



Judicial Discretion in Criminal Justice: Challenges, Implications, and Comparative Lessons from Indonesia and the Netherlands

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Abstract: *This article discusses the challenges and implications of applying the principle of judicial pardon *rechtelijk pardon* in the Indonesian legal system, by comparing similar concepts that have already been implemented in the Netherlands. This principle grants judges the discretion not to impose criminal penalties on perpetrators who are proven guilty if their actions are deemed minor, taking into account the principles of justice and humanity. This study employs a normative juridical method, utilizing a legislative, historical, conceptual, and comparative approach. The results show that the Dutch legal system has comprehensively implemented *rechtelijk pardon*, supported by consistent procedural law and jurisprudential practice. Conversely, the application of this principle in Indonesia still faces significant challenges due to the lack of synchronization between the substantive law in the 2023 Criminal Code and the formal law in the Criminal Procedure Code, as well as the absence of clear technical guidelines for judges to apply it. As a result, the principle of judicial pardon has the potential to become a symbolic norm without effective operationalization. This article emphasizes the importance of harmonizing the legal system and strengthening the implementation of regulations so that this principle can function optimally as an instrument of humanistic justice in national criminal law.*

Keywords: *Rechtelijk Pardon, Judicial Pardon, Criminal Law Reform*

Abstrak: Artikel ini membahas tantangan dan implikasi penerapan asas permaafan hakim *rechtelijk pardon* dalam sistem hukum Indonesia, dengan membandingkan konsep serupa yang telah lebih dahulu diterapkan di Belanda. Asas ini memberikan kewenangan kepada hakim untuk tidak menjatuhkan pidana terhadap pelaku yang terbukti bersalah apabila perbuatannya tergolong ringan, dengan mempertimbangkan nilai-nilai keadilan dan kemanusiaan. Penelitian ini menggunakan metode yuridis normatif melalui pendekatan perundang-undangan, historis, konseptual, dan perbandingan. Hasil penelitian menunjukkan bahwa sistem hukum Belanda telah mengimplementasikan *rechtelijk pardon* secara komprehensif, dengan dukungan hukum acara dan praktik yurisprudensi yang konsisten. Sebaliknya, penerapan asas ini di Indonesia masih menghadapi tantangan serius karena belum adanya sinkronisasi antara hukum materiil dalam KUHP 2023 dengan hukum formil dalam RKUHAP, serta ketiadaan pedoman teknis yang jelas bagi hakim dalam penerapannya. Akibatnya, asas permaafan hakim berpotensi menjadi norma yang bersifat simbolik tanpa operasionalisasi yang efektif. Artikel ini menegaskan pentingnya harmonisasi sistem hukum dan penguatan regulasi pelaksana agar asas tersebut dapat berfungsi optimal sebagai instrumen keadilan yang humanis dalam hukum pidana nasional.

Kata Kunci: *Rechtelijk Pardon, Permaafan Hakim, Pembaruan Hukum Pidana*

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A. Introduction

The legal system in Indonesia remains influenced by its Dutch colonial heritage, as evident in the Criminal Code (KUHP). Therefore, adjustments to societal developments are urgently needed in order to reform criminal law. These reform efforts are significant in that they aim to codify national criminal law, replacing the Dutch *Wetboek van Strafrecht* (Dutch Criminal Code).¹

The idea of reforming and developing criminal law in Indonesia cannot be separated from various factors, including political, philosophical, sociological, and practical considerations, which are closely related to the concept of reform and evolution of national criminal law.² The primary objective of this criminal law reform is to uphold human rights in accordance with the values of Pancasila, taking into account the dynamics and developments of Indonesian society.

According to Barda Nawawi Arief, “*the process of drafting or reforming laws (law reform, especially' penal reform) is basically about developing or renewing the main ideas or basic concepts,*” not merely replacing the wording of articles in legislation. Therefore, criminal law reform must be formulated in the form of normative texts accompanied by conceptual arguments and discussions.³

Sudarto, in his work “Criminal Law and Social Development: A Study of Criminal Law Reform,” emphasizes that the criminal law system in Indonesia must be based on the values of Pancasila. The concept of criminal law is closely tied to broader perspectives on law, the state, society, and criminality. Therefore, criminal law reform needs to be directed towards replacing it with a material criminal law system oriented towards the values of Pancasila and the Constitution of the Republic of Indonesia.⁴

In the process of revising the national Criminal Code (KUHP), there have been interesting developments, particularly in relation to the types of judicial decisions. Normatively, the Criminal Procedure Code recognizes three types of decisions, namely: (1) acquittal from all legal charges as stipulated in Article 191 Paragraph (1); (2) acquittal from all legal charges as stipulated in Article 192 Paragraph (2); and (3) sentencing as stipulated in Article 193 Paragraph (1).⁵

¹Jörg Kammerhofer, “Beyond the Res Judicata Doctrine: The Nomomechanics of ICJ Interpretation Judgments,” *Leiden Journal of International Law*, 2023, 1–27; Rebecca Emiene Badejogbin, “Judicial Discretion: Problematizing the Ascertainment and Application of Customary Law by Formal Courts and Relevant Theories (Nigeria and South Africa),” *Legal Pluralism and Critical Social Analysis* 54, no. 2–3 (2022); Esther Nir and Siyu Liu, “The Challenge of Imposing Just Sentences Under Mandatory Minimum Statutes: A Qualitative Study of Judicial Perceptions,” *Criminal Justice Policy Review* 33, no. 2 (2022).

²Anis Widyawati, “Criminal Policy of Adultery in Indonesia,” *Journal of Indonesian Legal Studies* 5, no. 1 (2020): 107–29; Zachary R. Hart, “Managing Judicial Discretion: Qualified Immunity and Rule 12(b)(6) Motions,” *Indiana Law Journal* 97, no. 4 (2022); Vivi Ariyanti, “Pembaharuan Hukum Pidana Di Indonesia Yang Berkeadilan Gender Dalam Ranah Kebijakan Formulasi, Aplikasi, Dan Eksekusi,” *sinta 3 Halu Oleo Law Review* 3, no. 2 (2019): 178–95.

³George Tsebelis, “What Determines the Judicial Discretion of the European Court of Human Rights?” *European Convention on Human Rights Law Review*, 2022.

⁴Hukum Sudarto, *Hukum Pidana Dan Perkembangan Masyarakat* (Bandung: Sinar Baru, 1983); A Hamzah, *Perbandingan Hukum Pidana Beberapa Negara* (Jakarta: Sinar Grafika, 2008).

⁵Law Number 81 of 1981 concerning Criminal Procedure Law

However, the Draft Criminal Code (RKUHP) regulates the existence of judicial pardon, stipulating that judges may grant a pardon to defendants who have been found guilty if the crime committed is considered minor. In considering such a decision, judges are required to assess various aspects, such as the severity of the act, the personal circumstances of the perpetrator, the situation at the time the crime was committed, as well as considerations of justice and humanitarian values.⁶ This provision is included in Law Number 1 of 2023 concerning the Criminal Code, Article 54, paragraph (2). Basically, if someone commits a criminal offense, they will be punished. This is, of course, intended to deter behavior that is not justified according to the Criminal Code.⁷ However, this does not apply to minor offenses.

The concept of *rechtelijk pardon* adopts provisions in the Dutch legal system, specifically as stipulated in Article 9a of the Dutch Criminal Code. These provisions give judges the authority not to impose punishment if the act committed is minor, the perpetrator's personality shows a positive attitude, and the circumstances at the time the act was committed support the application of the principle of humanity.⁸ Thus, this amendment reflects a more humanistic and contextual approach to criminal law, which adapts to the concrete conditions of the perpetrator and their actions.

The selection of Indonesia and the Netherlands as the subjects of study in this research is based on strong historical and juridical considerations.⁹ *The Wetboek van Strafrecht voor Nederlandsch-Indië*, as the legal guideline in the Indonesian Criminal Code (KUHP), shows a direct relationship between the Dutch colonial legal system and the criminal justice system that is still in force in Indonesia today.¹⁰ Therefore, this historical connection is the main reason why these two countries are relevant and significant to compare in the context of applying the principle of judicial pardon.

According to Nico Keizer, a Dutch criminal law expert, the application of the principle of *rechtelijk pardon* in the RKUHP is motivated by the large number of cases in which the defendant has provided complete evidence, but if the judge still imposes a criminal sentence, this is considered contrary to the principle of justice.¹¹ This principle of judicial pardon is a form of criminal law decision aimed at handling minor cases in a proportional and humane manner. The existence of this principle is relevant in cases such as that experienced by Nenek Minah in 2009. In that case, Nenek Minah was charged with stealing three cocoa beans belonging to PT Rumpun Sari Antan.

⁶Nefa Claudia Meliala, "Rechterlijk Pardon (Pemaafan Hakim): Suatu Upaya Menuju Sistem Peradilan Pidana Dengan Paradigma Keadilan Restoratif," *sinta 1 Jurnal IUS Kajian Hukum Dan Keadilan* 8, no. 3 (2020): 551–68.

⁷Beniharmoni Harefa and Abdul Kholiq, *Hukum Pidana* (Jakarta: Raja Grafindo Persada, 2024).

⁸"Criminal Law. Pardon. Effect as Obliterating Conviction," *Harvard Law Review* 41, no. 7 (1928).

⁹"Constitutional Law. Power of the Executive to Pardon. Criminal Contempt," *The Yale Law Journal* 38, no. 6 (1929).

¹⁰Adery Ardhan Saputro, "Konsepsi Rechterlijk Pardon Atau Pemaafan Hakim Dalam Rancangan KUHP," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 28, no. 1 (2016).

¹¹Muhammad Rifai Yusuf et al., "Overview of the Judge's Forgiveness Concept: Is Relation to the Legal Interests of Criminal Victims," *Walisono Law Review* 3, no. 1 (2021).

Although her actions formally fulfilled the elements of a criminal offense, the value of the stolen goods was very small and did not justify the cost of the trial and the sentence imposed, which was one month and fifteen days in prison with a three-month probation period.¹²

The case sparked criticism from the public and legal academics, as it was considered to reflect a disproportionate enforcement of criminal law. In this context, the principle of *rechtelijk pardon* plays an important role in creating substantive justice based on human values and Pancasila as the ideological basis of the national legal system. However, in its application, this principle has several weaknesses and challenges when linked to Indonesian law, especially when linked to the dominant legal system in society.¹³

As supporting material for this research, the researcher conducted research on previous studies relevant to the issues being investigated. This review was intended to avoid plagiarism of other people's work. With this research, the researcher was able to identify the similarities and differences between the issues being investigated and those investigated by previous researchers. Research related to the principle of judicial pardon includes the first study entitled "Implementation of Judicial Pardon (*Rechterlijk Pardon*) in the National Criminal Code," written by Doni Laksita in 2025 and published in the *Journal of Law and Citizenship*. This study describes how the Indonesian criminal justice system has adopted judicial pardon, representing a paradigm shift from retributive justice to restorative justice, which focuses more on rehabilitation. To avoid disproportionate punishment and maintain the dignity of judicial power, judges are given the authority to grant pardons after carefully considering justice, humanity, and the benefits of the law. In order to achieve a more just, efficient, and humane justice system, this strategy is expected to make the criminal justice system more humane, actively involve victims and the community, and support the social reintegration of offenders.

The second study, entitled "*The Principle of Judicial Pardon in Criminal Law Reform in Indonesia*," was written by Muh. Iksan K, Dian Ekawaty I, and Suwitno Yutye I published in the *Journal of Law and Political Science* in 2024. The study describes the policy of Judicial Pardon in the new Criminal Code, which reflects efforts to reform criminal law in Indonesia by granting judges new authority to issue guilty verdicts without imposing criminal penalties. The implementation of this concept, which is already recognized in various countries, including the Netherlands, is adapted to the national context by considering factors such as the severity of the offense, the personal circumstances of the perpetrator, and the principles of justice and humanity. However, this study also identifies challenges in its application, particularly regarding the

¹²Meliala, "Rechterlijk Pardon (Pemaafan Hakim): Suatu Upaya Menuju Sistem Peradilan Pidana Dengan Paradigma Keadilan Restoratif."

¹³Mufatikhatul Farikhah, "Rekonseptualisasi Judicial Pardon Dalam Sistem Hukum Indonesia: (Studi Perbandingan Sistem Hukum Indonesia Dengan Sistem Hukum Barat)," *sinta 2 Jurnal Hukum & Pembangunan* 48, no. 3 (2018): 556-88.

consistency of law enforcement and the societal legal culture. Therefore, this study recommends a more detailed explanation of the elements of *Rechtelijk Pardon* in regulations, as well as further provisions regarding the types and forms of pardons, in order to ensure prudent implementation and support the achievement of substantive justice.

Finally, the last study, entitled “The Urgency of *Rechterlijk Pardon* in Criminal Law Reform in Indonesia,” was written by Bella Putri H, Fenty U. P., and Weny Almoravid D. It was published in the law journal “THE JURIS” in 2023. This study examines the significance of the principle of Judicial Pardon in the reform of Indonesian criminal law, presenting it as a more humane and just alternative to law enforcement. In the context of the Indonesian legal system, which is still influenced by colonial heritage and a retributive approach, the application of the principle of Judicial Pardon is considered capable of harmonizing law enforcement with humanitarian values and social justice, especially in cases of minor crimes. This study confirms that the application of the principle of Judicial Pardon can be an effective instrument in creating a more humane criminal justice system that aligns with Indonesian socio-cultural values.

This research is certainly inseparable from previous studies published in various scientific journals, which serve as secondary data sources. Previous studies found several similarities in their discussions. However, there are also several differences with this study. The differences in the discussion in this study are that the author describes the superiority of the application of the principle of Judicial Pardon, which has been applied for a long time in the Netherlands, so that Indonesia wants to apply it, as well as the differences in the application of this principle between the Netherlands and Indonesia. In addition, the author wants to study more deeply the challenges in applying the principle of Judicial Pardon in Indonesia.

This type of research employs a normative juridical method, involving legal research conducted through literature studies or secondary data analysis alone, as well as data and information collection techniques that examine written sources related to the scope of judicial pardon (*rechtelijk pardon*). In this case, the research uses several approaches to the problem: a statutory approach by examining Law No. 1 of 2023 Article 54 (2) and Article 9a of the *Wetboek van Strafrecht* (Dutch Criminal Code), the existence of these two laws analyzes the concept of the principle of judicial pardon in each country. Second, a historical approach reveals a special connection between the Netherlands and Indonesia in terms of legislation that is still in force in Indonesia, *WvS*. Third, a comparative approach is employed to examine the system of applying the principle of judicial pardon in the Netherlands and Indonesia. Fourth, the conceptual approach is very important because, when facing legal challenges, understanding the opinions and theories that arise in legal science can serve as the basis for developing effective legal arguments. In this study, the author examines the challenges and implications of applying the principle of judicial pardon in Indonesia when compared to the Netherlands. The data collection technique used in this paper is library research.

In addition, the data analysis technique employed in this paper is descriptive analysis, which is an approach used in this study to interpret processed legal materials.¹⁴

Based on the background described above, the author wishes to examine: 1) how the concept of *rechtelijk pardon* works in the Netherlands and Indonesia; 2) the challenges in implementing *rechtelijk pardon* in Law No. 1 of 2023. In addition, the author also wishes to examine the differences in the application of the principle of judicial pardon between the two countries, as well as the superiority of the Netherlands, which has implemented judicial pardon for longer than Indonesia, resulting in the national Criminal Code adopting this principle. To that end, it is necessary to examine the legal issues surrounding the principle of judicial pardon in Indonesia.

B. The Principle of Judicial Pardon (*Rechtelijk Pardon*): Comparative Perspectives from the Netherlands and Indonesia

According to its conceptual definition, judicial pardon or judicial clemency is a form of pardon for criminal acts that grants exemption from punishment to a person who has been proven guilty of an unlawful act. This idea essentially illustrates a shift from the principle of strict legal certainty to a more elastic or flexible principle of legal certainty in its application.¹⁵ Thus, judicial pardon not only reflects the humanistic aspect of justice, but also affirms that the law can adapt to concrete conditions in order to achieve the benefits of law for society. This is also in line with Adi Hamzah's opinion: "In the concept of *rechterlijk pardon*, if an act constitutes a crime but is of little social significance, then it is not necessary to impose a criminal penalty or action."¹⁶

In 1983, the Dutch legal system began to accommodate the conflict between the principles of justice and legal certainty, particularly in cases where the defendant was proven to have committed a criminal offense but was not sentenced to criminal sanctions by the judge. Recognition of this dilemma was manifested through the enactment of Law No. 1 of 1983, which came into effect on March 31, 1983, revising the *Wetboek van Strafrecht (WvS)*, specifically with the addition of Article 9a, which introduced the concept of judicial pardon. The drafters of Dutch criminal procedure law then adjusted the judicial system by integrating pardon decisions as a formal part of the judicial process. As a result of this harmonization, the Dutch judicial system recognizes four types of decisions, namely acquittal, dismissal, sentencing, and pardon.¹⁷

¹⁴Bambang Sunggono, *Metodologi Penelitian Hukum* (Jakarta: Raja Grafindo Persada, 2006).

¹⁵Henk Van De Bunt and Jean Louis Van Gelder, "The Dutch Prosecution Service," *Crime and Justice* 41, no. 1 (2012); Laksita, "Implementasi Pemaafan Hakim (*Rechterlijk Pardon*) dalam KUHP Nasional."

¹⁶Nilvany Hardicky, Riadi Asra Rahmad, and Heni Susanti, "Policy Formulation of The *Rechterlijk Pardon* Concept (Judge's Forgiveness) In Traffic Accident Criminal Cases," *Journal of Law, Politic and Humanities* 4, no. 6 (2024).

¹⁷Hilde Wermink et al., "Expanding the Scope of Sentencing Research: Determinants of Juvenile and Adult Punishment in the Netherlands," *European Journal of Criminology* 12, no. 6 (2015); Gatot Sugiharto et al., "Analysis Of Legal Discovery Methods By Judges In *Rechterlijk Pardon's* Perspective to

The addition of provisions regarding pardon and the application of fines as an alternative punishment for all types of offenses in the Dutch Criminal Code reflects that the current changes to the Dutch Criminal Code are more flexible or “lenient.” The punishment system in the *Wetboek van Strafrecht* (WvS) establishes three main types of punishment: fines, detention, and imprisonment. It applies a simple classification of criminal acts and offenses, making this system more realistic in practice. Additionally, the absence of maximum penalties for several serious crimes is a sign of public trust in the integrity and authority of the criminal justice system.¹⁸ Article 9a states: *Indien de rechter dit raadzaam acht in verband met de geringe ernst van het feit, de persoonlijkheid van de dader of de omstandigheden waaronder het feit is begaan, dan wel die zich nadien hebben voorgedaan, kan hij in het vonnis bepalen dat geen straf of maatregel zat worden opgelegd.* Nico Keizer explained that the main reason for including the concept of judicial pardon or judicial clemency is that, in some cases, even though the defendant has been proven to have committed a crime legally and convincingly, imposing a sentence on them would be inappropriate.¹⁹

Nico Keizer explains that the main reason for including the concept of judicial pardon or judicial clemency is that, in some cases, even though the defendant has been proven to have committed a criminal offense in a lawful and convincing manner, imposing a sentence is considered unfair. Imposing a criminal penalty in such circumstances has the potential to cause a conflict between the principles of legal justice and legal certainty. Prior to 1983, the Panel of Judges was still obligated to impose a sentence, albeit a very light one, in such situations. This explanation confirms that Article 9a of the *Wetboek van Strafrecht* essentially serves as a guideline for sentencing, providing flexibility so that the law is not applied rigidly. The existence of this provision can also be understood as a judicial discretion mechanism that functions as an emergency door (*noodeur*) or safety valve (*veiligheidsklep*) to prevent injustice in the sentencing practice.²⁰

According to Andi Hamzah, the court has the authority to pass a *verdict* in accordance with the concept of judicial discretion as stipulated in Article 9a of the *Wetboek van Strafrecht* (WvS), but still allows the judge to impose a criminal penalty if deemed necessary. This authority is influenced by the concept of *subsocialeit*, which states that imposing a criminal penalty or other legal action is not always necessary if

Solve Criminal Cases,” *Jurnal Jurisprudence*, 2024; Ridwan Suryawan, “Asas Rechtelijk Pardon (Judicial Pardon) Dalam Perkembangan Sistem Peradilan Pidana Indonesia,” *Indonesian Journal of Criminal Law and Criminology (IJCLC)* 2, no. 3 (2021): 170–77.

¹⁸Aulia Rizka Estiningtyas, Ulfatul Hasanah, and Rusmilawati Windari, “Comparison of the Legal Regulation of the Rechterlijk Pardon in Indonesia and The Netherlands,” *Jurnal Suara Hukum* 6, no. 1 (2024); Sisno Pujinoto, Anis Mashdurohatun, and Achmad Sulchan, “Juridical Analysis Of Application Of Forgiveness (Rechterlijk Pardon) As A Basis Of Judge Consideration In Deciding The Criminal,” *Jurnal Daulat Hukum* 3, no. 2 (2020).

¹⁹Jur Andi Hamzah, *Perbandingan Hukum Pidana Beberapa Negara (Edisi Ketiga)* (Sinar Grafika, 2024); Romli Atmasmita, *Perbandingan Hukum Pidana* (Bandung: Alumni, 1998). Hamzah, *Perbandingan Hukum Pidana Beberapa Negara (Edisi Ketiga)*.

²⁰Maher Haswa and Suhaib Walid Sharaiyra, “Rationale Verification and Its Applications in Judicial Discretion,” *Islamic Quarterly* 68, no. 2 (2024).

an act is classified as a criminal offense but does not have a significant social impact. Thus, the application of judicial clemency reflects the flexibility of criminal law that considers the social relevance of an unlawful act.²¹

The Netherlands has long promoted a punishment system oriented towards humanism and rehabilitation. The principle adopted states that imprisonment should be used as an *ultimum remedium* or last resort, so that judges are required to provide clear reasons if they choose imprisonment over alternative sanctions such as community service. This system suggests that the use of non-custodial sentences is considered more proportionate in addressing certain types of legal violations. In addition, the rate of recidivism in the implementation of alternative sentences is reported to be lower than that of prison sentences, which reinforces the effectiveness of a rehabilitative approach to sentencing.²²

Meanwhile, the Indonesian criminal justice system has yet to implement regulations on judicial pardons. As a result, many minor offenses, such as stealing watermelons, cocoa, plates, and sandals, are punished with severe penalties that are not in line with the humanitarian ideals of society,²³ even though in this case the Criminal Code clearly states that the elements of a criminal offense have been fulfilled. To improve justice in the application of law and resolve social disputes regarding retributive law enforcement for minor offenses, the concept of judicial pardon, also known as *rechterlijk pardon*, was developed as an effort to harmonize Indonesian criminal law.²⁴ Whereas law enforcement is a fundamental principle, under certain conditions, judges are allowed to grant pardons by setting aside the strict provisions of the law. The granting of a pardon has two primary objectives: to serve as a corrective measure to the overly strict application of the principle of legality and as an alternative to short-term imprisonment.²⁵

The concept of judicial pardon is a new idea that is being sought to be integrated into the National Criminal Code (KUHP). Through this concept, judges are given broader authority in determining and passing sentences on defendants. However, judicial pardon (also known as *rechterlijk pardon* or judicial pardon) was previously recognized by Law No. 11 of 2012 on the Criminal Justice System for Children, specifically regulated in Article 70, which states that "*the severity of the act, the personal circumstances of the child, or the circumstances at the time the act was committed or that*

²¹Sebastián A. Reyes Molina, "Judicial Discretion as a Result of Systemic Indeterminacy," *Canadian Journal of Law and Jurisprudence* 33, no. 2 (2020).

²²Jeffrey S. Nowacki, "Race, Ethnicity, and Judicial Discretion: The Influence of the United States v. Booker Decision," *Crime and Delinquency* 61, no. 10 (2015); Tyler J. King and Mariana Valverde, "The Multiple Realities of Legal Objects: Accounting for 'Ontological Discretion' in Criminal Courts," *Law and Social Inquiry*, 2025.

²³Ramadhita Ramadhita, Ali Mahrus, and Bachri Syabbul, "Gender Inequality and Judicial Discretion in Muslims Divorce of Indonesia," *Cogent Social Sciences* 9, no. 1 (2023); William A. Schabas, "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court," in *Journal of International Criminal Justice*, vol. 6, 2008.

²⁴Laksita, "Implementasi Pemaafan Hakim (Rechterlijk Pardon) Dalam KUHP Nasional."

²⁵Anandy Satrio P, "Rechterlijk Pardon: Gagasan Dan Tantangan Instrumen Humanisme Hukum," MA RI News, 2025.

occurred afterwards may be used as a basis for the judge's consideration not to impose a penalty or to impose a measure taking into account aspects of justice and humanity."²⁶ In the revision of the national Criminal Code, this concept of judicial pardon was also adopted by Law No. 1 of 2023 on Criminal Law. This is stated in Article 54 (2), known as *Rechtelijk Pardon* or judicial pardon, which states that: "*The minor nature of the act, the personal circumstances of the perpetrator, or the circumstances at the time the criminal act was committed and those that occurred afterwards may be used as a basis for consideration not to impose a penalty or not to impose measures, taking into account aspects of justice and humanity.*"²⁷

The punishment system in the new Criminal Code has undergone fundamental changes. Currently, the correctional system employs a restorative justice approach that aims to restore social balance disrupted by criminal acts. This approach focuses on restoring the rights of victims, promoting reconciliation between perpetrators and victims, and facilitating the social rehabilitation of perpetrators. This model differs from the previous system, which emphasized punishment and rehabilitation alone. In addition, the principles of justice and protection of human rights are explicitly integrated into the drafting of the new Criminal Code.²⁸ In Indonesia, this is regulated in Article 54 (2), which refers to Article 51 of Law Number 1 of 2023 concerning the Criminal Code, which states the following:²⁹

- a) Prevent crime by enforcing legal norms in order to maintain and provide a sense of security to the community.
- b) Rehabilitating prisoners through guidance and counseling so that they become good and useful individuals.
- c) Resolving conflicts caused by crime, restoring balance, and creating a sense of security and peace in society.
- d) Creating feelings of remorse and eliminating feelings of guilt in prisoners.

Judges have judicial discretion to decide a case based on objective legal considerations and convictions. This authority is in line with the provisions of Article 1, point 8 of Law Number 8 of 1981 of the Republic of Indonesia concerning Criminal Procedure,³⁰ which explains that "*Judges are state judicial officials who are authorized by law to adjudicate.*" This discretion allows judges not only to interpret legal norms textually, but also to adjust their decisions to the values of justice, the circumstances of the defendant, and the social context behind the crime. This is in line with the provisions of Law No. 48 of 2009 on Judicial Authority, Article 54 (3): "*Court decisions*

²⁶Article 70. "Law No. 11 of 2012 concerning the Juvenile Criminal Justice System."

²⁷Article 54 paragraph (2) of the Criminal Code. "Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code."

²⁸Nicola Gennaioli and Andrei Shleifer, "Judicial Fact Discretion," *Journal of Legal Studies* 37, no. 1 (2008).

²⁹Article 51 of the Criminal Code, "Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code"

³⁰Article 1, number 8. "Law of the Republic of Indonesia Number 8 of 1981 concerning Criminal Procedure Law."

*shall be carried out with due regard to the values of humanity and justice.*³¹ Thus, judges do not merely act as mechanical enforcers of the law, but also as upholders of substantive justice within the criminal justice system.

Table 1: Differences in the Application of Judicial Discretion
in Indonesia and the Netherlands

Aspect	Netherlands	Indonesia
Legal Basis	Article 9a Wetboek van Strafrecht (WvS), effective since Law No. 1 of 1983.	Article 54 paragraph (2) of Law No. 1 of 2023 concerning the Criminal Code (adopted from Article 70 of Law No. 11 of 2012 concerning SPPA)
Conceptual Definition	Judges may decide not to impose punishment if the act is considered minor, taking into account the perpetrator's personality and the circumstances at the time of or after the act was committed.	The judge may not impose a criminal penalty by considering the minor nature of the act, the personal circumstances of the perpetrator, and aspects of justice and humanity.
Legal Philosophy	Based on the principle of subsidiarity, not all violations must be punished if the social impact is minor. Realizing a balance between justice and legal certainty.	Based on the principles of humanity and substantive justice. Aims to avoid rigid application of the law to minor offenses.
Types of Decisions	There are four types of decisions: acquittal, release, sentencing, and judicial pardon (<i>rechterlijk pardon</i>).	Not yet formally implemented in the Criminal Procedure Code (KUHP) decision system; still a normative provision in the new Criminal Code (KUHP).
Nature of Implementation	Institutionalized and part of the national sentencing system, judges have established guidelines and jurisprudential practices.	Still conceptual and normative in nature; implementation pending harmonization with the Criminal Procedure Code and Supreme Court guidelines.
Main Objectives	To provide judicial discretion to prevent injustice resulting from the rigid application of the law.	To encourage reform of the penal system to make it more humane and restorative.
Penal System Orientation	Emphasizes rehabilitation and <i>ultimum remedium</i> ; imprisonment is only a last resort.	Adopts a restorative justice and substantive justice approach to restore social balance.
Effectiveness in Practice	Proven effective in reducing recidivism rates and increasing public trust in the judicial system.	It has not yet been empirically proven because it has not been widely implemented in judicial practice.
Role of Judges	Judges play an active role in assessing the proportionality of punishment, taking into account the social context and personality of the perpetrator.	Judges are given judicial discretion, but are still limited by a legal system that is not yet synchronized between the Criminal Code and the Criminal Procedure Code.

³¹Article 54 paragraph (3). "Law No. 48 of 2009 concerning Judicial Power."

Implementation Obstacles	Not significant; there is already consistency between substantive and procedural law.	The lack of synchronization between the new Criminal Code and the old Criminal Procedure Code, as well as the absence of explicit judicial guidelines.
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Source: Data compiled from our own research based on previous studies.

C. Challenges in the Application of the Principle of Judicial Pardon in Law No. 1 of 2023

Law No. 1 of 2023 on the National Criminal Code (KUHP) contains the principle of judicial pardon, which is an important element in the Indonesian legal system. This provision grants judges the discretion to refrain from imposing criminal penalties on defendants under specific circumstances, without compromising the principle of legal accountability.³² This concept is part of the criminal law reform in Indonesia known as judicial pardon. In addition, Mardjono Reksodiputro explained that Roeslan Saleh was the first figure to seek the insertion of a clause on justice and the concept of judicial pardon in the Draft Criminal Code. According to this view, if a judge is faced with a conflict between legal certainty and justice, the principle of justice must be prioritized. Thus, the concept of judicial pardon is considered to better reflect the values of Pancasila and the social norms that exist in Indonesian society. Ultimately, this idea was accommodated and officially adopted in the National Criminal Code.³³

However, the application of *Rechterlijk Pardon* is not automatically granted in every case. Judges must assess several aspects, including the perpetrator's good intentions, the consequences for the victim, and the social benefits of granting forgiveness. The 2023 Criminal Code regulates this mechanism more comprehensively, allowing pardons to be granted proportionally, not only based on proven legal wrongdoing, but also taking into account the perpetrator's responsibility and efforts to rectify the damage caused by their actions. However, the legal basis governing the application of judicial pardons remains general in nature and has not been supplemented with technical regulations that serve as guidelines for its application in court. The absence of more detailed rules from the government has the potential to cause problems in practice, as it can lead to confusion among law enforcement officials. In addition, the absence of guidelines also opens up the possibility of disparities in judges' decisions on similar cases, making it impossible to guarantee consistency and uniformity in the application of the law.³⁴

Currently, the criminal justice system recognizes only three types of court decisions: acquittal, dismissal, and sentencing, as stipulated in the Criminal Procedure Code. Based on these three types of decisions, judges do not yet have a legal basis for

³²HukumOnline, "Penerapan Ketentuan Judicial Pardon Dinilai Masih Bersifat Abstrak , Sehingga Dari Satu Kasus Ke Kasus Lainnya Bisa Saja Penerapannya Berbeda .," 2024.

³³Mufatikhatul 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).

³⁴Nefa Claudia Meliala, "Rechterlijk Pardon : (Judicial Pardon) : An Effort Toward Criminal Justice System With Restorative Justice Paradigm," *Jurnal IUS Kajian Hukum Dan Keadilan* 8, no. 3 (2020).

issuing a pardon, as this is considered inconsistent with the principle of legality in criminal law.³⁵ In this case, harmonization is needed between the latest Criminal Code article 54(2) and the Draft Criminal Procedure Code (RKUHAP) Article 1, number 18, amendments to articles 187(2), (3), and 192(1), letter h. This is to ensure the harmony of the criminal law system. To date, the RKUHAP does not yet contain formal provisions governing the application of *rechterlijk pardon*, thus creating a gap between the substantive provisions in the new Criminal Code and the procedural legal instruments that should support its implementation.³⁶ The absence of synchronization has the potential to hamper the effectiveness of law enforcement and create uncertainty in criminal court practice. To date, the Indonesian legal system lacks a clear formulation regarding the form of a pardon decision for criminals who are granted forgiveness by a judge.

Therefore, the provisions regarding judicial pardon need to be harmonized with the RKUHAP. This synchronization is important so that the provisions regarding the institution of judicial pardon do not become a “dead letter” that is difficult to apply in court practice. These concerns arise when viewed critically, particularly in relation to the provisions in the RKUHAP regarding the types of verdicts that can be imposed on defendants. The discussion of judicial pardon raises questions about what type of verdict is appropriate to hand down to defendants who are proven guilty but pardoned.

Judges cannot hand down an acquittal unless the defendant's actions are proven. The use of acquittal verdicts is not appropriate because judicial pardons are not grounds for eliminating criminal punishment, such as justifications or excuses recognized in criminal law, and not all cases of judicial pardons fall into this category. The third option is a conviction without punishment, as suggested by Andi Hamzah and Jeroen Chorus, who refer to it as a “guilty verdict without punishment.” However, a conviction must include the type of punishment or action imposed. If the judge does not impose any punishment or action, the verdict is null and void.

Thus, of the three forms of verdict in the RKUHAP, none can be used normatively to apply *rechterlijk pardon*. If the RKUHAP does not provide specific regulations regarding the form of a judge's pardon, then this provision only becomes an inoperative norm (dead article) in judicial practice.³⁷ The regulation of the concept of *rechterlijk pardon* in the National Criminal Code remains very limited, requiring further details in the form of indicators that can serve as guidelines for judges in its application. In addition, the lack of harmonization between the substantive legal rules in the Criminal Code and the formal legal rules in the Criminal Procedure Code has led to

³⁵Mufatikhatul Farikhah, “Konsep Judicial Pardon (Pemaafan Hakim) Dalam Masyarakat Adat Di Indonesia,” *Jurnal Media Hukum* 25, no. 1 (2018).

³⁶Syed Raza Shah Gilani, Ali Mohammed Al-Matrooshi, and Ms. Aisha Nayab Qureshi, “Supremacy of the Parliament and the Rule of Law in the UK: An Analysis,” *Journal of European Studies (JES)* 40, no. 1 (2024).

³⁷Mulianita Ika and others, “Penerapan Asas Permaafan Hakim (Rechterlijk Pardon) Dalam Penyelesaian Perkara Tindak Pidana Ringan Sebagai Upaya Pembaharuan Hukum Pidana Nasional” (Universitas BATANGHARI Jambi, 2023).

inconsistencies in accommodating the effective application of judicial pardon in the criminal justice system. This situation is exacerbated by the absence of clear technical guidelines, which creates obstacles to implementing the concept of judicial pardon, thereby putting this concept at risk of remaining a theoretical idea without concrete realization in judicial practice.

Table 2: Comparison of judicial pardon provisions in the Dutch and Indonesian criminal justice systems

Aspect	Indonesia	Netherlands
Article Formulation	Article 54 paragraph (2) of the Criminal Code stipulates that “the minor nature of the act, the personal circumstances of the perpetrator, or the circumstances at the time the crime was committed and those that occurred afterwards may be used as a basis for consideration not to impose a penalty or not to take action, taking into account aspects of justice and humanity.”	Article 9a WvS states: “If the judge deems it advisable in view of the minor seriousness of the offense, the personality of the perpetrator or the circumstances under which the offense was committed, as well as those that occurred afterwards, he may determine in the verdict that no punishment or measure will be imposed.” (If the judge considers it appropriate in view of the minor nature of the act, the personality of the perpetrator, or the circumstances at the time the act was committed, as well as after the act was committed, he shall determine in the verdict that no penalty or measure shall be imposed.
Differences in the Content of Articles	<p>“Minor Offenses”</p> <p>In Indonesia, the term “minor offense” has not been explicitly defined in legislation. However, the explanation of Article 132(1)(d) provides a limitation: a minor offense is defined as an act punishable by a fine in Category I or Category II.</p>	<p>“Minor Significance of the Act”</p> <p>In the Netherlands, the term “minor significance of the act” is not explicitly defined in legal provisions. However, minor criminal offenses are classified into several categories regulated in Book Three of the Wetboek van Strafrecht (Penal Code). This classification includes minor offenses related to public safety for people and property, public order, public authority, civil status, protection of individuals in emergencies, public morality, rural policing, minor offenses resulting from abuse of office, and minor offenses related to shipping.</p>

“Personal Circumstances of the Perpetrator”

The assessment can be made by considering the age of the perpetrator, whether they are young or old, and taking into account whether they hold a certain position, have a special profession, or suffer from a mental disorder that could potentially affect their behavior and legal responsibility.

“The Perpetrator's Personality”

The term “the perpetrator's personality” encompasses elements of remorse and efforts to correct mistakes, which are crucial indicators for judges in determining whether a criminal act can be classified as a minor offense. In addition, this aspect also includes the perpetrator's background and life history, including whether they have a previous criminal record, the conditions of the environment they come from, and the psychological impact they have experienced, such as trauma resulting from the events that occurred.

“Conditions at the time the crime was committed and after the crime was committed.”

As applied in the Netherlands, similar provisions in Indonesia are explicitly stated in Article 70 paragraph (1) of the National Criminal Code.

“The circumstances at the time the act was committed and afterwards.”

This element assesses the circumstances that prevailed both at the time and after the act was committed, with an emphasis on the factors that led to the act. In addition, the defendant's remorse for their actions, accompanied by an apology and forgiveness from the victim or the victim's family, is also an important consideration in assessing this element.

“Consideration of Fairness”

There is no detailed description of the standards or benchmarks for fairness. However, Article 53 of the National Criminal Code emphasizes that in the process of examining and deciding criminal cases, judges are obliged to uphold the law and fairness. If there is a conflict between legal certainty and justice, judges must prioritize the principle of justice.

Provisions governing the element of “consideration of aspects of justice” are not found in the Dutch Criminal Code, particularly in Article 9a.

Legal Effects

Judges have the authority to use their discretion **not to impose punishment or action on proven perpetrators**, as long as they consider aspects of justice and humanity. This discretion is optional, and the provisions are still general in nature.³⁸

Judges have the authority to decide **not to impose punishment or action**, even if a criminal act has been proven, if certain criteria are met, such as the low severity of the act, the perpetrator's personality, or the circumstances surrounding the act. Consequently, the decision does not include the imposition of punishment.

³⁸Winan Hilmi and Rizqin Prijatna, “Bagaimana Pengaturan Rechterlijke Pardon Dalam Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang- Undang Hukum Pidana ?,” 2024.

Formal and Material Harmonization	The material provisions have been regulated in the Criminal Code, but they are not yet fully in line with the formal provisions contained in the Criminal Procedure Code or the Draft Criminal Procedure Code. The absence of clear technical guidelines has resulted in suboptimal harmonization in practice. ³⁹	Relative harmony between the substantive and formal systems has been achieved, as reflected in Article 9a of the WvS and supported by procedural provisions, such as through decisions that include reasons for pardon and restrictions on appeals or cassation in certain cases.
Case Law/Practice Examples	In Indonesia, studies suggest that this norm remains challenging to implement in practice due to the lack of clear implementing regulations.	In the Netherlands, numerous decisions have been made regarding Article 9a, and the application of the concept of pardon by judges has been consistently recorded in case law.
Practical Implications	The risk is that the concept of judicial forgiveness may become merely a written norm without real implementation, given the lack of technical guidelines and clear definitions of the criteria. For example, the phrase “minor offense” does not yet have a standard interpretation.	Its application in the Netherlands has been more concrete, where judicial leniency decisions are recognized as a valid and final alternative in certain cases. Judges also have a more operational framework of norms and procedures for applying it.

Source: Data compiled from own research based on previous studies.

Based on this comparison, the Netherlands shows superiority in its implementation. This can be seen from the clearer and more operational formulation of its articles, the harmonization between its formal and material laws, and the realization of well-documented judicial practices. In contrast, in Indonesia, although the normative basis has been regulated in the Criminal Code, its implementation still faces various obstacles due to the lack of standardised verdicts, adequate technical guidelines, and optimal synchronization between material and formal aspects.

D. Conclusion

The Indonesian criminal justice system continues to show strong influences from its Dutch colonial heritage, as evident in the *Wetboek van Strafrecht voor Nederlandsch-Indië* (Criminal Code for the Dutch East Indies) of 1915, which formed the basis for the old Criminal Code. This situation calls for reforming national criminal law to align it with the values of Pancasila, humanitarian principles, and the needs of modern society. Legal reform is not only understood as a revision of norms, but also a conceptual reform towards more humane and proportional legal principles. One important reform in Law No. 1 of 2023 on the Criminal Code is the provision of the *Rechterlijk Pardon* principle, also known as the principle of judicial pardon. This principle gives judges the authority not to impose punishment on defendants who are legally proven guilty if their actions are considered minor and do not cause serious

³⁹Anandy Satrio P, “Rechterlijk Pardon: Gagasan Dan Tantangan Instrumen Humanisme Hukum.”

consequences. This concept was adopted from Article 9a of the *Wetboek van Strafrecht* (Dutch Criminal Code), which has been in effect since 1983, aiming to strike a balance between legal certainty and substantive justice. In Dutch legal practice, this principle has been effectively operationalized through the harmonization of formal and material law, supported by consistent jurisprudential guidelines, thereby prioritizing imprisonment as the *ultimum remedium* and emphasizing the importance of rehabilitative non-custodial sanctions.

In contrast, the application of the principle of judicial discretion in Indonesia still faces several challenges, both structural and normative. Although this principle is materially regulated in Article 54 paragraph (2) of the Criminal Code, the applicable criminal procedure law (KUHAP) does not yet provide a form of verdict that can be used for defendants who are proven guilty but are granted discretion. This creates an inconsistency between formal and substantive law and has the potential to create disparities in verdicts between judges due to the absence of objective criteria regarding the limits of “minor offenses.” Furthermore, the absence of judicial guidelines and measurable parameters renders this principle vulnerable to becoming an ineffective standard. Thus, the application of the *Rechterlijk Pardon* principle in Indonesia is a progressive step towards a more humane and socially just criminal justice system, but its success is highly dependent on the clarity of norms, the harmonization between the Criminal Code and the Criminal Procedure Code, and the consistent application of this principle by judicial institutions in order to achieve a balance between legal certainty, utility, and substantive justice in the practice of national law enforcement.

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