The Judicial Pardon Arrangement as a Method of Court Decision in the Reform of Indonesian Criminal Law Procedure

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Abstract

Judicial Pardon is a new concept formulated in the 2019 Draft of the Criminal Code. The concept refers to the judges' new powers to forgive defendants who are convicted guilty. However, the formulation of the concept has not been adjusted to the formulation of decision types in the draft of the Criminal Law Procedure. There has to be a harmonization between the Draft of the Criminal Code and the Draft of the Criminal Law Procedure. This article is based on a legal study on the importance of regulating judicial pardon as a form of the court decision. It reveals that judicial pardon is in line with the 'insignificant principle' that if an act already fulfills the elements of a criminal act but is not significant with the essential characteristics of the crime, it cannot be declared as a criminal act. However, it is not consistent with the essential nature of a criminal act. In addition, a judicial pardon is a form of shifting punishment towards a flexible balance model from the original one that is absolute. Therefore, it is important to amend the Draft of the Criminal Procedure Law on the types of judges' decisions. The current judges' decisions are not compliant with the concept of judicial pardon. The amendment can be processed by adding a decision of conviction without punishment as a type of judge's decision. The article offers a concept related to legal remedies on judicial pardon as a final and binding decision. Therefore, legal remedies cannot target such decisions.

Keywords: court decisions, criminal procedure law reform, judicial pardon.

Pengaturan *Judicial Pardon* Sebagai Bentuk Putusan Pengadilan dalam Pembaharuan Hukum Acara Pidana Indonesia

Abstrak

Judicial Pardon merupakan konsep baru yang dirumuskan dalam Rancangan KUHP 2019. Konsep ini merujuk pada kewenangan baru yang diberikan kepada hakim dalam memberikan pemaafan kepada terdakwa yang terbukti bersalah melakukan tindak pidana. Akan tetapi, perumusan konsep tersebut tidak diimbangi dengan perumusan Judicial Pardon sebagai jenis putusan dalam RKUHAP. Dengan demikian, perlu ada harmonisasi antara RUU KUHP dan RKUHAP. Artikel ini ditulis berdasarkan hasil penelitian hukum terkait pentingnya pengaturan Judicial Pardon sebagai bentuk putusan pengadilan. Judicial Pardon sejalan dengan Insignificant Principle. Prinsip ini menyatakan bahwa tidak dapat dinyatakan sebagai suatu pidana terhadap suatu perbuatan yang memenuhi rumusan unsur tindak

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pidana, akan tetapi tidak sesuai dengan sifat hakiki dari suatu tindak pidana. Selain itu, Putusan Judicial Pardon merupakan bentuk pergeseran pemidanaan ke arah model keseimbangan yang fleksibel, dari semula bersifat absolut. Sehingga perubahan RKUHAP terkait jenis putusan hakim sangat diperlukan. Jenis-jenis putusan hakim yang saat ini ada dalam KUHAP belum sesuai dengan konsep Judicial Pardon. Perubahan tersebut dapat dilakukan dengan menambahkan putusan salah tanpa pidana sebagai salah satu jenis putusan hakim. Artikel ini menawarkan konsep terkait dengan upaya hukum atas putusan Judicial Pardon dengan menerapkan Judicial Pardon sebagai putusan yang bersifat final and binding. Sehingga terhadap putusan tersebut tidak dapat dilakukan upaya hukum.

Kata kunci: *judicial pardon, putusan pengadilan, pembaharuan hukum acara pidana.*

A. Introduction

Two of the instruments used in regulating and protecting the interests of the state, the community, and individuals in a balanced manner are Criminal Code and criminal justice system.[1] In Indonesia, various legal regulations are enhanced by criminal code. On the one hand, the criminal code protects people's rights but on the other hand it also limits and even seizes the rights due to formal justice. In making a decision, judge recognizes two feelings of justice, namely formal and moral justices. Moral justice or a sense of community justice is often considered unable to be fulfilled in a court where judge makes decisions based on formal justice that are often unable to fulfill a sense of justice for all. Even when judge has ruled with lightest sanction, defendant often feels it unfair.

A judge can make verdict to a defendant after all evidentiary elements proven. The defendant can be found guilty, then an acquittal can be issued by the judge after the defendant's actions do not meet the element of being against the law, in addition, the judge can also decide to leave all legal charges if the defendant's act is proven not a criminal act. The three types of decisions are listed in Indonesia's current criminal procedural law. However, there are reforms related to decisions that can be handed down by judges in the 2019 Draft of the Criminal Code that make judges to be able to decide judicial pardon against defendants who proven guilty without imposing any punishment or action. The concept of Judicial Pardon is outlined in Article 54 Paragraph (2) of the 2019 Draft of the Criminal Code. It reads as follows:[2]

> *"Ringannya perbuatan, keadaan pribadi pelaku, atau keadaan pada waktu dilakukan tindak pidana serta yang terjadi kemudian dapat dijadikan dasar pertimbangan untuk tidak menjatuhkan pidana atau tidak mengenakan tindakan dengan mempertimbangkan segi keadilan dan kemanusiaan".*
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> [The level of the act, the personal condition of the perpetrator, or the circumstances at the time when the criminal act was committed and

[1] Muladi, *Kapita Selekta Sistem Peradilan Pidana,* Semarang: Badan Penerbit Universitas Diponegoro, 1995, p. ix.

[2] Article 54 paragraph (2) of the 2019 Draft of Criminal Procedure Code.

what happened later can be used as a basis for consideration not to impose a crime or not to take action by considering the aspects of justice and humanity]

The provision shows that there are several alternative factors. Therefore, the judge has a consideration not to impose a sentence. First, the act is a minor crime; and the second, the perpetrator had a condition at the time of committing the crime; the third, the situation at the time the act is committed; and the fourth, the situation after the occurrence of the crime. Based on the four considerations, if one of them has been fulfilled, the judge can consider not to impose a crime or not to take action. The most prominent thing is that there are considerations that must pay attention to aspects of justice and humanity. There lies the difference where the human side begins to pay attention. To date, the Criminal Code has taken the side of formal justice, which tends to be less humanistic.

It is expected that Judicial Pardon can realize a sense of justice based on law and a sense of public justice. However, the emergence of this concept also requires more in-depth examination, considering that this concept is an authority given by law to judges to provide forgiveness to a defendant who has been proven guilty. There must be a further explanation for this idea of pardon.

Hitherto, the Indonesian criminal justice system has focused more on the interests of suspects. It can be seen from the content of the Criminal Procedure Code which provides a lot of rights to suspects and defendants in Articles 50-56. In the intervening time, the rights of victims are not considered in the Code. Victims need to be involved either directly or indirectly in all criminal case settlement processes. The settlement of a criminal case must also include repair and recovery of losses suffered by victims, both material and non-material. As one of the efforts to accommodate the interests of victims and their families without neglecting the interests of the suspect, the Judicial Pardon concept is included in the reform of Indonesian criminal law. Forgiveness by the victim cannot then be the only reason to annul the crime. Restoration of the victim's condition must also be carried out due to the loss following a crime act.

Previously, there had been a study finding that it is necessary to reformulate the Judicial Pardon concept in the Draft of Criminal Code. However, not only in the formulation of the concept, there is a problem related to considerations of judges to provide forgiveness. This causes the existence of changes to the types of judge's decisions. The panel of judges in deciding a case based on the Criminal Code has three possibilities.[3] They are:

1. Criminalization (*veroordeling tot enigerlei sanctie*);
2. Free Decision (*vrij spraak*); and

[3] M. Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP*, Jakarta: Sinar Grafika, 2006, pp. 347-354.

3. Decision Free from all lawsuits (*onslag van recht vervolging*).

A judge cannot impose one of the three types of decisions in accordance with Article 54 paragraph (2) of the 2019 draft of the Criminal Code. Therefore, there is a need for alignment with the Draft of the Criminal Procedure Code. Hence, the Article 54 paragraph (2) can be applied.

Article 187 of The Draft Criminal Procedure Code has regulated the types of decisions. Unfortunately, they are still the same as in the current Code, namely conviction, acquittal, and release. Then, there is no type of order that can be passed on to the pardoned defendant.[4] This study examines two problems, namely the importance of making Judicial Pardon as a form of court decisions in the reform of criminal procedural law, as well as the concept of legal remedies that can be requested for Judicial Pardon decisions. This paper is based on the results of normative juridical research using a statutory approach, a conceptual approach, and a comparative approach.

B. The Urgency of Judicial Pardon as a Type of Court Decision in the Reform of Criminal Procedure Code

Judicial Pardon is a process of the principle of restorative justice, which is one of the implementations of Transitional Justice. This type of justice is obtained by way of reconciliation outside the court. The concept of restorative justice views that crime is a violation of the people and relations among citizens. Then, the violation creates an obligation. Justice here includes victims, offenders, and community members in an effort to put things right. The focal point of this justice is how the victims get recovery for the losses they have suffered (physically, psychologically, and materially) and the perpetrators are responsible for it. It is usually achieved from perpetrator's confession, apologizing, and feeling remorse. Then, there is a provision of compensation or restitution. In Indonesia, judicial pardon is accommodated in the 2019 Draft of the Criminal Code. The judicial pardon concept is outlined in Article 54 paragraph (2), which reads:[5]

> *"Ringannya perbuatan, keadaan pribadi pelaku, atau keadaan pada waktu dilakukan tindak pidana serta yang terjadi kemudian dapat dijadikan dasar pertimbangan untuk tidak menjatuhkan pidana atau tidak mengenakan tindakan dengan mempertimbangkan segi keadilan dan kemanusiaan".*
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> [The level of the act, the personal condition of the perpetrator, or the circumstances at the time when the criminal act was committed and what happened later can be used as a basis for consideration not to impose a crime or not to take action by considering the aspects of justice and humanity].

[4] Article 187 of the 2019 Draft of Criminal Procedure Code.

[5] Article 54 paragraph (2) of the 2019 Draft of Criminal Procedure Code.

The provision shows that there are several alternative factors. Therefore, the judge has a consideration not to impose a sentence. First, the act is a minor crime; and the second, the perpetrator had a condition at the time of committing the crime; the third, the situation at the time the act is committed; and the fourth, the situation after the occurrence of the crime. Based on the four considerations, if one of them has been fulfilled, the judge can consider not to impose a crime or not to take action. The most prominent thing is that there are considerations that must pay attention to aspects of justice and humanity. There lies the difference where the human side begins to pay attention. To date, the Criminal Code has taken the side of formal justice, which tends to be less humanistic. Judicial pardon is also in line with the Insignificant Principle. The principle states that if an act already fulfills the elements of a crime act but is not significant with the essential characteristics of the crime act, it cannot be declared as a criminal act. In other words, when an act is not significant to be convicted, the judge can pardon the perpetrator who has been proven to have committed a crime act.[6]

Judicial pardon, related to Indonesia's ability to adapt globally with criminal law, is in accordance with the adaptive basis, which is one of the reasons for the importance of this concept. According to Hamzah, in the Netherlands currently, 60% 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 *afdoening buiten process* (settlement of cases out of court). Minor cases are settled out of court. The minor cases referred to are crime acts punishable by imprisonment of less than six years by means of compensation by the perpetrator of the crime to the victim. In other form, if a minor case is still resolved in court, the judge can decide with a judicial pardon. The judge may take into account the level of the act, the circumstances of the perpetrator of the crime, and the circumstances before or after the crime.[7] This conception has the objectives

1. as an alternative penal measure to imprisonment;
2. as a judicial corrective to the legality principle; and
3. as a prevention for unnecessary convictions.

In connection with the first objective, when the convict has been sentenced to a short imprisonment, for example 3 (three) months, then the convict has completed the sentence in the form of a short prison term. The convict he is deemed to have completed the criminal sanction. However, the convict also faced social sanctions. The community stigma against the convict is bad, even though the person committed only a minor criminal offense with a light criminal sanction. This situation is very detrimental to the person. Therefore, the judicial pardon concept

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[6] Aska Yosuki and Dian Adriawan Daeng Tawang, "Kebijakan Formulasi Terkait Konsepsi Rechterlijke Pardon (Permaafan Hakim) Dalam Pembaharuan Hukum Pidana di Indonesia", *Jurnal Hukum Adigama*, Vol. 1, No. 1, 2018, p. 17.

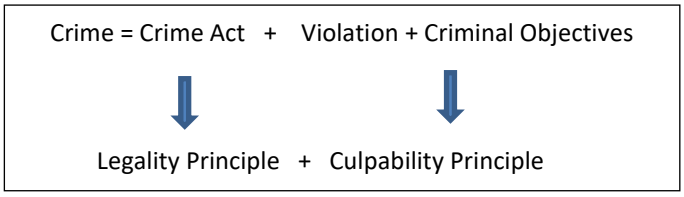
[7] *Ibid*., pp. 18-19.

enables the judge to give another alternative than short imprisonment by providing pardon to the perpetrator. In the context of the second objective, if a person has been legally and convincingly proven to have committed a crime act but the judge considers that the person does not have to be convicted. This becomes a problem because the judge is not given space by the legislators to make a pardon, therefore with the judicial pardon, then the judge can make an apology against a person who is proven to have committed a criminal act but is deemed not a subject to punishment. The objective of the Judicial Pardon is not only to avoid short imprisonment and judicial correction of the legality principle but also to prevent unnecessary convictions based on needs, both the need to protect the community and to rehabilitate the perpetrator of the crime.[8]

The concept of Judicial Pardon is also balanced with the individualistic idea, which uses "*daad-dader strafrecht*" as a reference for its criminal justice system. In this model, the aim of punishment is peace and welfare of each party, namely prioritizing the balance of state's, individual's, perpetrator's, and victim's interests. In the reform of Indonesian criminal law, the idea of pardon is also called *pemaafan individual* (individual forgiveness). It considers every interest, including the perpetrator's. This is a form of the idea of criminal individualization. The idea of criminal individualization contains several characteristics such as personal or individual criminal liability (personal principle). Punishment can only be given to the guilty person (culpability principle). The punishment must be adjusted to the characteristics and conditions of perpetrator. It means there is leniency for judges to choose criminal sanctions and there must be the possibility to modify the punishment in the form of adjustments in its implementation.[9]

The inclusion of Judicial Pardon in the 2019 draft is a reform in the substantive criminal system, which currently focuses on three criminal laws, namely criminal offenses (*strafbaarfeit*), mistakes (*schuld*) and crimes (*straf/poena*), leading to the affirmation of the purpose and principle of punishment. They are the central roles in the criminal justice system. The criminal scheme in the draft places the purpose of the crime as a condition for the validity of a punishment. Described in a schematic form, it appears in the picture below.[10]

Figure 1. Criminal Scheme in the 2019 Draft of the Criminal Code



[8] *Ibid.*, pp. 20-21.

[9] Aristo Evandy A. Barlian and Barda Nawawi Arief, "Formulasi Ide Pemaafan dalam Pembaharuan Sistem Pemidanaan Indonesia", *Jurnal Law Reform*, Vol.13, No. 1, 2017, p. 34

[10] Ibid., p. 38.

It appears that in the Draft, the basis for punishment is not only a criminal act as an objective condition and violation as a subjective condition. The purpose of punishment is also a variable. By looking at the purpose of the punishment and the guidelines for the punishment, with certain considerations, judge is given the authority to give pardon and not impose any punishment or action, even though the objective and subjective requirements have been proven. With the guideline not to impose punishment, the court will become more humane. It can be said that conceptually there has been a shift, which is currently rigid/absolute, which will change to a flexible balance model.[11]

Based on Article 54 paragraph (2) of the 2019 Draft of the Criminal Code and the objectives of the judicial pardon, judges have the authority not to impose crimes or actions. It brings juridical consequences to the Indonesian criminal justice system. Such decisions are currently not accommodated in the Law Number 8 of 1981 on the Criminal Procedure Code. Currently, based on the Criminal Procedure Code, judges only recognize three types of decisions, namely conviction (*veroordeling tot enigerlei sanctie*), acquittal (Vrijspraak), and free from all lawsuits (*onslag van recht vervolging*). Each of these decisions has conditions stipulated in law.

A judge's decision is the result or conclusion of something that has been thoroughly considered and assessed.[12] The judge's decision is the last stage of the case examination process in court. In the Criminal Procedure Code, there are two characteristics of judge decisions, namely convictions and non-conviction decisions.

A conviction based on Article 193 of the Criminal Procedure Code states that if the court finds the defendant guilty of committing the crime act, the court would sentence the defendant.[13] On the other hand, free decision is contained in Article 191 paragraph (1) of the Criminal Procedure Code. It states that if the court is of the opinion that from the results of the examination at trial, the defendant's guilt for the act he is accused of has not been legally and convincingly proven, then the defendant is acquitted.[14] Article 191 paragraph (2) provides decision to free from all lawsuits. It states that if the court is of the opinion that the act of which the defendant is accused is proven, but the act does not constitute a criminal act, then the defendant shall be acquitted of all legal charges.[15]

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[11] Marcus Priyo Gunarto, "Asas Keseimbangan dalam Konsep Rancangan Undang-Undang KUHP", *Jurnal Mimbar Hukum*, Vol. 24, No. 1, 2012, pp. 86-96.

[12] Lilik Mulyadi, *Hukum Acara Pidana "Normatif, Teoritis, Praktik dan Permasalahannya"*, Bandung: PT. Alumni, 2012, p. 202.

[13] See the provisions of Article 193 of Law Number 8 of 1981 on the Law of Criminal Procedure.

[14] See the formulation of Article 191 paragraph (1) of Law Number 8 of 1981 on the Criminal Procedure Code.

[15] See the formulation of Article 191 paragraph (2) of Law Number 8 of 1981 on the Law of Criminal Procedure.

Acquittal decision means that the defendant is sentenced to be acquitted or is declared free from legal action, or acquittal.[16] An acquittal decision is at least based on the following.

1. There is no fulfillment to the principle of proof negatively according to the law. The evidence that has been done in the trial process is not sufficient to prove the defendant's guilt and the judge is not sure of the defendant's guilt.
2. There is a failure to fulfill the principle of minimum proof of evidence, this is related to the minimum evidence that must be provided in court, namely a minimum of two evidences.

The free decision cannot be applied as a judicial pardon decision since in judicial pardon the defendant's actions have been proven in the proving process. Therefore, the minimum limit of proof, namely two pieces of evidences, has also been proven in court so that the defendant's guilt is also proven. The Judicial Pardon decision was not in accordance with Article 191 paragraph (1) of the Criminal Procedure Code.

The decision to be free from all lawsuits means that what is being charged against the defendant is proven legally and convincingly but the defendant's act is not a criminal act or is not against the law or there is excuse for forgiveness.[17] It can be described as follows:

1. The act of the defendant was not a crime act

A crime act is an act that is prohibited by a legal rule accompanied by sanction in the form of certain crimes for those who violate. The prohibition is aimed at actions, namely a situation or event that is carried out by a person (human action).[18] Therefore, if the defendant's act is not a criminal act, then that person's act is not an act, which is stated in the Criminal Code as a prohibited act, or the act does not fulfill the formulation of the law as a prohibited act. Related to Judicial Pardon, it is not appropriate because in Judicial Pardon the defendant's act is a criminal act that has fulfilled the formulation of the law as a prohibited act and has been proven in the trial process.

2. The defendant did not act against the law

The nature of being against the law is an element of condemnation of an act, where the nature of being against the law is divided into two, namely against formal law and against material law. In Judicial Pardon, the defendant's act was legally proven so that his unlawful nature was also evident in the defendant's actions.

3. There are reasons to be pardoned

The reason for pardon is one of the reasons for the eradication of crime, which based on the Criminal Code are as follows:

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16 M. Yahya Harahap, *op.cit.*, p. 347.

17 Andi Hamzah, *Hukum Acara Pidana Indonesia (Edisi Kedua),* Jakarta: Sinar Grafika, 2008, pp. 286-287.

18 Moeljatno, *Asas-asas Hukum Pidana*, Jakarta: Rineka Cipta, 1993, p. 54.

a. Incapability of responsibility

A person is said to be able to be responsible if his/her soul is healthy so that he is able to know or realize that his actions are against the law and can determine his will according to that awareness. The incapacity to take responsibility is regulated in Article 44 of the Criminal Code. This provision is not in line with Judicial Pardon since judicial pardon only covers a person who is mentally healthy and aware of his actions is able to take responsibility.

b. Force (*Overmacht*)

According to MvT, force is every power or every pressure that cannot be resisted. It means a situation that is relatively unavoidable. In this case, a person commits a criminal act because it is pushed by certain circumstances that cannot be avoided. In Judicial Pardon, the act committed does not fulfill this reason, considering that the act is carried out in normal conditions, not in conditions or situations that are described as *overmacht*.

c. Emergency defense that goes beyond borders

Article 49 paragraph (2) of the Criminal Code regulates defenses that exceed the limit, namely the existence of attacks or threats that are still ongoing against property or body, against oneself or other people in which there is severe mental shock. It also does not fulfill the judicial pardon. Similar to the state of coercion previously, emergency defense is also not one of the conditions in which judicial pardon is allowed.

d. With good faith carry out orders that are not valid

In this criterion, there are two conditions, namely an objective requirement whereby the order carried out by the accused objectively is still within the scope of his duties. The next condition is a subjective requirement where the defendant feels that the order given to him to do an act comes from a legitimate order. Both of these conditions are also not in accordance with the Judicial Pardon criteria.

The reason for forgiveness as referred to is very different from the pardon given by the judge in the judicial pardon decision. In judicial pardon, forgiveness is given because of one of the criteria: (1) the lightness of act, (2) the personal condition of perpetrator, or (3) the circumstances at the time the criminal act was committed and occurs later. By one of these criteria, judge can decide not to impose a sentence or not to impose an act.

Based on the provisions, judicial pardon is very different from the decision to leave all lawsuits.

The sentencing verdict is based on article 193 of the Criminal Procedure Code. A judge can pass a sentence if the defendant is guilty of committing the criminal act he was accused of. The defendant's guilt must be proven by at least two (2) valid evidence, and the judge has the belief that a crime did occur, and the defendant

was guilty of committing it.[19] This is actually in accordance with the criteria of the defendant in the Judicial Pardon where the defendant is legally and convincingly proven guilty of committing a criminal act. However, this provision is not accompanied by conviction. It is on the contrary with the criteria of lightness of the act, the personal condition of the perpetrator, or the circumstances at the time the criminal act was committed and happened later, and by considering the aspect of justice and then the judge decided not to impose a sentence or not to impose an act. The three types of decisions cannot be applied to Judicial Pardon. Then, the Draft of Criminal Procedure Code also has not accommodated Judicial Pardon yet. Article 187 of the Draft reads as follows:[20]

> *"(1) Jika hakim berpendapat bahwa hasil pemeriksaan di sidang, tindak pidana yang didakwakan terbukti secara sah dan meyakinkan, terdakwa dipidana.*
>
> *(2) Jika hakim berpendapat bahwa hasil pemeriksaan di sidang, tindak pidana yang didakwakan tidak terbukti secara sah dan meyakinkan, terdakwa diputus bebas.*
>
> *(3) Jika hakim berpendapat bahwa perbuatan yang didakwakan kepada terdakwa terbukti, tetapi ada dasar peniadaan pidana, terdakwa diputus lepas dari segala tuntutan hukum"*.
>
> [(1) If the judge is of the opinion that the result of the examination at trial is that the criminal act charged is legally and convincingly proven, the defendant shall be sentenced.
>
> (2) If the judge is of the opinion that the results of the examination at trial have not been proven legally and convincingly, the defendant shall be acquitted.
>
> (3) If the judge is of the opinion that the act of which the defendant is accused is proven, but there is a basis for the nullification of the crime, the defendant shall be acquitted of all legal charges.]

Based on the formulation, there is no significant change compared to the current Criminal Procedure Code. Hamdan states that from a theoretical point of view, the three types of judges' decisions are based on three things: (1) the Principle of No Crime without Errors, (2) elements of criminal acts, and (3) the doctrine of reasons for the eradication of crime.[21]

Article 187 paragraph (1) regulates that a judge can pass a sentence if the crime act is legally and convincingly proven. It means that this article looks only at the evidence of evidence at trial and the judge's conviction. The sentencing verdict does not look at the guilt of the perpetrator of the crime act so that he respects the

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[19] See the provisions of Article 193 of Law Number 8 of 1981 on the Law of Criminal Procedure.

[20] Article 193 of the 2019 Draft of Criminal Procedure Code.

[21] M.Hamdan, "Jenis-jenis Putusan Hakim dalam perkara pidana (suatu catatan tentang pembaharuan KUHAP)", *Jurnal Hukum dan Pembangunan*, Vol. 40, No. 4, 2010, p. 507.

principle of no crime without error (*geen straft zonder schuld*). In imposing a decision, the Draft only has the view based on what was done (*daad-straaf*) without paying attention to the perpetrator (*dader-straaf*). Then if someone (the defendant) has been proven to have committed a criminal act, she/he will be convicted, even though the person is not likely to have any fault at all.[22]

Based on the elements of the criminal act, Article 187 paragraph (1) also contain blurry formulation since there is no formulation related to the fault of the defendant, the subjective element in the element of criminal action is also not fulfilled. In criminal law, a person can be convicted if the act fulfills the elements of a criminal act. In theory, there are two elements in a criminal act, namely the subjective and the objective elements. The subjective element relates to the maker's self-condition and soul or inner attitude in doing the action (deliberately/negligently). The objective element relates to circumstances outside the personal of the maker, namely the act committed, the time, and place of the crime, and other matters related to the crime.[23]

Then, if it is connected to the reason for the remission of the crime, in this case it is excuse and justification, then Article 187 paragraph (2) does not contain this as a reason for the judge to release the defendant. This is because the article only emphasizes crimes that are not proven but does not apply excuses for forgiveness and justification for the actions committed by the defendant.

According to Article 187 paragraph (3) of the draft, the decision to make the defendant free from all lawsuits if the defendant's actions are proven but there is a basis for the negation of the crime. Thus, it can be concluded that the draft states that all reasons for the exclusion/elimination of the crime will result in the decision being exempt from all lawsuits.[24] According to the doctrine of reasons or the basis for eliminating such crimes, there are those that cause an acquittal and some cause the decision to be released from all legal claims. If the unlawful nature of the act is erased, the defendant is acquitted. On the other hand, if the wrongdoing of the perpetrator/the defendant is eliminated (the perpetrator cannot be accounted for) then the verdict will sound free from all legal charges. The erasure of the offender/the defendant is written in the Criminal Code, Articles 44, 48, 49 paragraph (2), and 51 paragraph (2); some others are not written that remove the violation altogether (*avasafwezigheid van aile schuld*) as happened in the case of milk delivery. Then, the drafting of the Criminal Procedure Code has formulated the sound of a decision to be released from all charges, which seems to apply for all reasons for the negation of criminal code.[25]

In the three types of decisions, it turns out that they are no better than the types of decisions in the current Criminal Procedure Code. Judicial Pardon has not

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22 *Ibid.*, p. 508.
23 *Ibid.*, p. 510.
24 Article 187 of the 2019 Draft of Criminal Procedure Code.
25 *Ibid.*, pp. 512-513.

also accommodated in the Draft. In the judicial pardon, judge will issue a verdict without punishment (non-imposing of penalty) because in the defendant is legally and convincingly proven to have committed the act, but the judge gives a pardon so that there is no sanction. This is of course very different from the criminal verdict. The weakness of this decision can result in the judicial pardon is not applicable in the Criminal Procedure Code and judge will be forced to impose a sentence even though there is pardon in the trial process. In the Netherlands, Judicial Pardon has been regulated in article 9 *Wetboek Van Strafrecht* (WvS), which reads as follows:[26]

> "*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 circumstances attendant upon the commission of the offense or thereafter".*

With this arrangement, the Netherlands then harmonized it in its Criminal Procedure Code, where criminal judges in the Netherlands can submit four forms of decisions. They are

1. Acquittal decision (*Vrijkpraak*);
2. Release Decision (*onslag van alle rechtsvervolging*);
3. Conviction Decisions (*veroordeling tot enigerlei sanctie*); and
4. Judge's pardon (*recthterlijk pardon*).

The panel of judges in the Netherlands can issue a judicial pardon decision that has a special form when compared to the other three decisions. The background for the inclusion of the judicial pardon concept, according to Keizer is the number of defendants who actually have fulfilled the evidence. However, if it is carried out a conviction will be contrary to the sense of justice.[27] In other words, if a sentence is imposed, a conflict will arise between legal certainty and legal justice. Prior to 1983, if the above problems occurred, Panel of Judges would be "forced" to impose a very light sentence.[28]

It can be seen that article 9A of the Dutch WvS is, in essence, is a "punishment guide" that is based on the idea of flexibility to avoid rigidity. It also states that the judge's pardon guidelines functioned as a safety valve (*veiligheidsklep*) or emergency exit (*noodeur*).[29] With the new concept of judicial pardon in the Indonesian Criminal Code that is adjusted to the values that exist in the Indonesian community, it can be implemented in the future. It is necessary to formulate the

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[26] Article 9 of the WvS.

[27] Keizer, Nico and Schaffmeister, D., *Beberapa Catatan tentang Rancangan Permulaan 1998 Buku I KUHP Baru Indonesia*, Dutch: Driebergen/Valkenburg, 1990, p. 55.

[28] The Drafting Team, Academic Paper of the Criminal Procedure Code *(February 25, 2015)*, Jakarta: BPHN, 2015, p. 23.

[29] *Ibid.*

type of judicial pardon decision to become one of the types of decisions that can be given by judges, namely conviction without punishment. This decision can accommodate the judicial pardon provisions that have been formulated in the Draft.

C. The Concept of Legal Remedies that Can be Requested for Judicial Pardon Decision in the Indonesian Reform of Criminal Procedure Code

Until now, there is no regulation of judicial pardon in Indonesian positive. However, in practice, there are several decisions that have implemented this concept. Hiariej explains that there was a decision from the Pacitan District Court to a father who accidentally hit his biological child to death. The father was charged with Article 359 of the Criminal Code (negligence in causing the death of a person) and was also detained. In the trial, it was proven that the defendant's actions met the formulation of Article 359 of the Criminal Code, with complete evidence and the judge was sure that the defendant was guilty. However, in the consideration, the judge saw the principles of benefit, justice, and certainty in a balanced manner. The panel of judges sees the principle of legal certainty that all elements of Article 359 of the Criminal Code have been fulfilled with a minimum of two evidences. In addition to legal certainty, the panel of judges also considers the benefit side, where in this case the wife of the defendant or the mother of the victim is depressed because of losing a child and the detention of her husband. The panel of judges also assessed from the side of justice that justice was very abstract. Based on the side of the victim's family, in this case the depressed wife and father as the defendant are the families of the victims, so it is fair to whom if the defendant is convicted. The judge judges that the death of a child is the toughest punishment morally and psychologically for the defendant. With various considerations and assessments of the principles of legal objectives, the judge decided that the defendant was legally and convincingly proven guilty, but this was not followed by a criminal conviction. This judge's decision was a form of the Judicial Pardon decision. In this case, the attitude of the public prosecutor was to accept the judge's decision and not file an appeal.

The attitude of the public prosecutor above shows that the public prosecutor understands of restorative justice, which is the basis of Judicial Pardon, where humanity, justice, and benefit are one of the important points in its principles. This is interesting considering that the Judicial Pardon decision is one of the decisions that in principle there is no regulation yet. However, law enforcement officials who uphold the value of Restorative Justice will accept the decision. Its practice will greatly depend on the understanding and ability of law enforcement officials to see the law in its values and community values. Of course, this is very individual and has no legal certainty. The public prosecutor in the above case is very appropriate in terms of restorative justice despite the fact that the opportunity to take legal action is very large.

Legal remedy is the right of a defendant or public prosecutor not to accept a court decision in the form of resistance or appeal or cassation or the right of the convict to submit a request for reconsideration in matters and according to methods. It is regulated in the Criminal Procedure Code. Article 1 point (12) distinguishes five types of legal remedies, namely resistance, appeal, cassation, cassation for legal purposes, and judicial review.

Meanwhile, based on the time when legal remedies are filed in relation to court decisions, ordinary remedies are distinguished from extraordinary legal remedies. Ordinary legal remedies are legal remedies made by parties (defendants and/or public prosecutors) against court decisions that do not yet have permanent legal force. Extraordinary legal remedies are legal actions carried out after a court decision has permanent legal force. Thus, it can be concluded that what is included in the usual legal remedies are appeals and cassations. Then, extraordinary legal remedies are cassations for the sake of law and review.[30]

There are main differences between ordinary remedies and extraordinary remedies as follows:

1. Legal effort is extraordinary because a decision that can be used by law is extraordinary is a judge's decision that has permanent legal force. An ordinary legal remedy because judge's decision has no permanent legal force.
2. Extraordinary legal remedies are submitted to the Supreme Court for the first and last time (Article 259 paragraph (1) of the Criminal Procedure Code), while ordinary legal remedies can be filed in several levels (appeal and cassation).

A decision is said to have permanent legal force if (1) all legal remedies have been made against the decision; and (2) the parties involved claim to accept the decision.

The defendant or the public prosecutor can submit resistance. Based on the parties who can apply for a resistance, the resistance is submitted by the convicted person to a court decision outside the presence of the defendant or resistance by the Public Works prosecutor over judgments related to the exception decision. The court verdict, which was passed outside the presence of the defendant, was in the form of deprivation of liberty specifically for traffic violations only. With this resistance, the verdict for depriving independence was immediately annulled.[31] Judging from the point of view of the object used as the reason for resistance, there are two types of resistance as follows:[32]

1. Opposition to the decision of the District Court which contains the local District Court not having the authority to hear cases because it is the authority of

[30] Mohammad Taufik Makaro and Suhasri*, Hukum Acara Pidana dalam Teori dan Praktek,* Bogor: Ghalia Indonesia, 2010, p. 190

[31] Andi Hamzah and Irdan Dahlan, *Upaya Hukum dalam Perkara Pidana*, Jakarta: PT. Bina Aksara, 1987, p. 4.

[32] Ramiyanto, *Upaya-Upaya Hukum Perkara Pidana di Dalam Hukum Positif dan Perkembangannya,* Bandung: Citra Aditya Bakti, 2019, pp. 46-48.

another District Court (relative competence) through Article 149 jo 148 KUHAP. Only the public prosecutor can do this resistance. This resistance was carried out before the trial began.
2. Resistance to the interim decision regarding the exception submitted by the legal representative. Both the prosecutor and the legal advisor can carry out this resistance. Submitted to the High Court - by the prosecutor or the defendant depending on which party feels aggrieved by the interlocutory decision.

An appeal is the right of both convicted person and public prosecutor to request a retrial to a higher court because they are not satisfied with the decision of the district court.[33] Therefore, an appeal can be made by:
1. The prosecutor against the decision of the court of first instance according to Article 67 (Article 233 paragraph 1); and
2. The defendant or the legal representative against the decision of the court of first instance according to Article 67 (Article 233 paragraph 1).

Not all court decisions can be submitted for appeal because Article 67 of the Criminal Procedure Code explicitly states three types of decisions that cannot be compared.[34] They are 1) free decision; 2) free from all lawsuits due to inaccurate application of the law; and 3) court decisions in express examination procedures (particularly fines).

An acquittal and free of all lawsuits are not possible to appeal but cassation can still be made.[35] In practice, free decisions cannot be compared but can be appealed by the prosecutor to the Supreme Court based on four conditions.[36] They are as follows:
1. Interpretation of the formulation of Article 67 states that against an acquittal decision, an appeal cannot be filed. It is interpreted by the Prosecutor that what cannot be filed for an appeal is only that is expressly stated in Article 67. It is an appeal to the high court, not the cassation to the supreme court.
2. Jurisprudence of the Supreme Court decision Number 275/Pid/1983 dated 29-12-1983 allows and grants cassation against the decision to release the court of first instance. It is resulted from the corruption case of the defendant Natalegawa Hospital by the Central Jakarta District Court (Number:33/1981/Pid.B:10-2-1982). The case makes a jurisprudence and the appeal for an acquittal decision has a strong legal basis. It has until now been carried out by prosecutors.

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33 Article 67 in conjunction with Article 233 of Law Number 8 of 1981 on the Law of Criminal Procedure.
34 Maruarar Siahaan*, Hukum Acara Mahkamah Konstitusi Republik Indonesia*, Jakarta: Sekretariat Jenderal dan Kepaniteraan MK RI, 2006*,* p. 235.
35 Andi Hamzah*, op.cit.,* p. 291.
36 *Ibid.,* p. 292.

3. In line with the Supreme Court's efforts to provide a cassation for the free decision from the Central Jakarta District Court, the Ministry of Justice, in the attachment to the Decree of the Minister of Justice Number M-14 PW 07.03 of 1983, has provided views on free decisions in relation to appeals and cassation attempts. In certain cases, specifically based on situations and conditions, for the sake of law, justice and truth, an appeal can be made against an acquittal.
4. The Constitutional Court Decision Number 114/PUU-X/2012 on Article 244 of the Law Number 8 of 1981 on Criminal Procedure Law regulates the prohibition of filing appeals and cassations for acquittal decisions. In its decision, the Constitutional Court states that the phrase "except for an acquittal" in Article 244 of the Criminal Procedure Code contradicts the 1945 Constitution and has no binding legal force. With the cancellation of the phrase "except for an acquittal" in Article 244, it can be interpreted that for every acquittal decision, cassation can be filed.

The expedited examination procedure (fine) cannot be appealed because 1) it is simple and easy to prove; 2) it is not much time consuming; and 3) the crime is not too significant. The three types of decisions that cannot be appealed are determined. Meanwhile, the types of decisions that can be appealed cover verdicts on conviction/deprivation of liberty in an ordinary, brief, and quick examination procedure. The reasons for filing an examination at the appeal level are not limited in terms of the Articles of Criminal Procedure Code. The authorities of the Appeal Level are as follows:[37]

1. It covers all examinations and decisions of first instance courts.
2. It reviews all aspects of the examination and decision by giving a new assessment (*judicium novum*).

In filing an appeal, the High Court after conducting an examination will issue the following decisions.[38]

1. Strengthening the decision of the district court that has been passed with or without additional considerations.
2. Changing or correcting the ruling of the District Court. A verdict is a decision that is passed regarding a criminal act and the law.
3. To cancel the district court decision, this means that the higher court makes a separate decision different from the district court's decision.

Cassation is a common legal remedy that can be taken by convicted or public prosecutors to submit a request for examination to the Supreme Court against a

[37] *Ibid.,* pp. 292-29.
[38] *Ibid.,* p. 74.

criminal case decision given at the last level by lower court.[39] Decisions that can be countered by means of cassation are all final decisions other than the decision of the Supreme Court, which is not an acquittal.[40] Article 244 of the Criminal Procedure Code states that the final decision of acquittal (*vrijspraak*) from a court other than the Supreme Court cannot be challenged by cassation. However, the Constitutional Court decision Number 114/PUU-X/2012 regulates that an appeal can be filed against the decision.

It also covers decisions at the last level by other courts, not only by the general court, but also by other courts. The background for the establishment of the cassation institution is based on the following objectives.

1. it is to avoid differences in the application of the law by the courts in order to create uniformity in the application of law.
2. it finds/creates law through court decisions (jurisprudence), especially on special events that enter areas where the law is not yet clear, or where the law is clear but looking for breakthroughs in the effort to achieve justice.
3. It corrects the errors of the lower court decisions.[41]

A clear distinction between appeal and cassation remedies in terms of the examination procedure lies in the filing of a memorandum of appeal or cassation. At the appeal level, the appeal memorandum of appeal is only a "right" for the convicted person, while at the cassation level the appeal for an appeal memorandum is an "obligation". These results in certain consequences attached to the cassation memory, as an obligation for the convict to file it. Another aspect of the difference between the level of appeal and cassation can also be seen from the reasons for filing the petition, if the appeal is not determined be restricted while at the cassation level it is regulated contrary in Article 253 paragraph 1 of the Criminal Procedure Code. There are three reasons that serve as the basis for filing an appeal as follows:[42]

1. A legal rule is not enforced by the *judex factie* or a legal rule is applied inappropriately.
2. The way to judge the *judex factie* is not in accordance with the law.
3. *Judex factie* has exceeded the limits of her authority.

Cassation for the sake of law is submitted to the Supreme Court. Only the Attorney General can make the cassation once (Article 259 paragraph [1] of the Criminal

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[39] Article 10, paragraph 3 of the Law Number of 1985 on the Supreme Court jo, Article 30 of the Law Number 5 of 2004 on the Amendment to Law Number 14 of 1985 on the Supreme Court in conjunction with Article 244 of the Law number 8 of 1981 on Criminal Procedure Code

[40] Article 244 of the Law Number 8 of 1981 on the Law of Criminal Procedure.

[41] *M. Yahya Harahap*, *op.cit*, p. 466.

[42] Andi Hamzah, *op.cit*, p. 299.

Procedure Law).[43] The information on filing a legal action was obtained from the public prosecutor. In this case, it should not be detrimental to the parties involved in the case because the purpose of this legal remedy is to protect the interests of the convicted person. The application for cassation for the sake of law is submitted in writing by the Attorney General to the Supreme Court through the court clerk who has decided the case in the first instance and is accompanied by a treatise (memory) that contains the reasons for the petition. The clerk immediately sends a copy of the minutes of the appeal for cassation for the sake of law to the interested party. Furthermore, the head of the district court concerned will immediately forward the request to the Supreme Court, as well as a copy of the minutes of the petition for cassation for the sake of law is submitted to the interested party (Article 260).[44]

The Criminal Procedure Code states that the sentence imposed in cassation for the sake of law cannot be heavier than the original sentence, which has permanent legal force. This is intended solely to open up the possibility of amendments to court decisions under the Supreme Court that the Attorney General deems inappropriate. The Supreme Court can review a criminal decision that has obtained permanent legal force, which contains punishment in accordance with Article 9 of the Supreme Court Regulation Number 1 of 1980 on the grounds as follows:

1. If in the different decisions, there are circumstances which are proven to be proven but are contradictory to one another.
2. If there is a situation, which gives rise to a strong suspicion, that if the situation is known during the trial, the verdict to be passed will contain the convict's acquittal from the accusation, release from the lawsuit on the basis that the act imposed cannot be convicted, a statement that the prosecutor's demand to submit the case to court proceedings cannot be accepted or the application of other lighter criminal provisions.

Herziening is a judicial review of court decisions that have permanent legal force at all court levels.[45] However, the decision to be free or free from all lawsuits cannot be filed by a judicial review.[46] The judicial review application is addressed to the Supreme Court through the district court clerk who decides the case in the first instance. The judicial review application does not delay nor stop the implementation of the decision.[47] Judicial review can only be filed once (Article 268 paragraph (3) of the Criminal Procedure Code). The Constitutional Court in Decision Number 34/PUU-XI/2013 has annulled Article 268 paragraph (3) of the Criminal Procedure Code, which limited the judicial review application to only once. It is due

[43] *Ibid.,* p. 303.
[44] *Ibid.,* p. 304.
[45] *Ibid.,* p. 307.
[46] See the formulation of Article 263 paragraph (1) of Law Number 8 of 1981 on the Law of Criminal Procedure.
[47] See the formulation of Article 268 paragraph (1) of Law Number 8 of 1981 on the Law of Criminal Procedure.

to the case of former KPK (Corruption Eradication Commission) chairperson, Antasari Azhar, and his wife and children requested so that judicial review could be repeated many times. As for the reasons for the Constitutional Court to cancel Article 268 paragraph (3) of the Criminal Procedure Code, they among others, are:

1. on the pretext of justice, the Constitutional Court annulled Article 268 paragraph (3) of the Criminal Procedure Code, which limited the submission of a PK to only once;
2. the Constitutional Court is of the opinion that the PK's historical-philosophical extraordinary remedy is a legal attempt that was born to protect the interests of the convicted person;
3. extraordinary legal measures are aimed at finding justice and material truth. Justice cannot be limited by time or formalities that limit extraordinary legal remedies to be filed only once. It is possible that after a PK is proposed and terminated, a substantial new state (novum) will only be discovered when the previous PK has not been discovered;
4. the conditions for taking extraordinary remedies are very material or very basic requirements related to truth and justice in the criminal justice process as stipulated in Article 263 paragraph (2) of the Criminal Procedure Code; and
5. the judicial review as an extraordinary legal measure regulated in the Criminal Procedure Code must be in such a framework, namely, to uphold law and justice. The Constitutional Court emphasized that efforts to achieve legal certainty deserve to be limited. However, this is not the case for achieving justice. This is because justice, which is a very basic human need, is more fundamental than legal certainty.

The Supreme Court then responded to the Constitutional Court decision Number 34/PUU-XI/2013 with Circular Number 7/2014, which in essence stated that the judicial review application based on the discovery of new evidence could only be submitted once. The Circular Number 7/2014 has created a much more complex problem. It is considered a form of non-compliance with the Constitutional Court decision; even the Constitutional Court itself considers that this incident is a form of defiance of the constitution.

However, the Supreme Court still believes that Circular Number 7 of 2014 was issued to provide legal certainty. In the Circular, the Supreme Court based the consideration that the provisions regarding restrictions on filing a re-application that can only be made once are still valid based on Article 24 paragraph (2) of the Law Number 48 of 2009 on Judicial Powers and Article 66 paragraph (1) of the Law Number 14 of 1985 on the Supreme Court as amended by the Law Number 5 of 2004 and the second amendment to Law Number 3 of 2009. Based on this logic, the Supreme Court states that the Constitutional Court's decision did not necessarily abolish the legal norms limiting judicial review from Article 24 paragraph (2) of the Law on Judicial Power and Article 66 paragraph (1) of the Law

on the Supreme Court. Nevertheless, the Supreme Court is of the opinion that there can still be restrictions on judicial review. It can only be done once.[48]

The Circular was then responded to by justice seekers by filing a judicial review of Article 24 paragraph (2) of the Law Number 48 of 2009 on Judicial Power and Article 66 paragraph (1) of the Law Number 14 of 1985 on the Supreme Court as amended with the Law Number 5 of 2004 and the second amendment to Law Number 3 of 2009.

In these two decisions, the Constitutional Court decided that both of them could not be accepted because the material of the petition referred to by the two petitions had been decided by the Constitutional Court in decision Number 34/PUU-XI/2013. The Constitutional Court stated that the Constitutional Court's decision mutatis mutandis also applies to the object of the petition for these two decisions, namely Article 66 paragraph (1) of the Law of Supreme Court and Article 24 paragraph (2) of the Law on Judicial Powers. On the basis of the two decisions of the Constitutional Court, it immediately broke the arguments, logic, and reasons for the judgments established by the Supreme Court in the Circular number 7/2014, which once again was based on the limitation more than once to only once in Article 66 paragraph (1)of the Law of Supreme Court and Article 24 paragraph (2) of the Judicial Powers Act. According to the Court's ruling, the Supreme Court should no longer be able to base the provisions in both Articles as restrictions on filing more than once. In other words, the Circular of the Constitutional Court is null and void.[49]

The reasons for submitting a judicial review are determined limitatively in Article 263 paragraph (2) of the Criminal Procedure Code as follows:[50]

1. If there is a new situation that gives rise to a strong suspicion that if the situation is known, at the time the trial is taking place, the result will be in the form of an acquittal or an acquittal of all lawsuits, or demands from the public prosecutor cannot be accepted or the case stipulates more minor criminal provisions (novum). This situation was not new, it had existed when the case was examined at the first level. Because the new condition must come from evidence, the existence of the evidence was also there at the time the trial was taking place, but it had not been found or was not revealed, for example because it was deliberately covered by false information] (Article 242 of the Criminal Code);
2. If in various decisions there is a statement that something has been proven, but the matter or condition as the basis or reason for the decision being declared proven has been in conflict with one another.

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[48] Herri Swantoro*, Harmonisasi Keadilan dan Kepastian Dalam Peninjauan Kembali,* Jakarta: Kencana, 2017, pp. 5-8.

[49] *Ibid.*

[50] M. Yahya Harahap*, op.cit,* p. 167.

The conditions for the existence of two conflicting judges' decisions as the reason for these two judicial reviews are as follows:

a) There are two or more court decisions which are still related. They can be a criminal case with a criminal case or a criminal case with a civil case.
b) In each decision, there is a statement about something that has been proven.
c) However, the basis on which the reasons for the respective decisions are contradictory.
d) Since the grounds on which the grounds are based are proven to be different, the warnings of each decision and the legal consequences of the amar are different.

3. When the verdict clearly shows a judge's mistake or obvious mistake. The obvious fallacy of the verdict was (1) in the legal considerations and (2) in the verdict. For the first one, the legal considerations are wrong so that it is also wrong on the amar that is concluded. For the second thing, it could be a legal consideration that the verdict is correct, but the conclusion is wrong.

According to Article 263 paragraph (3) of the Criminal Procedure Code, on the same basis as stated in Article 263 paragraph (2), a court decision that has obtained legal force can still be filed a judicial request, if in the verdict an alleged act has been declared proven, it will but not followed by a conviction.

If the Supreme Court changes the criminal provisions in the PK decision, the punishment imposed must not exceed the sentence imposed in the original decision (Article 266 paragraph (3) of the Criminal Procedure Code). A copy of the decision along with the case file is sent to the court which continues the application within 7 days after the decision is passed (Article 267 paragraph (1) of the Criminal Procedure Code). The purpose of establishing the judicial review institution is to protect and defend the rights of the convicted person by the wrong decision of the judge which cannot be requested for revision through ordinary legal means. Based on the objectives of this institution, it is only natural that the judicial review cannot be carried out by the Prosecutor. However, in practice, prosecutors often carry out the judicial review under the pretext of the norm in Article 263 (1) that does not explicitly prohibit prosecutors from filing it. Article 263 paragraph (1) KUHAP reads as follows:[51]

> *"Terhadap putusan pengadilan yang telah memperoleh kekuatan hukum tetap, kecuali putusan bebas atau lepas dari segala tuntutan hukum, terpidana atau ahli warisnya dapat mengajukan permintaan peninjauan kembali kepada Mahkamah Agung."*
>
> [With respect to court decisions that have permanent legal force, unless the verdict is acquitted or acquitted of all lawsuits, the convict

[51] Article 263 paragraph (1) of Law Number 8 of 1981 on the Criminal Procedure Code.

> or the legal representative can submit a request for reconsideration to the Supreme Court.]

With the Constitutional Court decision Number 33/PUU-XIV/2016, the Court decided that the Public Prosecutor could not apply for a judicial review, except for the convict or the legal representative. The decision states as follows:[52]

> *"Mengabulkan permohonan Pemohon, Pasal 263 ayat (1) KUHAP bertentangan dengan UUD 1945 dan tidak mempunyai kekuatan hukum mengikat secara bersyarat, yaitu sepanjang dimaknai lain selain yang secara eksplisit (tegas) tersurat dalam norma a quo"*
> [To grant the Petitioner's petition, Article 263 paragraph (1) of the Criminal Procedure Code contradicts the 1945 Constitution and does not have legally binding force conditionally, that is, as long as it is interpreted other than what is explicitly (expressly) expressed in the a quo norm.]

In its decision, the Court emphasized that the formulation of Article 263 paragraph (1) of the Criminal Procedure Code contains at least four main bases. First, judicial review is only filed against decisions that have permanent legal force. Second, judicial review cannot be filed against an acquittal or acquittal of all charges. Third, judicial review applications can only be submitted by the convict or the legal representative. Fourth, judicial review can only be filed against a conviction.

Based on the provisions related to these legal remedies, then in Judial Pardon legal remedies cannot be made, either ordinary legal remedies or ordinary remedies, instead the judicial pardon decision can be a reason for filing a legal remedy for judicial review. It is stated in Article 263 paragraph 3) of the Criminal Procedure Code, where a court decision that has obtained legal force can still be filed a judicial review request, if in the decision an act accused has been declared proven but is not followed by a conviction.

The Draft also has not provided a legal remedy for the judicial pardon decision. This is of course related to the not yet regulating Judicial Pardon as a decision. The fundamental difference in the Draft related to legal remedies is the legal remedy for an acquittal, where in the Draft an free decision cannot be submitted for appeal or cassation. This is related to the affirmation in the Draft that the convict's right does not to get a decision that is heavier than the previous verdict. This is also emphasized in the filing of cassation for the sake of law, where the decision of cassation for the sake of law must not be detrimental to the parties concerned, as well as the decision for review. Related to judicial pardon, legal remedies against Judicial Pardon cannot be taken because in the Judicial Pardon decision, pardon has occurred between the victim and the defendant and the judge has also granted the

[52] Constitutional Court Decision Number 34 / PUU-XI / 2013.

pardon. Therefore, there is no other legal remedy, which will be lighter than judicial pardon. There are two concepts that can be offered by the author in terms of legal remedies on the judicial pardon decision or a guilty verdict without punishment. The first is to apply the Judicial Pardon decision as a decision that is final and binding. It means that the Judicial Pardon decision is the first level decision, which it is final and binding. This has a juridical consequence that there is no legal remedy that can be taken against the decision. This concept is also applied in the Dutch criminal justice system, where the Judicial Pardon decision is final. The second is to apply the judicial pardon decision as the free decision. The appeal and cassation lawsuits cannot be made but extraordinary legal remedies can be made, namely cassation for the sake of law and review. This is an anticipatory step if there are mistakes in the Judicial Pardon decision which can then be proven and resolved with legal remedies extraordinary.

D. Conclusion

Judicial Pardon Arrangement as a Form of Court Decisions in the Reform of Criminal Procedure Law is very necessary considering that the current decisions in the Criminal Procedure Code and the Draft cannot accommodate the judge's authority regarding the Judicial Pardon decision. Currently, the Criminal Procedure Code regulates three types of decisions, namely acquittal decisions, free decisions from all lawsuits, and convictions. Related to Judicial Pardon, an acquittal decision cannot be applied as a judicial pardon decision. In Judicial Pardon, the defendant's act has been proven in the proving process. It means that the minimum limit of evidence, namely two pieces of evidence, has also been proven in court so that the defendant's guilt is also proven. Likewise, the decision to release from all lawsuits contains the meaning that what is being charged against the defendant is proven legally and convincingly but the defendant's act is not a crime act or is not against the law or there are reasons for forgiveness. Based on these provisions, the Judicial Pardon decision is very different from the acquittal decision.

Then the sentencing verdict, in which the judge can impose a sentence if the defendant is guilty of committing the criminal offense he was accused of. The defendant's guilt must be proven by at least two valid evidences and the judge has the confidence that a crime has actually occurred and it is the defendant who is guilty of committing it. This is actually in accordance with the criteria for the defendant in the Judicial Pardon, where the defendant is legally and convincingly proven guilty of committing a criminal act. However, this provision is not accompanied by conviction, on the contrary with the criteria of lightness of the act, the perpetrator's personal condition, or the circumstances at the time the criminal act was committed and happened later, and by considering the aspect of justice and then the judge decided not to impose a sentence or not to impose an act.

With these three types of decisions, none of them can be applied to judicial pardon. The Draft on Criminal Procedure Code has not accommodated the

decisions for Judicial Pardon. Article 187 of the Draft has no significant changes compared to the current Criminal Code. In the Judicial Pardon formulation, the judge will issue a non-imposing of penalty, but this decision has not been accommodated in the Draft. It is important to be included in revisions related to the types of judges' decisions in the Draft by adding a guilty verdict without punishment as a type of judge's decision.

The verdict of the judge that has been handed down is very closely related to legal remedies, where if the convict is not satisfied with the judge's decision, the convicted person can file a legal remedy to the court above it. In terms of legal remedies, the authors find two concepts that can be applied in terms of legal remedies on the Judicial Pardon Decision or a guilty verdict without punishment. The first is to apply the Judicial Pardon decision as a decision that is final and binding. It means that the Judicial Pardon decision is the first level decision, which it is final and binding. This has a juridical consequence that there is no legal remedy that can be taken against the decision. This concept is also applied in the Dutch criminal justice system, where the Judicial Pardon decision is final. The second is to apply the judicial pardon decision as the free decision. The appeal and cassation lawsuits cannot be made but extraordinary legal remedies can be made, namely cassation for the sake of law and review. This is an anticipatory step if there are mistakes in the Judicial Pardon decision which can then be proven and resolved with extraordinary legal remedies.

However, comparing the two concepts, this study is of the position to be more inclined to the first concept, namely judicial pardon decision as a final and binding decision. This decision is related to considerations for the sake of justice and humanity. In principle, in addition to these considerations, judge also sees that there was forgiveness given by the victim by considering the reparations for the damage caused by the perpetrator, so that the purpose of the principle of restorative justice was also realized.

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