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The Implementation of Noodweer Exceeds to Perpetrators of Murder in the Practice of Criminal Justice Practices in Indonesia

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Abstract

Article 49 of the Indonesian Criminal Code regulates acts of "emergency defense" or "forced defense" (Noodweer) for oneself or others, honor, decency or property of themselves or others, because there is an attack or threat of a very close attack. The provision on emergency defense (Noodweer Exces) is a universal principle that the state is not fit to sue its citizens to surrender to let injustice befall them, injustice need not defeat the law. Noodweer Exces is a defense caused by a great mental shock. Not all acts that fulfill all elements of a criminal offense can be convicted of a criminal offense, but the Judge can give an acquittal or acquittal. The possibility of a judge giving a free decision on a criminal offense that has been committed is part of the principle in the criminal justice system in force in Indonesia. The problem is, are there reasons justified by criminal law for a judge to give an acquittal decision or the perpetrator's actions cannot be accounted for a criminal offense committed. The reason referred to is interpreted as a reason for a criminal eraser or a reason for criminal negation.

Keywords: *Noodwer Exces; Court Sentence; Murder Case*

Introduction

According to Achmad Ali, law is a set of rules or measurements arranged in a system that determines what is allowed and what is not allowed to be done by humans as citizen of a state in social life. The law is sourced both from the community itself and from other sources that are recognized by the highest authority in the community and is actually enforced by the community as a whole in their lives. If the rules are violated, it will give power to the highest authority to impose external sanctions (Ali, 2008, p. 11).

Moeljatno (2010, p. 1) defines criminal law as part of the overall applicable law in a country that establishes the principles and rules to determine which actions are prohibited and accompanied by threats or sanctions in the form of certain penalties for those who violate the prohibition, determine when and in what cases they have violated the prohibitions can be caused or convicted of a criminal as threatened, and determine in what way the imposition of the criminal can be carried out if someone has violated the prohibition.

Not all actions that fulfill all elements of a criminal offense can be convicted of a criminal offense, but the Judge can give an acquittal. The possibility of a judge giving an acquittal decision on a

criminal offense that has been committed is part of the principle in the criminal justice system in Indonesia. The problem is whether there are reasons that are justified by criminal law for a judge to give an acquittal or decide the perpetrator's actions cannot be accounted for a criminal offense. It can be seen from the specific provisions formulated by the legislators which allow the perpetrators of criminal offenses to not be sentenced to any criminal sentence. This means that the law accepts certain circumstances that allow a criminal offender to be held not responsible or not to be sentenced to any criminal offense. Thus, the actions of someone who has fulfilled certain conditions make it possible for criminal law provisions cannot be applied. This applies to both the provisions contained in the Indonesia Criminal Code and other legislation outside the Indonesia Criminal Code.

The reason referred to is interpreted as a reason for a criminal offense or a reason for criminal negation. One of them is a forced defense (*noodweer*) as stipulated in Article 49 paragraph (1) of the Criminal Code, the act that enters this forced defense is basically to judge people who violate the law against themselves or other people, then the person who receiving instant attacks against the law is permitted to do so long as it meets the requirements to protect the legal interests (*rehtsbelang*) of themselves or the legal interests of others. According to Adam Chazawi (2002, p. 39), an assault that is against the law immediately bring forth to an emergency law that allowed the victim to protect and defend his/her legal interests or the legal interests of others by himself, this is the philosophical basis of the forced defense.

Van Hamel argued that criminal act carried out under forced conditions is a reason for justification, namely those which eliminate the unlawful nature of an action (*rechtsvaardingingsgronden*). According to Simons, from a person who is forced, according to proper calculations, it cannot be expected that he/she will sacrifice his own legal interests, solely to save the legal interests of others. Therefore, his/her actions can be forgiven and cannot be punished. While Simons argues that this is a reason for forgiveness, a reason that eliminates mistakes (*schulduitsluitingsgronden*). According to him, a person who is forced by someone else to do an offense (a crime) does not have free will.

On the other hand, this defense theory also has to do with the principle of proportionality in terms of making such a defense. If the defense is inappropriate or by using a disproportionate tool, then it cannot be used as a reason to omit a criminal offense sentence (Hamdan, 2014, p. 71). According to Van Hamel, exceeding the limits in doing defense more than necessary must be caused by the influence of such a great mental shock, which is not solely due to a "*vress*", "*angst*" which can both be interpreted as ignorance, but also caused by other things like "*toorn*" or anger and "*medelijden*" or feelings of pity.

According to Noyon-Langemeijer (Hamdan, 2014, p. 71), in accordance to the law, things that go beyond justified limits include two things, which are exceeding the limits in doing defense and exceeding the limits of things that are necessary. If the act goes beyond the limits of a defense that is not included in the understanding as referred to in Article 49 paragraph (2) of the Criminal Code, accordingly, the formulation of Article 49 paragraph (2) of the Criminal Code should mention "the limits of necessity" and not " the limits of a defense as necessary ".

According to Pompe (Lamintang, 2014, p. 507), in accordance with the formulation of Article 49 Verse (2) of the Criminal Code, actions that are beyond the limits can be related to actions exceeding the limits of needs and can also be related to actions beyond the limits of his own defense. The limits of the need have been exceeded if the means used to carry out the defense have been carried out excessively, for example by killing the attacker even though with a single punch a person can already make the attacker helpless, and if people actually there is no need to make a defense, for example because he can save himself by running away. The limits of a defense have been exceeded if after the actual defense has been completed, people still attack the attacker, even though the attacker has actually ended their attack. The

act of beating the attacker, even though the action can no longer be called a defense, according to the criminal provisions that are being discussed, cannot make the person be punishable.

According to Simons, actions that have been carried out by exceeding the limits of a *noodweer* are illegal but cannot be accounted to the perpetrator, and for this reason a *noodweer exces*, one can be justified in committing a *noodweer* (Lamintang, 2014, p. 507-511). Therefore, based on theories, legal principles and provisions of Article 49 paragraph (2) of the Criminal Code, a person who makes an emergency defense or plea cannot be convicted for the reason of forgiveness, in some cases forgiveness reasons cannot be used because they must comply with the conditions the forced defense (*noodweer exces*) itself, namely: the defense is forced, defended is yourself, others, the honor of decency, or one's own property or others, there is an instant attack or threat of a very close attack at the time, and the attack was against the law (Hamzah, 2010, p. 166).

Research Methodology

This research method is normative juridical which emphasizes secondary data which are legal materials that have been documented. The focus of research with a normative juridical approach is aimed at library research. This study examines more secondary data in the form of primary legal materials, secondary legal materials and tertiary legal materials. Reasons that can be raised are due to the legal issues under investigation relates to regulations and court decisions. However, this juridical-normative research method is supported by juridical-empiric research methods with an emphasis on elements or factors related to the object of research as part of field research.

Findings and Discussion

Basis for Crime Dismissal in Indonesian Criminal Law Code

The reasons that erase criminal offense (*strafuitsluitingsgronden*) are reasons that have results in a situation where even though the action has fulfilled the elements of the formulation of crime provisions, the action cannot be convicted. It can be illustrated by someone who shoots someone else which from this piece of news will give the impression that the shooter must have committed a crime. However, in certain cases it turns out that the shooter is an officer assigned to carry out capital punishment, therefore, in this case there is a reason to omit the criminal offense.

Van Bammelen and Pompe see a close relationship between the definition of an act (feit) in Article 76 and Article 63 of the Criminal Code (concoction of offense or *concursus*), Pompe gives a definition of the same act (*feit*) between Article 76 and Article 63 of the Criminal Code "three concrete actions, aimed at the same goal as long as this goal becomes the object of the norm". Decisions that have the power to remain valid as a decision that cannot be changed again. This includes every unguilty judgment, free from lawsuits and criminal convictions as well as conditional criminal sentence decisions.

Furthermore, according to Van Bemmelen (Hamzah, 2010, p. 148), it is sometimes difficult to distinguish whether this is the basis for prosecution or the basis for rendering a not guilty judgment, because the terms used by lawmakers are not always clear. It is often requested that certain regulations be applied, which designate the omission of prosecution, even though the intent of the lawmaker which contains a fall in crime in that regard. If a general prosecutor agrees that this is not acceptable, then a second prosecution can be held for the same action provided that the basis for the nullification of the prosecution has been returned. If a verdict is released from the discussion on legal assistance, the prosecution cannot be carried out (Hamzah, 2010, p 148-149).

The writers of criminal law have put forward various forms of distinguishing reasons for criminal eradication from certain criteria. Some of the most common types of differentiation include; justification and excuse. One differentiation of the reasons for criminal eradication is between *rechtsvaardigingsgronden* and *schulduitsluitingsgronden*. In Bahasa Indonesia, Moeljatno translates *rechtsvaardigingsgronden* as justification, while *schulduitsluitingsgronden* is translated as forgiving excuse (Maharani, 2016, p. 133).

Rechtvaardigingsgronden is "*faits justificatifs*" which means to abolish its unlawful nature so that the act is justified, in other words it is called justification. Therefore, *Rechtvaardigingsgronden* can also be said to be the object of *Rechtvaardigingsgronden*. This is consistent with the view of the nature of breaking the law is an element of criminal activity, which is also an objective part of the *feit*. *Schulduitsluitingsgronden* is "*faits d 'excuse*" which means to be removed from the responsibility of the maker or his mistakes are erased, so that the action is not punished. In other words, it is called excuse. Because the *Schulduitsluitingsgronden* which eliminates the error lies in the objective part in the *strafbaar feit*, it can also be said to be the subject of the *Strafuitsluitingsgronden* Poernama, 1992, p. 193).

According to Moeljatno (2010), as stated above, justification is the reason that eliminates the unlawful nature of an action, so that what is done by the defendant becomes an appropriate and correct action. Meanwhile, excuse is the reason where the actions committed by the defendant remain to be against the law and considered a criminal offense, but it is not convicted because there are no prove of fault.

Regarding the articles of reasons that cancel criminal offense contained in book I Chapter III of the Criminal Code, what is classified as justification and classified as an excuse is explained by Moeljatno (2010) that usually what people see as justification is Article 49 paragraph (1) Criminal Code concerning forced defense (*noodweer*), Article 50 of the Criminal Code concerning carrying out the law's orders, Article 51 paragraph (1) of the Criminal Code concerning carrying out orders from superiors, while those considered as reasons for forgiveness are Article 49 paragraph (2) of the Criminal Code concerning defenses that exceed the limits , Article 51 (2) of the Criminal Code concerning an order of office without authority. There is no agreed opinion about Article 48 of the Criminal Code which is called *overmacht*. There are opinions that perceive that power of force as a justification and others perceive it as an excuse. In addition to this, there is a third opinion that stated in Article 48 of the Criminal Code maybe there is a reason for justification and there is also a reason for excuse (Maharani, 2016, p. 138).

This distinction between justification and excuse is derived from the German scholar Von Liszt and the French scholar Mariauel. According to Van Hamel, the basis of generators (*rechtvaardingsgronden*) abolished things against the law, while others abolished *strafwaardigheids* (things worthy of conviction). Vos in the first case holds the same opinion, but the basis of excurse (*e*) is not to erase the offense but rather to abolish the thing the maker is responsible for the action. *Memorie van Toelichting* (MvT) or minutes of explanation does not make such a division, all of Article 48-51 of the Criminal Code on the basis of outer side cannot be accounted for and the opposite is an aspect in terms of irresponsibility like Article 44 of the Penal Code. Thus, everything is the basis of excure (*schulduitsluitingsgronden*). Vos stated that it was not quite right, because Article 50 of the Criminal Code certainly did not erase the matter from which the author was responsible for the act but also erased the case against the law.

According to Pompe referred to in Article 49 paragraph (2) a forced defense that exceeds the limit and Article 51 paragraph (2) carries out an order of position that is not authorized, as both the basis of justification (*rechtvaardigingsgrond*) and the basis of forgiveness (*strafuitsluitingsgronid*). Therefore, Vos said that perhaps this should not be called a basis for excuse, but the nullification of subjective

crimes (*subjectieve strafitsluitingsground*) which includes Article 49 paragraph (2) and Article 51 paragraph (2) (Hamzah, 2010, p. 151).

In the minutes of explanation (*memorie van toelichting*) on the draft of the Dutch Penal Code the distinction of criminal eradication has been made consisting of: *onerekendbaarheid* caused by things from within (*inwendinge oorzaken*), *onerekenbaarheid* caused by things from outside (*uitwendinge oorzaken*) (Maharani, 2016, p. 136). What is meant by words cannot be justified because the causes from within (*inwendinge*) are causes that lie in the person himself. The minutes of the explanation are classified in Article 44 of the Criminal Code. In Article 44 of the Criminal Code it is determined that a person cannot be liable for his actions if his mind is handicapped in growth or disturbed due to illness.

While what is meant by cannot be insured for causes from outside (*uitwendinge*) are causes that lie outside the self of the actor. The minutes of the explanation classify into these external causes the matters specified in Article 48 to Article 51 of the Indonesian Criminal Code. Most criminal law writers do not approve of the distinction made in the minutes of the explanation. According to *memorie van toelichting*, the reason for a criminal offense is divided into the reasons contained in the defendant's mind which is Article 44 of the Criminal Code, and the reasons that comes from outside stated in Article 48-51 of the Criminal Code (Maharani, 2016, p. 137). Therefore, as stated by Moeljatno, if the minutes of explanation classify Article 48 through Article 51 of the Criminal Code into groups of external causes (*uitwendinge*), actually it is in those articles are the more appropriate causes if classified as internal causes, for example, those from in the mind of the defendant himself.

The basis for criminal negation is divided into two groups, which are those listed in the law and the other that is outside the laws introduced by jurisprudence and doctrine. What is stated in the law can be further divided into the general one (contained in the general provisions of Book I of the Criminal Code) and applies to all offense formulations. Specifically, it is stated in certain articles that the general details apply to the formulation of the offense only. General details are contained in: Article 44 of the Criminal Code (cannot be justified), Article 48 of the Criminal Code (forced power), Article 49 paragraph (1) of the Criminal Code (forced defense), Article 49 paragraph (2) of the Criminal Code (forced defense that exceeds the limit), Article 50 of the Criminal Code (carrying out legal regulations), Article 51 of the Criminal Code (carrying out an authorized position order) (Hamzah, 2010, p. 151). The specific basis is stated in related articles such as Article 310 paragraph (3) of the Criminal Code, article 166 for offenses in articles 164 and 265, and, Article 221 paragraph (2).

There are several things that can eliminate criminal offense which are regulated in the Criminal Code, among other is if the offense cannot be justified. Based on the Article 44 paragraph (1) of the Criminal Code, those convicted of acts that cannot be relied upon (*uponegerekend*) to him because they have mental disorder are defective in growth or disturbed because of illness, which in Dutch terms *gebrekkige ontwikkeling of ziekelijke storing zijner verstandelijke vermogens*. Van Hamel argues that the ability to be responsible is a state of psychological normality and maturity. The abilities are reflected by three abilities, which are (1) to understand the real environment itself, (2) to realize his actions as something that is not permitted by society, and (3) to his actions can determine his will (Zainal, 1995, p. 190).

Article 48 of the Criminal Code stipulates that anyone who commits an act due to the influence of forced force (*overmacht*) is not convicted. E. Utrecht is said that according to *memorie van toelichting* to the Draft of Indonesian Criminal Code, what is meant by force (*overmacht*) is *eenkracht, een drang, een dwang waaran men geen weestand right bieden* (a force, a compulsion, a force that cannot be resisted). H.B Vos criticized the use of the words "cannot be resisted" in giving meaning to "*overmacht*" by *Memorie van Toelichting*. E. Utrecht cites Vos's opinion that, the words *Memorie van toelichting* are incorrect, the words "*wa geen weerstand bieden*" should be read "*waarvan men niet vergen, dat weerstand geboden wordt*" which means that from the author it cannot be expected that he will fight.

What was stated by H.B. Vos can be understood. For example, a person who is threatened with a gun and ordered to write a slandering letter can actually be against the order even if the risk is to be shot. In this situation it is more correct to say that the person concerned cannot be expected to fight it because the risk is very heavy.

However, the general opinion is that force can be a justification and can also be a basis for excuse. So, according to these experts the forced power (*overmacht*) listed in Article 48 of the Criminal Code can be separated according to the theory of two types. Van Bemmmelen called a state of emergency (*noodtoestand*) as a justification (*rechtvaardigingsgrounnd*). Here acts are justified, for example a driver who stops on a public road because his car broke down, can be interpreted as an emergency (*noodtoestand*). The force to justify (*reachtvaardigt*) actions if the maker has no other choice (Hamzah, 2010, p. 163).

According to Jonkers (C.S.T. Kansil, 1995, p. 204), the difference between absolute *overmacht* and relative *overmacht* can be seen in two aspects. First, practically those who force or encourage those who do. Second, those who are threatened, forced or encouraged to do, even if they do so because of the threat or encouragement. Not all coercion or encouragement against a person can cause a relative *overmacht* of strength. Coercion or encouragement must be such that the affected person cannot or does not need to put up a fight. For example, a mere boss's order does not result in *overmacht relatieve*. Thus, the power of parents cannot be taken as an excuse to refuse military service obligations.

Article paragraph (1) of the Indonesian Criminal Code, whoever commits an act of defense is forced to himself or for another person, the honor of his decency or property as well as others, because there is an attack or threat of a very close attack at that time which is against the law. Moeljatno's translation, whoever is forced to commit an act of defense because there is an attack or threat of an attack when it is against the law against oneself or others against the honor of decency (*eerbaarheid*) or one's own or someone else's property, is not convicted. In Wirjono Prodjodikoro's translation, someone is not punishableby doing an actions, which are required (*geboden*) in the absolute necessity to defend the body (*lijf*), decency (*eerbaarheid*) or objects in the form of objects (*goed*) from himself or others, against an attack (*aanranding*) which is illegal (*wederrechtelijk*) and is faced immediately (*ogenblikkelijk*) or is feared will soon be happened (*onmiddelijk dreigend*).

In Article 49 paragraph (1) of the Criminal Code, a criminal eradication reason called *noodweer* is stipulated, which can be translated as forced defense or emergency defense. Based on the the formulation of Article 49 paragraph (1) of the Criminal Code, elements of forced defense or emergency defense are forced defense, defended oneself, others, decency, or the property of one's own or others, an instant attack or threat of an imminent attack at the time and it was against the law (Hamzah, 2010, p. 166-167).

Defenses must be balanced with attacks or threats. Attacks must not exceed the limits of need and necessity. This principle is called the principle of subsidiarity (*subsidiariteit*). It must be balanced between the interests defended and the methods used on the one hand and the interests sacrificed. Thus, it must be proportional. Not all tools can be used, only what is appropriate and makes sense. Defenses are also limited to the body, the honor of decency and property. The body includes mind, injury and freedom of movement. The honor of decency includes feelings of sexual shame. Narrower than honor but broader than body.

The Concept of Forced Defenses that Exceeds Limits (Noodweer Exces)

Article 49 Paragraph (2) of the Criminal Code provides the provision that forced defenses that exceed the limits, which are directly caused by severe mental shock due to the attack or threat of the attack, may not be punished. The elements of Article 49 paragraph (2), according to the translation are

forced defenses that exceed the limits, forced defenses that exceed the limits are directly caused by severe mental shaking, and severe mental shaking due to the attack or threat of the attack (Prasetyo, 2014, p. 141). In the third element, "the attack" meant, in relation to Article 49 paragraph (1), "the attack against the law and threatening directly at that time". Thus, in Article 49 paragraph (2), there must also be an attack against the law and a direct threat at the time.

Based on the opinion of Andi Zainal Abidin (1995, p. 235), Article 49 Paragraph (2) should be interpreted appropriately or similarly to the decree. In this sense, the article should read as follows: "against himself or others, the honor of one's own morality or property from attacks against the law that threaten at that instant or that threatens instantaneously".

What is meant by moral honor is an honor that is directly related to the field of sexual or lust or genitals. Attack (*aanranding*) of honor (*eer*) or dignity as regulated in Article 310 of the Criminal Code and so on, is not included in the sense of moral honor referred to in Article 49 of the Criminal Code must be a real action, for example touching or trying to touch a woman's breasts or genitals. While the attack referred to in Article 310 of the Criminal Code, is not a real action, but with the words accusing someone of sexual abuse and so forth with a view to defaming someone's good name. If the (way) defense of immoral honors is determined in Article 49 of the Criminal Code, then the method of "defense" against criminal acts regulated in Article 310 of the Criminal Code is with complaints (Kanter, 2002, p. 291).

In order to exceed this emergency defense limit, the following conditions must be met; beyond the required defense, the defense is carried out as a result of intense mental shock (a feeling of extreme heat), the intense mental shock is caused by an attack or between mental shock and attack or between mental shock and a mild defense event there must be a relationship cause and effect. C.S.T. Kansil gave his opinion about the limits of emergency defense, the limits are exceeded if a person is: using an endeavor that was harder than necessary to avoid the attack, or if the defendant, did not stop after the attack had been finished (Kansil, 1995, p. 204). Usually people who exceed the limits in doing an emergency defense, must be blamed, but it is not real, that the "excess" only occurs because of "shocked feeling". In this case, therefore, the perpetrators must be released from all criminal charges regarding the case in question.

So, what is meant by *noodweer exce*s is an action that exceeds the necessary limits for defense. Meanwhile, what is meant by exceeding the necessity of defense, the defense is a *noodweer* if the defense (unless directed to the defense of the body, honor, property must be necessary) is necessary to be done if there is no possible way to avoid the attack. Necessity, which is meant by a necessity is that someone must be threatened and the legal interests violated because of a defense action, then what is meant by intense mental stress must be understood, for that must be seen in MvT what was originally meant by intense mental stress is "fear and confusion". The term according to the Dutch Parliament is too narrow so that the Dutch Parliament defines the state of the mind that is pressing very or severely.

An action done as *noodweer exces* is still against the law, only in this case the perpetrators who have committed the act against the law cannot be punished. Therefore, *noodweer exces* are not included in *rechtvaardigingsground* but instead included as *strafitsluitingsground* (Prasetyo, 2015, p. 141-142). According to Article 49 paragraph (2), the attack has resulted in severe mental shock or intense mental stress. Regarding what is meant by this great mental stress, an explanation is given by Satochid Kartanegara who state that in order to know that great mental stress, an explanation of the law must be studied which means that in order to find out about this issue historical, interpretation must be used (as cited Prasetyo, 2015, p. 145). At first the *gemoedsbeweging hevige* was interpreted as fear and confusion (*vrees en radeloosheid*). However, that fear and confusion was then considered too narrow by the Dutch parliament, so it was necessary to change it instead of the term "*vrees en radeloosheid*" and then the parliament put in the plan the law the term *gevige gemoedsbeweging* (a state of the mind which was

pressing very or severely). With this change, it is also included in the understanding of the term mental state in the form of "extreme anger or waode" so it's not just fear and confusion ".

According to Article 50 of the Criminal Code, anyone who commits an action to implement the provisions of the law (*wettelijk voorschrift*), is not convicted. The basic reason for the omission of Article 50 of the Criminal Code is the easiest way of thinking, because it is appropriate for anyone who by one law is ordered or given the power to carry it out. There will not be convicted by other laws because, if not so, no one will dare to carry out laws that often contain strict prohibitions or orders. His actions were not against the law, so the act was justified because of the *rechtvaardigingsground*. but it does not mean that even if the law is carried out without proper limits, it is like the police shooting prisoners who run without any signaling reasons. Some jurisprudence shows that each case is reviewed individually (Poernama, 1992, p. 200).

According to Article 51 paragraph (1) of the Criminal Code, anyone who commits an actino to carry out an official order given by an authorized authority, is not convicted. In Article 51 Paragraph (1) of the Criminal Code, a reason for criminal sentence cancellation is formulated based on the implementation of a position order (*ambtelijk bevel*), specifically a legal order or with authority. For example, the police are ordered by a National Police Investigator by issuing an Arrest Warrant to arrest someone who has committed a crime. The police essentially deprived someone of their independence, but because the arrest was carried out based on a legal order, the police cannot be convicted. With regard to the substance of the position order as a reason for criminal offense, Moeljatno stated that the important idea is that not every implementation of a position order releases a person who is governed from responsibility for the actions committed (Poernama, 1992, p. 165). In other words, it includes condemnation of what is called corpse discipline (cadaver discipline). Our government condemns people who blindly think first, just carry out orders from their superiors. Our government should not consist of officials who can only say "*sendiko, semuhun dawuh*" or "yes-man".

Implementation of Noodweer Excess in Murder Crime in the Practice of Criminal Justice in Indonesia

The stage of rendering a decision in a criminal court is the final stage of the whole series of proceedings in a trial. This stage is after the *Replik* and *Duplik* stages. "*Replik*" is the response of the Public Prosecutor while "*Duplik*" is the response to the *Replik* response of the Public Prosecutor, but the Judge consisting of Judges in the assembly does not directly compile and read the verdict at the time, but postpones the hearing to deliberate on negotiating and thinking about everything that happens in the trial to then make a decision.

Before deciding a case the Judge must consider several things, such as whether or not the elements contained in the indictment are met, matters that can incriminate the criminal and matters that can alleviate the crime as stated in Article 197 letter F of the Criminal Code or even eliminate criminal as in Articles 44, 48, 49 paragraph (1) and (2), 50 and 51 of the Criminal Code.

Judges' considerations can be divided into 2 (two) categories namely, juridical considerations and non-juridical considerations. Juridical considerations are judges' considerations that are based on juridical facts revealed in court proceedings and are determined by law to be contained in a decision. While non-juridical considerations can be seen from the defendant's background, due to the defendant's actions, the defendant's condition, and the defendant's religion (Muhammad, 2010, p. 212). Based on the provisions of Article 14 paragraph (2) of Law Number 48 Year 2009 which states that in a deliberation session, each Judge is required to submit written opinions or opinions on the case being examined and become an inseparable part. In addition, the judge's decision must not be separated from the results of the evidence during the examination and the results of the court hearing.

As in Decision No.26 / PID.B / 2014 / PN.ATB with the defendant named Rofinus Asa aka Finus aka Asa Mali charged with Article 338 of the Criminal Code, the threat of criminal punishment is a maximum of 15 (fifteen) years imprisonment and the defendant after undergoing trial found guilty and sentenced to 7 (seven) years in prison. The chronology of the case in brief is; between the defendant Rofinus Asa aka Finus alias Asa Mali and the victim Paul Mau Bere was a neighbor, the relationship was not good when the victim Paul Mau Bere found out his wife (accused) had an affair with the defendant Rofinus Asa alias Finus alias Asa Mali. But the second problem was resolved at the Village Office in a customary manner, by the defendant giving a fine in the form of 1 (one) pig, Rp. 1,500,000 and 1 (one) piece of traditional cloth and the victim's wife gave Rp 1,500,000 and 1 (one) piece of traditional cloth. Then the pigs are cut and eaten together, the traditional cloth from the victim's wife is given to the defendant's wife, while the traditional cloth and money from the defendant is given to the victim.

After the problem was settled traditionally, the victim's wife and the defendant never met again. That it was known that after that there were no more problems between the two, until one night on January 3, 2014 at 08.00 Central Indonesia Time (WITA), the defendant attended a party organized by students from Kupang. At around 02.30 WITA the defendant returned home with his friend named Thobias Mali, when they arrived in front of Thobias Mali the two separated, Thobias entered his house while the defendant returned to his uncle's house. Arriving in front of his uncle's house the defendant stood at the front door and called "uncle Antonius" to open the door but the door was not opened, so the defendant went aside to the kitchen while continuing to call "*uncle Antonius*", after the defendant called several times but om Antonius did not open the door, suddenly there was a hit on the defendant's right back, the defendant turned to see that the victim Paul Mau Bere, at that time the victim Paul Mau Bere immediately swung his machete again toward the face and hit the defendant's head on the right.

Because he felt sick the defendant immediately pushed and seized the machete victim, after that the defendant immediately stabbed the machete towards the body and stabbed the victim repeatedly. Initially the defendant stabbed toward the chest, after which the defendant swung repeatedly and no longer knew which part of the body was affected because the defendant was already darkened. The defendant stopped swinging his machete at the victim's body after hearing the victim shout "*Mali Asa cut me*", then the victim fled towards the highway and the victim shouted saying "Asa Mali cut me, dead already". Then the defendant quickly slipped a machete under the door of the victim's house. Then the defendant fled towards the back of the victim's house to the police station and because the defendant was hit by a slash from the victim's machete, so the defendant was also treated in the hospital. And as a result of the defendant's actions, the victim Paul Mau Bere finally died on the way to the hospital.

The demands of the Public Prosecutor in Decision Number 26 / PID.B / 2014 / PN. ATB on behalf of Rofinus Asa alias Finus alias Asa Mali, dated Friday, April 25, 2014 which in essence the Public Prosecutor demanded that the Atambua District Court Judge who examined and tried this case decide; stated the defendant Rofinus Asa alias Finus alias Asa Mali has been proven legally and convincingly guilty of committing a Criminal Act as in the Primair indictment in violation of Article 338 of the Criminal Code, Subsidair 354 paragraph (1) and (2), and more subsidiary 351 paragraph (1) and (3). Drop the criminal on Rofinus Asa alias Finus alias Asa Mali with life imprisonment. Stating evidence in the form of a machete whose length is approximately 50cm with a handle made of yellowish-brown wood, which was confiscated from the defendant was seized to be destroyed. Imposes the defendant to pay the court fee of Rp. 5,000.

Meanwhile, the Judge's ruling stated Rofinus Asa aka Finus alias Asa Mali has been proven legally and convincingly guilty of committing a crime of murder. Drop the criminal on the defendant Rofinus Asa alias Finus alias Asa Mali with 7 (seven) years in prison. Determine the length of time the defendant is detained deducted entirely from the criminal sentence imposed. Order the defendant to remain in custody. Establish evidence in the form of a machete whose length is more than 50 cm with a

handle made of yellowish-brown wood and there are blood spots, seized to be destroyed. Imposes the defendant to pay the court fee of Rp. 5,000.00.

In addition, the Judge also considered matters that were burdensome and matters that alleviated the defendant, among others; incriminating matters: the defendant's actions resulted in the death of the victim, the defendant's actions were based on the affair of the accused and the victim's wife. While the things that are considered alleviating namely the defendant regretted his actions, the defendant was polite in court.

Positive law in Indonesia (written law) refers to Article 49 of the Criminal Code which states that someone who commits an act in an effort to protect themselves from threats that can endanger the safety of life, property, and honor both personal and others cannot be convicted. Because the actions committed in the context of defending themselves in a state of compulsion can be a reason for a criminal offense even though all elements of the crime have been fulfilled. However, the perpetrators cannot be held liable because there are excuses.

The reason for forgiveness or *schulduitsluitingsground* is related to a person's responsibility for a criminal act that he has done or criminal responsibility. This excuse basis eliminates the mistakes of people who commit offense on the basis of several things. The reason for forgiveness can be found in the case that the person commits an act in a state: not accountable (*ontoerekeningsvaatbaar*); forced force (*overmacht*), forced defense which exceeds the limit (*noodweer exces*), Judge's consideration in deciding case No.26 / PID.B / 2014 / PN.ATB is felt to be wrong by applying Article 338 of the Criminal Code, if seen from witness statements presented at the face of the trial that was actually carried out by the defendant was a forced defense that exceeded the limit as described in Article 49 paragraph (2) (Prasetyo, 2015, p. 126). Because the beginning of the fight between Rofinus Asa aka Finus alias Asa Mali (the defendant) and Paulus Mau Bere (the victim) began with the victim's attack on the defendant, and then the defendant intended to defend himself by seizing the machete used by the victim to stab the defendant. As a result of mental shock experienced by the defendant resulting in a fight that caused the victim died in the world with stab wounds in the chest, broken ribs and slices of the cheeks. And the defendant also suffered a torn wound on the right back and head due to the attack that was started by the victim.

Consideration Judges must be truly wise and prudent in making decisions because on the one hand the actions taken by the defendant are indeed legal and convincing to commit acts of law intentionally and result in the loss of one's life, but on the other hand the acts are carried out due to forced defense which exceeds the limit (*noodweer exces*), it is indeed contained in Article 49 paragraph (2) a forced defense that exceeds the limit, which is directly caused by the shock of the mind because of the attack or threat of the attack, is not convicted.

In this case there is an attack against the law that can threaten safety or life, so that a person can make a defense carried out in an emergency, even though his actions will harm the attacker, but the action of the action (victim) in this case the party attacked is to defend yourself from the harmful actions of the attacker. *Noodweer exces* is a legitimate defense according to Van Hamel, about why someone who makes a defense is forced to not be punished, basically there are several opinions: opinion of the legislators who assume that a *noodweer exces* is a right, so someone who make a defense and cannot be punished (Lamintang, 1984, p. 467). Because his actions are not against the law. Opinions from Binding who see forced defenses that exceed the limits as a legal defense according to the law, which confirms the defense is not the injustice that occurs, but what happens to someone. The opinion in *Memorie van Toelichting*, which says that *noodweer exces* is an "external cause that makes an action not accountable to the culprit".

The opinion found in Memorie van Antwoord, which states that *noodweer exces* is a right, which has subsequently been said in Dutch "*her recht nooit behoeft te wijken voor het onrecht*" in English "something that is legal according to the law is not at all not need to succumb from something against the law".

The explanation is indeed clear that someone who makes a forced defense cannot be convicted, but it does not necessarily mean that a defense must be done arbitrarily by someone, the Judge must see what the considerations of the defendant are forced to defend among others must meet the elements. From the formulation of Article 49 paragraph (2) of the Criminal Code, elements of forced defense or emergency defense, namely: forced defenses that exceed the limits, forced defenses that exceed those limits are directly caused by severe mental shaking and severe mental shaking due to attack or threat the attack (Hamzah, 2010, p. 167).

The judge will judge from the three elements namely that the defendant made a defense because it was forced, defended is yourself, others, the honor of one's own morality or property, there was an attack or threat that was very close at that time and the attack was against law. The judge considered that this matter was also an excuse for carrying out the act so that it could and should be justified because the defense was forced at the time of the attack that immediately occurred, the state through the means of the state in charge of protecting the community was not able to protect the interests of the person attacked, so that the person it can be justified to do something forced. the instant attack against the law gave birth to an emergency law that allowed victims to protect and defend their legal interests or the legal interests of others, this is the philosophical basis of the forced defense.

According to Van Hamel, the Judge in determining a crime based on a forced defense, the Judge must see some of the things below as a material for judges in determining a loose verdict in a crime that results in death based on reasons of forced defense that exceeds the limit (Lamintang, 1984, p. 504).

Judges' basic considerations in issuing decisions by applying Article 338 of the Criminal Code in Athambua District Court Decree Number 26 / PID.B / 2014 / PN.ATB are not in accordance with the explanation of a forced defense that exceeds the limit (*noodweer exces*), here the Judge's knowledge is deemed lacking in theory *noodweer exces* so that there is a mistake in deciding a criminal case, the Judge should be able to consider based on facts before the court obtained from witness statements. because in this case the defendant was legally and convincingly proven to have committed a crime, but the defendant committed the act because it was based on a forced defense that exceeds the limit (*noodweer exces*) because the defendant's actions are included in the excuse of forgiveness. As a comparison in Court Decision Number 964 K / PID / 2015 the Judge decided that the defendant was not legally proven and convincingly committed a crime, taking into account the provisions of Article 49 paragraph (2) of the Criminal Code (*noodweer exces*). The author agrees with the above decision because he has decided to be free by applying Article 49 paragraph (2) of the Criminal Code and it is hoped that this decision can be considered by the Judge in deciding criminal cases in the future so that it becomes a material for Judges' consideration before deciding a criminal case.

Conclusion

Before the judge issue a decision, three aspects must be assessed and considered, these are juridical, philosophical and sociological aspects. This juridical aspect is an aspect related to the laws and regulations, doctrine and jurisprudence as the consideration for the judge in deciding each criminal case. Philosophical aspects are aspects related to the Pancasila and the 1945 Constitution as the basis of the philosophy of the Indonesian people, so that the Judge, in imposing every decision, will be loyal to the foundation of the Indonesia and reflect a sense of justice as reflected in the 5th precepts of the Pancasila "Social Justice for All Indonesian People ". Sociological aspects relate to the dynamics of the surrounding

community at large, so that the Judges in making decisions do not cause turmoil on the dynamics of the community. These three aspects are combined with legal theory that explains forced defense which goes beyond the limit (*noodweer exces*). The judge will consider it so that in making a decision it does not cause pros and cons, so that giving birth to a decision that truly reflects the values and fulfills the community's justice.

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