

The Application of Judicial Pardon in Criminal Law in Indonesia



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ABSTRACT: Judicial Pardon is a new concept in the Indonesian criminal law system introduced in Article 54 paragraph (2) of Law Number 1 Year 2023 on the Criminal Code (KUHP). This concept authorizes judges not to impose punishment on defendants who are proven guilty by considering aspects of justice and humanity. This research aims to analyze the position of Judicial Pardon in Indonesian criminal law and its model with the modern criminal law paradigm oriented towards restorative justice. The research method used is normative juridical with statute approach, comparative approach, and conceptual approach. The results showed that Judicial Pardon is part of judicial discretion which aims as an alternative punishment for minor offenders. In addition, this concept is in line with the theory of restorative justice which emphasizes victim recovery, offender rehabilitation, and balance in the punishment system. Nevertheless, the implementation of Judicial Pardon in Indonesia still faces challenges in terms of the limits of its application and its supervision mechanism. Therefore, clearer implementing regulations are needed to ensure that the application of this concept does not conflict with the principle of legal certainty and is not abused in criminal justice practice.

KEYWORDS: judicial pardon, criminal law, restorative justice, KUHP 2023, judge pardon.

I. INTRODUCTION

The dynamics of legal thinking always develop in line with the development of law and justice. No exception, legal thinking in Indonesia has also experienced a shift in thinking about punishment. This is translated as an initial step towards the reform of the national criminal law system as a whole, especially in the development or renewal of criminal law, not only involving the development of legal institutions alone, but also involving the development of criminal law as a whole, including aspects of substance or legal products such as criminal law regulations and cultural values that influence the legal system.¹

Progressive law was introduced in Indonesia by Sadjipto Rahardjo. Where this concept arises because of the recognition that the positive legal approach that has been applied in Indonesia has not fully met the needs. The idea of progressive law stems from concerns about the state of law enforcement in Indonesia, this is due to the goal of progressive law to ensure that law in Indonesia can function optimally by solving social problems. Law enforcement must ultimately be carried out with sympathy and mental fortitude to find alternative solutions that do not always follow standard procedures.²

Progressive law aims to find effective solutions oriented towards human interests, in line with the concept of Restorative Justice. This concept emphasizes the importance of meeting the needs of both victims and offenders, not just complying with the law or imposing criminal sanctions, and also involving community participation in the process. In this context, offenders must take responsibility for their actions, apologize, return stolen property, and perform community service. Victims are also involved in the process.³

The current Indonesian criminal law is a Dutch heritage (Het Wetboek van Strafrecht) which was updated through Law Number 1 Year 1946, changing the Dutch East Indies criminal law into the Indonesian Criminal Code. The Dutch heritage law has been too behind in following the development of society and the demands of a more modern criminal law.⁴ Problems with the

¹ Muhammad Yusuf Syakir dan Herman Sujarwo, "Kebijakan Permaafan Hakim (Rechterlijk Pardon) Dalam KUHP Baru", *Jurnal Studi Al-Qur'an Dan Hukum*, Vol. 9, no. 1 (2023), hlm. 109-118.

² Mukhidin, "Hukum Progresif Sebagai Solusi Hukum Yang Mensejahterakan Rakyat", *Jurnal Pembaharuan Hukum*, Vol. 1 No. 3, September-Desember 2014, hlm. 267.

³ Hanafi Arief, Ningrum Ambarsari, "Penerapan Prinsip Restorative Justice Dalam Sistem Peradilan Pidana Di Indonesia", *Jurnal Al'Adi*, Vol. X No. 2, Juli 2018, hlm. 177-178.

⁴ Agus Rusianto, *Tindak Pidana & Pertanggungjawaban Pidana: Tinjauan Kritis Melalui Konsistensi antara Asas, Teori, dan Penerapannya*, Jakarta: Kencana, 2016, hlm. 1.

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current development of the criminal justice system mean that it is no longer able to protect human rights and provide transparency to the public interest.⁵ The shift in punishment orientation from retributive to restorative in the colonial era marked a change in the punishment system. This system now focuses not only on the recovery and fulfillment of victims' rights, but also considers the sense of justice and humanity for the perpetrators. All of this led to the birth of the conception of judge forgiveness in criminal law.

The reform of criminal law in Indonesia is very important to achieve the decolonization of the national punishment system to be in line with the values, standards, and norms that dominate in the Indonesian legal community. According to Nico Keijzer and Schaffmeister, the conception of the judge's pardon (*rechterlijke pardon*) arises because many defendants who have actually been proven guilty but convicted will cause injustice, which will ultimately lead to conflicts between legal certainty and legal justice. In addition to avoiding chaos in the imposition of punishments that hurt humanity, the existence of this judge's pardon guideline can also be considered as a safety device or emergency exit against the strictness of criminal law as a result of the principle of legality.

Historically, the relationship between punishment and Judicial Pardon has existed since the Code of Hammurabi. The concept of Judicial Pardon is the result of comparative studies with several countries such as the Netherlands, Greece, Portugal and Uzbekistan.⁶ Whereas in Indonesia, the concept of Judicial Pardon was born in Law No. 1 of 2023 concerning the Criminal Code. Where Judicial Pardon is defined as the authority of the judge not to impose punishment on a defendant who is proven guilty. The concept of Judicial Pardon is expected to be a middle way to realize fair legal certainty in the Indonesian criminal justice system. However, there are considerations that judges can use to apply Judicial Pardon.

Where explicitly the concept of pardon is mentioned in Article 54 paragraph (2) of the latest Criminal Code, "The severity of the act, the personal circumstances of the perpetrator, or the circumstances at the time of the criminal offense as well as those that occur later can be used as a basis for consideration not to impose punishment or not to impose measures by considering aspects of justice and humanity." This concept is a new concept that is not recognized in the current Criminal Code, the concept of judge's forgiveness is a form of modification of rigid legal certainty, where the current formulation of punishment only lies in criminal acts and guilt.

Criminal cases are often perceived as receiving unfair verdicts by society, a phenomenon that has become common knowledge. Court decisions are often considered inhumane and contrary to the legal views of the community, especially in cases of crimes that are considered minor. One example is found in the decision of the Simalungun District Court Case Number 590/Pid.B/2019/PN Sim, which involved a theft case involving the defendant Grandfather Samirin. In this decision, Grandpa Samirin was sentenced to two months and four days in prison by the Simalungun District Court for taking leftover rubber latex from a plantation owned by PT Bridgestone, which caused a loss of Rp 17,480. Although the loss was relatively small, many people regretted the judge's decision in the case. They were of the view that the matter could have been resolved amicably or through alternative legal channels. This led to the view that the law appeared unfair.⁷

In this context, the judge makes a decision based on evidence that states that the defendant legally and convincingly committed the act charged, even though the judge may be of the opinion that the act was unnecessary. Criminal sanctions are applied by considering aspects of social justice and human values. This is the principle of legal certainty where a judge must not go beyond the limits that have been set.

This happens because, as is well known, the Panel of Judges in giving a decision in a case must comply with the provisions contained in the Criminal Procedure Code, where there are only 3 (three) possibilities that may occur:

1. Criminalization or imposition of punishment (*veroordeling tot enigerlei sanctie*)
2. Acquittal (*vrij spraak*)
3. Judgment of acquittal from all charges (*onslag van recht vervolging*).

A conviction confirms the official recognition of the defendant's guilt of the crime charged. An acquittal indicates that the charges against the accused cannot be proven conclusively and legally.⁸ Dalam hal ini, pada kasus sebelumnya, In case number 590/Pid.B/2019/PN Sim, the judge was not authorized to acquit the defendant. The latter decision indicates that the criminal act committed by the defendant did not involve an element of justifiable error (justification). This can also be caused by the presence of legally convincing evidence, but the defendant's actions are not considered criminal or unlawful. Instead, the act may fall within the realm of private law, commercial law, or other areas of law. Another possibility is the excuse of the person who pardoned.⁹

⁵ Eva Achjani Zulfa, *Pergeseran Paradigma Pemidanaan*, Bandung: Lubuk Agung, 2011, hlm. 2.

⁶ Mufatikhatul Farikhah, "Rekonseptualisasi Judicial Pardon Dalam Sistem Hukum Indonesia (Studi Perbandingan Sistem Hukum Indonesia Dengan Sistem Hukum Barat)", *Jurnal Hukum & Pembangunan*, Vol. 48 No. 3, (2018), hlm. 558.

⁷ Putu Mery Lusyana Dewi, I Ketut Rai Setiabudhi, "Kebijakan Formulasi Rechterlijk Pardon (Pemaafan Hakim) Dalam RKUHP", *Jurnal Kertha Wicara*, Vol. 9 No. 9, 2020, hlm. 3.

⁸ Undang-Undang No 81 Tahun 1981 tentang Kitab Undang-Undang Hukum Acara Pidana, Pasal 193 (1).

⁹ Undang-Undang No 81 Tahun 1981 Pasal 191 (2).

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When discussing justification and excuse, the old Criminal Code recognized the concept of exculpatory grounds. In the context of criminal law, there are several factors that can prevent a person accused of a criminal offense from being punished. These factors are referred to as grounds for criminal expungement. Offenses that meet certain criteria can be exempted from punishment under this principle. There are two forms of grounds for criminal expungement, namely:

1. "The reason for not meeting individual responsibility that lies in the individual himself, also known as *inwending*. It refers to a condition in which a person has an abnormal mental state or psyche and thus cannot be held responsible for the act and cannot be subject to punishment."¹⁰
2. "The reason for a person's unaccountability that lies outside the person is called *outwending*. This matter is regulated in article:
 - a. Article 48 of the Criminal Code (*Overmacht*) can be due to urgent conditions;
 - b. Article 49 of the Criminal Code (*Noodweer*) means a defense of necessity;
 - c. Article 50 of the Criminal Code i.e. for carrying out the orders of the law; and
 - d. Article 51 of the Criminal Code It's for carrying out the command of the office."

The reasons for the elimination of punishment can be divided into:

1. Justification (*rechtvaardigingsgrond*)

"Although the act can legally be categorized as a criminal offense, its legitimacy can be nullified based on certain provisions in criminal law, which are regulated in Article 48, Article 49, Article 50, and Article 51 of the Criminal Code."

2. Excuses for forgiveness (*schulditsluitingsgrond*)

"The grounds for forgiveness relate to the personal circumstances of the perpetrator, indicating that the person cannot be held guilty or responsible for their actions. Articles related to this include Article 44, Article 48, Article 49 paragraph 2 of the Criminal Code, and Article 51 paragraph 2 of the Criminal Code."¹¹

While the defense and pardon grounds have similar legal implications in criminal exclusion, there is a new and similar concept in the latest Criminal Code, namely the principle of Judicial Pardon. This concept is an addition included in the KUHAP (Kitab Undang-Undang Hukum Acara Pidana). Prior to the KUHAP, the old KUHP did not regulate the granting of pardons by judges in the criminal justice process to criminals. Pardons by judges are rare in some countries as clemency is generally the domain of the executive, not the judiciary. However, in Indonesia, the concept of clemency is adopted by the executive power, and the use of the concept of pardon by judges is still relatively new, considering that usually the concept of pardon is under the authority of the executive.¹²

Judge's pardon, also known as *Rechterlijk Pardon* or Judicial Pardon or Non imposing of Penalty, refers to the act where a judge grants pardon to an accused despite the accused being found legally proven and beyond reasonable doubt to have committed the act charged. The purpose of this pardon remains, which is to declare that although a person has been found legally guilty, he or she will not undergo punishment. Although no punishment is imposed, the reasoning behind these decisions is not always based on the idea of a pardon by the judge (only in the case of short prison sentences), but essentially, all three have the same intention not to incriminate. Jan Lemmering found that the provision of Judicial Pardon first appeared in the Dutch Criminal Procedure Code. It indicates an admission of guilt without imposing sanctions, by granting a pardon by a state judge (low-level judge). The concept of impunity has appeal when applied in an empirical context in Indonesia.¹³

The KUHP has adopted a modern legal paradigm that has been widely applied throughout the world. This new paradigm is the vision of the National Criminal Code that no longer uses criminal law as a *lex talionis* or law of revenge. The vision prioritizes retributive justice, corrective justice, restorative justice, and rehabilitative justice. Corrective justice is aimed at the perpetrator. In this study, the vision of the National Criminal Code on corrective justice is considered, where the perpetrators of criminal offense will be sanctioned in the form of punishment or action.¹⁴

The proposed penal system also undergoes changes in the new Criminal Code. Currently, the correctional system applies a restorative justice approach, which aims to restore the social balance disrupted by criminal acts. This approach focuses on victim recovery, reconciliation between offenders and victims, and social rehabilitation of offenders. This method differs from the

¹⁰ Undang-Undang No. 1 Tahun 1946 tentang Kitab Undang-Undang Hukum Pidana, Pasal 44.

¹¹ H. Suyanto, *Pengantar Hukum pidana*, dalam Suyanto (ed.), Deepublish: Yogyakarta, 2018, hlm. 111-114.

¹² Adery Ardhan Saputro, "Konsepsi Rechterlijk Pardon Atau Pemaafan Hakim Dalam Rancangan KUHP", *Jurnal Mimbar Hukum*, Vol. 28 No. 1, Februari 2016, hlm 63.

¹³ M. Holy One. N Singadimedja, Ahmad Rosidi, "Mencari Kemungkinan Judicial Pardon Sebagai Salah Satu Alternatif Bentuk Pemidanaan", *Jurnal Ilmiah Rinjani*, Vol. 9 No. 1, 2021, hlm. 41.

¹⁴ Eddy O.S Hiariej, *Prinsip-Prinsip Hukum Pidana Edisi Penyesuaian KUHP Nasional*, Depok: Rajawali Pers, 2024, hlm. 55.

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previous punishment system which emphasized punishment and rehabilitation. In addition, the principles of justice and human rights protection are incorporated into the new Criminal Code.¹⁵

In Ridwan Suryawan's research, quoting Chairul Huda's opinion, explains that the principle of forgiveness can be applied if the judge considers that the defendant's guilt is significant enough, without the need to determine a specific sentence in a certain form of time. Practically, the implementation of this case can only be done in special cases with a low level of seriousness or trivial in nature.¹⁶ In Indonesia, there is a written legal basis for applying the principle of Judicial Pardon, as stipulated in Article 54 (2) of Law Number 1 of 2023 concerning the Criminal Code, which states:

“The severity of the act, the personal circumstances of the perpetrator, or the circumstances at the time of the crime as well as those that occur later can be used as a basis for consideration not to impose punishment or not to impose measures by considering aspects of justice and humanity”.¹⁷

In an effort to update the future punishment system in Indonesia, lawmakers (the President and the Parliament) attempted to include the concept of *rechterlijk pardon*, which is formulated in Article 54 Paragraph (2) of Law Number 1 of 2023 on the Criminal Code (the new Criminal Code). The concept of *rechterlijk pardon* is a new concept included in the National Criminal Code. This concept gives judges greater authority in deciding the defendant's case, with the aim that judges are not only bound by the three types of decisions regulated in the Criminal Procedure Code, namely acquittal, release from prosecution, and conviction. Judicial Pardon is a concept based on considerations of human values and justice. This concept emerged as a correction to the principle of legality, which is considered to cause legal rigidity in the Indonesian punishment system.

Based on the explanation above, researchers are interested in analyzing Judicial Pardon in Indonesia based on the New Criminal Code. The regulatory implications related to Judicial Pardon in the new criminal law is a progressive step in encouraging the idea of restorative justice. Progressive law in its application in criminal law aims to describe the role of the state and its institutions in a more “humane” manner and explore values that uphold the dignity of Indonesian society. Based on this, the formulation of the problem that the author raises is how the ideal model of Judicial Pardon is associated with the new paradigm of Indonesian criminal law. With the aim of knowing how the ideal model of Judicial Pardon is associated with the new paradigm of Indonesian criminal law.

II. RESEARCH METHODS

This research uses normative juridical methods, because the main focus of attention in this research is the application of Judicial Pardon in Indonesian criminal law, both the current positive law (*ius constitutum*) and the aspired law (*ius constituendum*). Based on this, in terms of the data, this type of research is a research that uses the type or type of normative legal research. Research on law using normative methods is carried out by identifying and conceptualizing law as norms, rules and regulations that apply to a particular sovereign state. Legal research with this approach is normative legal research or doctrinal legal research.¹⁸

This research uses a normative juridical approach, namely by studying/analyzing secondary data in the form of legal materials, especially primary legal materials and secondary legal materials, by understanding the law as a set of positive rules or norms in the legislative system that regulates human life. This research uses a method of approach, including:

1. *Statute Approach*; The statutory approach is carried out by reviewing all laws and regulations relating to the legal issues studied. The statutory approach is used to study the consistency and compatibility between a law and other laws or between laws and the Constitution or between regulations and laws. Researchers will look for *ratio legis* on the basis of the birth of the law to understand the philosophical content of the law.¹⁹ This is used to provide an explanation of Judicial Pardon.
2. *Comparative Approach*) is a research strategy conducted by comparing characteristics or parts in various research situations. The aim is to identify similarities or differences, so as to understand the underlying causes or relationships. In legal research, a comparative approach is used to compare a country's legal system with that of another country, or to compare a country's constitution with that of another country. This approach can be used to explore the background of the application of legal systems, find differences, and provide conclusions about a legal issue. In conducting a comparative legal approach, researchers need to pay attention to the legal system in the country to be studied, such as Civil Law and Common Law.

¹⁵ Parningotan Malau, “Tinjauan Kitab Undang-Undang Hukum Pidana (KUHP) Baru 2023”, *Jurnal Hukum dan Pranata Sosial Islam*, Vol. 5 No. 1, Januari-Juni 2023, hlm. 840.

¹⁶ Ridwan Suryawan, “Asas *Rechterlijk Pardon* (Judicial Pardon) Dalam Perkembangan Sistem Pemidanaan di Indonesia”, *Jurnal Inonesian Jounsl of Criminal and Criminology (IJCLC)*, Vol. 2 No. 3, November 2021, hlm. 172.

¹⁷ Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana.

¹⁸ Ronny Hanitijo Soemitro, *Metodologi Penelitian Hukum dan Jurimetri*, Jakarta: Ghalia Indonesia (1990), hlm. 4.

¹⁹ Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta: Kencana Prenada Media Group (2013), hlm. 133-134.

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3. *Conceptual Approach*) What is meant by a conceptual approach is an approach that departs from the views and doctrines that develop in legal science. By studying the views of doctrines in law, researchers will find ideas that give birth to legal notions, legal concepts and legal principles that are relevant to the issue at hand.²⁰ This approach is used to examine and study legal concepts or ideas about the application of Judicial Pardon in criminal law in Indonesia, because the rules and explanations in criminal law in Indonesia have not regulated Judicial Pardon.

III. RESULTS AND DISCUSSION

Criminal law in Indonesia has undergone a significant paradigm shift in recent decades. This change is in line with the development of a modern legal system that is no longer only oriented towards retribution, but emphasizes restorative and rehabilitative justice.²¹ This change is driven by various factors, such as increasing awareness of the importance of human rights, public demands for more humane justice, and evaluation of the effectiveness of the previous punishment system.

The National Criminal Code enacted by Law Number 1 Year 2023 has referred to the modern legal paradigm that applies throughout the world. This new paradigm is a vision of the National Criminal Code that no longer uses criminal law as *lex talionis* or revenge law by prioritizing retributive justice, but is oriented towards corrective justice, restorative justice and rehabilitative justice. The application of Judicial Pardon is in line with the new paradigm in Indonesian criminal law that emphasizes restorative justice and humanization of criminal law. This paradigm focuses on restoring relationships between perpetrators, victims and society, and prioritizes a more just and humane solution. Corrective justice is aimed at the perpetrator. In this research, it takes the vision of the National Criminal Code for corrective justice, which means that the actions of perpetrators who commit criminal offenses will be corrected with sanctions, which according to the National Criminal Code can be in the form of punishment or action.²²

Changes in the Indonesian criminal law system cannot be separated from the development of society and the need to accommodate broader principles of justice. Laws that are too rigid and rigid often create injustice, especially for those who commit minor crimes or who are in difficult socio-economic conditions.²³

In classical criminal law, the retributive approach is the main basis of the punishment system. This concept focuses on retaliation against criminals based on the principle of *lex talionis* or the law of revenge. Punishment is given as a form of punishment for the wrong that has been committed, without taking into account the social and humanitarian impact of the punishment itself.²⁴

Judicial Pardon is a new concept in the Indonesian criminal law system which is regulated in Article 54 paragraph (2) of Law Number 1 Year 2023 concerning the Criminal Code. Judicial Pardon authorizes judges not to impose punishment on defendants who are proven guilty based on considerations of justice and humanity. Judicial Pardon emerged as a more flexible and humanist legal solution. This concept gives judges the authority to consider the situation and condition of the defendant before making a decision. In many cases, the punishment of minor offenders actually worsens their social conditions, which in turn harms society as a whole.²⁵ Thus, judges can consider various factors such as the severity of the offense, the personal circumstances of the defendant, and the social conditions during and after the crime occurred.²⁶

One of the negative impacts of rigid sentencing is the high rate of recidivism, where former prisoners who have completed their sentences re-offend due to the social stigma attached to them. In many cases, prison sentences for minor crimes make it more difficult for offenders to return to society and find decent work.²⁷ In more advanced legal systems, punishment is not only viewed as a punishment, but also as a means of rehabilitation and social reintegration. Judicial Pardon allows judges to consider whether punishment is really necessary in a particular case or if there are other alternatives that are more beneficial to all parties involved.²⁸

This concept is particularly important in the Indonesian context, where the correctional system is experiencing overcapacity. Correctional institutions in Indonesia are currently experiencing serious overcrowding, with the number of prisoners far exceeding

²⁰ *Ibid.*

²¹ Satjipto Rahardjo, *Ilmu hukum*, Bandung: PT. Citra Aditya Bakti (2000), hlm. 87.

²² *Loc.Cit.*, Eddy O.S Hiariej, *Prinsip-Prinsip Hukum Pidana Edisi Penyesuaian KUHP Nasional*, hlm. 55

²³ Satjipto Rahardjo, *Hukum Progresif: sebuah sintesa hukum Indonesia*, Genta Pub (2009), hlm. 25

²⁴ Arief Barda Nawawi, *Kebijakan legislatif dalam penanggulangan kejahatan dengan pidana penjara*, Semarang: Ananta (1994), hlm. 105.

²⁵ John A. Rawls, *Theory of Justice: Revised Edition*, Harvard University Press (2020), hlm. 112.

²⁶ Yusuf Syakir dan Herman Sujarwo, "Kebijakan Pemaafan Hakim (Rechterlijk Pardon) Dalam KUHP Baru", *Syariat: Jurnal Studi Al-Qur'an dan Hukum*, Vol. 9 No. 1 (2023), hlm. 109 - 118. doi: <https://doi.org/10.32699/syariat.v9i1.4655>.

²⁷ Bambang Poernomo, *Asas-Asas Hukum Pidana*, Jakarta: Ghalia Indonesia (1976), hlm. 134.

²⁸ Eddy O.S. Hiariej, *Prinsip-Prinsip Hukum Pidana Edisi Penyesuaian KUHP Nasional*, Depok: Rajawali Pers (2024), hlm. 55.

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their intended capacity.²⁹ Many of these prisoners are actually minor offenders who should be able to serve alternative sentences outside of prison. The implementation of Judicial Pardon can help reduce the burden on the correctional system by providing a fairer way out for minor offenders.³⁰

In addition, the application of Judicial Pardon can also reduce the state's costs in financing punishment. Every year, the government allocates large funds for the operation of correctional institutions, most of which are used to meet the needs of prisoners who can actually get non-prison sanctions. From an economic perspective, overly repressive punishment policies burden the state budget without providing significant benefits to society. With Judicial Pardon, legal resources can be diverted to more strategic and beneficial law enforcement, especially in handling cases that really have a major impact on security and public order.³¹

On the other hand, this policy also provides benefits for victims. In many cases, victims of crime want compensation and reparation rather than just seeing the perpetrator thrown into prison.³² Judicial Pardon allows judges to consider solutions that are more favorable to the victim, such as restitution or community service, as opposed to prison sentences that do not directly benefit the victim.

One of the biggest criticisms of the traditional criminal law system is the lack of room for flexibility and individual judgment. The overly formalistic approach often ignores social and human factors that should be part of the legal considerations.³³ In the theory of retributive justice, punishment is considered as a way to avenge the crime committed by the perpetrator. However, this theory is increasingly being abandoned as it is considered to not always result in true justice. In many cases, true justice is not only obtained through punishment, but also through restoring social relations and reducing negative impacts on victims and society.³⁴

The restorative justice approach underpinning Judicial Pardon offers a more inclusive and humane solution to criminal cases. Instead of focusing solely on punishment, this approach seeks to repair the impact of the criminal offense, both on the victim, the perpetrator, and the wider community.³⁵ In addition, overly rigid sentencing often results in injustice for certain groups, such as the elderly, children, or those with difficult social conditions. Judicial Pardon provides a mechanism for judges to take these factors into account in reaching a verdict, so that the justice applied better reflects the human values upheld in the modern legal system.³⁶

Judges in the criminal justice system ideally should not only act as interpreters of the law, but also as protectors of society who ensure that the law is truly applied to create true justice. Judicial Pardon provides a tool for judges to make decisions that are more oriented towards the interests of society at large, rather than simply following the legal text mechanically.³⁷

Overall, Judicial Pardon is part of a more progressive criminal law reform, which allows the Indonesian legal system to be more responsive to societal developments and changing social challenges. With this approach, the Indonesian criminal justice system can be more effective in achieving the goals of justice, both for perpetrators, victims, and society as a whole.

Judicial Pardon is not an entirely new concept in the criminal law system. A number of countries have implemented similar mechanisms in order to provide space for judges to adjust decisions to the specific conditions of each case. The application of this concept in various countries shows that a more flexible legal system can contribute to the creation of more substantive justice, compared to rigid and mechanistic laws.³⁸

²⁹ Elma Fitria, "Formulasi Asas Permaafan Hakim dalam Tindak Pidana Ringan dalam Perspektif Keadilan", *Ensiklopedia Education Review*, Vol. 5, No 1 (2023), hlm. 78. DOI: <https://doi.org/10.33559/eer.v5i1.1734>

³⁰ Sindhi Cintya dan Hery Firmansyah, "Penerapan Restorative Justice Sebagai Bentuk Permaafan Hakim Dalam Tindak Pidana Pencurian Oleh Lansia", *Jurnal USM Law Review*, Vol. 6, No. 2 (2023), hlm. 543-553.

³¹ Yusuf Syakir dan Herman Sujarwo, "Kebijakan Pemaafan Hakim (*Rechterlijk Pardon*) dalam KUHP Baru", *Syariat: Jurnal Studi Al-Qur'an dan Hukum*, Vol. 9, No. 1 (2023), hlm. 109-118.

³² Tony F. Marshall, "*Restorative Justice: An Overview*", Home Office Research Development and Statistics Directorate (1999), hlm. 30.

³³ Rahardjo Satjipto, *Ilmu hukum*, Bandung: Citra Aditya Bakti (2000), hlm. 45.

³⁴ Eva Achjani Zulfa, *Pergeseran Paradigma Pemidanaan*, Bandung : Lubuk Agung, Perpustakaan STIK (2011), hlm. 78.

³⁵ Barda Nawawi Arief, *Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara*, Semarang: CY Ananta (1995), hlm. 80.

³⁶ Mufatikhatul Farikhah, "Rekonseptualisasi Judicial Pardon dalam Sistem Hukum Indonesia", *Jurnal Hukum & Pembangunan*, Vol. 48, No. 3, hlm. 110. DOI: <https://doi.org/10.21143/jhp.vol48.no3.1746>

³⁷ Parningotan Malau, "Tinjauan Kitab Undang-Undang Hukum Pidana (KUHP) Baru 2023", *AL-MANHAJ: Jurnal Hukum dan Pranata Sosial Islam*, Vol. 5 No. 1 (2023), hlm. 837-844.

³⁸ *Op.Cit.*, Eddy O.S. Hiarije, *Prinsip-Prinsip Hukum Pidana Edisi Penyesuaian KUHP Nasional*, hlm. 65.

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1. Netherlands

Judicial pardon or in the Dutch legal system known as *gratie*, is a form of forgiveness for a person who has been sentenced to a criminal sentence by the court. This pardon is individualized and can alleviate, modify, or remove the entire sentence that has been imposed. The main purpose of granting clemency is to make room for humanitarian considerations or substantive justice in situations that cannot be resolved through the ordinary judicial process.

The regulation of judicial pardons in the Netherlands is set out in two main legal instruments:

a. Konstitusi Belanda (Constitution for the Kingdom of the Netherlands).

Article 122(1) states that the King has the authority to pardon criminal convictions. However, in the practice of the Dutch parliamentary system, this authority is exercised by the Minister of Justice and Security on behalf of the King.

b. Clemency Law (*Gratiewet*)

The *Gratiewet* is a special law that regulates the application procedure, the decision-making process, and the forms of clemency that can be granted. This law emphasizes that clemency can only be granted after a court decision has obtained permanent legal force (in *kracht van gewijsde*).

The procedure in applying for judicial pardon can be submitted by: first, the convicted person directly; second, a legal representative; third, a close family member; fourth, the Public Prosecutor, in exceptional circumstances.

An application for clemency may be submitted by the convicted person, legal representative, close family member, or prosecutor under certain circumstances. The Minister of Justice and Security is tasked with assessing the application based on a number of considerations, including the personal condition and health of the convicted person, new evidence, and legal and humanitarian interests.

Clemency does not remove a convicted person's legal status, and criminal records remain on file unless overturned through other legal mechanisms such as judicial review. This indicates that clemency is not an annulment of the crime, but a pardon of the sentence.

In the Netherlands judicial pardon is not the removal of a convicted person's guilt status, but rather the pardon of his or her sentence. This pardon does not necessarily erase the criminal record (*strafblad*) that has been recorded, unless there is a separate decision from the court that overturns the previous decision. The granting of clemency in the Netherlands is also highly selective and rarely granted. This is to preserve judicial authority and prevent abuse of power.

Judicial pardon in the Netherlands is a form of judicial correction outside the court mechanism. Although it has an exceptional nature, the existence of this institution reflects the principle of humanism in the Dutch legal system which still pays attention to humanitarian factors in law enforcement.

2. Portugal

In Portugal, a similar concept is known as *dispensa de pena*, where a judge can commute the sentence of an offender who meets certain criteria. In Portugal, this rule relies heavily on the social benefit and rehabilitation of the offender. Judges are given the authority to consider whether the offender could be more beneficial to society if not serving a prison sentence, for example by performing social services as an alternative form of sanction.

In the Portuguese legal system, the term judicial pardon is not explicitly recognized as a form of pardon granted by the judiciary. Rather, pardon mechanisms such as *indulto* (clemency) and *amnistia* are vested in the executive and legislative branches. Article 134(f) of the Constitution of the Republic of Portugal establishes that the President of the Republic has the power to grant pardons and commute sentences, after hearing the opinion of the Government.³⁹

Although there is no formal judicial pardon mechanism, judges in Portugal have the discretion to suspend the execution of a prison sentence in certain circumstances. This discretion allows judges to consider factors such as the seriousness of the offense and the personal characteristics of the defendant in determining whether a suspended sentence is appropriate.⁴⁰

In addition, Portugal has a tradition of *amnistia* and *indulto* granted at specific moments. For example, in 2020, the Portuguese government pardoned a number of inmates as a measure to reduce the prison population during the COVID-19

³⁹ Constitution of the Portuguese Republic. (2005). Diakses dari [https://en.wikisource.org/wiki/Translation:Constitution_of_the_Portuguese_Republic_\(2005\)](https://en.wikisource.org/wiki/Translation:Constitution_of_the_Portuguese_Republic_(2005))

⁴⁰ Budimansyah, Prija Djatmika, Rachmad Safa'at, dan Setiawan Noerdajasakti, "COMPARISON OF THE JUDICIAL FORGIVENESS (RECHTERLIJK PARDON) BETWEEN CIVIL LAW SYSTEM AND ISLAMIC LAW SYSTEM (FINDING THE FORMULATION OF THE PRINCIPLE OF RECHTERLIJK PARDON IN INDONESIAN CRIMINAL LAW)", *International Journal of Educational Review, LawAnd Social Sciences (IJERLAS)*, Vol. 3 No. 4 (2023), hlm. 1198-1210. DOI: <https://doi.org/10.54443/ijerlas.v3i4.946>

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pandemic, with the main objective of protecting public health and preventing the spread of the virus in the prison environment.⁴¹

3. Greece

Another country with a system of judicial forgiveness is Greece. In the Greek legal system, the decision not to impose criminal punishment is often linked to the age and psychological condition of the defendant. Criminal offenders who are elderly or have mental health problems can obtain pardons at the discretion of the judge, provided that they do not have a criminal record that endangers the public.

In Greece, the regulation of judicial pardon is explicitly set out in the Greek Constitution. Clemency is the prerogative of the President of the Republic of Greece, who has the authority to pardon individuals who have been sentenced by the courts. Although the President holds the highest authority in granting clemency, the process is not done unilaterally, but must go through recommendations from the Minister of Justice and after considering the opinion of a special committee whose majority members come from the judiciary.⁴²

In Greek law, clemency was clearly distinguished from amnesty. Clemency was individualized and applied only to certain individuals who had been sentenced, with the aim of removing, mitigating or modifying the sentence. Amnesties, on the other hand, were general and applied to a specific group of crimes, with the consequence of removing the entire legal effect of the crime in question.⁴³

Furthermore, in certain situations, the Greek Constitution also provides for the possibility of granting clemency to state officials, including ministers who have been sentenced. However, in such cases, clemency can only be granted by the President with the consent of Parliament, signaling the control and balance of power between state institutions in the Greek legal system.⁴⁴

4. Germany

A more lenient approach is also found in Germany, where their legal system allows for diversion in the form of sentence commutation based on the principle of second chances. Judicial pardons in Germany are primarily aimed at first-time offenders, provided they show remorse and a willingness to make amends.

In the German legal system, the concept of judicial pardon is not explicitly recognized. Germany adheres to a legal system that strictly separates the functions of the executive, legislative and judicial powers. Therefore, the authority to grant clemency rests entirely with the executive, not the judiciary.

Normatively, the legal basis for granting clemency in Germany is set out in Article 60(2) of the Grundgesetz (German Basic Law), which states that the Federal President (Bundespräsident) has the right to grant clemency on behalf of the federal state. For criminal offenses that fall under the jurisdiction of the states (Länder), the power of clemency rests with the respective state governments. The granting of clemency in Germany can take the form of individual clemency (Einzelbegnadigung), which is casuistic and personal, and collective clemency (Amnestie), which is usually enacted through legislation by parliament. This clemency can take the form of a commutation of sentence, a reduction of sentence, or a change in the form of sentence.⁴⁵

In contrast to the systems in some countries such as the Netherlands or Indonesia that allow for a certain role of judicial institutions in the process of pardoning or commuting sentences, the German legal system does not allow for judges or judicial institutions to issue pardons. However, within the realm of criminal justice, judges have the discretion to impose lighter sentences based on certain circumstances (mildernde Umstände). Beyond that, the annulment or amendment of court decisions can only be done through legal mechanisms such as appeal (Berufung), cassation (Revision), or judicial review (Wiederaufnahmeverfahren).

Basically, the concept of judicial pardon as understood as a form of forgiveness by the judiciary is not accommodated in the German legal system. The function of clemency remains the prerogative of the executive, both at federal and state level, and is exercised through administrative, rather than judicial, procedures.

5. Uzbekistan

⁴¹ Corrections and Crime in Spain and Portugal during the Covid-19 Pandemic: Impact, Prevention, and Lessons for the Future. (2021). *Global Corrections and Crime*. Diakses dari <https://globcci.org/wp-content/uploads/2021/04/5.22-Corrections-and-Crime-in-Spain-and-Portugal-during-the-Covid-19-Pandemic-Impact-Prevention-and-Lessons-for-the-Future.pdf>

⁴² Donysios Spinellis, *National Report: Greece*, In P. Cassia & A. Cabantous (Eds.), *Judicial pardon and amnesty in Europe* (2009). hlm. 1-6. https://shs.hal.science/halshs-00419159v2/file/RAPPORTS_NATIONAUX_-_Greece_-_Donysios_SPINELLIS.pdf.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Martin Böse, "Criminal Justice and the Constitution in Germany", *European Constitutional Law Review*, Vol. 7 (2011), hlm. 156–158.

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In addition to European countries, the application of the concept of judicial pardon can also be found in the legal system of the Republic of Uzbekistan, which adopted Judicial Pardon as part of its rehabilitative policy for non-violent offenders. Offenders who are not a danger to society are often given the opportunity to avoid imprisonment on the condition that they undergo rehabilitation and legal education programs.

In the Republic of Uzbekistan, the granting of clemency is a constitutional authority exclusively vested in the President, as provided for in Article 109 of the Constitution of the Republic of Uzbekistan. Clemency is positioned as a legal instrument that represents the principle of humanism in the punishment system, as well as an integral part of the state's efforts to support the social reintegration of prisoners.

Normatively, the mechanism for granting clemency is further regulated in Presidential Decree No. UP-5439 dated May 8, 2018 on "Procedure for Granting Clemency in the Republic of Uzbekistan". This decree stipulates that an application for clemency can be submitted by a convicted person, a former convict, or a third party who has obtained written consent from the convicted person, after the court decision has obtained permanent legal force. In certain cases, particularly those involving long-term sentences, the application may be submitted after two-thirds of the sentence has been served.

Evaluation of clemency applications is carried out by the Commission for the Granting of Clemency, which is under the direct authority of the President. This commission considers various aspects, including the behavior of the convict during the sentence period, the level of remorse, and the potential for social rehabilitation. The forms of clemency that can be granted include full or partial release from the main and additional punishment, replacement of the type of punishment with a lighter form, and expungement of criminal records.

In practical terms, Uzbekistan has demonstrated its consistency in implementing clemency policies as part of legal and criminal justice reform. One example is the Presidential decree of December 7, 2024 granting clemency to 483 individuals, of which 107 obtained full release.⁴⁶ Such a policy not only reflects a commitment to humanitarian principles, but also emphasizes the role of clemency as a legal tool to promote social recovery and prevent recidivism.

6. United States of America

In the United States legal system, the concept of judge forgiveness is better known in the form of plea bargaining, which allows defendants to get a reduced sentence if they cooperate with prosecutors or show deep remorse for their actions. However, in some jurisdictions, judges also have the discretion not to impose a sentence if they see strong humanitarian factors.

In the US legal system, the concept of judicial pardon is not explicitly recognized as it is in the Dutch legal system. Clemency or pardon is the exclusive authority of the executive power. This is regulated in Article II Paragraph 2 of the United States Constitution, which states that the President "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment". Thus, clemency can only be granted by the President for violations of federal law, while for violations of state law, such authority rests with the Governor in accordance with the respective state constitutions. Courts do not have the authority to grant pardons of any kind.

Despite not having the authority to issue pardons, courts in the United States still have legal mechanisms that can substantively have a similar effect to judicial pardons. Some of these mechanisms include a motion to vacate judgment, which allows a defendant to ask the court to overturn a judgment on the basis of procedural errors or the emergence of new evidence, and a writ of habeas corpus, which tests the legality of a person's detention.⁴⁷ In addition, courts can also grant expungement, which is widely used to rehabilitate the good name of minor offenders or first-time offenders.

In addition to these legal mechanisms, courts in the United States also have broad discretion in determining the type and severity of punishment through the sentencing system. This is reflected in the application of diversion programs, probation, or the imposition of sentences equivalent to time served. This practice is mainly applied to minor offenses and aims to encourage a more restorative approach in the criminal justice system. This principle is also contained in the Federal Sentencing Guidelines, which allow judges to consider mitigating factors and the social circumstances of the defendant. While not explicitly a form of judicial pardon, such mechanisms can serve as a form of correction and restoration within a more humane justice framework.

Thus, although normatively the term judicial pardon is not recognized in the US legal system, substantively there are a number of judicial instruments that can perform a similar function. This reflects the character of the American legal system which upholds the principle of separation of powers, but still opens space for corrective and rehabilitative approaches in criminal justice practice. Comparison with other legal systems shows that the function of pardon does not always have to be

⁴⁶ "President Shavkat Mirziyoyev pardons 483 individuals", Kantor Berita Uzbekistan, 7 Desember 2024. Artikel lengkap tersedia di: <https://president.uz/en/lists/view/7752>

⁴⁷ Douglas A. Berman, "Reconceptualizing Sentencing", *University of Chicago Legal Forum*, Vol. 2005, Issue. 1, Article 2, hlm. 1-28.

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formal in the form of executive clemency, but can also be realized through judicial mechanisms that prioritize the principles of substantive justice and protection of human rights.

The application of the concept of judicial pardon in various countries shows that a more flexible legal system not only provides justice for the defendant, but also increases the efficiency of the justice and correctional systems. In Indonesia, the implementation of Judicial Pardon can provide a solution to the problem of prison overcapacity and increase the effectiveness of the criminal law system in achieving the goals of rehabilitation and social reintegration.⁴⁸

Although Judicial Pardon offers many benefits in the Indonesian criminal law system, its implementation still faces a number of challenges that need to be addressed so as not to cause legal uncertainty and abuse of authority.⁴⁹

One of the biggest challenges in the application of Judicial Pardon in Indonesia is the lack of regulations that detail the criteria and procedures for its application. Although Article 54 paragraph (2) of the New Criminal Code has regulated this concept in general, there are no specific guidelines that explain the minimum standards for judges in exercising this authority.⁵⁰ Without clear standards, judges' decisions in granting Judicial Pardon can be highly subjective and vary from case to case. This could lead to legal uncertainty and open up opportunities for inconsistent and discriminatory judicial practices.

Another challenge that needs to be addressed is the potential for abuse of authority by judges. In a judicial system that still faces major challenges in terms of integrity, the discretion for judges to grant pardons without strict controls could open up loopholes for corrupt practices or influence from interested parties.⁵¹

In addition, there is still a lack of understanding of law enforcement officials and the public towards the concept of Judicial Pardon. Many law enforcement officials still adhere to the retributive criminal law paradigm, so they tend to be skeptical of the concept of forgiveness by judges.⁵²

Also, the concept of judge forgiveness is also embodied in Article 232 Paragraph (1) RKUHAP, which reads:

"In the event of a verdict in the form of a Judicial Pardon Decision, acquittal or release from all charges, the court determines that the confiscated evidence be handed over to the party most entitled to receive it back whose name is listed in the decision, unless according to the provisions of the legislation the evidence must be seized for the benefit of the state or destroyed or damaged so that it can no longer be used."

To overcome these challenges, a Supreme Court Regulation (Perma) or other more detailed regulations are needed to provide guidelines for judges in applying Judicial Pardon. This regulation should include objective criteria for cases that are eligible for judicial pardon, a transparent oversight mechanism, and an evaluation mechanism for decisions rendered under this concept. Overall, while Judicial Pardon has great potential to realize more inclusive justice, its successful implementation will largely depend on clear regulations, strict oversight, and a commitment from all elements in the criminal justice system to use it fairly and responsibly.

CONCLUSIONS

The application of Judicial Pardon in Indonesia is still lacking in terms of regulations that regulate in detail the criteria and procedures for its application. Although Article 54 paragraph (2) of the New Criminal Code has regulated this concept in general, there are no specific guidelines that explain the minimum standards for judges in exercising this authority. Without clear standards, judges' decisions in granting Judicial Pardon can be highly subjective and vary from case to case. This could lead to legal uncertainty and open up opportunities for inconsistent and discriminatory judicial practices. When compared to the legal systems in the Netherlands and Portugal, both have implemented the concept of *rechterlijk pardon* with stricter and more transparent parameters, including criteria regarding the condition of the perpetrator, the social impact of the criminal offense, as well as supervision mechanisms for judges' decisions. Meanwhile, in the United States, the concept of judicial clemency has clear limitations in certain state laws, where judges can only grant pardons in truly exceptional circumstances and often require approval from a pardon board. Thus, the Indonesian system still needs to develop more comprehensive rules so that the application of Judicial Pardon can run effectively and does not reduce the principles of justice in criminal law.

⁴⁸ *Op.Cit.*, Eva Achjani Zulfa, *Pergeseran Paradigma Pemidanaan*, hlm. 78.

⁴⁹ *Op.Cit.*, Sindhi Cintya dan Hery Firmansyah, "Penerapan Restorative Justice Sebagai Bentuk Permaafan Hakim Dalam Tindak Pidana Pencurian Oleh Lansia".

⁵⁰ *Op.Cit.*, Parningotan Malau, "Tinjauan Kitab Undang-Undang Hukum Pidana (KUHP) Baru 2023".

⁵¹ Vita Adolfini Manafe, Listiyowati Sumanto, "ASAS PEMAAFAN HAKIM (RECHTERLIJK PARDON) SEBAGAI UPAYA PENYELESAIAN TINDAK PIDANA RINGAN UNTUK PEMBAHARUAN HUKUM PIDANA NASIONAL", *Quantum Juris: Jurnal Hukum Modern*, Vol. 6 No. 3 (2024), hlm. 338-349.

⁵² M. Holy One N. Singadimedja dan Ahmad Rosidi, "Mencari Kemungkinan Judicial Pardon sebagai Salah Satu Alternatif Bentuk Pemidanaan", *Journal Ilmiah Rinjani*, Vol. 9, No. 1 (2021), hlm. 78.

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