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The Concept of Judge's Forgiveness (Rechterlijk Pardon) in The National Criminal Law Code

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Abstract

The absence of provisions regulating Judicial Pardon (Rechterlijk Pardon) in the current Indonesian Penal Code and Criminal Procedure Code has created a legal vacuum. Judges are normatively bound to issue one of three verdicts: conviction, acquittal, or dismissal. This limitation excludes the possibility for judges to apply discretionary forgiveness in cases involving minor offenses or mitigating circumstances. Although Article 54 paragraph (2) of Law No. 1 of 2023 concerning the Penal Code introduces the concept of Rechterlijk Pardon, it fails to provide clear parameters regarding what constitutes "minor severity of the act," as well as the personal background of the offender or contextual factors surrounding the offense. This vagueness raises concerns over legal uncertainty and inconsistency in judicial interpretation. The purpose of this study is to examine the normative foundation and interpretive scope of the Judicial Pardon doctrine under Article 54 paragraph (2) and to formulate a legal construction that harmonizes substantive and procedural criminal law. This research is normative in nature, using a combination of statutory, conceptual, philosophical, case, and comparative approaches. The findings demonstrate that Judicial Pardon must be explicitly regulated through clear interpretive guidelines to ensure its implementation does not conflict with the principles of justice and legal certainty. Moreover, the integration of Judicial Pardon into the Draft Criminal Procedure Code is necessary to provide formal procedural legitimacy for judges to refrain from sentencing in specific circumstances, thus ensuring the penal system accommodates fairness, humanity, and proportionality in the enforcement of criminal justice.

1. Introduction

Indonesia as a state of law is revealing its new face. For 78 years, Indonesia was subject to the rule of law inherited from the Dutch.[1] The current Indonesian criminal law is a Dutch legacy (*HetWetboek van Stafrecht*) based on Law Number 1 Year 1946, the criminal law applicable in the Dutch East Indies became Indonesian criminal law. This Dutch heritage law is very far behind with the development of society and the need for better criminal law.[2]

The Criminal Code that was enforced in Indonesia prior to Law Number 1 Year 2023 on the Criminal Code was the *Wetboek van Strafrecht voor Nederlandsch Indie* which was translated and enacted by Law Number 1 Year 1946 on the Regulation of Criminal Law. The Criminal

[1] Muhammad Fathi Dandi Jayusman, Dita Gusnawati, "Judicial Pardon Antara Abuse of Pardon Power Dan Pembaharuan Hukum Pidana," *Jurnal Hukum Justitia Et Fax* 40 No.2 (2024), https://doi.org/DOI:10.24002/jep.v40i2.8574.
[2] Rusianto Agus, *Tindak Pidana & Pertanggungjawaban Pidana Tinjauan Kritis Melalui Konsistensi Antara Asas, Teori, Dan Penerapannya* (Jakarta: Kencana, 2016).

Code inherited from the colonial government carries colonialism values because it was made by the colonisers. The enforcement of this colonial heritage criminal law is not in accordance with the values upheld by the Indonesian people, namely the law that lives in the community.[3]

Especially in relation to punishment, it is currently considered unsatisfactory to the community. This has triggered a number of thoughts to make alternative efforts in answering problems related to the handling of criminal offences. Problems surrounding the development of the current criminal justice system suggest that it is no longer able to provide protection for human rights and transparency to the public interest. [4]

The individualistic and formal procedural punishment system has ignored the reality of the value of peace so that it is not used as a basis for the elimination of punishment. The State's interest in resolving criminal cases is very large and strong to convict even though the perpetrator and victim have reconciled. It is as if the State will be guilty if the perpetrator who has been forgiven and compensated the victim is expunged. The Criminal Code pays little attention to the existence and application of the philosophy of deliberation and consensus (based on Pancasila) in peace as the principle of resolving conflicts between citizens, both individual and public order. If the philosophy of punishment that ignores peace is allowed to drag on, it is feared that there will be a shift in legal culture in society. The culture of the Indonesian nation, which was originally a friendly nation, likes to stay in touch and likes to make peace, is very unfortunate if this nation has become an emotional and selfish nation as a result of the law not placing peace as a remover of punishment.[5]

It is well known that the concept of judicial pardon refers to the power vested in the judiciary to pardon a sentence imposed on an individual who has been convicted of a criminal offence. The decision to grant a judicial pardon is usually based on various factors such as the circumstances of the offence, the behaviour of the offender, and the potential for rehabilitation.[6]

The enactment of Law Number 1 Year 2023 on the Criminal Code (the new Criminal Code), will certainly have an impact on the administration of criminal law in Indonesia. [7] The law regulates new matters that have not been recognised in the old Criminal Code. One of the new arrangements is the principle of rechterlijk pardon which is regulated in Article 54 paragraph (2) with the following wording 'The severity of the act, the personal circumstances of the perpetrator, or the circumstances at the time of the criminal offence as well as those that occur later can be used as a basis for consideration not to impose punishment or not to impose measures by considering aspects of justice and humanity' (KUHP, 2023). This principle allows

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[3] Itok Dwi Kurniawan Vincentius Patria Setyawan, "Permaafan Hakim Dalam Pembaharuan Hukum Pidana Indonesia," *Jurnal Dunia Ilmu Hukum* 1, No 1 (2023): 25–27, https://doi.org/https://doi.org/10.59435/jurdikum.v1i1.97.

[4] N Zulfa Achjani Eva, *Pergeseran Paradigma Pemidanaan* (Bandung: Lubuk Agung, 2011).

[5] Thaib Hasballah, *Perdamaian Adalah Panglima Dari Semua Hukum. Dalam Pendastaren Tarigan Dan Arif (Ed). Spirit Hukum: Dedikasikan Untuk Purna Bakti 70 Tahun Prof. Hj. Rehgena Purba, S.H., M.H.* (Jakarta: Rajawali Pers, 2012).

[6] Prof. Mouaid Al Qudah Dr. Gehad Mohamed, *Judicial Pardon of Punishment: An Evaluative and Comparative Review*, n.d., https://doi.org/https://doi.org/10.15379/ijmst.v10i3.1705.

[7] Bayu Dwi Anggono Indi Muhtar Ismail, Dominikus Rato, "Kepastian Hukum Penerapan Asas Rechterlijk Pardon Pada Putusan Perkara Pidana, Humani" 13 No. 2 (n.d.): 398-412 P-ISSN: 1411-3066, E-ISSN: 2580-8516, https://doi.org/http://dx.doi.org/10/26623/humani.v1312.7964.

the judge not to impose punishment on the perpetrator even though he/she has been proven legally and convincingly guilty of committing a criminal offence, provided that the elements in Article 54 paragraph (2) are fulfilled.

The applicable Criminal Code does not regulate general provisions regarding the possibility of forgiveness by judges because in the process of deciding a case it only allows the panel of judges to give decisions in the form of punishment, acquittal and release. However, in the Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code, there is a guedeline for judge forgiveness (Rechterlijk Pardon) in Article 54 of the Criminal Code.

The meaning of the phrase and concept of Rechtelijk Pardon (judge's forgiveness) in Article 52 paragraph (2) of the Criminal Code does not explain and elaborate integrally and comprehensively on the limitations or categories regarding the severity of the act, the personal circumstances of the perpetrator or the circumstances at the time the act was committed or which occurred later, causing legal uncertainty.

This Rechtelijk Pardon principle is a principle that originated in the Netherlands, since long ago in Dutch procedural law, Netherland Wetbook Van Strafvordering Jan Remmelink stated that the Rechtelijk Pardon principle is a statement of guilt without imposing punishment from the canton judge as the lowest level court. In language, Rechtelijk Pardon is a pardon or forgiveness of power by a judge.[8]

Judicial Pardon or often known as Rechterlijk Pardon is a new institution known in the criminal justice system where with the existence of Judicial Pardon it is possible for judges to be able to impose forgiveness on convicts by considering several things which include the severity of the acts committed by the convict.[9] In this context, judges have the authority to reduce or remove the sentence that would otherwise be given to the accused based on special considerations that may include factors such as genuine remorse, rehabilitation, or the personal circumstances of the accused. Judicial pardons provide additional flexibility in sentencing, allowing judges to consider broader justice and social recovery and reintegration objectives.[10]

Then the meaning of the phrase and concept of Rechtelijk Pardon (*judge's forgiveness*) in Article 52 paragraph (2) of the Criminal Code does not explain and elaborate integrally and comprehensively regarding the limitations or categories regarding the lightness of the act, the personal circumstances of the perpetrator or the circumstances at the time the act was committed or which occurred later, causing legal uncertainty. That in the future, the meaning of the phrase the seriousness of the act, the personal circumstances of the perpetrator, or the circumstances at the time of the criminal offence as a basis for consideration not to impose

[8] Ridwan Suryawan, "Asas Rechterlijk Pardon (Judicial Pardon) Dalam Perkembangan Sistem Pemidanaan Di Indonesia," *Indonesian Journal of Criminal Law and Criminology (IJCLC)* 2, No. 3 (2021): 170–77, https://doi.org/DOI : 10.18196/ijclc.v213.12467.
[9] Nurini Aprilianda, "Menggali Makna Pemaafan Hakim Bagi Anak Melalui Ratio Legis Pasal 70 Undang-Undang Sistem Peradilan Pidana Anak," *Arena Hukum Jurnal Ilmu Hukum, Faculty of Law, Universitas Brawijaya, Malang Indonesia* 16 no.2 (2023): 423–42, https://doi.org/https://doi.org/10.21776/ub.arenahukum.2023.01602.10.
[10] Sugeng Jatmiko, "Rechterilijke Pardon (Pemaafan Hakim) Dalam Tindak Pidana Perpajakan HERMENEUTIKA," *Jurnal Ilmu Hukum* 6, no. 1 (2022), https://doi.org/http://dx.doi.org/10.33603/hermeneutika.v3i2.

punishment or not to impose measures by taking into account the aspects of justice and humanity, henceforth the regulation of Judge's Pardon (*Rechterlijk Pardon*) must also be harmonised with the Draft Criminal Procedure Code as a formal criminal law. In conclusion, the meaning of Article 54 Paragraph (2) of Law Number 1 Year 2023 on the Criminal Code in the phrase lightness of the act, the personal circumstances of the perpetrator, or the circumstances at the time of the criminal offence, namely:

a. The lightness of the act is the type of act that is punishable by a maximum imprisonment of 5 (*five*) months, a maximum fine of not more than Rp 2,000. 000.00 (*two million rupiah*), is not a repetition of the crime, there is peace from both parties and the suspect/defendant regrets his/her actions, is not a crime committed with aggravation (*vorgezette handeling*) or carried out in conjunction (*consursus idealis/realis*), or carried out by participation (*delneming*), is not a crime that is detrimental to the general public, government institutions, the crime, does not harm others and the crime does not attract public attention.
b. Personal circumstances of the perpetrator, is a physical and psychological condition of the perpetrator which includes the perpetrator does not have mens rea and actus reus in full, the perpetrator is a minor or the perpetrator is elderly, the perpetrator is incapable of responsibility (*toerekeningsvaatbaarheid*) due to a defect in growth (*gebrekkige ontwikkeling*) or impaired due to illness (*storing zakelijke*) or the perpetrator has a mental disability.
c. The circumstances at the time of the criminal offence, including the situation of overmacht or forced defence (*noodweer*), the criminal offence was not committed in a state of disaster, the perpetrator committed the criminal offence due to economic necessity, the perpetrator was a first time offender, the perpetrator was only an accomplice to the criminal offence, the criminal offence was committed within the scope of the household, the criminal offence was not a complaint offence, whether the criminal offence was committed with premeditation (*voorbedachte* rade) or was committed with intent (*dolus*) or was committed due to negligence (*culpa*), if it was committed with negligence (*culpa*) then the punishment becomes lenient, and whether the criminal offence is an attempted criminal offence (*poging*) or a completed criminal offence, both formal (act) and material (effect), if the criminal offence is an attempted criminal offence (*poging*) then the punishment will be lenient. Then whether the criminal act is included in the criminal act of participation, namely pleger, doen pleger, medepleger, persuading to commit a criminal act (*uitlokking*) or included in assisting a criminal act (*medeplichtige*), if it turns out that the perpetrator is assisting a criminal act (*medeplichtige*) then the punishment becomes lighter. Then whether the perpetrator committed the crime in a state of coercion (*overmacht*), forced defence (*noodweer*), emergency (*noodtoestand*), or because of carrying out a legal or official order. Then whether because of the principle of retroactivity, or because of the principle of expiration, or because of the principle of nebis in idem, or because the perpetrator died.

One example of a case that should not have been sentenced because it tarnished the value of justice is the case of Minah's grandmother who only took 3 cocoa pods and was sentenced

to probation for 3 months. The imposition of punishment in this case, although very light, still labelled her as a convict. Due to the existence of such penomena that can tarnish the value of justice, the Criminal Code 2023 formulates a new concept of Judicial Pardon as an alternative to criminal case decisions precisely in Article 54 paragraph (2) (development of criminal law).[11]

Judge's Pardon Rechterlijk Pardon is regulated in Article 53 and Article 54 of the Criminal Code 2023, where the judge must ensure justice and the rule of law before making a decision on punishment. Judge's Pardon, more commonly known as judicial clemency, is a decision given by a judge in the criminal justice system of a judge in the criminal justice system who grants pardon to a defendant who has been found guilty of a criminal offence.[12]

Then the Concept of Judge Forgiveness in the phrase Article 54 Paragraph (2) of Law Number 1 Year 2023 concerning the Criminal Code to realise justice and humanity, is to reconstruct the rules for implementing judge forgiveness in the form of additional types of judge decisions so as to obtain legal certainty which leads to decisions that are just and humane. The addition of types of decisions, namely conviction (*verroordeling*), acquittal (v*rij spraa*k), decision to forgive the judge (*rechterlijk pardon*). Then the suggestion to the Government and the House of Representatives is to immediately include the norm of the phrase forgiveness of judges and the construction of the concept of forgiveness of judges in an integral and comprehensive manner in Article 54 Paragraph (2) of the National Criminal Code in the Government Regulation on Guidelines for the Implementation of Law Number 1 of 2023 concerning the Criminal Code. Then immediately also include in the Criminal Procedure Code regarding the judge's forgiveness decision. Then to the Supreme Court to immediately issue a Regulation of the Supreme Court of the Republic of Indonesia and Circular Letter of the Supreme Court of the Republic of Indonesia regarding the Judge's Forgiveness Decision as long as the reform of the Criminal Procedure Code has not been carried out.

State of the art in this dissertation research, previously there was already a dissertation title on behalf of Ali Rizky discussing the philosophical level and perspective of the interpretation of judges in the punishment system.[13] While the researcher's research in the dissertation on the meaning of phrases and concepts of the severity of the act, the personal circumstances of the perpetrator, or the circumstances at the time of the criminal offence as a basis for consideration for not imposing punishment or not imposing action by considering aspects of justice and humanity, so that the meaning of phrases and concepts in Article 54 paragraph (2) of the Criminal Code becomes clear and clear so that it makes it easier for the Panel of Judges to impose a Verdict of Forgiveness (*Rechterlijk Pardon*), thus causing legal certainty and also the title of the dissertation on behalf of Lukman Hakim discusses the Application of the Concept of Judge Forgiveness (*Rechterlijk Pardon*).

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[11] Mahren, "Judicial Pardon Dalam Perkembangan Hukum Pidana Indonesia (Studi KUHP 2023)," *Juris Notitia Jurnal Imu Hukum* 1, No.1 (2023): 1–6, https://doi.org/https://ojs.ninetyjournal.com/index.php/IURIS.

[12] Muhamadaree Waeno Achmad Junaedy, Andi Marlina, Muhammad Kholid, "Wrongful Convictions Without Punishment Trought Judicial Pardon Persfective Fiqh Islamic Law," *Jurnal Hukum Dan Politik Islam* 9, No 2 (2024), https://doi.org/DOI 10.30863/ajmpi.v912.6290.

[13] Ali Rizky, "Disertasi Permaafan Hakim Dalam Sistem Pemidanaan. Program Doktor Program Studi Ilmu Hukum Fakultas Hukum Universitas Airlangga Surabaya.," *Program Doktor Program Studi Ilmu Hukum Fakultas Hukum Universitas Airlangga Surabaya.*, 2023.

The Criminal Justice System in Indonesia is guided by the Draft Criminal Code while the researcher's research in the dissertation is guided by Law Number 1 Year 2023 on the Criminal Code. The novelty in this dissertation research is to analyse current conditions and to find novelty that will be built by the author is as follows to analyse and examine the meaning of phrases and concepts in Article 54 paragraph (2) of the Criminal Code to be clear and clear so as to make it easier for the Panel of Judges to impose a Decision of Pardon (*Rechterlijk Pardon*), so as to create legal certainty.

2. Methods

This research uses a type of Normative Juridical Research that examines the subject matter based on legal rules and legal norms that exist in Positive law. In this research, there are three (3) methods of approach that will be used, namely the Historical approach and Comparative approach for the first problem and conceptual approach for the second problem. Historical approach is carried out in the framework of tracking the history of legal institutions from time to time, as well as to understand the development and philosophical changes that underlie a rule of law. In this research, the approach is used to find the philosophical basis for the emergence of the concept of rechterlijk pardon. A comparative approach is used to compare the law of one country with the law of another country or the law of a certain time with the law of another time. In this research, the comparison made is a comparison between the legal systems of countries that have used and applied rechterlijk pardon with Indonesia, which is trying to include rechterlijk pardon in its criminal law reform. Conceptual approach is an approach used to obtain clarity and scientific justification based on legal concepts derived from legal principles. This approach is carried out by looking at the views and doctrines that develop in legal science which aims to find ideas that give birth to legal concepts, legal notions, and legal principles that are relevant to legal issues.[14]

The problem approach in this research uses a regulatory approach, conceptual approach and comparative approach. The comparative approach of the author conducts a comparative study of laws and regulations in Indonesia with those in several countries. This research is legal research that uses several approaches to find solutions to the legal problems at hand, namely by using a conceptual approach, statutory approach, comparative approach, and case approach.

3. Results and Discussion

3.1. The Concept of Judge Pardon (Rechterlijk Pardon) Phrased in Article 54 Paragraph (2) of Law Number 1 Year 2023 on the Criminal Code to Realise Justice and Legal Certainty.

The concept of Rechterlijk Pardon, this new institution gives judges the authority to pardon a person who is guilty of committing a criminal offence that is very light in nature (not serious), and/or has mild circumstances for his actions.[15] The concept of Judge's Pardon (*Rechterlijk Pardo*n) in Article 54 paragraph (2) of Law Number 1 Year 2023 on the Criminal Code can be seen from 3 (three) categories, namely:

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[14] Marzuki Mahmud Peter, *Penelitian Hukum* (Jakarta: Kencana, 2005).
[15] Chitto Cumbhadrika Fadjar Sukma, "Urgensi Penerapan Rechterlijk Pardon Sebagai Pembaharuan Hukum Pidana Dalam Perspektif Pembaharuan Hukum Pidana Dalam Perspektif Keadilan Restoratif," *Gorontalo Law Review* Volume 6 N (2023), https://doi.org/: https://doi.org/10.32662/golrev. v61.212678.

1. The severity of the act
2. Personal circumstances of the perpetrator
3. The circumstances at the time the criminal offence was committed as well as those that occurred later.

In Law Number 1 Year 2023 on the Criminal Code, the phrase lightness of the offence is regulated in several articles:

1. The Crime of Mild Insult, regulated in Article 436 of the Criminal Code, states that insults that are not in the nature of pollution or written defamation committed against another person either in public orally or in writing, or in the presence of the insulted person orally or by deed or by writing sent or received by him, shall be punished for mild insult with a maximum imprisonment of 6 (six) months or a maximum fine of category II in the amount of Rp 10,000,000.00 (ten million rupiahs).
2. The crime of light maltreatment as set out in Article 471 of the Penal Code states that in addition to the maltreatment referred to in Article 467 and Article 470, maltreatment that does not result in illness or an impediment to the exercise of a profession or livelihood shall be punished as light maltreatment with a maximum fine of category II of Rp 10,000,000.00 (ten million rupiah).
3. The crime of petty theft, as stipulated in Article 478 of the Criminal Code, shall be punished as petty theft, with a maximum fine in category II in the amount of Rp 10,000,000.00 (ten million rupiah).
4. The crime of light embezzlement, regulated in Article 487 of the Penal Code, states that if the embezzled property is not livestock or goods that are not a source of livelihood or sustenance, the value of which does not exceed Rp1,000,000.00 (one million rupiah), every person as referred to in Article 486 of the Penal Code, shall be punished for light embezzlement, with a maximum fine of category II in the amount of Rp 10,000,000.00 (ten million rupiah).
5. The crime of minor fraud, as stipulated in Article 494 of the Penal Code, shall be punished for minor fraud with a maximum fine of category II if the goods delivered as referred to in Article 492 are not livestock, not a source of livelihood, debts, or receivables with a value not exceeding Rp1,000,000.00 (one million rupiah) or the value of the profit obtained is not exceeding Rp1,000,000.00 (one million rupiah) for the perpetrator as referred to in Article 493 of the Penal Code.

Furthermore, for the phrase personal circumstances of the perpetrator, it can be guided by Article 70 Paragraph (1) of the National Criminal Code, which reads by continuing to consider the provisions referred to in Article 51 to Article 54, imprisonment should not be imposed as far as possible, if there are circumstances:

a. The defendant is a child;
b. The defendant is over 70 (seventy) years old;
c. The defendant is a first time offender;
d. The loss and suffering of the victim is not too great;
e. The defendant has paid compensation to the victim;
f. The defendant did not realise that the criminal offence committed would cause substantial loss;

g. The criminal offence was committed due to strong incitement from another person;
h. The victim of the criminal offence encouraged or mobilised the criminal offence;
i. The criminal offence is the result of a situation that is unlikely to be repeated;
j. The personality and behaviour of the defendant is convincing that he/she will not commit another criminal offence;
k. Imprisonment will cause great suffering to the defendant or his/her family;
l. Coaching outside the correctional institution is expected to be successful for the defendant;
m. The imposition of lighter punishment will not reduce the seriousness of the criminal offence committed by the defendant;
n. The criminal offence occurred within the family and/or;
o. The criminal offence occurred due to negligence.

Furthermore, the circumstances at the time the criminal offence was committed and those that occurred later. According to the author, the phrase circumstances at the time of the criminal offence and what happened later as an excuse for the judge's forgiveness (*Rechterlijk Pardon*) in Article 54 paragraph (2) of Law Number 1 Year 2023 on the Criminal Code, where the meaning of this phrase is whether the criminal act was planned in advance (*voorbedachte rade*) or the criminal act was committed with intent (*dolus*) or committed due to negligence (culpa), if the criminal act was committed with negligence (culpa) then it is a minor crime, Then whether the criminal offence is included in the crime of attempt (*poging*) or a criminal offence which is a completed offence both formal (*focusing on prohibited acts*) and material (*focusing on prohibited consequences*), if the criminal offence is an attempt (*poging*) then it is a minor crime and then whether the criminal offence is included in the category of participation, namely pleger, doen pleger, medepleger, uitloking, or included in assisting the crime (medeplictige), if it turns out that the perpetrator only acts as a medeplictige then it is a minor crime.

The concept of Judge's Pardon (*Rechtelijk Pardon*) is a principle that originated in the Netherlands, since long ago in Dutch procedural law, the Netherland Wetbook Van Strafvordering (Dutch procedural law book) Jan Remmelink put forward the concept of Rechtelijk Pardon is a statement of guilt without imposing punishment from the canton judge as the lowest level court. In the language of the Judge's Pardon (*Rechtelijk Pardon*) is a pardon or forgiveness of power by the judge. In this case, the cantonal judge was of the view that if the defendant was convicted, the value of the harm was more than the benefit, as well as the conditions surrounding the implementation. So the judge did not decide not to impose a punishment in his verdict.[16]

The provision of rechterlijk pardon has basically been accommodated in the criminal law of several countries as a response to the development of modern criminal law. As a comparison, here are some countries that have accommodated such provisions in their criminal law.

1. Greece

[16] J Remmelink, *Pengantar Hukum Pidana Material 3 Hukum Penintensier, (Inleiding Tot de Studie van Het Nederland Strafrecht) Di Terjemahkan Oleh Moeliono, T.P.* (Yogyakarta: Maharsa, n.d.).

Greek criminal law does not directly mention the term rechterlijk pardon, but the formulation of the sentence represents the concept. In one of the articles of the Greek Criminal Code, it is stated that:

1. Introduce new sanctions and enforcement methods such as probation and weekend detention;
2. Expanding the scope of existing sanctions and modes of execution, such as suspended sentences, fines to be based on day fines and parole;
3. Reduced use of detention measures;
4. Abolition of types of imprisonment;
5. Increase the minimum imprisonment to 1 (one) month.

In Greece, a similar concept applies where judges can grant pardons. However, the circumstances under which the pardon is granted do not oblige the judge to grant the pardon. This is reflected in the use of the word 'may' which indicates flexibility in granting pardons.[17]

In certain cases the court may refrain from imposing a sentence, namely if:

a. The offence is very light;
b. Considering the evil character of the perpetrator;
c. The imposition of punishment is considered not useful as a means to prevent the perpetrator from repeating the criminal offence (special deterrence). [18]

Based on this formulation, the authority of rechterlijk pardon is indicated by the clause 'the court may refrain from imposing punishment', the two crucial things from the clause are the word 'may' which means able to do; able; can. Meanwhile, 'refrain' consists of two words, namely 'refrain' which means to inhibit, stop or prevent from stopping and 'self' which in this case refers to the judge. Through this sentence, the judge is given absolute authority to determine a criminal case based on certain considerations to impose or not to impose punishment. The circumstances required to the judge by which he can refrain or not impose a punishment as a form of rechterlijk pardon authority are the following considerations:

a. Very minor offences.

This relates to the act and its criminal consequences. There is no definition of a minor offence in this provision, however, if we refer to the science of criminal law, a minor offence is a criminal offence with insignificant consequences for the victim. Or in terms of the criminal sanction, it is an offence that carries a sentence of no more than two years.[19]

b. Consideration of criminal character.

This requirement relates to the personal aspect of the criminal offender (subjective element). A person's evil disposition can be traced through both genetic origins, namely by looking at how the perpetrator's family is or looking at the social environment in which he or she associates daily. A person's character can also be known through a branch of science called

[17] Adery Ardhan Saputro, "Konsepsi Rechterlijk Pardon Atau Pemaafan Hakim Dalam Rancangan KUHP," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 28 no.1 (2016), https://doi.org/https://doi.org/10.22146/jmh.15867.
[18] Arief Nawawi Barda, *Beberapa. "Masalah Perbandingan Hukum Pidana,"* (Raja Grafindo Persada, 2003).
[19] Hamzah Andi, *Perbandingan Hukum Pidana Beberapa Negara.* (Jakarta: Sinar Grafika, 2018).

characterology, which is a science that studies human character. The general types of people include: [20]

1. Physical constitution is the physiological state of the body, which is innate from birth. Physical constitution affects a person's behaviour, and is unique, original and unchangeable. For example, the characteristics of slender people are certainly different from the characteristics of fat people and so on.
2. emperament, is the characteristics of a person caused by the mixture of substances in his body which also affects the behaviour of that person. So temperament means the nature of mental behaviour, in conjunction with physical characteristics. Temperament, is also a fixed trait that cannot be educated.
3. Character is the personality of the soul that expresses itself in all actions and statements in relation to talent, education, experience and the surrounding environment.

Temperament and disposition are mental personalities. Temperament is fixed in a person while character can be educated or changed, in other words, it can be influenced by external environmental factors. There is a classification of human character in three types as proposed by Heymans, a Dutch psychologist, including:

a) Emotienoliteit, emotional people are quick to take sides, their fantasies are strong, their writing and speech are rather strange, they lack love for the truth, are easily angered, easily love and love sensations.
b) Secondary functions, secondary functioning people are at home, obedient to customs, loyal in friendship, great gratitude, difficult to adjust, easily verstroit and consistent.
c) Aktifiteit, people who are active, like to work, are easy to act, have many hobbies, easily overcome difficulties and so on.

The imposition of punishment is considered not useful as a means to prevent the perpetrator from repeating the criminal offence (special deterrence). This shows that the desired purpose of punishment is oriented towards the principle of expediency, where punishment is given by considering the benefits both for the defendant in terms of rehabilitation and society at large. So that if the punishment is deemed to have no benefit, especially to prevent the perpetrator from repeating his actions, the judge can provide forgiveness.

2. Portugal

In addition to the Netherlands, the Portuguese Criminal Code is a modern Criminal Code in the sense that it is very new. It is a radical revolutionary change from the old system. The Penal Code came into force on 1 January 1983. The central focus of criminal law reform in Portugal lies in the decriminalisation and dehumanisation of the administration of criminal prosecutions, the reduction of imprisonment, the emphasis on the protection of society and the rehabilitation of offenders. In order to realise these objectives, a number of draft laws were drafted which contained[21]

[20] Hamzah Andi, *Perbandingan Hukum Pidana Beberapa Negara.* (Jakarta: Sinar Grafika, 2018).
[21] Hamzah Andi, *Perbandingan Hukum Pidana Beberapa Negara.* (Jakarta: Sinar Grafika, 2018).

a. Introduce new sanctions and enforcement methods such as probation and weekend detention;
b. Expanding the scope of existing sanctions and modes of execution, such as suspended sentences, fines to be based on day fines and parole;
c. Reduced use of detention measures;
d. Abolition of types of imprisonment;
e. Increase the minimum imprisonment to 1 (one) month.

The criminal sanctions in the old Portuguese Penal Code were numerous and very harsh. Therefore, the new sanctions in the 1983 Penal Code are simplified. The new sanction system is:

1. Basic punishment; which consists of:
   - Imprisonment;
   - Fine;
   - Suspended sentence;
   - Conditional punishment (probation);
   - Public reprimand;
   - Community service;
   - Conditional release.
2. Additional punishment;

Relatively unspecified punishment (time period);

3. Measures to protect public safety.

The conditions for not imposing punishment are that there is minimal fault. This means that the fault committed is considered minor with little or no significant consequences for the victim and the community.

a) The damage or loss has been repaired. If the offender's conduct has caused consequences to the victim for which the offender is liable to pay damages, the damages must have been paid by the offender.
b) There are no factors (for rehabilitation or general deterrence) that preclude solving the problem in this way. Here it is different, in that it appears that the judge first looked at other factors besides the victim and the perpetrator in resolving the case, as well as the environment in which the criminal offence occurred. so the judge also considered all of these factors before deciding to grant forgiveness.[22]

The judge considers that the postponed punishment is sufficient to prevent the convicted person from committing the criminal offence again and is consistent with general deterrence. Consideration of personal circumstances, personal, and at the time after the crime was committed and compensate the victim for the loss or provide security for it, make moral

[22] Mufatikhatul Farikhah, "Rekonseptualisasi Judicial Pardon Dalam Sistem Hukum Indonesia (Studi Perbandingan Sistem Hukum Indonesia Dengan Sisitem Hukum Barat)," *Jurnal Hukum & Pembangunan* 48, no. 3 (2018): 556, https://doi.org/10.21143/jhp.vol48.no3.1746.

reparation, and payment of a sum of money to the victim to the state equivalent to the amount of the fine stated in the offence violated.[23]

3. Belanda

The Dutch Criminal Code (WvS) is the closest to the Indonesian Criminal Code, as it originated there. Although the upcoming Draft Criminal Code (RKUHAP) transforms into a new Criminal Code, according to Andi Hamzah, it is still relevant as a comparative study because in general the principles and formulation of offences in the RKUHAP are still similar to the Dutch Criminal Code. The current difference is that the Dutch Criminal Code has increasingly lenient criminal provisions. This can be seen from two things, first, deletion (decriminalisation), for example, the offence of mukah (overspel) has been deleted and then changes in the formulation of offences, for example Article 239 which is equivalent to Article 281 of the Criminal Code which originally read the same except for the punishment and the word 'intentionally' in Article 281 of the Criminal Code. The words 'in public' have been replaced with 'in a place of public traffic' in Article 239 WvS, which automatically reduces the number of people who violate this article because 'in public', according to the explanation, means in a place that can be seen by the public. [24]

Secondly, it is more lenient because all offences in the Ned. WvS has the alternative of a fine. Similarly, the insertion of Article 9a which regulates rechterlijk pardon where the judge may not impose punishment, if the offence is minor, the circumstances at the time of committing the offence, as well as afterwards. The provision on rechterlijk pardon in Article 9a of the Dutch Criminal Code 1984 is as follows:

'If the judge considers it appropriate in connection with the insignificance of the offence, the personality of the offender or the circumstances at the time of the commission of the offence, as well as afterwards, he shall determine in his judgement that no punishment or measures shall be imposed' (*indien de rechter dit raadzaam acht in verband met de geringe ernst van het feit, de persoonlijkheid van de dader of de omstandigheden whereby het feit is began, and wel die zich nadien hebben voorgedaan, kan hij in het vonnis bapelan dat geen straf of maatregel zat worden opgelegd*). [25]

The concept of rechterlijk pardon in Article 9a of the Dutch Criminal Code is inseparable from the influence of the development of modern criminal law, namely the theory of subsociality (*subsocialiteit*) introduced by M. P. Vrij.[26] This theory concerns the idea of renewing the conditions of punishment, which basically says that a behaviour will be important for criminal law, if it causes harm to society, even if the harm is very small.[27]

The regulation of Rechterlijk Pardon in the Netherlands and Indonesia has almost the same formulation. However, there are some differences, namely in terms of the conditions for

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[23] Setiawan Noerdajasakti Budimansyah, Prija Djatmika, Rachmad Safa'at, "Comparison Of The Judicial (Rechterlijk Pardon) Between Civil Law System and Islamic Law System (Finding The Formulation Of The Pinciple Of Rechterlijk Pardon In Indonesian Criminal Law.," *International Journal of Educational Review, Law And Social Sciences |IJERLAS E-ISSN: 2808-487X*, n.d., https://doi.org/https://radjapublika.com/index.php/IJERLAS.

[24] Hamzah Andi, *Perbandingan Hukum Pidana Beberapa Negara*. Jakarta: Sinar Grafika, 2018.

[25] Hamzah Andi, *Perbandingan Hukum Pidana Beberapa Negara*. Jakarta: Sinar Grafika, 2018.

[26] Hamzah Andi, *Asas-Asas Hukum Pidana* (Jakarta: Rineka Cipta, 1991).

[27] Hamzah Andi, *Hukum Pidana Indonesia* (Jakarta: Sinar Grafika, 2017).

applying for a Rechterlijk Pardon, although at first glance they are the same, the conditions listed in the National Criminal Code require clear details so as to avoid confusion for judges in making decisions. Indonesia, as a new country, has just implemented the concept of Rechterlijk Pardon in the National Criminal Code, which still has many shortcomings and needs to be corrected immediately before it is implemented. There needs to be improvements in the formulation that makes the concept of Rechterlijk Pardon appropriate and practicable in Indonesian criminal law. Therefore, it is not enough to see the concept only from western law that has applied this concept, but also must explore the laws that apply in Indonesian society itself. In addition, to provide legal certainty regarding its application, it is necessary to clearly formulate what criminal offences can be forgiven by the judge and immediately formulate it in the Draft Criminal Procedure Code.[28]

The Indonesian Criminal Code adopts the principle of Rechterlijk Pardon or the principle of judge's forgiveness, the Criminal Code also adopts the principle of culpa in causa or actio libera in causa, which means that a person who commits a criminal offence is not exempted from criminal liability based on the reason for the elimination of punishment, and if the person has deliberately caused the occurrence of circumstances that can be the reason for the elimination of punishment.[29] This is in line with what Romli Atmasasmita said that the development of today's society has far exceeded the theory and practice as well as the needs of material criminal law and formal criminal law, so that a paradigm shift towards criminal law is not impossible.[30]

Judge's Pardon (*Rechterlijk Pardon*) aims to produce justice, restoration (*restorative*) to the perpetrators and victims, peace to all parties involved in the circle of crime causality, and places punishment as the last alternative (*ultimum remedium*). Flexibility is based on morality, solely to make Indonesia a just and civilised nation, not for the arrogance of 'power'.[31]

Judge forgiveness seeks to balance the need for justice for the victim and the potential for rehabilitation for the offender, which is at the heart of restorative theory. Judicial Forgiveness allows for a more in-depth consideration of the circumstances of the offender and the impact of the criminal offence so that the sentencing process is not only punitive but also leads to healing and learning.[32]

In this research, the author will analyse and examine the concept of judge's pardon (*Rechterlijk Pardon*) in the Criminal Code according to Law Number 1 Year 2023. Judicial Pardon in Indonesia is the result of a comparative study with several countries, namely concepts that have been practised in the Netherlands, Greece, Portugal and Uzbekistan. This

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[28] Rusmilawati Windari Aulia Rizka Estiningtyas, Ulfatul Hasanah, "Comparison of the Legal Regulation of the Rechterlijk Pardon in Indonesia and The Netherlands," *Jurnal Suara Hukum* 6 N0 1 (2024), https://doi.org/https://doi.org/10.26740/jsh.v6n1.p162-186.

[29] Barda Nawawi Arief, *Perkembangan Asas-Asas Hukum Pidana Indonesia, Perspektif Perbandingan Hukum Pidana* (Semarang: Undip, 2017).

[30] Atmasasmita Romli, *Sistem Peradilan Pidana Perspektif Eksistensialisme Dan Abolisionisme,* (Bandung: Bina Cipta, 1996).

[31] Mangesti Arie Yovita, *Pemafaan Hakim (Rechterlijk Pardon) Perspektif Kemanusiaan* (Surabaya: Universitas 17 Agustus 1945, 2013).

[32] Muhammad Fatahillah Akbar, "Pembaharuan Keadilan Restoratif Dalam Sistem Peradilan Pidana Indonesia," *Masalah-Masalah Hukum* 51, no.2 (2022): 199–208, https://doi.org/https://doi.org/10.14710/mmh.51.2.2022.199-208.

paper is based on normative juridical research with a historical approach, comparative approach, and conceptual approach. Currently, criminal law is also influenced by the Anglo Saxon legal system.[33] Indonesia is a country that has a different ideology that refers to the Pancasila philosophy, the community also consists of so many tribes that are very pluralistic, and a country that is also said to be a country with a different democratic system, namely democracy based on Pancasila. From these three things, it can be ascertained that the laws that apply in Indonesia should be different from the laws of other countries, even though they have the same goal in them, namely peace in society. Indeed, historically Indonesia cannot simply escape the role of the Netherlands in the formation of its laws, but with the current developments both in the legal system and society should not make western law the main mecca for legal formation in Indonesia. So that in addition to looking at western law, it must also look at the laws that exist in society both from custom and religion. When associated with Judicial Pardon in the Criminal Code in Article 54 paragraph (2) part of the guidelines for punishment as follows[34]

"The seriousness of the offence, the personal circumstances of the perpetrator, or the circumstances at the time of the offence or at a later date may be taken into consideration for not imposing punishment or imposing measures by taking into account the aspects of justice and humanity".

The concept of judicial pardon must also be placed on the idea of balance, where there must be a balance between the interests of the public or society and the interests of individuals, between the protection or interests of the perpetrator (the idea of individualisation of punishment) and the victim. So far, the concept of judicial pardon contained in Article 54 paragraph (2) of the Criminal Code is more concerned with the interests of the perpetrator, this can be seen in its formulation which clearly considers the actions of the perpetrator as well as the circumstances that follow the perpetrator's actions at the time and after the criminal offence, in this article there is no protection for victims, so it needs to be balanced by providing protection to victims through the provision of conditions for defendants who will get a judicial pardon decision. These conditions will provide more protection to the victim, for example by providing compensation to the victim.

Then, the application that is almost similar to the Judge's Pardon (*Rechterlijk Pardon*) in the Indonesian Criminal Justice System is in the process of diversion of juvenile criminal cases regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System only, which is resolved by restorative justice through the means of diversion deliberations. For criminal cases resolved through restorative justice by means of diversion deliberations at the Kalianda District Court from 2021 to 2024, the application of restorative justice in the criminal justice system is only contained in Law Number 11 of 2012 concerning the Juvenile Justice System which is carried out through diversion deliberations as mentioned above can be used as a guideline in the application of Judge's Forgiveness (*Rechterlijk Pardon*) in the Indonesian

[33] Farikhah, "Rekonseptualisasi Judicial Pardon Dalam Sistem Hukum Indonesia (Studi Perbandingan Sistem Hukum Indonesia Dengan Sisitem Hukum Barat)."
[34] Arief Irsan M, *Unsur Unsur Tindak Pidana Dan Teknik Penerpan Pasal KUHP (Undang-Undang Nomor 1 Tahun 2023* (Jakarta Pusat: Mekar Cipta Lestari, 2023).

Criminal Justice System as regulated in Article 54 paragraph (2) of Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code.

Hereinafter referred to as the National Criminal Code, there is a principle that is directly included in one of the Articles of the Criminal Code, namely the concept of Rechtelijk Pardon (judge's forgiveness) mentioned in the Criminal Code in Article 54 paragraph (2) of the Criminal Code, part of the sentencing guidelines as follows 'The severity of the act, the personal circumstances of the perpetrator, or the circumstances at the time the act was committed or which occurred later can be a basis for consideration not to impose punishment or impose measures by considering aspects of justice and humanity'.

Reading and carefully examining the provisions of Judge's Pardon (*Rechterlijk Pardon*) in the National Criminal Code, the author finds inconsistencies between Article 54 paragraph (2) of the National Criminal Code and Law Number 8 Year 1981 on Criminal Procedure, particularly Article 193 paragraph (1) of the Criminal Procedure Code and Article 197 paragraphs (1) and (2) of the Criminal Procedure Code. The concept of the judge's discretion in Article 54 paragraph (2) of the National Criminal Code, states that the severity of the act, the personal circumstances of the perpetrator, or the circumstances at the time the act was committed or that occurred later can be the basis for consideration not to impose punishment or regarding measures by considering aspects of justice and humanity.

In a sense, the judge can declare the defendant legally and convincingly proven guilty of committing a criminal offence but the defendant is not subject to punishment either imprisonment, confinement, fines or actions. Whereas in the Criminal Procedure Code, when the Judge states that the Defendant is legally and convincingly proven guilty of committing the criminal offence charged to him, the Panel of judges in their decision against the Defendant must be sentenced to punishment or action. If there is no punishment or action, the decision will be null and void. So that the regulation of Judge's Pardon (*Rechterlijk Pardon*) cannot only be regulated in the National Criminal Code which only contains material criminal law, but the regulation of Judge's Pardon (Rechterlijk Pardon) must be harmonised with the Draft Criminal Procedure Code, so that there is legal certainty.

The concept of forgiveness (Rechterlijk Pardon) is already contained in Article 54 paragraph (2) of the National Criminal Code. However, the concept of forgiveness (Rechterlijk Pardon) can be guided by the conditional punishment (voorwaardelijke veroordeling) in Article 14a of the (old) Criminal Code, where the defendant is still declared legally and convincingly proven guilty of committing a criminal offence and sentenced to punishment, but the punishment does not need to be executed unless in the future there is a judge's decision that determines otherwise, due to the convicted person committing a criminal offence before the probation period ends.

The author's previous research found that there is a need for reformulation related to the concept of judicial pardon in the Criminal Code, but not only the formulation of the concept, there is a problem related to the considerations that can be used by judges to grant pardon or not, this causes changes to the type of judge's decision. The panel of judges in deciding a case under the Criminal Procedure Code has three possibilities, namely:[35]

[35] Harahap YM, *Pembahasan Permasalahan Dan Penerapan KUHAP* (Jakarta: Sinar Grafika, 2006).

1. Punishment (veroordeling tot enigerlei sanctie)
2. Acquittal (vrij spraak).
3. Release from all charges (onslag van recht vervolging).

The problem is when a defendant is found guilty and proven legally and convincingly but the panel of judges considers that the actions committed do not have to be punished so that the judge forgives in accordance with article 54 paragraph (2) of the Criminal Code, then the judge is not possible to impose one of the types of decisions above. Therefore, it is necessary to align with the Draft Criminal Procedure Code (RKUHAP), so that article 54 paragraph (2) can be applied. The Draft Criminal Procedure Code (RKUHAP) regulates the types of decisions in article 187 where there are types of final decisions that can be given to the defendant, namely decisions of conviction, release and acquittal, this is the same as those in the current Criminal Procedure Code. So there is no type of decision that can be given to the defendant who is granted Judicial Pardon. If there is no change in the Draft Criminal Procedure Code related to the type of decision, the concept in Article 54 paragraph (2) of the Criminal Code will only be a blunt article that cannot be applied. This is different from the Netherlands, where the regulation related to Judicial Pardon is not only contained in the material criminal law, but also in the criminal procedural law. Criminal judges in the Netherlands can impose 4 (four) forms of judgement, namely:[36]

1. Putusan Bebas (*Vrisjkpraak*)
2. Putusan Lepas (*onslag van alle rechtsvervolging*)
3. Pemidanaan (*veroordeling tot enigerlei sanctie*) dan,
4. Putusan Pemaafan hakim (*recthterlijk pardon*)

As a result, judges in the Netherlands can impose judicial pardon decisions that have a special form when compared to the other three decisions. The draft Criminal Procedure Code also does not regulate the appeal or cassation that can be requested for judicial pardon decisions at the first court level, unlike in the Netherlands where judicial pardon decisions are final, so they cannot be appealed or cassated. Thus, there is a need for a new concept of Judicial Pardon both in the Criminal Code to adjust to the values that exist in Indonesian society and formulate it in the Draft Criminal Procedure Code to be one type of decision that can be given by the judge for the judge's forgiveness, namely a guilty verdict without punishment.[37]

The new Criminal Code (KUHP) will reflect the principle of humanity in the nation's philosophy, namely Pancasila, and will change the paradigm of the Criminal Code which is rigid to be flexible and as an integral system, the reform of material criminal law will lead to the implementation of criminal law, namely with the principle of forgiveness of judges will be a solution to overcome the problem of overcapacity in correctional institutions which has been a problem in Indonesia.[38] The concept of judge forgiveness has actually been carried out for a

[36] Saputra Ardhan Adery, "Konsepsi Rechterlijk Pardon Atau Pemaafan Hakim Dalam Rancangan KUH.," *Jurnal Mimbar Hukum* 28 (2016), https://doi.org/10.22146/jmh.15867.
[37] Farikhah, "Rekonseptualisasi Judicial Pardon Dalam Sistem Hukum Indonesia (Studi Perbandingan Sistem Hukum Indonesia Dengan Sisitem Hukum Barat)., DOI: 10.21143/jhp.vol48.no3.1746"
[38] Serikat Nyoman Maulidah Khilmatin, "Kebijakan Formulasi Asas Pemafaan Hakim Dalam Upaya Pembaharuan Hukum Pidana Nasional.," *Pembangunan Hukum Nasional Program Studi Magister Ilmu Hukum, Fakultas Hukum, Universitas Diponegoro* 1 (2019), https://doi.org/https://doi.org/10.14710/jphi.v1i3.281-293.

long time and spread in various parts of Indonesia. This concept appears in various forms of implementation in Indonesian society, where it can be concluded that forgiveness in customary society does not necessarily remove the punishment, there are still sanctions given but the sanctions are not only for the benefit of victims and perpetrators but also to restore the balance that has been damaged due to criminal acts.[39]

The purpose of punishment in the perspective of utilitarianism, namely judge forgiveness, is as follows:[40]

1. Prevent criminal offences by applying the law to deter people and protect society (*social protection*).
2. Fostering prisoners to become good and useful people for society and preparing them to live again in the midst of society (*rehabilitation and resocialisation of prisoners*).
3. Repairing tensions caused by criminal offences, restoring harmony, and creating peace in society (*restitution of social balance*).
4. Helping convicts to release guilt

The verdict of punishment through imprisonment in correctional facilities for all criminal offenders aims to improve the quality of the convict, realise his/her mistakes, not repeat his/her actions, and become a good and responsible citizen.[41]

The concept of Judge Pardon (*Rechterlijk Pardon*), then the judge in justifying the punishment of a person, the judge must consider the criminal offence, guilt and the purpose and guidelines of punishment. If the judge considers that the person does not have to be punished, then the judge forgives the perpetrator of the crime.[42] According to Yovita Arie Mangesti, the reflection of the fair and civilised value of humanity as the moral standard of 'Judge Forgiveness' is the principle of legal morality in the practice of judge forgiveness:

1. Conscience: Listen to the voice of Conscience
2. Beneficence: Do only what is beneficial
3. Vulnerability principle: Favouring the vulnerable
4. Harmony: Justice as social harmony

Judge's forgiveness (*rechterlijk pardon*) aims to produce justice, restoration to the perpetrators and victims, peace to all parties involved in the circle of crime causality, and places punishment as the last alternative (*ultimum remedium*). Flexibility is based on morality, solely to make Indonesia a just and civilised nation, not for the arrogance of 'power'.[43] The ratio legis for the inclusion of judge's forgiveness in the punishment system consists of:

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[39] Farikhah Mufatikhatul, "Konsep Judicial Pardon (Permaafan Hakim) Dalam Masyarakat Adat Di Indonesia.," *Media Hukum* 25 No.1 (2018), https://doi.org/10.18196/ jmh.2018.0104.81- 92.
[40] Mufatikhatul Farikhah, "The Judicial Pardon Arrangement as a Method of Court Decision in the Reform of Indonesian Criminal Law Procedure," *Padjadjaran Jurnal Ilmu Hukum* 8 No.1 (2021): 1–25, https://doi.org/https://doi.org/10.22304/pjih.v8n1.a1.
[41] Diah Ratna Sari Hariyanto & I Dewa Gede Dana Sugama, "Efektivitas Pemenjaraan Ditengah Ide Pemidanaan Dengan Pendekatan Keadilan Restoratif," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 10 No.2 (2021): 404, https://doi.org/https://doi.org/10.24843/jmhu.2021.v10.i02.p15.
[42] Daeng AD. Yosuki, Aska., & Tawang, "Kebijakan Formulasi Terkait Konsepsi Rechterlijk Pardon (Permaafan Hakim) Dalam Pembaharuan Hukum Pidana Di Indonesia.," *Hukum Adigama* 1 (2018), https://doi.org/10.24912/adigama.v1i1.2136.
[43] Yovita, *Pemafaan Hakim (Rechterlijk Pardon) Perspektif Kemanusiaan*.

1. The philosophical foundation is the second principle of Pancasila on just and civilised humanity, in addition there is also an aspect of justice where the concept of justice is also in line with Article 28D paragraph (1) which reads, 'Everyone is entitled to recognition, guarantees, protection and certainty of a just law and equal treatment before the law'.
2. Sociological Foundation, the regulation in Indonesian law cannot be separated from the characteristics of Indonesian society and the socio-cultural and religious values that develop in it where the application of forgiveness values has long been practised in indigenous peoples in several regions in Indonesia as well as understanding related to forgiveness values in religious norms.
3. The juridical basis that the formulation of provisions regarding the forgiveness of judges is regulated in the provisions of Article 54 paragraph (2) of Law Number 1 Year 2023 concerning the Criminal Code that the severity of the act, the personal circumstances of the perpetrator, or the circumstances at the time of the criminal offence and those that occur later can be used as a basis for consideration not to impose punishment or not to impose measures by considering aspects of justice and humanity.[44]

The Criminal Code currently in force, including the Criminal Procedure Code, does not regulate the concept of Judge Forgiveness (*Rechterlijk Pardon*) at all, problematically there is a legal vacuum, so that the Panel of Judges in trying and deciding criminal cases currently only gives decisions in the form of punishment, acquittal and release so that in the future the Draft Criminal Procedure Code must include the norm of the concept of Judge Forgiveness (*Rechterlijk Pardon*) so that there is a forgiveness decision. Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code, there is a principle that is directly included in one of the Articles of the Criminal Code, namely the concept of Rechtelijk Pardon (judge forgiveness) mentioned in the Criminal Code in Article 54 paragraph (2) part of the guidelines for punishment as follows 'The severity of the act, the personal circumstances of the perpetrator, or the circumstances at the time of the act or what happened later can be the basis for consideration not to impose punishment or impose measures by considering aspects of justice and humanity'.

The existence of the conception of Rechterlijk Pardon (*Judge's Forgiveness*), then the judge in justifying the punishment of a person, the judge must consider the criminal offence, guilt and the purpose and guidelines of punishment. If the judge considers that the person should not be punished, then the judge forgives the perpetrator of the crime. Currently, the judge in deciding a case has three possibilities according to the Criminal Procedure Code:

1. Conviction or imposition of punishment (*verrordeling*);
2. Acquittal (*vrij spraak*);
3. Judgement of release from all charges (*onslag van recht vervolging*);

By applying judicial pardon, judges have explored the values of justice that live in society, as mandated by Article 5 paragraph (1) of Law No. 48/2009 on judicial power. However, problems will arise, because legally according to KUHAP only 3 decisions are

[44] Ali Rizky, "Disertasi Permaafan Hakim Dalam Sistem Pemidanaan. Program Doktor Program Studi Ilmu Hukum Fakultas Hukum Universitas Airlangga Surabaya."

possible: acquittal, conviction, and release from all charges. Judicial Pardon decisions cannot be categorised into one of these three decisions. According to the researcher, reformulation of KUHAP or SPPA Law is needed, as in the Netherlands the regulation of Judicial Pardon is not only regulated by material criminal law, but also by criminal procedural law. Criminal judges in the Netherlands can impose 4 (four) forms of final judgement.[45]

3.2. Construction of the Concept of Judge's Pardon (Rechterlijk Pardon) Phrase Article 54 Paragraph (2) of Law Number 1 Year 2023 on the Criminal Code to Realise Justice and Legal Certainty.

Furthermore, the juridical basis is contained in Article 54 paragraph (2) of the Criminal Code, recognising the concept of Judge Forgiveness. Article 54 paragraph (2) of the Criminal Code states, 'the severity of the act, the personal circumstances of the perpetrator, or the circumstances at the time of the criminal offence as well as those that occur later can be used as a basis for consideration not to impose punishment or not to impose measures by considering aspects of justice and humanity'. Then the concept of Judge Forgiveness originated from the Netherlands by improving the Dutch WvS and including it in Article 9a.

According to the author, the concept of Judge's Pardon (*Rechterlijk Pardon*) is a decision made by the Panel of Judges to the Defendant who is legally and convincingly proven guilty of committing a minor criminal offence but the Defendant is not subject to imprisonment, confinement, fines or actions including conditional punishment (*voorwaardelijke veroordeling*). Therefore, the concept of judge's forgiveness (*Rechterlijk Pardon*) in Article 54 paragraph (2) of the National Criminal Code needs to be harmonised in the Draft Criminal Procedure Code:

1. Punishment (*verrordeling*)
2. Free verdict (*vrij spraaak*),
3. Judgement of acquittal (*onslag van recht vervolging*);
4. Judgement of pardon (*rechterlik pardon*).

That the Judge's Forgiveness Decision (*Rechterlijk Pardon*) is aimed at the Defendant, but in the imposition of a judge's forgiveness decision (*Rechterlijk Pardon*), the panel of judges must also see balanced justice, namely the interests of the Defendant and the interests of the victim, where if there is a victim then there must first be peace between the defendant and the victim if there is a loss then the Defendant must compensate for the loss before the Forgiveness Decision is imposed. Because the Judge's Forgiveness Decision (*Rechterlijk Pardon*) is emphasised on minor crimes so that restitution, compensation, social recovery are not applied in the judge's forgiveness decision but restitution, compensation, social recovery are applied in ordinary criminal cases not in minor crimes.

The application of restorative justice in the criminal justice system is only found in Law Number 11 of 2012 concerning the Juvenile Justice System which is carried out through diversion deliberations as mentioned above can be used as a guideline in the application of Judge Forgiveness (*Rechterlijk Pardon*) in the Indonesian Criminal Justice System as regulated in Article 54 paragraph (2) of the Law of the Republic of Indonesia Number 1 of 2023

[45] I Wayan Pariarsana, "Analisis Penerapan Pasal 70 Undang-Undang Nomor 11 Tahun 2012 Sebagai Judicial Pardon Terhadap Anak Yang Melakukan Pencurian Dengan Pemberatan," *Jurnal Parhesia Universitas Mataram* 2 No.1 (2024), https://doi.org/https://doi.org/10.29303/pargesia.v2i1.4157.

concerning the Criminal Code hereinafter referred to as the National Criminal Code, The existence of a principle that is directly included in one of the Articles of the Criminal Code, namely the concept of Rechtelijk Pardon (*judge's forgiveness*) is mentioned in the Criminal Code in Article 54 paragraph (2) of the Criminal Code, part of the sentencing guidelines as follows 'The severity of the act, the personal circumstances of the perpetrator, or the circumstances at the time the act was committed or which occurred later can be a basis for consideration not to impose punishment or impose measures by considering aspects of justice and humanity'.

Concept of forgiveness (*Rechterlijk Pardon*) can be guided by the conditional punishment (*voorwaardelijke veroordeling*) in Article 14a of the (old) Criminal Code, where the conditional punishment (*voorwaardelijke veroordeling*) the defendant is still declared legally and convincingly proven guilty of committing a criminal offence and sentenced to punishment, but the punishment does not need to be executed unless in the future there is a judge's decision that determines otherwise, because the convicted person commits a criminal offence before the probation period ends.

Article 54 paragraph (2) of the Criminal Code is in accordance with what is discussed about the purpose of punishment, Article 51 paragraph (1) of the Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code, namely:

1. Preventing the commission of criminal offences by enforcing legal norms for the protection and protection of society.
2. To socialise the convict by providing guidance and counselling in order to become a good and useful person.
3. Resolving conflicts arising from criminal offences, restoring balance and bringing a sense of security and peace in society.
4. Foster a sense of remorse and relieve the guilt of the convict.

Article 52 and Article 53 paragraphs (1) and (2) of the Criminal Code (Kitab Undang-Undang Hukum Pidana) state that punishment is not intended to degrade human dignity, in trying a criminal case, judges are obliged to uphold law and justice. If in upholding law and justice, as referred to in paragraph (1), there is a conflict between legal certainty and justice, the judge must prioritise justice.

The Criminal Procedure Code, Law Number 8 Year 1981, does not accommodate the type of decision on a case where the defendant is legally and convincingly proven to have committed a criminal offence, but without the imposition of punishment (judge's pardon decision). In relation to this matter, there are at least 2 (two) views. Firstly, Arsil and Sugeng Riyono argued that the emergence of the judge's forgiveness decision did not make the criminal procedure law need to form a new type of decision other than those already regulated in the 1981 Criminal Code. The judge's forgiveness decision is still considered as a criminal decision, it's just that the criminal is not sentenced because of the judge's forgiveness. Tanziel Aziezi explained that the judge's forgiveness decision is in principle a criminal decision based on the proof of a criminal offence, except that the punishment imposed is '0' or zero. This means that the 'big house' of the judge's forgiveness decision is still a punishment decision. This first view is also in line with the systematics of the 2023 Criminal Code, which regulates judge's forgiveness as part of the punishment. This can be seen from how Article 54 of the 2023 Criminal Code is divided into 2 (two) paragraphs, where paragraph (2) on judges' forgiveness

is also part of paragraph (1) which regulates punishment. In practice, the imposition of a judge's pardon in a decision of conviction will be similar to a decision of conviction with the imposition of a sentence 'during the period of detention,' which means that the defendant's actions are still proven in principle as a criminal offence (with criminal records), but the court does not feel the need to give actual legal consequences to the defendant, partly because the defendant has previously been 'punished' by serving detention. Secondly, several other parties such as Suharto, Agustinus Pohan, Nela Sumika, and Fachrizal Afandi are of the view that criminal procedure law needs to establish a new type of criminal decision, namely the judge's forgiveness decision. This is because the judge's forgiveness decision is not part of the criminal decision because it does not contain any punishment at all. [46]

This is similar to the practice in the Netherlands which has 4 (four) types of decisions, namely conviction decisions, acquittal decisions, release decisions, and judge forgiveness decisions.[47] In other words, the reform of Indonesian criminal procedure law can refer to the model of regulating the types of decisions in Dutch criminal procedure law.

Both the first and second views above have their respective justifications. However, for each of these views, it is also necessary to anticipate the ideal regulatory model and the relationship between the regulatory model and other criminal procedural law provisions. For example, in the event that the reform of criminal procedure law is to accommodate the first view, the following points need to be considered:

1. It is necessary to amend the provisions on the content of the verdict of conviction, which states that the verdict of conviction must contain a statement of the defendant's guilt, a statement that all core parts and elements in the formulation of the criminal offence have been fulfilled, accompanied by a qualification and the punishment or action imposed. Moreover, if the verdict of conviction does not include the punishment or action imposed, then the verdict becomes null and void. Do not let every judge's forgiveness decision become null and void simply because the judge's forgiveness decision is considered part of the punishment decision.
2. There needs to be an amendment to the provisions on the reasons for extraordinary legal remedies for judicial review, where it is stated that one of the reasons for judicial review is a guilty verdict but without a conviction, which in principle is the definition of a judge's pardon decision. It is important not to let every judge's forgiveness decision become a reason for judicial review, even though the intention of the provision on judicial review of guilty verdicts without conviction is to be reviewed by the prosecutor because judicial review of decisions without conviction is unlikely to be utilised by convicted persons or their families because they have already benefited.

In addition to dealing with the type of decision, criminal procedure law reform also needs to consider the space for legal remedies against the judge's forgiveness decision. In the Netherlands, for example, appeals and cassations are not possible for the judge's forgiveness decision. Against this, Arsil argues that legal remedies for judge's forgiveness decision, such

[46] Tim Indonesia Judicial Research Society (IJRS), *Pembaharuan Hukum Acara Pidana Pasca Berlakunya KUHP 2023*, Cetakan Pe (Jakarta, 2024).
[47] Adery, "Konsepsi Rechterlijk Pardon Atau Pemaafan Hakim Dalam Rancangan KUH."

as appeal and cassation, still need to exist. This is in line with Arsil's view that judge's forgiveness is part of the punishment verdict that is also possible to be appealed and cassated.[48]

Talking about legal remedies for the judge's forgiveness decision, it is necessary to recall the judge's consideration in imposing a judge's forgiveness decision (in addition to the judge's consideration when imposing a sentence), namely the judge (also) must consider:

1. The severity of the offence;
2. The personal circumstances of the perpetrator; or
3. The circumstances at the time of the commission of the criminal offence as well as those occurring subsequently.

The above considerations need to be supported by evidentiary results in the form of legal facts that are characteristic of the judex factie, so that there is no longer any reason for the appellate court to be unable to re-examine the judge's forgiveness decision. In addition, although the defendant was granted a pardon by the judge, the defendant's criminal record is still considered to exist because his actions were proven as a criminal offence. Therefore, it is possible for the defendant to object to the judge's pardon because perhaps the defendant thinks he should be acquitted of all charges (*vrijspraak*). Similarly, the extraordinary remedy of judicial review does not rule out the possibility that the judge's decision to pardon the defendant may have been the result of an oversight or an obvious mistake by the judge, or that there are new circumstances (*novum*) that could affect the judge's decision to pardon the defendant.

Then the regulation of legal remedies for the judge's forgiveness decision. In addition to dealing with the type of decision, criminal procedure law reform also needs to consider the space for legal remedies against the judge's forgiveness decision. In the Netherlands, for example, appeal and cassation legal remedies are not possible for the judge's forgiveness decision. Against this, Arsil argues that legal remedies for judge's forgiveness decision, such as appeal and cassation, still need to exist. This is in line with Arsil's view that the judge's forgiveness is part of the punishment verdict which is also possible to be appealed and cassated. Talking about legal remedies for the judge's forgiveness decision, it is necessary to recall the judge's consideration in imposing a judge's forgiveness decision (in addition to the judge's consideration when imposing a sentence), namely the judge (also) must consider:

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[48] (IJRS), *Pembaharuan Hukum Acara Pidana Pasca Berlakunya KUHP 2023*.

judicial review does not rule out the possibility that the judge's decision to pardon the defendant may have been the result of an oversight or an obvious mistake by the judge, or that there are new circumstances (novum) that could affect the judge's decision to pardon the defendant. Based on the above reasons, regardless of whether the judge's forgiveness decision is part of the punishment decision or needs to be made in a separate type of decision, the criminal procedure law still needs to open space for filing legal remedies for the judge's forgiveness decision. [49]

The construction that will be built in the author's opinion, in its implementation, the concept of discouragement of judges must be outlined in the form of a decision so as to obtain legal certainty. So far, Law Number 8 of 1981 concerning the Criminal Procedure Code does not regulate the concept of the judge's interpretation. So far, the Judge in imposing a Criminal Case Decision against the Defendant recognises 3 (three) forms of Decision, namely:

1. Verdict of Punishment (*verrordeling*).

If the court is of the opinion that the defendant is guilty of committing the criminal offence charged against him, then the court imposes a sentence (Article 193 Paragraph 1 of the Criminal Procedure Code).

2. Acquittal (*vrij spraak*).

If the Court is of the opinion that as a result of the examination at trial, the guilt of the Defendant for the act charged to him/her has not been proven legally and convincingly, then the Defendant shall be acquitted (Article 191 Paragraph (1) of the Criminal Procedure Code).

3. Release verdict (*onslag van recht vervolging*).

If the Court is of the opinion that the act charged against the Defendant is proven, but the act does not constitute a criminal offence, the Defendant is released from all legal charges (Article 191 Paragraph 2 of the Criminal Procedure Code). Regarding the judge's pardon (*rechterlik pardon*), it is necessary to harmonise in the Draft Code of Criminal Procedure the concept of Judge's Pardon (*rechterlik pardon*), which becomes:

1. Pemidanaan (*verrordeling)*
2. Putusan Bebas (*vrij spraaak*),
3. Putusan lepas (*onslag van recht vervolging*);
4. Putusan pemaafan Hakim (*rechterlik pardon*)

Because the regulation of rechterlijk padon is only regulated in the Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code, which only contains material criminal law, then further regulation of rechterlijk padon must also be harmonised with the Draft Code of Criminal Procedure as a formal criminal law in the future. So that the article will have an impact on the judge's understanding of legal certainty that can be implemented in practice to the trial. Legal certainty regarding the application of rechterlijk pardon, which is only regulated in the Criminal Code, will become increasingly important if it is related to what kind of decision will be imposed on defendants who are deemed guilty but pardoned.

The concept of Judge Forgiveness based on the severity of the act, the personal circumstances of the perpetrator or the circumstances at the time of the criminal offence to realise justice and humanity, in its implementation must be regulated in formal criminal law

[49] (IJRS), *Pembaharuan Hukum Acara Pidana Pasca Berlakunya KUHP 2023*.

(*strafvordering*). Where the formal criminal law (Criminal Procedure Law) regulates how to implement the procedures and procedural concepts of judge forgiveness in an integral and comprehensive manner.

The principle of judge's forgiveness (*rechterlijk pardon*) is motivated by the main idea of avoiding rigidity / absolutism in the sentencing system carried out by law enforcement officials, as well as seeing the condition of prisons that cannot accommodate because it is the last and only place for convicts. In the opinion of Nico Keijzer and Schaffmeister, the emergence of the principle of judge forgiveness is due to the fact that many defendants have fulfilled the evidence, but if a verdict is imposed, it will be contrary to justice, and there will be a clash between legal certainty and legal justice. The principle of judge forgiveness is also an emergency exit (*nooddeur*) against rigid criminal law and is a consequence of the principle of legality.[50]

The urgency of reforming the Criminal Procedure Code with the addition of the judge's forgiveness decision in Article 191 of the Criminal Procedure Code is very important. The application or imposition of a judge's forgiveness decision must go through several considerations, such as the severity of the act, the personal condition of the perpetrator, or the circumstances surrounding the act at that time or afterwards, as well as considering aspects of justice and humanity. The application of the judge's forgiveness decision must be balanced with the integrity of law enforcers. This is intended so that the judge's forgiveness decision, which aims to further uphold justice, is not used as a new field of play by unscrupulous people as we often encounter in the application of restorative justice at the police level. The addition of the judge's forgiveness decision must be carried out transparently so that public confidence in the judiciary does not decrease.[51]

Departing from the foundation described above, it is necessary to have a concept of Forgiveness by Judges as one of the foundations to stand on from criminal law, namely: 1) Alternative punishment in the short term (*alternative criminal acts other than imprisonment*); 2) Judicial improvements to the principle of legality; 3) Reducing and overcoming the urgency of unnecessary punishment.[52]

According to Nico Keizer's view, the institution of judge forgiveness has a purpose as a safety valve or emergency exit in a punishment.[53]

The characteristics of the Indonesian criminal system, which refers to the Dutch Criminal Code. Overall, it is based on the Classical School of thought that focuses the attention of criminal law on the act or criminal offence (*Daad- Strafrecht*). The Criminal Code itself is a rigid

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[50] Listiyowati Sumanto Vita Adolfina Manafel, "Asas Pemaafan Hakim Rechterlijk Pardon Sebagai Upaya Penyelesaian Tindak Pidana Ringan Untuk Pembaharuan Hukum Pidana Nasional," *Quantum Juris : Jurnal Hukum Modren* 06, No. 3 (2024), https://doi.org/https://journalpedia.com/1/index.php/jhm.

[51] B.K & Frans Simangunsong Octafiana, "Urgensi Penambahan Putusan Permaafan Hakim (Rechterlijk Pardon) Dalam Pasal 191 KUHAP," *IURIS STUDIA: Jurnal Kajian Hukum* 5, No. 3 (2024): 655–66, https://doi.org/https://doi.org/10.55357/is.v5i3.672.

[52] Sahat Marisi Hasibuan, "Kebijakan Formulasi Rechterlijke Pardon Dalam Pembaharuan Hukum Pidana," *Jurnal Hukum Progresif* 9, No. 2 (2021), https://doi.org/https://doi.org/10.14710/jhp.9.2.111-122.

[53] Sugeng Jatmiko, "Rechterilijke Pardon (Pemaafan Hakim) Dalam Tindak Pidana Perpajakan HERMENEUTIKA."DOI: http://dx.doi.org/10.33603/hermeneutika.v3i2

(*substantive*) system of punishment and is based on three issues of criminal law, namely (*strafbaarfeit*), guilt (*schuld*), and punishment (*straf/punishment/poena*). The possibility of judicial pardon as one of the alternative answers to the problem of punishment in Indonesia is almost non-existent, because it is limited by the types of punishment in Article 10 of the Criminal Code and Article 187 of the Criminal Procedure Code which regulates the types of criminal decisions, there is no Judicial Pardon. [54]

4. Conclusions

Based on the description of the discussion that has been submitted previously, several conclusions can be drawn at a practical level, seen from the existing Criminal Code, the regulation of rechterlijk pardon cannot only be regulated in the Criminal Code which only contains material criminal law, but the regulation of rechterlijk pardon must be harmonised with the Criminal Procedure Code in the future. So that the article on the institution of the judge's forgiveness can be implemented in accordance with the philosophy of Pancasila above. Therefore, the provisions on punishment contained in the judge's decision have more contact with formal criminal law (the Criminal Procedure Code). So that in fact in the Draft Code of Criminal Procedure, the Panel of a Judge in a criminal case in Indonesia, based on the case, can only provide a decision in 4 (four) types of decisions, namely:

1. Sentencing or imposition of punishment (*veroordeling*);
2. Acquittal (*vrijspraak*);
3. Judgement of release from all charges (*onslag van recht vervolging*).
4. Judgement of pardon (*rechterlik pardon*).

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