authorities' erroneous use of criminal law.

Regarding the objective of criminal law, which is to protect the public from crime, it was recognized early on that criminal law's power to combat crime is severely restricted. Criminal law only deals with when a crime happens, not its symptoms. While the symptoms of crime are tied to the criminal law problem, they are also related to the social, economic, political, and others. As a result, if the symptoms are not addressed, crime will continue to develop. In certain instances, criminal consequences, including incarceration, are not the best option. In actuality, the perpetrator of a crime receives a negative impact from fellow convicts. Thus it is not an exaggeration to suggest that jail is a school for criminals. In jail, seasoned offenders will engage with chronic criminals in such a way that their mental and moral well-being is harmed. As a result, the goal of incarceration, which is to have a deterrent impact and help inmates become decent people again (resocialization), is not being met as intended.

Given the harmful excesses of the jail term, the employment of criminal punishments, particularly incarceration, must be done with extreme caution. If alternative non-criminal tactics prove ineffective, new incarceration is used. Criminal punishments are not the sole way to combat crime, particularly offenses involving the rights of others or the legal protection of persons (individuale belangen). The second duty of criminal law is to safeguard society against officials that misuse criminal law. Incorporating criminal punishments in the Indonesian criminal code and various other laws and regulations is the most effective approach for combating crime. It is analogous to incomplete criminal law regulations without criminal punishments if the principles of legality (objective element) and guilt (subjective element) are satisfied. As a result, if a crime's objective and subjective elements are satisfied, criminal consequences must exist..

This notion in Indonesian criminal law states that crime is an accumulation of criminal acts (of an illegal character) and criminal culpability (errors). As previously stated, the principle does not exist in the Netherlands, Greece, or Portugal. In such states, the judge may not impose any criminal sanctions on the accused if the crime committed is little, insignificant, or trivial, the maker's or perpetrator's circumstances or character, the consequence of the criminal conduct in the community, and the perpetrator has paid damages to the victim. The principle is known as the principle of judge's pardon (rechterlijk pardon), and it states that if a perpetrator is found guilty of a crime but cannot be convicted because he sees these reasons. Compared to the regulation of the principle of judicial forgiveness (rechterlijk pardon) in these three nations, the principle of judicial forgiveness (rechterlijk pardon) in Islamic criminal law is more complete. The judge in Islamic criminal law can forgive jarimah qadzaf (accusing adultery), qishas-diyat, and jarimah Ta'zir. Thus, compared to the regulation of the principle of forgiveness of judges (rechterlijk pardon) in the Netherlands, Greece, and Portugal, the concept judicial forgiveness (rechterlijk pardon) in Islamic criminal law has benefits.

If they have gained forgiveness from the victim, the court can award forgiveness before the trial for minor offenses as long as they are connected to the rights of fellow human beings. Furthermore, if and has gained forgiveness from the victim, a judge's pardon can be granted for a criminal violation, including insult or attack on honor. Even for terrible offenses like murder and

molestation, the judge might award a pardon if the victim or his heirs have been pardoned before the trial. As a result, the formulation of the principle of judge forgiveness (rechterlijk pardon) in Indonesian criminal law in the future might represent the principle of judge forgiveness (rechterlijk pardon) in Islamic criminal law. The direction of forgiveness is following the ideals of Islamic teachings to forgive each other's human faults and as a symbol of Allah SWT's character, who is forgiving and forgiving. Furthermore, forgiving reflects Islam as a religion that values compassion.

5. CONCLUSION

Two inferences may be taken from the preceding description. First, the notion of judicial forgiveness (rechterlijk pardon) has been utilized in civil law nations such as the Netherlands, Greece, and Portugal. There are similarities in the three countries' Criminal Codes in establishing the principle judicial forgiveness (rechterlijk pardon), namely that judge forgiveness is given to crimes of a mild nature, character, character, or personality of the perpetrator, and circumstances after the crime were committed. Compared to the regulation of the principle of judicial forgiveness (rechterlijk pardon) in the Netherlands, Greece, and Portugal, the regulation of the principle of judicial forgiveness (rechterlijk pardon) in Islamic criminal law is more comprehensive. The benefit is that in Islamic criminal law, the notion of judicial forgiveness (rechterlijk pardon) is found not only in minor offenses, but little crimes are equivalent to jarimah Ta'zir. However, the notion of the judicial forgiveness (rechterlijk pardon) may also be found in jarimah qadzaf (accusing of adultery) and jarimah qishas-diyat (accusing of adultery) (murder and mistreatment). Second, the principle of judicial forgiveness (rechterlijk pardon) will be formulated in future Indonesian criminal law for minor offenses, crimes of insulting honor or contempt, persecution, and murder. The judge may award forgiveness if the perpetrator wins forgiveness from the victim or his heirs. Forgiveness is a manifestation of Islam's principles of love and compassion.

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