THE POTENTIAL DISPARITY IN JUDICIAL PARDON DECISIONS: FORMULATION ISSUES IN THE NATIONAL CRIMINAL CODE

Muhammad Kharisma Bayu Aji
Faculty of Law, University of Brawijaya
kharismabayuaji@student.ub.ac.id

Milda Istiqomah
Faculty of Law, University of Brawijaya
milda.istiqomah@ub.ac.id

Sriti Hesti Astiti
Badan Strategi Kebijakan dan Pendidikan dan Pelatihan Hukum dan Peradilan
sritihestia2021@gmail.com

Faisal Akbaruddin Taqwa
China-ASEAN Legal Research Center, Southwest University of Political Science and Law, Chongqing, China
justicefaisal@gmail.com

Abstract

This scientific article discusses the problems and ideal formulation of judicial forgiveness in the future in Article 54, Paragraph (2) of Law Number 1 of 2023 on the Criminal Code. This article regulates judicial forgiveness but does not explain the requirements, resulting in different interpretations and decision disparities. This research is normative research with a descriptive research nature. The legislative and comparative approaches are used. This study found that the formulation of judicial forgiveness has problems such as abstract norms, alternative requirements, and difficulties when the victim does not forgive the defendant. The ideal formulation of judicial forgiveness is to determine the maximum criminal sanctions and cumulative requirements. The requirement for the lightness of the act can be interpreted as a maximum fine of Category II (IDR 10,000,000.00) and is related to minor crimes in the Criminal Procedure Code. The requirement for the offender's personal circumstances is linked to Article 22 of the National Criminal Code,

and the requirement for the circumstances at the time the crime was committed is linked to the sentencing guidelines in Article 54 paragraph (1) of the National Criminal Code letters b, d, e, f, and j.
Keywords: Judicial Pardon, Disparity in Verdicts, National Criminal Code of Indonesia.

Introduction

Similia similibus curantur, for similar cases, the same decisions must be applied.[1] It is the essence of a postulate that essentially serves as a guideline for judges to apply the same legal principles to similar cases, thereby ensuring justice and legal certainty. According to Gustav Radbruch, the objectives of law consist of justice, expediency (benefit), and legal certainty.[2] The principle of legal certainty (*rechtmatigheid*) interprets legal issues from a juridical perspective. The principle of justice (*gerechtigheid*) views legal issues from a philosophical standpoint, focusing on the concept of fairness. Meanwhile, the principle of expediency (*zweckmässigkeit*) examines legal issues from a sociological perspective, considering the benefits and consequences of a particular legal provision.[3] *Justitia est virtus excellens et altissimo*, meaning justice is the highest virtue that brings ultimate goodness and happiness.[4] Based on this postulate, legal provisions can only be applied if they embody the values of justice. As one of the sources of law, judicial decisions must reflect the values of justice, legal certainty, and expediency.

In criminal cases, judicial decisions serve a dual purpose. On the one hand, it is necessary for the defendant to determine whether the defendant is guilty or not so that an appropriate sentence can be imposed. On the other hand, for society, judicial decisions reflect the moral values and sense of justice the community upholds, which the

[1] Zainal Arifin Mochtar dan Eddy O.S. Hiariej. *Dasar-Dasar Ilmu Hukum*, (Jakarta: Red & White Publishing, 2021), p. 173.

[2] Iyan Nasriyan, "Asas Kepastian Hukum dalam Penyelenggaraan Perpajakan di Indonesia" *Journal Multidiscplinary Studies,* vol. 10, no. 2 (2019), p. 212.

[3] Anisa Nur Kanifah, "Pemenuhan Hak Anak Pasca Perceraian Perspektif Hukum Positif dan Teori Tujuan Hukum Gustav Radbruch" *Journal of Law & Familt Studies* vol. 6, no. 1 (2024), p. 29.

[4] Rasyid Musdin, "Rekonstruksi Tindakan Afirmatif Bantuan Hukum Penyandang Disabilitas Perspektif Tujuan Hukum Gustav Radbruch" *Siyasi: Jurnal Trias Politica* vol. 1, no. 2 (2023), p. 88.

occurrence of a criminal act has harmed. Legal certainty serves as a foundation and primary objective in criminal cases. It is reflected in the principle of legality in criminal law, which essentially contains the following elements include *lex scripta* (written law), *lex stricta* (strict interpretation), *lex certa* (clear and unambiguous law), and *lex praevia* (non-retroactivity). According to the modern school of thought in criminal law, the primary objective of criminal law is to protect society from criminal acts.[5] On Act Number 1 of 2023 about the National Criminal Code (KUHP Nasional), which was promulgated on 1 January 2023 and will officially come into effect on 2 January 2026, the modern criminal law paradigm is also adopted. It is reflected in the preamble of the KUHP Nasional, which states that national criminal law regulates the relationship between individual interests and societal interests.

One of the provisions contained in KUHP Nasional is to regulate *judicial pardon* (Non-Imposing of a Penalty/*rechterlijke pardon*), as stipulated in Article 54 paragraph (2) of the KUHP Nasional, which reads as follows:

> "*The minor nature of the act, the personal circumstances of the offender, or the circumstances at the time the crime was committed and those occurring thereafter may serve as the basis for considerations not to impose a penalty or not to impose any measures, taking into account aspects of justice and humanity*."

Upon closer examination, Article 54 paragraph (2) outlines four conditions for the application of judicial pardon, namely: the minor nature of the act**,** the personal circumstances of the offender**,** the circumstances at the time the crime was committed, and those occurring thereafter**,** and considerations of justice and humanity**.** On the one hand, the formulation of judicial pardon in the KUHP Nasional represents implementing one of the missions of the KUHP Nasional, namely corrective justice and rehabilitative justice, which seek to balance justice for both victims and offenders. However, at the practical level, this formulation of judicial pardon may lead to multiple interpretations among judges when interpreting the meaning of the conditions for granting judicial pardon. It occurs because there are no

[5] Eddy O.S. Hiariej, *Prinsip-Prinsip Hukum Pidana Edisi Penyesuaian KUHP Nasional,* (Depok: Rajawali Pers, 2024)*,* p. 35.

concrete parameters to define these conditions. Judges are given the discretion not to impose a sentence if, in their assessment, the offense is considered minor or if the offender's personal circumstances**,** the situation at the time of the incident**,** or considerations of justice and humanity justify such a decision. Neither the KUHP Nasional nor the explanatory notes to Article 54 paragraph (2) provide a clear explanation of what constitutes a minor act**,** the personal circumstances of the offender**,** circumstances at the time of the crime and those occurring thereafter**,** or considerations of justice and humanity. As a result, these provisions become highly abstract and dependent on the judge's interpretation**.**

Although, in principle, judges possess the characteristic of *ius curia novit*, meaning that judges are presumed to know the law, in cases where legal provisions are vague or unclear, judges are obligated to understand and explore the values of justice that live and develop within society. However, explicit provisions within a criminal regulation are essential to ensure legal certainty and safeguard human rights. The presence of abstract provisions such as these ultimately has the potential to lead to disparities in judicial decisions when applying for a judicial pardon. Disparity in decisions refers to the unequal application of penalties to identical criminal cases**.**[6] The uncertainty of legal provisions is one of the leading causes of disparities in judicial decisions, as judges must interpret the rules. On the other hand, based on the principle of *nulla poena sine lege*, which means no penalty without a law, judges are restricted from imposing punishments beyond what is explicitly stated in the law.[7]

In cases where the defendant or defense counsel argues that the defendant meets the requirements for the judicial pardon sentence, the judge must carefully and thoroughly consider whether the defendant indeed meets the criteria for the judicial pardon. Furthermore, suppose the requirements for judicial pardon in the KUHP Nasional remain abstract and lack clear parameters. In that case, the judge must

[6] A.A. Ngr Rai Anjasmara Putra dkk, "Disparitas Putusan Hakim dalam Tindak Pidana Narkotika", *Jurnal Analogi Hukum* vol. 2, no. 2 (2020), p. 130.

[7] Maria Ulfa Arifia dkk, "Upaya Meminimalisir Disparitas Putusan Hakim", *Jurnal Syntax Transformation* vol. 4, no. 1 (2023), p. 18.

first engage in legal discovery following Article 5, paragraph (1) of the Act on Judicial Power. One method of legal discovery is by legal interpretation. However, various legal interpretation methods will lead to different conclusions, thereby failing to guarantee legal certainty and justice for defendants. In practice, this could result in one judge concluding that a defendant meets the requirements for judicial pardon while another judge, in a similar case, concludes otherwise, creating inconsistencies in sentencing.

This article discusses the issues surrounding the normative formulation of judicial pardon sentences (*rechterlijk pardon*) in Act Number 1 of 2023 on the National Criminal Code, particularly focusing on the abstract nature of the requirements for granting judicial pardon, which lacks concrete criteria. This article aims to propose a concept for parameters of judicial pardon sentences that can guarantee legal certainty and justice as part of the reform of national criminal law. It is essential because the main principle in criminal law is the principle of legality, which emphasizes that no act can be punished unless it is explicitly regulated by law. However, in the context of judicial pardon theory, judicial pardon is considered a counterbalance to the rigid nature of the legality principle.[8] However, the implementation of judicial pardon sentences must also consider the principle of legality to ensure legal certainty and prevent disparities in judicial decisions.

The analysis presented in this article complements the study titled "*Rechterlijk Pardon (Pemaafan Hakim): Suatu Upaya Menuju Sistem Peradilan Pidana Dengan Paradigma Keadilan Restoratif*" written by Nefa Claudia Meliala, which highlights the weaknesses in the formulation of judicial pardon sentences in the National Criminal Code (KUHP Nasional), particularly the lack of detailed criteria that must be met for judges to apply judicial pardon in a case.[9] In addition, this article also complements the article titled "*Konsep Putusan Pemaaf Oleh Hakim*

[8] Lukman Hakim, *Penerapan Konsep Pemaafan Hakim (Rechterlijk Pardon) Dalam Sistem Peradilan Pidana Indonesia*, (Yogyakarta: Graha Ilmu, 2019), p. 15.

[9] Nefa Claudia Meliala, "Rechterlijk Pardon (Pemaafan Hakim): Suatu Upaya Menuju Sistem Peradilan Pidana Dengan Paradigma Keadilan Restoratif ", *Jurnal IUS Kajian Hukum dan Keadilan* vol. 8, no. 3 (2020), p. 1.

(Rechterleijk Pardon) Sebagai Jenis Putusan Baru dalam KUHAP" by Alfret and Mardian Putra Frans, which concludes that the concept of judicial pardon decisions has not yet regulated in KUHAP, as KUHAP only recognizes actual decision, dismissal of charges, and sentencing.[10] Furthermore, this article also complements the study in the article titled "*Rekonseptualisasi Judicial Pardon Dalam Sistem Hukum Indonesia (Studi Perbandingan Sistem Hukum Indonesia Dengan Sistem Hukum Barat)*" by Mufatikhatul Farikhah, which concludes that a judicial pardon concept aligned with Indonesian legal system should incorporate elements of Islamic and customary law in the formulation where it should clearly specify which types of criminal offenses may be subject to a judicial pardon, as well as include the addition of a judicial pardon verdict within KUHAP.[11]

Furthermore, the novelty element of the author's article, in comparison with the three aforementioned articles before are in focuses on the issue of normative ambiguity regarding judicial pardon in the National Criminal Code, as well as the formulation of parameters for judicial pardon sentencing within the future development of the National Criminal Code. Although the issue of normative ambiguity has been discussed in the article "*Rechterlijk Pardon (Pemaafan Hakim): Suatu Upaya Menuju Sistem Peradilan Pidana Dengan Paradigma Keadilan Restoratif*" by Nefa Claudia Meliala, that article doesn't elaborate on an ideal model for the future formulation of judicial pardon through a comparative study and systematic interpretation of the National Criminal Code. The novelty of the author's article compared to "*Konsep Putusan Pemaaf Oleh Hakim (Rechterleijk Pardon) Sebagai Jenis Putusan Baru dalam KUHAP*" by Alfret and Mardian Putra Frans and article with titled "*Rekonseptualisasi Judicial Pardon Dalam Sistem Hukum Indonesia (Studi Perbandingan Sistem Hukum Indonesia Dengan Sistem Hukum Barat)*" by Mufatikhatul Farikhah is that both articles focus on the absence of legal norms

[10] Alfret dkk, "Konsep Putusan Pemaaf Oleh Hakim (*Rechterlijk Pardon*) Sebagai Jenis Putusan Baru Dalam KUHAP", *Krtha Bhayangkara* vol. 17, no. 3 (2023), p. 1.

[11] Mufatikhatul Farikhah, "Rekonseptualisasi Judicial Pardon Dalam Sistem Hukum Indonesia (Studi Perbandingan Sistem Hukum Indonesia Dengan Sistem Hukum Barat) ", *Jurnal Hukum & Pembangunan 48*, no. 3 (2018), p. 1.

regarding judicial pardon verdicts in KUHAP and the limitation of judicial pardon application in the current National Criminal Code. In contrast, the author's article places greater emphasis on the formulation of an ideal model of judicial pardon sentencing in the future in order to prevent disparities in sentencing among judges when granting pardons.

Methodology

The research is normative or, commonly known as literature research, with a descriptive character that focuses on examining statutory regulations and legal doctrine. A descriptive study aims to gain a deeper understanding of a particular phenomenon and to find the answers to a legal issue through explanatory analysis. The research approach employed by the author is a statutory approach and a comparative legal approach. The author tried to examine the provisions regarding judicial pardons as regulated in Indonesia's positive law, specifically the National Criminal Code, and compare them with similar provisions in other countries in order to provide comprehensive answers to the research questions.

In this study, the author addresses the research questions by applying a legal theory of interpretation, specifically systematic interpretation, which involves connecting the parameters of judicial pardon in the National Criminal Code with other related provisions. Additionally, the author strengthens the analysis by employing a comparative legal approach, examining the formulation of judicial pardon in other civil law countries, such as the Netherlands and Portugal, to obtain more thorough answers to the legal issues discussed. Ultimately, the author hopes that this article can contribute to resolving the issue of normative ambiguity surrounding judicial pardon in the National Criminal Code and offer objective parameters for judges in applying judicial pardon decisions to prevent disparity of verdicts in judicial pardon based on the National Criminal Code.

The Issue of Formulating Judges' Exculpatory Norms in The National Criminal Code

The main principle in criminal law is the principle of legality, which essentially states that no act can be punished unless there is a law that regulates it. The principle of legality relates to criminal acts (*actus reus*), while the principle of culpability relates to criminal responsibility (*mens rea*). In the doctrine of dualism in criminal law, there is a clear distinction between criminal acts and criminal responsibility. This means that someone who commits a criminal act is not necessarily subject to punishment; it must first be determined whether the defendant has the capacity to be held responsible. According to Barda Nawawi Arief, there are three components or substances in criminal law, known as the *trias* of criminal law, which consist of Criminal acts, criminal responsibility, and sentencing.[12] More simply, a judge can impose a sentence using the following formulation:

Table 1. Sentencing Formula.

SENTENCING=
CRIMINAL ACTS + CRIMINAL RESPONSIBILITY

Along with the development of the times, the conventional model of the *trias* of criminal law is considered no longer relevant to current developments and the modern school of criminal law, which aims to avoid unnecessary retaliation against offenders and views punishment as a last resort (*ultimum remedium*). This is because sentencing is only seen as a consequence of the existence of a criminal act and the defendant's criminal responsibility, without considering the purpose of imposing the sentence itself, which is a concept also referred to as the rigid certainty model.[13] Furthermore, a different approach is regulated in KUHP Nasional, where in examining a criminal case, the judge must also consider the purposes and guidelines of sentencing, as stipulated in Article 51 and Article 54 paragraph (1) of the KUHP Nasional.

[12] Barda Nawawi Arief, *Kebijakan Hukum Pidana Perkembangan Konsep KUHP Baru*, (Jakarta: Kencana, 2011), p. 79.

[13] Badan Pembinaan Hukum Nasional (BPHN), *Naskah akademik RUU Kitab Undang-Undang Hukum Pidana*, (Jakarta: BPHN, 2015), p. 22.

Furthermore, concerning judicial pardon (*rechterlijk pardon* in Dutch), it can be interpreted as a form of forgiveness for an act that violates the law, based on considerations of justice within society.[14] This means that in the judicial pardon mechanism, the defendant is declared proven to have committed a criminal act and can be held criminally responsible. However, considering certain circumstances, such as the minor nature of the offense, the personal circumstances of the offender**,** and the conditions at the time and after the crime occurred, the judge has the authority to grant a pardon to the defendant by imposing a judicial pardon sentence. Historically, judicial pardon has been recognized since the era of the Code of Hammurabi, which essentially granted judges the authority to pardon individuals who committed criminal acts due to specific circumstances.[15] Initially, judicial pardon emerged as a reaction to the existence of short-term imprisonment, namely sentences imposed for relatively short periods. These short sentences often fail to achieve the actual purpose of imprisonment, which is to properly reintegrate the convicted person back into society.[16] The criticism put forward by these academics aligns with the modern school of criminal law, which prioritizes corrective and rehabilitative justice while avoiding the retributive paradigm in criminal law. According to Andi Hamzah, the provision on judicial pardon applies in cases where the judge does not impose any significant punishment or action, although the judge may still impose a sentence if deemed necessary. This stems from the subsosialis/*subsocialiteit* concept, which means that even if an act fulfills the elements of a criminal offense if the act is socially considered minor, there is no need to impose a sentence.[17]

Furthermore, during the Roman era under King Charles**,** judicial pardons were applied arbitrarily, and the king granted pardons or

[14] Nefa Claudia Meliala, *Rechterlijk Pardon (Pemaafan Hakim)* …., vol. 8, p. 562.

[15] Adey Ardhan Saputro, "Konsepsi Rechterlijk Pardon atau Pemaafan Hakim Dalam Rancangan KUHP", *Mimbar Hukum* vol. 28, no. 1 (2016), p. 64.

[16] Hans Jorg Albrecht, "*Sanction Policies and Alternative Measure to Incarcetion: European Experiences with Intermediate and Alternative Criminal Penalties*," Makalah, (2010), UNAFEI International Training course visiting Experts Paper, Fuchu Jepang.

[17] Andi Hamzah, *Asas-Asas Hukum Pidana*, (Jakarta: Rineka Cipta, 2008), p. 137.

forgiveness to anyone without clear indicators or criteria.[18] Since the emergence of the concept of separation of powers between the executive, legislative, and judicial branches, namely *trias politica*, the institution of pardon/forgiveness, which was originally granted by the head of state as part of the executive branch, gradually shifted to the judiciary power. The judiciary was given this role because it is responsible for enforcing the laws made by the legislative and executive branches. This shift occurred due to criticism that pardons granted by the executive branch were seen as interference by the executive in the judicial process. As a result, the pardon mechanism was revived under a model where the authority rests with the judiciary.

According to Keizer**,** judicial pardon serves as a safety valve or emergency exit within the sentencing process.[19] In a famous case in France on 5 March 2001, there was a mother named Anne Pasquio who had three children, one of whom, a 10-year-old child, had autism. Over time, the child's condition worsened, causing significant suffering for both the child and the mother. Out of love and compassion, the mother pushed her child off a pier into the water, resulting in the child's death.[20] At the time, the case caused a great public stir in France**,** as the killing was driven by compassion**.** However, the act fulfilled the elements of a criminal offense**.** On the other hand, the case was not classified as a minor offense**,** and the offender was not elderly**,** so the prosecution proceeded against her**.**

In the criminal justice system, a criminal act is understood as a threat to the state, which disrupts balance within society. Therefore, criminal law serves as *ius puniendi* criminal law in a subjective sense, where the state has the authority to impose punishment, as stipulated by law, on anyone who commits a prohibited act or fails to carry out a required act. Meanwhile, under the concept of *ius poenale* criminal law in an objective sense, the state is granted legitimacy to determine

[18] Andi Hamzah, *Asas-Asas*……..., p.137.

[19] Anza Ronaza Bangun dkk, "Rechterlijk Pardon (Pemaafan Hakim) Dalam Kitab Undang-Undang Hukum Pidana Di Sistem Pemidanaan di indonesia", *Al-Furqan: Jurnal Agama, Sosial, dan Budaya* vol. 2, no. 5 (2023), p. 375.

[20] Anza Ronaza Bangun dkk, "*Rechterlijk Pardon*….., vol. 2, p. 375.

which acts are prohibited and which acts are mandatory.[21] Furthermore, in the context of the formulation of judicial pardon as set out in Article 54 paragraph (2) of the KUHP Nasional, several conditions must be met, including the minor nature of the act, the personal circumstances of the offender, the conditions at the time the crime was committed and the circumstances thereafter, as well as considerations of justice and humanity. However, this raises normative issues. The normative issues related to the formulation of judicial pardon as regulated in Article 54 paragraph (2) of the KUHP Nasional are as follows:

The Formulation of Judicial Pardon That Is Abstract in Nature

Based on Article 54 paragraph (2) of the KUHP Nasional, there are four (4) conditions for the imposition of judicial pardon, namely: the minor nature of the act, the personal circumstances of the offender, the conditions at the time the criminal act was committed and the circumstances thereafter, and the requirement to consider aspects of humanity and justice.

These four conditions are abstract, and there are no concrete parameters further explained in the KUHP Nasional. As a result, judges must interpret the law to determine the meaning of these conditions. Each interpretation, depending on the theory used, could lead to different conclusions. Therefore, the absence of clear parameters for the conditions of judicial pardon has the potential to create disparity in court decisions, which ultimately fails to ensure legal certainty. This is contrary to the legal maxim *similia similibus curantur*, which means that similar cases should be treated with similar decisions.

Issues Related to Criminal Acts Involving Victims

One type of offense in criminal law is offenses causing harm and offenses creating a state of danger.[22] Criminal acts causing harm (*delik merugikan*) are designed to protect individual rights, while

[21] P.A.F. Lamintang, *Dasar-Dasar Hukum Pidana Indonesia*, (Bandung: Citra Aditya Bakti, 1996), p. 3-5.

[22] Eddy O.S. Hiariej, *Prinsip-Prinsip* …., p. 133.

criminal acts creating a state of danger (*delik menimbulkan keadaan bahaya*) are offenses that do not directly cause harm or suffering to the victim.[23] Offenses causing harm (*delik merugikan*) are generally applied to criminal acts that directly involve victims. In cases where there is a direct victim, the victim's forgiveness becomes an important consideration for the judge.

In Supreme Court Regulation (PERMA) Number 1 of 2024 on the Implementation of Restorative Justice, it is explained that a peace agreement is a primary requirement for applying restorative justice. Therefore, if one party refuses to reconcile, the judge cannot proceed with the restorative justice process. A problem arises in cases where there is a direct victim, and the victim refuses to reconcile or forgive the offender. However, at the same time, the judge believes that the offender's actions meet the criteria for judicial pardon as stipulated in Article 54 paragraph (2) of the KUHP Nasional. This issue is not regulated in the KUHP Nasional, meaning the judge must engage in legal interpretation and reasoning to find a solution to this legal problem.

The Requirements for Judicial Pardons That Are Alternative in Nature

Upon closer examination, the norm formulation of the requirements for judicial pardon in Article 54 paragraph (2) of the KUHP Nasional uses the conjunction "or." It means that if one of the conditions for granting a judicial pardon is met, the judge may already impose a judicial pardon on the defendant.

This is further reinforced by the fact that the formulation of judicial pardon uses the word "may" as the conjunction between the requirements for judicial pardon and the imposition of judicial pardon itself. As a result, the decision to impose judicial pardon is entirely left to the judge's discretion, whether to grant or not grant judicial pardon, even if the defendant meets one or more of the requirements for judicial pardon.

Furthermore, when imposing judicial pardon, the judge must also consider aspects of justice and humanity, although these two

[23] Eddy O.S. Hiariej, *Prinsip-Prinsip* …., p. 133.

factors are not sufficiently explained. While justice can be simply understood as giving each person what they are rightfully entitled to based on their obligations, several experts hold differing views on the meaning of justice itself. These differences in interpretation among experts also lead to varying understandings between judges, which in turn could impact the consistency of how judicial pardon is applied.

Formulation of Parameters for Judicial Pardon in the National Criminal Code in The Future to Ensure Legal Certainty and Justice

As with the first aspect, please write the article in the same way including a subsection if required. In order to conduct legal discovery on a norm that is vague or abstract, there are several legal discovery methods that can be used, including the comparative law method and legal interpretation. In the study of comparative law, experts identify three elements of legal comparison, namely *comparatum*, *comparandum*, and *tertium comparationis*. *Comparatum* refers to the elements being compared in the study. *Comparandum* is the subject that becomes the focus of the comparison. Meanwhile, *tertium comparationis* refers to the common characteristics shared by each legal element being compared in the study.[24] *Tertium comparationis* is understood as the common element shared by the variables to be compared so that the legal study conducted can provide meaning and produce a functional impact.[25] Legal interpretation, on the other hand, refers to an instrument used to explain the provisions of a legal norm contained in an article that is abstract in nature so that it can then be implemented into a concrete event, thereby creating fair and legally certain law enforcement.

In this article, the author makes a comparison between the Dutch Penal Code and the Portuguese Penal Code for the following reasons: the Netherlands is the country that provided the foundation for Indonesia's Penal Code through the *Wetboek van Strafrecht* (WvS), while Portugal is a country that also adheres to the Continental European legal or Civil Law system, the same system adopted by Indonesia.

[24] Ratno Lukito, *Perbandingan Hukum Perdebatan Teori dan Metode*, (Yogyakarta: Gadjah Mada University Press, 2016), p. 26.

[25] Ratno Lukito, *Perbandingan Hukum…..,* p. 26.

Therefore, both countries fulfill the elements of *comparatum*, *comparandum*, and *tertium comparationis*. As for legal interpretation, the author will use the systematic interpretation method by linking the provisions on judicial pardon in Article 54 paragraph (2) of the KUHP Nasional with other relevant laws and regulations.

Judicial pardon has two main objectives, namely as a form of criticism towards the principle of legality, which is considered too rigid, and as an alternative to light imprisonment.[26] Therefore, judicial pardon seeks to position criminal law not as rigid law but as flexible law. The background of this idea of flexibility in criminal law stems from the conditions in the Netherlands at that time, where judges believed that the defendant's actions fulfilled the elements of a criminal offense, but the defendant's actions were considered very minor. As a result, judges would still impose a prison sentence, even though the prison sentence imposed was also short.[27] The short prison sentence, of course, does not provide a rehabilitative effect on the inmate but rather focuses solely on serving as a means of retributive revenge. This situation eventually led the Netherlands to include the provision of Article 9a of the Dutch Penal Code/Criminal Code Act of 3 March 1881, which is aimed at reducing short prison sentences. The wording of Article a quo is as follows:

> "The court may determine in the judgment that no punishment or measure shall be imposed, where it deems this advisable, by reason of the lack of gravity of the offense, the character of the offender, or the circumstances attendant upon the commission of the offense or thereafter."

Generally, the formulation of judicial pardon under Article 54(2) of Indonesia's National Criminal Code and Article 9a of the Dutch Penal Code is almost identical, as both require the offense to be minor in nature, take into account the offender's personal circumstances, or consider the circumstances accompanying the consequences of the offense. In practice, the application of judicial pardon in the Netherlands largely depends on each judge's interpretation in applying

[26] ICJR, Aliansi Nasional RKUHP, Pantau KUHAP, "*Tinjauan Atas Non-Imposing of a Penalty/ Rechterlijk Pardon/ Dispensa de Pena dalam RKUHP Serta Harmonisassinya dengan RKUHAP",* (Jakarta: Institute for Criminal Justice Reform, 2016), p. 4-7.

[27] ICJR, Aliansi Nasional RKUHP, Pantau KUHAP, "*Tinjauan Atas*…..p. 22.

the parameters of pardon, such as the lack of gravity of the offense, the character of the offender, or the circumstances attendant upon the commission of the offense or thereafter. For example, in the decision of the Court of Appeal s'-Hertogenbosch No. 2015:2093 dated 10 June 2015, the defendant was charged under the provision of child neglect for not allowing a child under his guardianship to attend school on Fridays. In its considerations, the judge stated that the defendant was found guilty and could be held criminally responsible. However, no punishment was deemed necessary, as the reason for not allowing the child to attend school on Fridays was that the child's motivation had significantly deteriorated since Friday schooling began. Therefore, the defendant and his wife agreed to provide home-schooling for their child.[28] The panel of judges, with the chair Judge Meeuwis, in its considerations, stated that the defendant didn't have malicious intent in not allowing his child to attend school on Fridays. Based on the circumstances at the time the offense was committed, the panel concluded that although the defendant was guilty and could be held criminally responsible, there was no need to impose a penal sentence.[29]

Meanwhile, the provisions for judicial pardon in Portugal are slightly different, as they add a concrete requirement: it can only be applied to an offense punishable by a prison sentence of no more than 6 (six) months or a fine of no more than 120 (one hundred twenty) days. Furthermore, judicial pardon as regulated in Article 74 of the Portuguese Criminal Code (Criminal Code of Portugal, Law No. 59/2007 of 4 September, Twenty-third Amendment to the Criminal Code, approved by Decree-Law No. 400/82 of 23 September) reads as follows:

> "When the crime is punishable with a sentence of imprisonment for not more than six months, or only with a fine penalty for not more than 120 days, the court may declare the defendant guilty but not apply any sentence if:

[28] Gerechtshof's-Hertogenbosch, "Arrest van de meervoudige kamer voor strafzaken van het gerechtshof's-Hertogenbosch", *De Rechtspraak* (10 June 2015),https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHSHE:2015:2093&showbutton=true&keyword=rechterlijk%2Bpardon&idx=1, accessed 30 Apr 2025.

[29] *Ibid.*

1. The unlawfulness of the act and the agent's guilt are small;
2. The damage has been repaired, and
3. There are no prevention reasons opposing to the discharge without punishment."

It should be noted that according to Article 147 of the Portuguese Penal Code, the provisions regarding fine penalties in the Portuguese Penal Code are based on the offender's daily income so that the fine imposed on wealthy individuals is greater than that imposed on individuals with lower incomes for the same type of offense. Furthermore, the conditions for imposing a judicial pardon under the Portuguese Penal Code are cumulative, meaning that a judge may only impose a judicial pardon if all the conditions stated in Article 74 of the Portuguese Penal Code have been met. Based on a comparative legal study with the Dutch Penal Code and the Portuguese Penal Code, Indonesia may adopt the formulation of judicial pardon from the Portuguese Penal Code by imposing strict requirements for applying judicial pardon. It includes a concrete condition that it applies only to offenses with light penalties by specifying the maximum penalty, as well as the implementation of cumulative conditions so that a judge may only impose a judicial pardon if all those conditions are fulfilled.

In practice in Portugal, judges may only issue a pardon judgment in cases where the defendant's actions meet the conditions for such a decision, namely a prison sentence not exceeding six (6) months or a fine not exceeding 120 (one hundred and twenty) days. It means that although Article 74 of the Portuguese Penal Code sets out the parameters for issuing a pardon judgment—such as the act and the fault of the offender being relatively minor, the damage caused by the criminal act having been repaired, and the absence of grounds for eliminating the issuance of a pardon—the judge is still bound by the provision that the offense must carry a penalty of no more than six (6) months of imprisonment or a fine of 120 (one hundred and twenty) days. An example is the judgment of the Coimbra Court of Appeal No. 615/20.0PBCBR.C1 dated 26 March 2025, which upheld the Coimbra District Court's decision to acquit Defendant AA and Defendant BB, who had committed acts of violence against each

other.[30] Furthermore, in the judgment of the Coimbra Court of Appeal No. 325/22.4GB SRT.C1 dated 6 March 2024, in a case where the defendant, BB, pushed his assistant, AA, causing AA to fall to the ground, then proceeded to strangle AA and repeatedly strike him, and subsequently, AA was repeatedly beaten again.[31]

In both rulings, the defendants were found to have violated Article 143 of the Portuguese Penal Code, which regulates minor acts of violence and carries a maximum penalty of three (3) years of imprisonment or a fine. Paragraph 3 of this Article further stipulates that the court may exempt the defendant from punishment (while still declaring that the defendant's actions are proven and that the defendant may be held criminally liable) in cases involving mutual fighting where it cannot be determined who initiated the aggression, as well as in cases where the offender acted solely in self-defense. With regard to the practical implementation of judicial pardon decisions, it can be concluded that in the Netherlands, judges are granted broad discretion to define the parameters for issuing a pardon judgment, whereas in Portugal, judges are bound by the provision that the offense must carry a penalty of no more than six (6) months of imprisonment or a fine of 120 (one hundred and twenty) days, as well as by the special pardon provisions for violent offenses as stipulated in Article 143(3) of the Portuguese Penal Code**.**

In the context of Indonesia, judicial pardon or *rechterlijk pardon* is only regulated in Article 54(2) of the KUHP Nasional, which essentially sets conditions for judges in the form of the minor nature of the act, the offender's personal circumstances, or the circumstances at the time of the offense and those occurring subsequently, while also considering aspects of humanity and justice. However, the KUHP

[30] Acordao do Tribunal da Relacao de Coimbria, "Acórdão do Tribunal da Relação de Coimbra n.º 615/20.0PBCBR.C1", *Instituto de Gestao Financeira e Equipamentos da Justica I.P (IGFEJ)* (25 Mar 2025), https://www.dgsi.pt/jtrc.nsf/8fe0e606d8f56b22802576c0005637dc/0b6e6afb672a848d80258c65004c5bf2?OpenDocument, accessed 20 Apr 2025.

[31] Acordao do Tribunal da Relacao de Coimbria, "Acórdão do Tribunal da Relação de Coimbra n.º 325/22.4GB SRT.C1", *Instituto de Gestao Financeira e Equipamentos da Justica I.P (IGFEJ)* (06 Mar 2024), https://www.dgsi.pt/jtrc.nsf/8fe0e606d8f56b22802576c0005637dc/c9f943b5e4bb931580258af6003b4375?OpenDocument, accessed 20 Apr 2025.

Nasional does not provide any explanation of these parameters. Therefore, judges must interpret these provisions themselves to find solutions to these legal issues. The following is an explanation of the four parameters using various methods of legal interpretation.

The Minor Nature of the Act

According to Barda Nawawi Arief, the absence of limitations or criteria regarding the minor nature of the act in judicial pardon is intended to ensure that judges are not restricted to granting pardon only for certain types of offenses.[32] Without an objective regulation regarding the limitation on the minor nature of the act, judges must perform a systematic interpretation by linking one article with another to find solutions to legal problems. In the explanation of Article 54(2) of the KUHP Nasional, it is stated that the provisions on judicial pardon are intended to grant judges the authority to forgive someone who is guilty of committing a minor offense. This judicial pardon is recorded in the verdict, which must state that the defendant has been proven guilty of committing an offense. This means that judicial pardon only abolishes the penalty imposed on the defendant but does not eliminate the offense itself or the defendant's criminal responsibility.

Based on a systematic interpretation, if the provisions of Article 54(2) of the KUHP Nasional are linked with those of Article 70(2) and Article 79(1) of the KUHP Nasional, meanwhile Article 70(2) regulates the non-application of Article 70(1), which advises judges, as far as possible, not to impose imprisonment if certain conditions are met as stipulated in that paragraph. The condition for imposing judicial pardon in terms of the minor nature of the act can be derived from the provisions of Article 70(2), which include offenses with a penalty of 5 (five) years or more, offenses punishable by a specific minimum penalty, certain offenses that are very dangerous or harmful to society, or offenses that harm the state's finances or economy. Moreover, if interpreted according to the categorization of fines in Article 79(1), the requirement of the act being minor can also be limited to, at most, a Category II fine amounting to 10,000,000.00 (ten

[32] ICJR, Aliansi Nasional RKUHP, Pantau KUHAP, "*Tinjauan Atas*…..p. 4.

million rupiah). This interpretation is based on the provisions of Article 132(1)(d) of the KUHP Nasional, which essentially states that prosecution shall lapse if the maximum fine is paid voluntarily for offenses that are only subject to, at most, a Category II fine.

In addition, when linked to the provisions regarding light crimes in Article 205 (1) of Act Number 8 of 1981 on Criminal Procedure (KUHAP), which essentially states that crimes punishable by imprisonment or detention for a maximum of 3 (three) months and/or a fine of no more than Rp7,500.00 (seven thousand five hundred rupiahs) or Rp7,500,000.00 (seven million five hundred thousand rupiahs) are included in the category of light crimes with an expedited examination process. Furthermore, based on Supreme Court Regulation (PERMA) No. 2 of 2012 on the Adjustment of Limits on Light Crimes and the Amount of Fines in the Criminal Code, the threshold for a crime to be considered light, in the case of the value of goods or money generated from certain crimes such as theft, fraud, embezzlement, or handling of stolen goods, is set at Rp2,500,000.00 (two million five hundred thousand rupiah).

Thus, by adopting the norm for light crimes as regulated in Article 205 of KUHAP, the requirement for the act being minor can be interpreted as any type of crime for which the legal penalty is imprisonment or detention of no more than 3 (three) months and/or a fine of no more than Rp7,500,000.00 (seven million five hundred thousand rupiah).

The Personal Circumstances of the Offender

KUHP Nasional does not define what the offender's personal circumstances mean. However, the explanation of Article 22 of the KUHP Nasional states that "personal circumstances" refer to the state or condition at the time when the principal offender or an accomplice commits an offense, such as being of older or younger age, holding a particular position, practicing a specific profession, or suffering from a mental disorder. From this explanation, it can be understood that the

offender's personal circumstances relate to the condition of the offender at the time of committing the offense, whether acting as the principal (actor intellectualist) or merely as an accomplice, whether the offender is underage or too old, whether the offender belongs to a particular profession (for example, a doctor committing malpractice with only minor consequences), and whether the offender suffers from mental disorders, which is one of the grounds for penalty abatement as stipulated in Article 44 of the Old Criminal Code.

Furthermore, Article 70(1)(a, b, c, j, k) of the KUHP Nasional states that judges should, as far as possible, refrain from imposing imprisonment if the defendant is a child (i.e., under 18 years old), if the defendant is over 75 years old, if the defendant is committing an offense for the first time, if the defendant's personality and behavior are convincing enough that they will not commit further offenses, or if imprisonment would cause great suffering to the defendant or their family. These provisions are consistent with the explanation in Article 22, which provides criteria for the offender's personal circumstances, including being a principal actor or an accomplice, being either young or old, holding a particular position, practicing a specific profession, or suffering from a mental disorder.

Moreover, Article 74(1) of the KUHP Nasional stipulates that a person who commits an offense punishable by imprisonment due to personal circumstances may be subject to an alternative penalty. The term "alternative penalty" refers to a method of implementing a sentence as an alternative to imprisonment that considers the balance between the offense committed and the offender's personal circumstances (*daad-daderstrafrecht*). Additionally, through systematic interpretation, judges can connect the provisions regarding the offender's personal circumstances with the twelve sentencing guidelines outlined in Article 54(1)(g) and (k) of KUHP Nasional, which include the offender's life history, social conditions, and economic status, as well as the legal values and justice prevailing in society.

The Circumstances at the Time of the Commission of the Offense and Those Occurring Subsequently

Similarly to the other conditions for imposing judicial pardon, the condition "the circumstances at the time of the commission of the

offense and those occurring subsequently" is also not explicitly explained in the KUHP Nasional. According to Adery Syahputra, the lack of clarification regarding this condition can potentially lead to bias with the provisions concerning emergency situations (*noodtoestand*)[33] according to Article 22 of the KUHP Nasional. Furthermore, using systematic interpretation, if the provision regarding the circumstances at the time of the commission of the offense and those occurring subsequently is linked with the sentencing guidelines in Article 54(1) of KUHP Nasional, it can be interpreted that these circumstances align with the sentencing guidelines in points b, d, e, f, and j, which include the motive and objective behind committing the offense, whether the offense was premeditated or not, the method of committing the offense, the offender's behavior and actions after committing the offense, and forgiveness from the victim and/or the victim's family. In other words, the judge must consider, based on the evidence proven in court, whether the defendant's act meets the mitigating criteria specified in those points.

Considering the Aspects of Justice and Humanity

Aequum et bonum est lex legume, meaning that what is considered just and good is the law itself. Justice is the fundamental value in law, utility is a pragmatic value, and legal certainty is an instrumental value.[34] Where in cases of conflict between justice and legal certainty, justice takes precedence. Although KUHP Nasional does not clearly define what is meant by the values of justice and humanity, Article 53(2) of the KUHP Nasional states that if a conflict arises between legal certainty and justice in the enforcement of the law, the judge is obliged to prioritize justice. John Rawls views the concept of justice as fairness, which consists of two principles: first, that every person is entitled to the same rights under the broadest possible scheme of fundamental liberties equal to those of others, and second, that social and economic differences must be arranged so that they provide the

[33] Adey Syahputra, *Tinjauan atas Non-Imposing of a Penalty/ Rechterlijk Pardon/ Dispensa de Pena dalam RKUHP serta Harmonisasinya dengan RKUHAP,* (Jakarta: Institute for Criminal Justice Reform, 2016), p. 22.

[34] Zainal Arifin Mochtar dan Eddy O.S. *Dasar-Dasar…..,* p. 115.

expected benefits and are attached to positions and offices open to everyone.[35]

Furthermore, in the context of law enforcement, Rawls introduces principles consisting of rationality, consistency, publicity, and the presumption of innocence. The principle of rationality essentially states that matters regulated by law are those that are reasonably considered to be either prohibited or permitted by law. The principle of consistency demands that the same law be applied to the same event. The principle of publicity stipulates that the law must be widely disseminated so that everyone is aware of it, even though there is what is known as legal fiction or the assumption that everyone knows the law. Lastly, the principle of the presumption of innocence essentially means that a person should not be declared guilty before a final, legally binding court decision declares them so.[36]

Furthermore, the principle of humanity is essentially aligned with the fifth principle of Pancasila, "Just and Civilized Humanity." This means that in law enforcement, judges, in addition to prioritizing the value of justice, must also uphold a civilized approach to law enforcement so that, especially in criminal law, the enforcement is consistent with the mission of the KUHP Nasional namely, corrective justice and rehabilitative justice while avoiding a purely retributive purpose. Moreover, this is done to ensure that the enforcement of criminal law achieves its intended purpose, which is to resolve conflicts arising from criminal offenses, restore balance, and foster a sense of security and peace in society.

Furthermore, in addressing issues related to crimes involving victims, there must be synchronization with the provisions of Article 6(2)(a) of PERMA No. 1 of 2024 on Guidelines for Adjudicating Criminal Cases Based on Restorative Justice, which requires reconciliation or forgiveness from the victim. Therefore, if the defendant has met the conditions for being granted a judicial pardon, but the victim refuses to forgive the defendant, the judge cannot impose a judicial pardon. The basis for this reasoning is that the National Criminal Code is oriented toward corrective justice and

[35] Zainal Arifin Mochtar dan Eddy O.S. *Dasar-Dasar…..,* p. 336

[36] Yustinus Suhardi Ruman, "Keadilan Hukum Dan Penerapannya Dalam Pengadilan", *Jurnal Humaniora* vol. 3, no. 2 (2012), p. 349-351.

restorative justice.[37] Corrective justice attempts to rectify the criminal act committed by the offender by imposing sanctions in the form of penalties or measures, whereas restorative justice aims to remedy the consequences of the criminal act. Thus, corrective justice is justice for the offender, while restorative justice is justice for the victim.

Thus, in imposing a sentence, besides meeting the elements of a criminal act and the defendant's criminal liability, the judge must also consider the objectives and sentencing guidelines as stipulated in Articles 51 and 54(1) of the KUHP Nasional. One of the sentencing guidelines set forth in Article 54(1)(j) of the National Criminal Code is the forgiveness from the victim or their family. Based on these considerations, a judicial pardon ruling must also take into account the willingness of the victim or their family to forgive the criminal act committed by the defendant.

Based on the above explanation, the author hopes that judicial pardon can become a solution for minor offenses that do not require a sentence while still upholding justice and legal certainty, thereby minimizing any disparities in judicial pardon rulings.

Conclusion

Based on the research findings, it can be concluded that the issues regarding the formulation of judicial pardon in KUHP Nasional consist of the formulation of judicial pardon in Article 54(2) of KUHP Nasional, which is abstract in nature because it does not provide an explanation for the conditions such as the minor nature of the act, the offender's personal circumstances, the circumstances at the time the offense was committed and those occurring subsequently, while also taking into account humanity and justice. Furthermore, KUHP Nasional does not regulate situations where the victim does not forgive the defendant, even though the judge has met the conditions for judicial pardon. In addition, formulating the conditions for judicial pardon, which is alternative in nature and uses the modal "may" between the conditions for judicial pardon and the imposition of judicial pardon, results in judicial pardon being entirely within the judge's discretion, relying on their own interpretation.

[37] Eddy O.S. Hiariej, *Prinsip-Prinsip* …., p. 55.

Furthermore, the future formulation of judicial pardon in KUHP Nasional is that Indonesia may adopt the provisions regarding the formulation of judicial pardon in Article 74 of the Portuguese Criminal Code, which applies only to offenses with a penalty of imprisonment not exceeding 6 (six) months or a fine not exceeding 120 (one hundred and twenty) days, as well as cumulative conditions. In addition, regarding the formulation of the conditions for judicial pardon in the KUHP Nasional, the author proposes that the condition regarding the minor nature of the act be interpreted in terms of a Category II fine offense, that is, an amount of Rp10,000,000.00 (ten million rupiah), based on the reasoning in Article 132(1)(d) of the National Criminal Code, which essentially states that prosecutorial authority lapses if the fine is paid voluntarily for an offense that is punishable by a fine of at most Category II. Moreover, the provisions of Article 70(2) of the National Criminal Code, which essentially regulate that a judge may still impose imprisonment if certain conditions are met—namely, for offenses with a penalty of 5 (five) years or more, offenses punishable by a specific minimum penalty, certain offenses that are extremely dangerous or harmful to society, or offenses that harm the state's finances or economy—can also be adopted. Furthermore, the provision regarding the minor nature of the act can be interpreted according to the light offense provisions in Article 205(1) of the Criminal Procedure Code (KUHAP), which essentially states that an offense punishable by imprisonment or detention for a maximum of 3 (three) months and/or a fine not exceeding Rp7,500.00 (seven thousand five hundred rupiahs) or Rp7,500,000.00 (seven million five hundred thousand rupiahs) is categorized as a light offense.

Furthermore, regarding the condition of the offender's personal circumstances, it can be interpreted based on the explanation in Article 22 of KUHP Nasional, which explains that personal circumstances refer to the condition at the time when the principal offender or an accomplice of an offense is either of older or younger age, holds a particular position, practices a specific profession, or suffers from a mental disorder. As for the condition regarding the circumstances at the time the offense was committed as well as those occurring subsequently, the judge must connect this with the

sentencing guidelines as stipulated in Article 54(1) of the KUHP Nasional, specifically points (b), (d), (e), (f), and (j), which include the motive and objective for committing the offense, whether the offense was planned or unplanned, the method of committing the offense, the behavior and actions of the offender after committing the offense, and forgiveness from the victim and/or the victim's family. As for the condition of considering justice and humanity, the judge must consider the principles of justice according to John Rawls, namely the principles of rationality, consistency, publicity, and the presumption of innocence.

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Arrest van de meervoudige kamer voor strafzaken van het gerechtshof's-Hertogenbosch.

Jurnal Hukum dan Peradilan Vol 14, no. 1 (2025), pp. 63-90
ISSN: 2303-3274 (p), 2528-1100(e)
DOI: https://doi.org/10.25216/jhp.14.1.2025.63-90