



## Comparative Study of Judicial Pardon in the Substantive Criminal Law and Criminal Procedure Law of the Netherlands and Indonesia: Note to the Draft Criminal Procedure Code

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### Abstract

The ruling on *Rechterlijk Pardon* (judicial pardon) or passing sentence of guilt without imposing penal sanction is regulated in Article 54 paragraph (2) of Law No. 1 of 2023 concerning Criminal Code. On the other hand, various academic drafts of the Criminal Procedure Law, and draft of the Criminal Procedure Law dated March 21, 2023, did not contain a ruling on the same. Meanwhile, the draft of criminal procedure code dated February 17, 2025, March 3, 2025, March 15, 2025, and March 20, 2025 mentions this legal institution only in passing. The legal lacunae resulting from this disharmony consequently make it impossible the passing such a sentence in practice. Numerous legal academic writings on Judicial Pardon can be found written by Indonesian legal scholars, but none seems to focus on the legal history of this institution using primary legal sources and none of those articles refers to the most recent draft criminal procedure code. Moreover, those articles still refer to the old criminal code and criminal procedure code draft. The method used in this research is legal normative, using statutory approach as well as comparative law. The main argument here is that the ruling about judicial pardon should be added into the draft of the criminal procedure code. With the intent to rectify the existing legal lacunae, this article discusses the above shortcomings and addresses the existing disharmony between criminal law and criminal procedural law and how to fill in the legal gaps. The author's main arguments are, taking in consideration the necessity to harmonize substantive and procedural law, first, that the legislature should synchronize-harmonize internally and externally the academic draft of the draft criminal procedure law and with the existing criminal code. Secondly, in the draft criminal procedure code should be added a ruling making the passing of judicial pardon a possibility. Third, to add a ruling obligating judge who pass such sentences to adequately support his/her decisions with arguments. Lastly, to add another ruling elaborating on for what crimes would judicial pardon be allowed and to what extent such sentences would be eligible to be challenged

**Keywords:** decision, rechterlijk pardon, criminal procedure law

The earlier draft of this manuscript has been presented by Aris Hardinanto at a national seminar *Kebaharuan KUHP Nasional dan Urgensi Pembaharuan KUHP: Mewujudkan Sistem Peradilan Pidana yang Berkeadilan*, organized by the Faculty of Law Universitas Muhammadiyah Purwokerto on February 21, 2025. This paper was awarded the first best paper category and to be published in *Kosmik Hukum* journal. The present article is a development of the first and has been reviewed by prof. mr. Nico Keijzer (the Netherlands). The author highly appreciates his comments and critiques.

## I. Introduction

Revealing and articulating the truth is said to bring liberation and relief – hence the maxim, the truth will set you free.<sup>1</sup> In contrast, concealing secrets, distorting facts, or constructing so-called “alternative truths” are often means of evasion, intended to escape the obligation of disclosure, yet are believed to inflict psychological torment.<sup>2</sup> What is repressed and tightly hidden inevitably becomes a thorn in the flesh. Likewise, it is often asserted that those who ignore history – who neglect historical truth – are doomed to repeat it.<sup>3</sup> This perpetual tension explains why scholars continually debate the nature of truth<sup>4</sup>, not only in its descriptive form, where statements must correspond to reality, but also in its prescriptive dimension, where truth is measured against certain ideal norms of what ought to be.<sup>5</sup> Furthermore, truth is frequently conceived as a utopian ideal, an aspiration to be pursued yet ultimately unattainable, as seen in the pursuit of a virtuous life, where moral integrity is expected, even though its absolute realization remains elusive.<sup>6</sup>

Conversely, it can also be argued that truth, once revealed and exposed, is not always comfortable, pleasant, or even tolerable, and for this reason, many contend that it is sometimes better left undisclosed.<sup>7</sup> The act of unveiling truth, for example in the technology era can generate controversy<sup>8</sup>, and social unrest, or risk provoking the anger of those in power who, upon exposure, may suffer a loss of face, authority, and dignity. For the sake of maintaining societal order, it is often deemed preferable to conceal the truth<sup>9</sup> and, if possible, to forget it altogether. This notion is reflected in the Javanese expression *mikul dhuwur, mendhem jero*<sup>10</sup>, which upholds the virtue of honoring one’s elders or ancestors by disregarding their faults and burying them as deeply as possible.<sup>11</sup> In short, partial or even total amnesia is often seen as a better and more justifiable course of action for the sake of peace, rather than exposing the truth and, whether intentionally or not, reviving past mistakes. It is sometimes more advantageous to shatter the mirror than to confront the reflection of an unpleasant reality.

Courts, in practice, can and have been used, or, conversely, deliberately not used, to reveal or uphold the truth.<sup>12</sup> This stands in contrast to the widely accepted principle that the primary

<sup>1</sup> <https://www.biblegateway.com/passage/?search=John%208%3A32&version=KJV>, accessed 11 February 2025

<sup>2</sup> Knight, E., & Tsoukas, H. (2018). When Fiction Trumps Truth: What ‘post-truth’ and ‘alternative facts’ mean for management studies. *Organization Studies*, 40(2), 183-197. <https://doi.org/10.1177/0170840618814557>

<sup>3</sup> Citation from G. Santanaya. He wrote: *Those who cannot remember the past are condemned to repeat it*. *The Life of Reason* (1905) vol. 1, ch. 12. <https://www.oxfordreference.com/display/10.1093/acref/9780191826719.001.0001/q-oro-ed4-00009114>, accessed 11 February 2025

<sup>4</sup> Wright, C. (1998). Truth: A Traditional Debate Reviewed. *Canadian Journal of Philosophy Supplementary Volume*, 24, 31-74. <https://doi.org/10.1080/00455091.1998.10717495>

<sup>5</sup> A. S. (2024). KEBENARAN PERSPEKTIF FILSAFAT ILMU SEBAGAI LANDASAN DALAM BERKARYA ILMIAH. *Journal of Excellence Humanities and Religiosity*, 1(2), 24-46. <https://doi.org/10.34304/joehr.v1i2.230>

<sup>6</sup> Belliotti, R.A. (2015). Virtue and the Law: Classical Perspectives. In: Sison, A. (eds) *Handbook of Virtue Ethics in Business and Management*. Springer, Dordrecht. [https://doi.org/10.1007/978-94-007-6729-4\\_42-1](https://doi.org/10.1007/978-94-007-6729-4_42-1)

<sup>7</sup> Magnis-Suseno, F. (2020). Philosophy, A Challenge To Post-Truth, Also in Indonesia. *Jurnal Filsafat*, 30(1), 1-22. [/dx.doi.org/10.22146/jf.53671](http://dx.doi.org/10.22146/jf.53671) / doi:<https://doi.org/10.22146/jf.53671>

<sup>8</sup> Cholidin, A., Fernando, Z., & Feka, M. (2024). Utilization of Neuroimaging in Criminal Justice: Unveiling Truth Through Brain Technology. *IJCLS (Indonesian Journal of Criminal Law Studies)*, 9(2), 243-280. doi:<https://doi.org/10.15294/ijcls.v9i2.50316>

<sup>9</sup> Rahayu, D. P., Faisal, F., Sari, R., & Satrio, N. (2020). Law Enforcement in the Context of Legal Culture in Society. *LAW REFORM*, 16(2), 276-289. <https://doi.org/10.14710/lr.v16i2.33780>

<sup>10</sup> See: Anik Maghfiroh, “Konsep Mikul Duwur Mendem Jero Versi Prof. Sugeng”, <https://www.uingusdur.ac.id/info/konsep-mikul-duwur-mendem-jero-versi-prof-sugeng>, accessed 11 Februari 2025. A different interpretation is presented: “This concept originates from religion and culture, which are inseparably linked in the history of civilization and the formation of Indonesia’s national identity. The expression Mikul Duwur Mendem Jero embodies a rich philosophical meaning, referring to the understanding that true learning begins with self-awareness (*mendem jero*) and culminates in pursuing higher knowledge (*mikul duwur*). *Mikul Duwur Mendem Jero* reflects the ethical values of Javanese culture, emphasizing the importance of upholding family honor, personal dignity, and strengthening one’s identity while also signifying respect and obedience toward others. This ethical principle is evident in relationships such as that between children and their parents, grandchildren and their grandparents, as well as students and their teachers.”

<sup>11</sup> Tafrijyah, K. (2024). Struktur Sintaksis dan Makna Semantik Ungkapan Tradisional sebagai Representasi Masyarakat Jawa. *Deskripsi Bahasa*, 7(1), 43-58. <https://doi.org/10.22146/db.11066>

<sup>12</sup> Laia, A., & Purwanto. (2023). KEBENARAN DAN KEADILAN HUKUM. *JURNAL PANAHA KEADILAN*, 2(1), 1-14. <https://doi.org/10.57094/jpk.v2i1.709>

duty of a judge is precisely to uncover the truth<sup>13</sup> and, in doing so, upholding justice.<sup>14</sup> The entire judicial process, whether in criminal or other legal matters, is designed to illuminate what has occurred, determine the root causes of disputes, establish liability, and, ultimately, where necessary, prescribe the appropriate legal consequences for the parties involved.<sup>15</sup> In this context, a judge must grapple with the fundamental question of whether imposing punishment<sup>16</sup>, such as criminal sanctions, can itself be considered a just decision<sup>17</sup>, inseparable from the broader pursuit of truth, justice, and even humanitarian considerations.<sup>18</sup>

Whether revealing the truth, identifying the responsible parties without imposing punishment, can still achieve the objectives of justice remains an open question. The imposition of punishment in the name of the state does not necessarily lead to justice or truth for the victims and their families<sup>19</sup>. The concept of restorative justice<sup>20</sup> appears to have been developed to address this very issue. However, the concern here is not about restorative justice per se, but rather whether the entire judicial process itself can serve as a sufficiently powerful message to both the perpetrators and society, affirming the wrongdoing of the act committed, without necessarily imposing punishment<sup>21</sup> – an act that conveys a different message and, in many cases, is neither desired nor expected by the victims, their families, or even society at large.<sup>22</sup>

One approach to realizing justice, beyond merely ensuring compliance with the letter of statutory provisions within the context of Indonesian criminal law, is the formulation of sentencing guidelines that allow judges to declare an individual legally and convincingly guilty of a criminal offense without necessarily imposing a punishment.<sup>23</sup> This possibility is known as *Rechterlijk Pardon* (judicial pardon).<sup>24</sup> To be noted here is that the authors chose to translate *Rechtelijke Pardon* into judicial pardon rather than judicial mercy. As it may be mercy which moved the judges to pass this sentence, the essence is more about pardoning the accused while at the same time deciding that his/her behavior is proven beyond doubt to be criminal.

The regulation governing this matter is stipulated in Article 54 paragraph (2) of Law No. 1 of 2023 concerning the Criminal Code (hereinafter referred to as the NCC). This provision establishes that the minor severity of the offense, the personal circumstances of the offender, or the conditions at the time of the offense and subsequent developments may serve as grounds for

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<sup>13</sup> Nurmansyah, G. (2024). THE ROLE OF JUDGES IN MAINTAINING JUDICIAL INDEPENDENCE. *Progressive Law Review*, 6(01). <https://doi.org/10.36448/plr.v6i01.162>

<sup>14</sup> Hakim, A. (2017). MENAKAR RASA KEADILAN PADA PUTUSAN HAKIM PERDATA TERHADAP PIHAK KETIGA YANG BUKAN PIHAK BERDASARKAN PERSPEKTIF NEGARA HUKUM PANCASILA. *Jurnal Hukum Dan Peradilan*, 6(3), 361-378. <https://doi.org/10.25216/jhp.6.3.2017.361-378>

<sup>15</sup> Soehartono, S. (2014). MENGEMBANGKAN PEMIKIRAN HAKIM DALAM MENYELESAIKAN SENGKETA. *Yustisia*, 3(1). doi:<http://dx.doi.org/10.20961/yustisia.v3i1.10106>

<sup>16</sup> Marzuki, P. M. (2019). The Judge's Task to Find Law Under the Indonesian Law. *Yuridika*, 19(2), 85-100. <https://doi.org/10.20473/ydk.v19i2.14410>

<sup>17</sup> YUSUF, M., LIMPO, I. Y., MAULIANA, D., MALLARANGENG, A. B., & HM, M. (2017). ROLE OF THE JUDGE IN CREATING JUSTICE AS AN INSTRUMENT OF SOCIAL CHANGE. *University Of Bengkulu Law Journal*, 1(1), 11-18. <https://doi.org/10.33369/ubelaj.1.1.11-18>

<sup>18</sup> Yunanto, Y. (2019). MENERJEMAHKAN KEADILAN DALAM PUTUSAN HAKIM. *Jurnal Hukum Progresif*, 7(2), 192-205. <https://doi.org/10.14710/hp.7.2.192-205>

<sup>19</sup> Yudhatama, C. F., & Pangestika, E. Q. (2024). Restorative Justice Model through the Imposition of Compensation Punishment as the Main Punishment in Crimes Against Property. *Rechtsnormen Journal of Law*, 2(2), 156-163. <https://doi.org/10.55849/rjl.v2i2.712>

<sup>20</sup> Arman S. (2023). Restorative Justice Dalam Penyelesaian Tindak Pidana Yang Dilakukan Oleh Anak. *Sawerigading Law Journal*, 2(1), 54-64. <https://doi.org/10.62084/slj.v2i1.330>

<sup>21</sup> Putri, W. (2022). Apakah Restorative Justice Sejalan Dengan Nilai-nilai Hukum dan Rasa Keadilan yang Hidup dalam Masyarakat Indonesia? *Gema Keadilan*, 9(2), 93-107. <https://doi.org/10.14710/gk.2022.16251>

<sup>22</sup> Procter-Legg, T., Hobson, J., & Quimby, E. (2024). Restorative justice and social justice: an international perspective. *Contemporary Justice Review*, 27(2-3), 218-238. <https://doi.org/10.1080/10282580.2024.2414953>

<sup>23</sup> Irmawanti, N. D., & Arief, B. N. (2021). Urgensi Tujuan Dan Pedoman Pemidanaan Dalam Rangka Pembaharuan Sistem Pemidanaan Hukum Pidana. *Jurnal Pembangunan Hukum Indonesia*, 3(2), 217-227. <https://doi.org/10.14710/jphi.v3i2.217-227>

<sup>24</sup> Meliala, N. C. (2020). *Rechterlijk Pardon (Pemaafan Hakim) : Suatu Upaya Menuju Sistem Peradilan Pidana Dengan Paradigma Keadilan Restoratif*. *Jurnal IUS Kajian Hukum Dan Keadilan*, 8(3), 551-568. <https://doi.org/10.29303/ius.v8i3.820>

judges to refrain from imposing a punishment or applying legal measures, taking into account considerations of justice and humanitarian principles.

Nevertheless, under the current criminal procedure law, this possibility has not yet been accommodated. According to the prevailing criminal procedure law, as stipulated in Law No. 8 of 1981 on the Criminal Procedure Code (hereinafter referred to as CPC), judges in ordinary criminal cases can only render three types of final decisions: acquittal (*vrijspraak*), dismissal of charges (*ontslag van alle rechtsvervolging*), and guilty verdicts.<sup>25</sup> This means that, to the possibility of granting judicial pardon in Indonesia following the enactment of the NCC, there exists a legal or normative gap (vacuum of norm), legal lacunae or, at the very least, a misalignment between substantive criminal law and criminal procedure law. Regardless of how it is classified, any provision established in substantive criminal law cannot be effectively implemented unless corresponding regulations within criminal procedure law accompany it.

In Draft Criminal Procedure Code prepared by the Center for Legislation in Politics, Law, and Human Rights of the Expertise Agency of the Indonesian House of Representatives<sup>26</sup> dated March 21, 2023 (hereinafter referred to as DCPC1), no provisions were found regulating how judicial pardon, as stipulated in the NCC, could be implemented. In the Draft Criminal Procedure Code dated February 17, 2025 (hereinafter referred to as DCPC2), March 3, 2025 (hereinafter referred to as DCPC3), March 15, 2025 (hereinafter referred to as DCPC4), March 20, 2025 (hereinafter referred to as DCPC5) regulations have been introduced regarding the possibility of granting judicial pardon.<sup>27</sup> Additionally, the consequences of judicial pardon on the seizure of evidence resulting from a pardon ruling are also regulated.<sup>28</sup> Nevertheless, in some versions of the draft criminal procedure law, the DCPC1, DCPC2, DCPC3, DCPC4, and DCPC5 no further regulations were found detailing how a judicial pardon ruling could be effectively enforced. A closer examination reveals the absence of specific provisions regarding the types of offenses eligible for judicial pardon, the grounds for issuing such rulings, and the available legal remedies to challenge them. In other words, merely recognizing the existence of judicial pardon mechanism within criminal procedure law does not resolve the issue of normative gaps. The primary concern is that, without clear implementing regulations, this legal institution risks becoming nothing more than *dead letter law* – a provision that exists in theory but lacks practical applicability. Similar legal issues related to judicial pardon have been discussed by some Indonesian legal scholars.<sup>29</sup> However, most of them only discuss the issue from the point of view of substantive criminal law and have not yet grappled with the newest legal development<sup>30</sup>, the current DCPC.<sup>31</sup> Those academic papers also neglect other primary sources such as the analytical report on the draft of the criminal code and comparison with the Netherlands criminal and procedure law.<sup>32</sup> It was this report that inspired the lawmakers in Indonesia when they drafted the new national criminal code.

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<sup>25</sup> Articles 191 paragraph (1), 191 paragraph (2), and 193 paragraph (1) of CPC

<sup>26</sup> The Indonesian House of Representatives (IHR), referring to the midterm National Legislative Program, initiated the amendment to the existing Law Number 8 Year 1981 concerning Criminal Procedure Code. The official title of the draft is Draft on the Amendment to Law Number 8 Year 1981 on Criminal Procedure Code, shortened as the Draft on Criminal Procedure Law. The draft omits any reference to be a codification as well as an amendment to the existing Criminal Procedure Law.

<sup>27</sup> Article 1 number 15 and 16 of DCPC2, DCPC3, DCPC4 and DCPC5

<sup>28</sup> Article 232 of DCPC2, DCPC3, DCPC4 and DCPC5

<sup>29</sup> A. Barlian, Aristo E., and Barda N. Arief. "Formulasi Ide Permaafan Hakim (Rechterlijk Pardon) Dalam Pembaharuan Sistem Pemidanaan Di Indonesia." *Law Reform* 13, no. 1 (2017): 28-44. <https://doi.org/10.14710/lr.v13i1.15949>

<sup>30</sup> Hasibuan, S. M. (2021). *Kebijakan Formulasi Rechterlijke Pardon Dalam Pembaharuan Hukum Pidana*. *Jurnal Hukum Progresif*, 9(2), 111-122. <https://doi.org/10.14710/jhp.9.2.111-122>

<sup>31</sup> Maulidah, Khilmatin, and Nyoman S. P. Jaya. "Kebijakan Formulasi Asas Permaafan Hakim Dalam Upaya Pembaharuan Hukum Pidana Nasional." *Jurnal Pembangunan Hukum Indonesia* 1, no. 3 (2019): 281-293. <https://doi.org/10.14710/jphi.v1i3.281-293>

<sup>32</sup> Yusuf, Muhammad Rifai, Briliyan Erna Wati, Muhammad Harun, and Tri Nurhayati. "Overview of the Judge's Forgiveness Concept Its Relation to The Legal Interests of Criminal Victims (RKUHP Concept Study)". *Walisongo Law Review (Walrev)* 3, no. 1 (September 8, 2021): 63-86. <https://doi.org/10.21580/walrev.2021.3.1.8724>

Building upon the observations above, this study will focus on the concept of judicial pardon and how it is formulated in the NCC and most recent DCPC. Additionally, this study will analyze how judicial pardon has been regulated and put in practice by the Netherlands courts.

## II. Research Problems

By comparing the legal developments in the Netherlands regarding judicial pardon: (1) how is this legal institution understood and explained within the context of substantive and criminal procedure law in Indonesia; (2) How should judicial pardon ideally be regulated within Indonesia, considering the necessity of alignment between substantive criminal law and criminal procedure law.

## III. Research Methods

This study is based on normative legal research<sup>33</sup>, that combines several approaches commonly used in legal studies in Indonesia, namely the statute approach, case approach, historical approach, comparative approach, and conceptual approach.<sup>34</sup> In addition, the authors also utilize a comparative legal approach, with historical legislative analysis and the examination of selected court decisions incorporated as supplementary elements.

## IV. Result And Discussion

### 1. Legal Institution of Judicial Pardon Understood and Explained Within the Context of Substantive Criminal Law and Criminal Procedure Law in Indonesia

According to Jan Remmelink, *Rechterlijk Pardon* (or in other term *dispensa de pena*<sup>35</sup>) refers to a declaration of guilt without the imposition of punishment (*strafbaarverklaring zonder oplegging van straf*) in a final court ruling in a criminal case, or more literally, a form of mercy granted to an individual who has been legally and convincingly proven to have committed a criminal offense.<sup>36</sup> The term “mercy” here indicates that the decision to not impose penal sanction is based on consideration of humanity and that deciding otherwise would be too cruel. In short, *Rechterlijk Pardon* can be understood as a judge's act of granting mercy, and on basis of the consideration put forth by the law (criminal procedure law). The term “pardon” here is similar or synonymous with “to forgive”. Forgiven here means that the court while still declare the action itself to be criminal, the accused shall not be punished. In daily practice, be compared to a written-official rebuke.

The primary reason why *Rechterlijk Pardon* would be best translated into judicial pardon is to avoid confusion and differentiate it from other kinds of court decisions. Article 191 paragraph (2) CPC mentioned that should the court decide that the act of which the accused is accused has been proven (beyond reasonable doubt), but the act itself does not constitute a criminal act, the accused shall be released from all legal charge (*onslacht van alle rechtvervolging*). This should be differentiated from acquittal, i.e., the decision that the accused is not guilty as charged.<sup>37</sup> Article 191 paragraph (2) CPC is based on consideration of the non-existence of wrongfulness on the

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<sup>33</sup> Negara, T. A. S. (2023). Normative Legal Research in Indonesia: Its Originis and Approaches. *Audito Comparative Law Journal (ACLJ)*, 4(1), 1-9. <https://doi.org/10.22219/aclj.v4i1.24855>

<sup>34</sup> Peter Mahmud Marzuki. 2023. *Penelitian Hukum: Edisi Revisi*, Jakarta: Kencana Prenadamedia, p. 133

<sup>35</sup> Mahraen. (2023). Judicial Pardon Dalam Perkembangan Hukum Pidana Indonesia (Studi Kuhp 2023). *Iuris Notitia : Jurnal Ilmu Hukum*, 1(1), 1-5. <https://doi.org/10.69916/iuris.v1i1.40>

<sup>36</sup> Jan Remmelink, 1994, *Mr. D. Hazewinkel-Suringa's Inleiding tot de Studie van Het Nederlandse Strafrecht*, Arnhem: Gouda Quint, pp. 631-632

<sup>37</sup> The National Legal Development Agency in its translation of article 191 paragraph 2 of the CPC uses the term acquittal rather than release from all criminal charges. See the website <https://bphn.go.id/data/documents/vcv.pdf>. The authors think that the use of the term acquittal to denote *putusan lepas* (court's decision to release the accused of all charges due to the fact that the act performed does not qualify as criminal act) is wrong. The term acquittal denotes that the accused has been proven beyond reasonable doubt not to be guilty as charged, see <https://thelawdictionary.org/article/what-does-it-mean-to-be-acquitted/> and <https://www.victimsofcrime.vic.gov.au/words-used-justice-system#A>.

accused (*schulduitsluitingsgrond*) or known in the Indonesian criminal law being part of *alasan pemaaf* (reasons to excuse or excusatory defense). Another reason to translate *Rechterlijk Pardon* as judicial pardon is to differentiate it from the concept of amnesty. The President, as head of the state based on Article 14 of 1945 Constitution, may grant to persons convicted of a crime, a pardon. Here the President, by the authority granted by the constitution, on consideration of humanity or other, decides to abolish the sentence the convict must endure.

The formulation of judicial pardon in Indonesian criminal law is inherently linked to efforts to reform the national criminal law system. This process began with the drafting of the Criminal Code Bill (hereinafter referred to as CCB) following the First National Law Seminar.<sup>38</sup> The legal institution of judicial pardon was first proposed for inclusion in the CCB after two eminent Netherlands professors of criminal law, Nico Keijzer (a Justice of the Netherlands Supreme Court) and Dieter Schaffmeister (Professor of Criminal Law and Criminal Procedure Law at Leiden University), were invited to provide feedback on the English translated Book I of the CCB, commissioned by the National Law Development Agency (Badan Pembinaan Hukum Nasional) in 1988. Their feedback was compiled into a limited report that was not publicly disseminated.<sup>39</sup> The full response is as follows:

We draw attention to the possibility of including provisions in the draft legislation that would allow judges, when they deem it justified, to refrain from imposing criminal sanctions. One conceivable scenario, for example, is a case where a death occurs due to negligence, resulting in the perpetrator losing a close family member. Netherlands criminal judges currently have the discretion to render such a decision. Previously, in cases where a judge encountered exceptional circumstances and considered that imposing a criminal sanction was unnecessary, they were nonetheless compelled to impose a penalty, albeit a very minimal one.<sup>40</sup>

Furthermore, according to Nico Keijzer and Dieter Schaffmeister, before the introduction of judicial pardon, judges were often compelled to impose a criminal sanction on an offender, even when, in their assessment, such a sanction was unnecessary. However, due to the absence of sentencing guidelines allowing for judicial discretion in such cases, Netherlands criminal judges had no choice but to impose a sentence, even if only a minimal one.<sup>41</sup> In addition to their remarks, Keijzer and Schaffmeister provided recommendations for improving the CCB. Their primary suggestion was to incorporate a provision on judicial pardon, modeled after Article 9a of the Netherlands Criminal Code, which states:

If the judge deems it necessary to take this decision, taking into account the minor severity of the offense, the personal circumstances of the offender, the situational context in which the act was committed, or the conditions that arose afterward, they may, in the final ruling, determine not to impose a criminal sanction or any legal measure.

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<sup>38</sup> Hardinanto, A. (2024). Critical Analysis of Living Law Formulation in Law No. 1 of 2023 Concerning the Criminal Code: Towards Law Reform to Realize Justice with the Spirit of Pancasila. *Journal of Law and Legal Reform*, 5(3), 1029-1066. <https://doi.org/10.15294/jllr.v5i3.13923>

<sup>39</sup> The title of the report is "*Enkele Opmerkingen en Aanbevelingen: Aangaande het In 1988 Opgestelde Voorontwerp Voor Boek I van Het Nieuwe Wetboek van Strafrecht van Indonesië.*" A limited-print Indonesian translation of this report, titled "*Beberapa Catatan dan Saran tentang Rancangan Permulaan 1988 Buku I KUHP Baru Indonesia,*" was used in drafting the 1993 the CCB, which was subsequently submitted to the Minister of Justice at the time, Ismail Saleh. The original Dutch version of the report was given directly by Nico Keijzer to the second author, when he was writing his master's thesis at the Criminal Justice System Studies Program at Universitas Diponegoro, while the Indonesian translation was provided by the thesis advisor and dissertation supervisor of the second author, Barda Nawawi Arief, who had served as the chair of the drafting team for Book I of the 2004 of the CCB and had been a member of the CCB drafting team since 1986. This article relies on the original Dutch version of the report.

<sup>40</sup> N. Keijzer en D. Schaffmeister. 1990. *Enkele Opmerkingen en Aanbevelingen: Aangaande het In 1988 Opgestelde Voorontwerp Voor Boek I van Het Nieuwe Wetboek van Strafrecht van Indonesië*, pp. 32-33

<sup>41</sup> *Ibid.*,

Following the feedback and recommendations received, the drafting team formulated sentencing guidelines incorporating the concept of judicial pardon. These guidelines were subsequently included in the provisions of Article 52 paragraph (2) of the CCB. The article stipulates that if a judge deems it necessary, considering the minor severity of the offense, the personal circumstances of the offender, or the conditions at the time the act was committed or those that arose afterward, the judge may grant a pardon to the offender by refraining from imposing any criminal sanction or legal measure, taking into account considerations of justice and humanity.<sup>42</sup>

The drafting team accepted the proposal to incorporate provisions on judicial pardon into the NCC. Several key considerations were put forward to justify this inclusion. First, it aimed to provide judges with greater flexibility in sentencing, in line with the objectives and sentencing guidelines outlined in the reform of national criminal law.<sup>43</sup> The fundamental principle underlying the CCB is known as the principle of balance, which is inherently flexible.<sup>44</sup> The core elements of this principle of balance are as follows:

1. avoiding rigidity and absolutism in sentencing;
2. providing a "safety valve" (*veiligheidsklep*);
3. a form of judicial corrective to the legality principle;
4. the implementation and integration of the value or paradigm of "wisdom and prudence" as embodied in Pancasila;
5. the implementation and integration of "sentencing objectives" into the requirements for sentencing (as granting pardon or clemency requires the judge to consider the objectives of sentencing); thus, the justification for sentencing is not solely based on the existence of a criminal act (legality principle) and culpability (culpability principle), but also on the purpose of sentencing.<sup>45</sup>

Second, the historical consequences and impact of Indonesia's colonial past under Netherlands rule, as well as the application of Netherlands law based on the concordance principle, played a significant role. Accordingly, Criminal Code-*Wetboek van Strafrecht* (hereinafter referred to as CC-WvS), which was enacted in the Netherlands East Indies, was later adjusted to align with the conditions of an independent Indonesia. However, in this adaptation, the provision on judicial pardon was not incorporated. As a result, in the absence of sentencing guidelines for such cases, judges were compelled to impose criminal sanctions whenever it was legally and convincingly proven that the accused had committed an act that met the elements of a criminal offense as charged by Public Prosecutor. Meanwhile, after Indonesia's independence, CC-WvS continued to be enforced unchanged until the enactment of the NCC in 2023. In contrast, the Netherlands, whose criminal code had originally served as the reference for CC-WvS, underwent numerous reforms, one of which was the adoption of the judicial pardon provision on March 23, 1983, which came into effect in 1984.

Third, several criminal cases in Indonesia have demonstrated situations where judges were compelled to impose criminal sanctions despite an awareness and understanding that such penalties were disproportionate to the offense committed or, considering the circumstances of the offender, resulted in injustice. One particularly notable case was the theft of three cocoa beans from an industrial-scale plantation by a traditional farmer from the local community, known as

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<sup>42</sup> Panitia Penyusun RUU KUHP 1991/1992) 1991/1992. 1993. *Naskah Rancangan Kitab Undang-undang Hukum Pidana (Baru) Buku Kesatu Disempurnakan oleh Tim Kecil sampai dengan 13 Maret 1993*, Jakarta: Ministry of Justice, p. 13

<sup>43</sup> Barda Nawawi Arief. 2022. *Tujuan dan Pedoman Pemidanaan: Perspektif Pembaharuan dan Perbandingan Hukum Pidana*, Pustaka Magister, Semarang, p. 59

<sup>44</sup> Gunarto, M. (2012). Asas Keseimbangan Dalam Konsep Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana. *Old Website Of Jurnal Mimbar Hukum*, 24(1), 83-97. /\*doi:http://dx.doi.org/10.22146/jmh.16143\*/ doi:https://doi.org/10.22146/jmh.16143

<sup>45</sup> Barda Nawawi Arief. 2022. *RUU KUHP: Sebuah Restrukturisasi/Rekonstruksi Sistem Hukum Pidana Indonesia*, Semarang: Pustaka Magister, p. 47

the case of Ny. Sanrudi binti Sanatma (Grandma Minah).<sup>46</sup> In this case, the panel of judges reasoned that, since no justifying or excusing circumstances existed to exempt the accused from criminal liability, she had to be declared guilty and sentenced accordingly.<sup>47</sup> The rigid nature of CC-WvS became evident in this case, as it left no alternative but to impose a criminal sanction on anyone proven guilty, except where a statutory ground for exemption applied.<sup>48</sup> Consequently, the judge still imposed a sentence, albeit a suspended sentence, a ruling that was widely criticized for lacking fairness and ignoring humanitarian considerations. Based on these considerations, the inclusion of the judicial pardon mechanism in the NCC is highly appropriate, as reflected in Article 54 paragraph (2). However, the application of Art. 54 paragraph (2) of the NCC does not necessarily imply forgiveness in its widest sense. As earlier indicated forgiveness here does not imply the change of status of the act itself. The accused behaviors are still declared criminal, deplorable and wrong, despite the court deciding not to impose a penal sanction.

Nevertheless, the inclusion of judicial pardon in the NCC has given rise to another issue: this legal institution is not regulated within criminal procedure law. At the very least, there is no clear reference to judicial pardon in any early academic manuscripts or CPC draft, regardless of the version, ranging from the academic manuscript drafted under the leadership of Andi Hamzah<sup>49</sup> to that of Didik Endro Purwoleksono.<sup>50</sup> However, the academic draft made by the parliament of February 2025 about Criminal Procedure Law already contains a ruling for judicial pardon.<sup>51</sup> Consequently, into the draft (of criminal procedure law) should be added a ruling for judicial pardon.<sup>52</sup> Adjustments were then made to the existing academic draft of the Criminal Procedure Law, which now contains a ruling about the return of evidence seized in case of a judicial pardon being passed.<sup>53</sup> However, absent in the same academic draft is a clear explanation as to when a court may decide on a judicial pardon, for what specific crimes a judicial pardon might be considered applicable, and the possibilities to contest such court decision.

The only reference linking judicial pardon to criminal procedure law can be found in the legislative drafting report of the CCB. The full excerpt is as follows:

Regarding *Rechterlijk Pardon*, in which the judge issues a declaration of guilt:

- a. the minor severity of the offense; or
- b. the personal circumstances of the offender; or
- c. the circumstances surrounding the commission of the act; or
- d. the circumstances that arose after the act was committed.

*Rechterlijk Pardon*, as defined above, is accepted as a principle in Book I of the national criminal code by the current provisions. The Supreme Court still retains the authority to review and correct such decisions through cassation.<sup>54</sup>

The background of the report, particularly regarding the concept of judicial pardon, led to its proposal for inclusion in Book I of CCB. However, the report does not explicitly address criminal procedure law within CPC or its draft CPC. Nonetheless, it appears that the drafters of CCB recognized that a guilty verdict without the imposition of a criminal sanction would still allow for the possibility of cassation as a legal remedy. Based on this observation, it can be concluded that the decision to incorporate the legal institution of judicial pardon into Indonesia's

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<sup>46</sup> Purwokerto District Court Decision No. 247/Pid.B/2009/PN.Pwt

<sup>47</sup> *Ibid.*, pp. 9-11

<sup>48</sup> *Ibid.*, p. 12

<sup>49</sup> Andi Hamzah. 2009. *Naskah Akademik RUU Hukum Acara Pidana*, Jakarta: National Law Development Agency

<sup>50</sup> Didik Endro Purwoleksono. 2012. *Naskah Akademik Rancangan Undang-undang tentang Hukum Acara Pidana*, Jakarta: National Law Development Agency

<sup>51</sup> Komisi III Dewan Perwakilan Rakyat Republik Indonesia, *Naskah Akademik Rancangan Undang-undang Tentang Hukum Acara Pidana*, p. 58

<sup>52</sup> *Ibid.*, p. 59

<sup>53</sup> *Ibid.*, p. 192

<sup>54</sup> Criminal Law Review Team 1988/1989 dan 1989/1990. 1990. *Laporan Hasil Pengkajian Bidang Hukum Pidana*, Jakarta: Ministry of Justice, National Law Development Agency, p. 69

substantive criminal law (NCC, set to take effect on January 2, 2026) is both appropriate and justified.

In the future, it is expected that courts, when handling minor criminal cases or cases where the offender's circumstances and the situational conditions related to the offense or those arising afterward warrant consideration, will be able to render decisions that affirm the wrongful nature of the act, thus fulfilling the function of general prevention, while simultaneously delivering justice (by refraining from imposing punishment, considering that the entire criminal trial process itself serves as both a warning and, in some cases, a form of suffering for the offender) and humane judgments (as a corrective measure to criminal law, which justice seekers may often perceive as rigid and strict, and therefore seemingly indifferent to human considerations.)

The issue, as previously indicated, is that criminal procedure law has not yet adequately responded to this development, or at the very least, there has been insufficient attention from legal drafters regarding this matter. It must be acknowledged that the DCPC1 was revised, and DCPC2, DCPC3, DCPC4, and DCPC5 do contain a reference to judicial pardon.<sup>55</sup> The provision states that such a ruling is a judicial declaration pronounced in an open court session, affirming that the accused is proven guilty but, due to the minor severity of the offense, the personal circumstances of the offender, or the conditions at the time of the offense and those arising afterward, the judge does not impose a criminal sanction or legal measure, taking into account considerations of justice and humanity.

However, this definition has yet to be supplemented with more detailed provisions specifying when and how such a ruling can be issued. Nonetheless, this issue can likely be easily corrected. Future drafts of CPC should include more specific guidelines to assist judges in determining the types of offenses for which judicial pardon may be granted, as well as when and how justice seekers may request such a ruling. Additionally, it should clarify the available legal remedies for public prosecutors, who represent the interests of victims and their families, to challenge such decisions. The absence of more detailed procedural regulations will inevitably affect how such rulings can be implemented in legal practice. Moreover, without these procedural clarifications, the inclusion of judicial pardon in criminal procedure law risks becoming merely a symbolic gesture of legislative goodwill, ultimately reducing it to dead letter law, a provision that exists in theory but lacks practical effect.

Furthermore, it is essential to consider that the understanding of this legal institution (as regulated in the criminal substantive or procedure law or as formulated in the DCPC2, DCPC2, DCPC3, DCPC4, and DCPC5) must be placed within the framework of the legality principle, both in its substantive and procedure dimensions. Articles 1 and 2 of the NCC stipulate that an individual may be subject to criminal sanctions and/or legal measures if they violate statutory provisions or living law. The phrase "and/or" is formulated both alternatively-cumulatively, signaling a degree of flexibility within the NCC. However, in the DCPC2, DCPC2, DCPC3, DCPC4, and DCPC5, the formulation is strictly alternative and not alternative-cumulative. The procedure legal consequence of this, from the perspective of criminal procedure law (even though what is being discussed pertains to *ius constituendum*), is that a judge, when considering a pardon ruling, may render a guilty verdict without imposing a criminal sanction but still imposing a legal measure, or conversely, a guilty verdict without imposing a legal measure but still imposing a criminal sanction. This ambiguity or unclarity must be corrected to align with the principles that underpin the criminal code. Such a formulation, in substance, contradicts the essence of judicial pardon.

Another important aspect related to judicial pardon concerns the seizure of evidence as a consequence of a judge's pardon ruling.<sup>56</sup> Regarding seizure of evidence after verdict of acquittal or release from all charges has been passed, DCPC2, DCPC3, DCPC4, and DCPC5 provide that:

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<sup>55</sup> Article 1 number 15 and 16 DCPC2, DCPC3, DCPC4, and DCPC5

<sup>56</sup> Article 232 DCPC2, DCPC3, DCPC4, and DCPC5

Article 232

- (1) In the case of a judicial pardon ruling, an acquittal, or a dismissal of all charges, the court shall order that the seized evidence be returned to the party lawfully entitled to receive it, as specified in the judgment, unless, according to statutory provisions, the evidence in question must be confiscated for the benefit of the state, destroyed, or rendered unusable.
- (2) If seized evidence is to be returned to the rightful party, the court shall order that the evidence be immediately handed over upon the conclusion of the hearing.
- (3) The order for the return of seized evidence shall be carried out unconditionally, except in cases where the court's ruling has not yet acquired legal finality

One notable aspect of the provision above is the unconditional order for the return of seized evidence, which is linked to the moment when the court's ruling attains legal finality. It is important to note, however, that the DCPC2, DCPC3, DCPC4, and DCPC5 do not provide detailed regulations on the available legal remedies to challenge a judicial pardon ruling. The lack of procedural clarity regarding such legal remedies, if left unaddressed, could hinder the practical application of judicial pardon rulings within Indonesia's legal system.

## 2. Judicial Pardon Ideally Be Regulated Within Indonesia, Considering the Necessity of Alignment Between Substantive Criminal Law and Criminal Procedure Law.

Comparative studies in criminal law are essential as they provide constructive insights for the development and formation of legal frameworks in general and criminal law in particular.<sup>57</sup> In discussing the first research question, the second issue concerning the position of judicial pardon within Indonesia's criminal procedure law has yet to be explored. To that end, an analysis will first be conducted on how judicial pardon is regulated within Netherlands criminal procedure law, based on a comparative legal approach. This examination will offer insights into how the regulation of judicial pardon in substantive criminal law has been aligned with criminal procedure law, ensuring a coherent legal framework. As a result, judges are provided with a clear legal basis for issuing judicial pardon rulings, while relevant parties, including the accused and the public prosecutor, retain the right to challenge such rulings through legal remedies should they object to the decision.

Judicial pardon in the Netherlands has long been within the jurisdiction of juvenile judges (*kinderrechter*) and cantonal judges (*kantonrechter*). Subsequently, a proposal emerged to extend similar authority to criminal judges in general courts. The fundamental rationale behind this proposal was to reduce the use of short-term custodial sentences (short-term imprisonment). Additionally, the proposal was driven by a desire to expand the applicability of sanctions targeting financial assets.<sup>58</sup> During parliamentary discussions on this proposal, as documented in the *Memorie van Toelichting* (MvT), the following explanation was provided:

For cases in which the judge deems the imposition of a material sanction unnecessary, it is preferable to pursue the best available alternative, namely, rendering a final decision without imposing a criminal sanction or legal measure. The opportunity to issue such a ruling without imposing punishment or legal measures has thus far, outside the realm of juvenile law (*cf.* Article 77f, paragraph 3 of the Netherlands Criminal Code), been limited solely to cantonal judges (Article 398, sub 9° of the Netherlands Criminal Procedure Code). Moreover, the legal requirements regarding the minor severity of the offense, the

<sup>57</sup> Aditya, S., & Sri Indrawati, A. (2013). PERBANDINGAN HUKUM PIDANA DALAM USAHA PEMBAHARUAN HUKUM PIDANA NASIONAL YANG BERKUALITAS. Kertha Semaya : Journal Ilmu Hukum, . Retrieved from <https://ojs.unud.ac.id/index.php/kerthasemaya/article/view/5360>

<sup>58</sup> Tweede Kamer der Staten-Generaal, Zitting 1978-1979, 15012 *Herziening van bepalingen van het Wetboek van Strafrecht, het Wetboek van Strafvordering, de Wet op de economische delicten en enkele andere wetten in verband met de oplegging van vermogenssancties (Wet vermogenssancties) Nr. 3: Memorie van Toelichting*, p. 23

circumstances under which the act was committed, and, in the context of juvenile law, particularly the offender's personality, make this approach reasonable and desirable. In this regard, the Commission holds the view that the current restriction on judicial discretion concerning the imposition or non-imposition of criminal sanctions can no longer be justified.<sup>59</sup>

The severity of the offense (*feit*) in the Netherlands only influences the range of sanctions that a judge may impose. The decision to impose a sanction is closely tied to the objective of the criminal penalty in question. In general, there is no mandatory requirement compelling a Netherlands judge to impose a criminal sanction as part of a verdict, particularly if the judge believes that a ruling without imposing a penalty would be just as effective, if not more so.<sup>60</sup> According to MvT, a judgment declaring the accused guilty without imposing a criminal sanction is considered far more dignified and effective than issuing a verdict with a relatively minor fine or a suspended sentence.<sup>61</sup>

MvT also emphasizes the need for specific limitations to ensure that judges do not decide cases based solely on their subjective views. There must be clear and identifiable indicators that emerge during the trial process to justify such a decision. The reasoning behind this is that, unlike in civil cases, a criminal trial cannot simply be terminated once the indictment has been read. Meanwhile, new circumstances, special situations, or unforeseen conditions may arise after the prosecutor has presented the charges, and these factors should be duly considered during the proceedings.<sup>62</sup> The full explanation is as follows:

Declaring a accused guilty without imposing a criminal sanction may occur for various reasons. The minor severity of the offense could be one such reason, but it may also be the case that the judge considers the guilty verdict itself to be a sufficient response, without the need to impose an additional criminal sanction. The rationale underlying the decision must be explicitly stated as the basis for the ruling<sup>63</sup>

It can be concluded that the underlying rationale for expanding judicial authority in the Netherlands to grant judicial pardon is to avoid the imposition of criminal sanctions that, despite being minimal, are deemed cruel to the offender. In this context, consideration is also given to the emergence of new facts after the indictment is read, particularly concerning the accused's circumstances, the impact of the offense, or even the overall utility of imposing a criminal sanction. After deliberations in parliament, as indicated in MvT, judicial pardon was ultimately incorporated into Article 9a of the *Wetboek van Strafrecht* (WvS). The full provision is as follows:

If the judge deems it appropriate to consider, in relation to the minor severity of the offense, the personality of the offender, the circumstances under which the act was committed, or subsequent events that have arisen, they may determine, in or through the final ruling, not to impose a criminal sanction or legal measure.

According to C.P.M. Cleiren, J.H. Crijns, and M.J.M. Verpalen, a judicial pardon may be granted when a judge is faced with a situation in which the offense is of minor seriousness, the personality of the offender warrants consideration, or the circumstances at the time of the offense or subsequent developments justify such a decision. For the latter, an illustrative example could be the onset of an incurable illness in the suspect or the death of a close family member who was a victim of the offense committed by the suspect.<sup>64</sup>

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<sup>59</sup> *Ibid.*,

<sup>60</sup> *Ibid.*,

<sup>61</sup> *Ibid.*,

<sup>62</sup> *Ibid.*,

<sup>63</sup> *Ibid.*, p. 54

<sup>64</sup> CPM Cleiren, JH Crijns, MJM Verpalen. 2018. *Strafrecht Tekst & Commentaar: Twaalfde Druk*, Nederlands: Wolter Kluwers, p. 123

In the Netherlands, judicial pardon is regulated not only in WvS but also in the *Wetboek van Strafvordering* (the Netherlands Criminal Procedure Code). Among the various provisions on judicial pardon in Netherlands criminal procedure law, two key articles stand out: Article 359(4), which concerns the inclusion of judicial reasoning for granting a pardon, and Article 404(2), which regulates the legal remedies available to challenge such a decision. The provision of Article 359(4) reads as follows: When applying Article 9a or Article 44a of the Criminal Code, the judgment must include specific reasoning that clearly explains why such a decision was made

Thus, according to the Netherlands Criminal Procedure Code, a judicial ruling based on Article 9a concerning judicial pardon must explicitly include the reasoning that underlies the decision. The judgment must specify which indicators have been met as the basis for granting the pardon. Furthermore, the full text of Article 404 paragraph (2) reads as follows:

An appeal is available against rulings on offenses, whether rendered as a final judgment by the district court or decided during trial proceedings. The public prosecutor may file an appeal before the court that issued the ruling, and the accused may also appeal if they were not acquitted of all charges, except in cases where the decision was issued as a final judgment:

- a. if, considering the application of Article 9a of the Criminal Code, no criminal sanction or legal measure has been imposed; or
- b. if no criminal sanction or other measure has been imposed, except for a fine at most, or, if the judgment includes two or more fines, the total amount €50

According to C.P.M. Cleiren and M.J.M. Verpalen, Article 404 paragraph (2) serves as an exception to the right of appeal against first-instance rulings in cases involving minor offenses (*overtredingen*). Their full opinion is as follows:

Paragraph 2 establishes the conditions and limitations on the right to appeal in cases where minor offenses (*overtredingen*) are examined and adjudicated by a court of first instance. Excluded from the right to appeal are cases involving minor offenses where, under Article 9a no criminal sanction or legal measure has been imposed. Furthermore, appeals are also barred in cases where an offense has been adjudicated without the imposition of a criminal sanction or legal measure, except for a fine not exceeding €50. In cases involving cumulative charges, where the district court has imposed multiple fines, the total sum of all fines must be calculated, and the €50 threshold applies. The restriction on appeals applies equally to both the public prosecutor and the accused<sup>65</sup>

Based on the provisions of Article 404 paragraph (2) above, appeals may generally be filed against rulings on minor offenses (*overtredingen*). However, if the judgment is based on Article 9a of the WvS concerning judicial pardon, neither the public prosecutor nor the accused may file an appeal. Additionally, under Article 427 paragraph (2) subsection (a), when an appeal decision concerns a minor offense and applies Article 9a WvS, cassation is not permitted. The full text of Article 427 paragraph (2) subsection (a) is as follows:

- 427 [Opportunity to File an Appeal, Suspension, and Expiration of the Right to Appeal]
1. Against a ruling by the court of appeal, if issued as a judgment concerning a criminal offense, cassation may be sought by the public prosecutor at the court that rendered the decision, as well as by the accused;
  2. Against a ruling by the court of appeal, if issued as a judgment concerning a minor offense, cassation may be sought by the public prosecutor at the court that adjudicated the case, as well as by the accused, except in the final judgment

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<sup>65</sup> CPM Cleiren dan MJM Verpalen. 2011. *Strafvordering Tekst & Commentaar: Negende Druk*, Nederlands: Wolter Kluwers, p. 1398

where: considering the applicability of Article 9a of the Criminal Code, no criminal sanction or legal measure has been imposed; or

There are several significant rulings related to the application of judicial pardon in the Netherlands. The key cases are summarized as follows:

- a. Supreme Court Ruling of 19 November 2019, NJ 2019/472<sup>66</sup>  
A ruling that declares guilt without imposing a criminal sanction but still orders compensation does not constitute a final judgment as envisioned under Article 9a of the Netherlands Criminal Code (which requires the absence of both criminal sanctions and legal measures). Accordingly, under Article 404 paragraph (2) and subsection (a) of the Netherlands Criminal Procedure Code, such a ruling is subject to appeal;
- b. Supreme Court Ruling of 6 December 2011, NJ 2013/12<sup>67</sup>  
This ruling refers to Article 26 of the European Union Convention on Combating Human Trafficking, which mandates that signatory states must provide the possibility of not imposing criminal sanctions on victims of human trafficking for their involvement in unlawful acts, if they were coerced into committing such offenses. However, this does not imply that a judge, when examining a case where this provision is relevant, is obligated to apply Article 9a of the Netherlands Criminal Code. There is no legal provision that explicitly requires courts to do so;
- c. Supreme Court Ruling of 21 March 2017, NJ 2017/153<sup>68</sup>  
In this ruling, the accused was found guilty without the imposition of a criminal sanction for assaulting two individuals. Art. 9a Netherlands Criminal Code was applied. The evidence presented did not support (prove) that one of the victims had sustained any injuries. Although the victim was possibly to initiate civil proceedings against the accused to claim compensation for the alleged injury, the ruling was under Article 404(2), second paragraph, subsection (a), of the Netherlands Criminal Procedure Code, not subject to appeal;
- d. Supreme Court Ruling of 16 October 2018, NJ 2018/455<sup>69</sup>  
The Supreme Court established a legal principle that a court of appeal ruling, in which the court "after considering all factors" decides not to impose a criminal sanction or legal measure, is not solely based on the excessive duration of proceedings in accordance with Article 6 of the *Europees Verdrag voor de Rechten van de Mens* (EVRM) but also on (i) the personal circumstances of the accused; (ii) the fact that the accused had no prior convictions; and (iii) the significant passage of time since the offense was committed. The reasoning provided by the court of appeal to justify the application of Article 9a of the Netherlands Criminal Code must be regarded as sufficiently justified;
- e. Court of Appeal of 's-Hertogenbosch Ruling of 28 November 2017, NJ 2018/149<sup>70</sup>  
This ruling concerns the consumption of cannabis, which in the Netherlands is generally not prosecuted. The legal principle established in this decision is that if the legislature does not regulate the issue of using the backroom of cannabis-selling establishments for consumption, the court should issue rulings that clarify under what circumstances the public prosecutor may bring such cases before a criminal court. It is recommended that no criminal sanction or legal measures be imposed in such cases.<sup>71</sup>

The comparative study of criminal law between the Netherlands and Indonesia regarding judicial pardon illustrates that, although Indonesia was "inspired" by the Netherlands formulation and incorporated it into the NCC, it did not conduct a thorough academic examination as evidenced in the academic draft of February 2025 and DCPC2, DCPC3, DCPC4,

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<sup>66</sup> ECLI:NL:HR:2019:1809

<sup>67</sup> ECLI:NL:HR:2011:BP9394

<sup>68</sup> ECLI:NL:HR:2017:472

<sup>69</sup> ECLI:NL:HR:2018:1944

<sup>70</sup> ECLI:NL:GHSHE:2017:5167

<sup>71</sup> The prosecution policy *Gedooigbeleid softdrugs en coffeeshops*, however, is that apart from exceptional circumstances possession of small quantities is not prosecuted.

and DCPC5. The team assigned to make the academic draft and the draft of Criminal Procedure Code apparently disregarded important issues on the need to require judges to based their decision to pass judicial pardon with sufficient considerations, what particular crimes would be eligible and what legal options would be available in case parties to the case objects to such decision. All these would be needed to provide judges with clear guidance on how and when to consider passing such judgment and provide sufficient considerations why in a particular case, they decide to grant pardon.

The absence of clear provisions regulating judicial pardon in the DCPC will lead to serious legal issues, as the function of the CPC as formal criminal law is to enforce substantive criminal law. Without a corresponding procedural framework, the judicial pardon mechanism in the NCC cannot be effectively implemented by criminal judges. Additionally, without clear procedural guidelines for its implementation, judicial pardon becomes highly vulnerable to abuse. This concern is particularly relevant given the susceptibility of Indonesian judges to transactional offers from the accused or external pressures, as has been widely observed in various legal cases in Indonesia.

These issues should ideally be addressed before it is too late through the regulation of several key aspects. First, there must be internal and external synchronization and harmonization between the existing academic manuscripts and DCPC, as well as between DCPC and the NCC. Second, DCPC should include a provision explicitly recognizing a ruling that declares an accused guilty without imposing a criminal sanction or legal measure. The use of the phrase “criminal sanction and legal measure” instead of “criminal sanction or legal measure” is intended to eliminate any judicial interpretation that allows for an alternative imposition of either a sanction or a measure within the framework of judicial pardon. If a judicial pardon is granted, then neither a criminal sanction nor a legal measure should be imposed. Third, DCPC should include a specific formulation in the form of sentencing guidelines for judges, requiring that any decision based on Article 54 paragraph (2) of the NCC explicitly state the considerations and justifications for applying this provision.

Fourth, it is necessary to define the types of offenses eligible for judicial pardon *and* establish legal indicators when and how it may be applied, and what legal avenues will be made open to challenge such sentence. This issue requires serious attention, given that the NCC no longer distinguishes between crimes (*kejahatan*) and minor offenses (*pelanggaran*). Meanwhile, in the Netherlands, which served as Indonesia’s “inspiration” for this provision, no legal remedies such as appeal or cassation are available to challenge the application of Article 9a the Criminal Code concerning judicial pardon in cases of minor offenses (*overtredingen*).

## **V. Conclusion**

The regulation of judicial pardon in Indonesian criminal law is based on the principle of balance, which is inherently flexible, as a response to the rigid nature of sentencing due to the absence of explicit sentencing guidelines in CC-WvS. It has become evident that there is a need to grant judges the discretion to issue a guilty verdict without simultaneously imposing a criminal sanction or legal measure on an accused who has been legally and convincingly proven guilty of a criminal offense, taking into account the specific circumstances of each case. This necessity was addressed through its formulation in Article 54 paragraph (2) of the NCC.

Judicial pardon should ideally be formulated within DCPC based on several key considerations. First, there must be internal and external synchronization and harmonization between the existing academic manuscripts and DCPC, as well as between DCPC and the NCC. Second, DCPC should include a provision explicitly recognizing a ruling that declares a person guilty without imposing a criminal sanction and legal measure, rather than formulating it alternatively. Third, DCPC should incorporate a specific sentencing guideline for judges, requiring any decision based on Article 54 paragraph (2) of the NCC explicitly states the reasoning and justification for applying this provision. Fourth, it is necessary to define the types of offenses eligible for judicial pardon and establish legal remedies to challenge its application. This issue requires serious attention, given that the NCC no longer distinguishes between crimes

and minor offenses. Meanwhile, in the Netherlands, which served as Indonesia's "inspiration" for this provision, there are no legal correction such as appeal or cassation available to challenge the application of Article 9a the Criminal Code concerning judicial pardon in cases of minor offenses (*overtredingen*), whether by the public prosecutor or the accused.

## References

- A. S. (2024). KEBENARAN PERSPEKTIF FILSAFAT ILMU SEBAGAI LANDASAN DALAM BERKARYA ILMIAH. *Journal of Excellence Humanities and Religiosity*, 1(2), 24-46. <https://doi.org/10.34304/joehr.v1i2.230>
- A.Barlian, Aristo E., and Barda N. Arief. (2017) "FORMULASI IDE PERMAAFAN HAKIM (RECHTERLIJK PARDON) DALAM PEMBAHARUAN SISTEM PEMIDANAAN DI INDONESIA." *LAW REFORM* 13, no. 1: 28-44. <https://doi.org/10.14710/lr.v13i1.15949>
- Aditya, S., & Sri Indrawati, A. (2013). PERBANDINGAN HUKUM PIDANA DALAM USAHA PEMBAHARUAN HUKUM PIDANA NASIONAL YANG BERKUALITAS. *Kertha Semaya : Journal Ilmu Hukum*. Retrieved from <https://ojs.unud.ac.id/index.php/kerthasemaya/article/view/5360>
- Arief, Barda Nawawi *RUU KUHP: Sebuah Restrukturisasi/Rekonstruksi Sistem Hukum Pidana Indonesia*, Semarang: Pustaka Magister, 2022
- Arief, Barda Nawawi *Tujuan dan Pedoman Pemidanaan: Perspektif Pembaharuan dan Perbandingan Hukum Pidana*, Semarang: Pustaka Magister, 2022
- Arman S. (2023). Restorative Justice Dalam Penyelesaian Tindak Pidana Yang Dilakukan Oleh Anak. *Sawerigading Law Journal*, 2(1), 54-64. <https://doi.org/10.62084/slj.v2i1.330>
- Belliotti, R.A. (2015). Virtue and the Law: Classical Perspectives. In: Sison, A. (eds) *Handbook of Virtue Ethics in Business and Management*. Springer, Dordrecht. [https://doi.org/10.1007/978-94-007-6729-4\\_42-1](https://doi.org/10.1007/978-94-007-6729-4_42-1)
- Cholidin, A., Fernando, Z., & Feka, M. (2024). Utilization of Neuroimaging in Criminal Justice: Unveiling Truth Through Brain Technology. *IJCLS (Indonesian Journal of Criminal Law Studies)*, 9(2), 243-280. doi: <https://doi.org/10.15294/ijcls.v9i2.50316>
- Cleiren, CPM dan MJM Verpalen. *Strafvordering Tekst & Commentaar: Negende Druk*, Nederlands: Wolter Kluwers, 2011
- Cleiren, CPM JH Crijns, dan MJM Verpalen *Strafrecht Tekst & Commentaar: Twaalfde Druk*, Nederlands: Wolter Kluwers, 2018
- Gunarto, M. (2012). ASAS KESEIMBANGAN DALAM KONSEP RANCANGAN UNDANG-UNDANG KITAB UNDANG-UNDANG HUKUM PIDANA. OLD WEBSITE OF JURNAL MIMBAR HUKUM, 24(1),83-97./\*doi:http://dx.doi.org/10.22146/jmh.16143\*/ doi: <https://doi.org/10.22146/jmh.16143>
- Hakim, A. (2017). MENAKAR RASA KEADILAN PADA PUTUSAN HAKIM PERDATA TERHADAP PIHAK KETIGA YANG BUKAN PIHAK BERDASARKAN PERSPEKTIF NEGARA HUKUM PANCASILA. *Jurnal Hukum Dan Peradilan*, 6(3), 361-378. <https://doi.org/10.25216/jhp.6.3.2017.361-378>
- Hamzah, Andi *Naskah Akademik RUU Hukum Acara Pidana*, Jakarta: Badan Pembinaan Hukum Nasional, 2009
- Hardinanto, Aris. (2024). Critical Analysis of Living Law Formulation in Law No. 1 of 2023 Concerning the Criminal Code: Towards Law Reform to Realize Justice with the Spirit of Pancasila. *Journal of Law and Legal Reform*, 5(3), 1029-1066. <https://doi.org/10.15294/jllr.v5i3.13923>

- Hasibuan, S. M. (2021). KEBIJAKAN FORMULASI RECHTERLIJKE PARDON DALAM PEMBAHARUAN HUKUM PIDANA. *Jurnal Hukum Progresif*, 9(2), 111-122. <https://doi.org/10.14710/jhp.9.2.111-122>
- <https://www.biblegateway.com/passage/?search=John%20%3A32&version=KJV>, accessed 11 February 2025
- <https://www.oxfordreference.com/display/10.1093/acref/9780191826719.001.0001/q-oro-ed4-00009114>, accessed 11 February 2025
- <https://www.uingusdur.ac.id/info/konsep-mikul-duwur-mendem-jero-versi-prof-sugeng>, accessed 11 February 2025.
- Irmawanti, N. D., & Arief, B. N. (2021). Urgensi Tujuan Dan Pedoman Pemidanaan Dalam Rangka Pembaharuan Sistem Pemidanaan Hukum Pidana. *Jurnal Pembangunan Hukum Indonesia*, 3(2), 217-227. <https://doi.org/10.14710/jphi.v3i2.217-227>
- Keijzer, Nico dan Schaffmeister, D. *Beberapa Catatan dan Saran tentang Rancangan Permulaan 1988 Buku I KUHP Baru Indonesia*, tanpa penerbit, 1990
- Keijzer, Nico dan Schaffmeister, D. *Enkele Opmerkingen en Aanbevelingen: Aangaande het In 1988 Opgestelde Voorontwerp Voor Boek I van Het Nieuwe Wetboek van Strafrecht van Indonesie*, Driebergen/Valkenburg, 1990
- Knight, E., & Tsoukas, H. (2018). When Fiction Trumps Truth: What 'post-truth' and 'alternative facts' mean for management studies. *Organization Studies*, 40(2), 183-197. <https://doi.org/10.1177/0170840618814557>
- Komisi III Dewan Perwakilan Rakyat Republik Indonesia, *Naskah Akademik Rancangan Undang-undang Tentang Hukum Acara Pidana*
- Laia, A., & Purwanto. (2023). KEBENARAN DAN KEADILAN HUKUM . *JURNAL PANAHA KEADILAN*, 2(1), 1-14. <https://doi.org/10.57094/jpk.v2i1.709>
- Magnis-Suseno, F. (2020). Philosophy, A Challenge To Post-Truth, Also in Indonesia. *Jurnal Filsafat*, 30(1), 1-22. /\*doi:<http://dx.doi.org/10.22146/jf.53671>\*/ doi: <https://doi.org/10.22146/jf.5367>
- Mahraen. (2023). JUDICIAL PARDON DALAM PERKEMBANGAN HUKUM PIDANA INDONESIA (STUDI KUHP 2023). *IURIS NOTITIA : JURNAL ILMU HUKUM*, 1(1), 1-5. <https://doi.org/10.69916/iuris.v1i1.40>
- Marzuki, P. M. (2019). The Judge's Task to Find Law Under the Indonesian Law. *Yuridika*, 19(2), 85-100. <https://doi.org/10.20473/ydk.v19i2.14410>
- Marzuki, Peter Mahmud *Penelitian Hukum: Edisi Revisi*, Jakarta: Kencana Prenada Media, 2023
- Maulidah, Khilmatin, and Nyoman S. P. Jaya. (2019) "KEBIJAKAN FORMULASI ASAS PERMAAFAN HAKIM DALAM UPAYA PEMBAHARUAN HUKUM PIDANA NASIONAL." *Jurnal Pembangunan Hukum Indonesia* 1, no. 3: 281-293. <https://doi.org/10.14710/jphi.v1i3.281-293>
- Meliala, N. C. (2020). Judicial pardon(Pemaafan Hakim) : Suatu Upaya Menuju Sistem Peradilan Pidana Dengan Paradigma Keadilan Restoratif. *Jurnal IUS Kajian Hukum Dan Keadilan*, 8(3), 551-568. <https://doi.org/10.29303/ius.v8i3.820>
- Negara, T. A. S. (2023). Normative Legal Research in Indonesia: Its Originis and Approaches. *Audito Comparative Law Journal (ACLJ)*, 4(1), 1-9. <https://doi.org/10.22219/aclj.v4i1.24855>

- Nurmansyah, G. (2024). THE ROLE OF JUDGES IN MAINTAINING JUDICIAL INDEPENDENCE. *Progressive Law Review*, 6(01). <https://doi.org/10.36448/plr.v6i01.162>
- Panitia Penyusun RUU KUHP 1991/1992 *Naskah Rancangan Kitab Undang-undang Hukum Pidana (Baru) Buku Kesatu Disempurnakan oleh Tim Kecil sampai dengan 13 Maret 1993*, Jakarta: Departemen Kehakiman, 1993
- Procter-Legg, T., Hobson, J., & Quimby, E. (2024). Restorative justice and social justice: an international perspective. *Contemporary Justice Review*, 27(2-3), 218-238. <https://doi.org/10.1080/10282580.2024.2414953>
- Purwoleksono, Didik Endro *Naskah Akademik Rancangan Undang-undang tentang Hukum Acara Pidana*, Jakarta: Badan Pembinaan Hukum Nasional, 2012
- Putri, W. (2022). Apakah Restorative Justice Sejalan Dengan Nilai-nilai Hukum dan Rasa Keadilan yang Hidup dalam Masyarakat Indonesia?. *Gema Keadilan*, 9(2), 93-107. <https://doi.org/10.14710/gk.2022.16251>
- Rahayu, D. P., Faisal, F., Sari, R., & Satrio, N. (2020). Law Enforcement in the Context of Legal Culture in Society. *LAW REFORM*, 16(2), 276-289. <https://doi.org/10.14710/lr.v16i2.33780>
- Rancangan Kitab Undang-undang Hukum Acara Pidana versi Pusat Perundang-undangan Bidang Politik Hukum dan Hak Asasi Manusia Badan Keahlian DPR RI 21 Maret 2023
- Rommelink, Jan Mr. D. *Hazewinkel-Suringa's Inleiding tot de Studie van Het Nederlandse Strafrecht*, Arnhem: Gouda Quint, 1994
- Soehartono, S. (2014). MENGEMBANGKAN PEMIKIRAN HAKIM DALAM MENYELESAIKAN SENGKETA. *Yustisia*, 3(1). doi:<http://dx.doi.org/10.20961/yustisia.v3i1.10106>
- Tafrijyah, K. (2024). Struktur Sintaksis dan Makna Semantik Ungkapan Tradisional sebagai Representasi Masyarakat Jawa. *Deskripsi Bahasa*, 7(1), 43-58. <https://doi.org/10.22146/db.11066>
- Tim Pengkajian Bidang Hukum Pidana 1988/1989 dan 1989/1990 *Laporan Pengkajian Hukum Pidana*, Jakarta: Badan Pembinaan Hukum Nasional Departemen Kehakiman, 1990
- Tweede Kamer der Staten-Generaal, Zitting 1978-1979, 15012 *Herziening van bepalingen van het Wetboek van Strafrecht, het Wetboek van Strafvordering, de Wet op de economische delicten en enkele andere wetten in verband met de oplegging van vermogenssancities (Wet vermogenssancities) Nr. 3: Memorie van Toelichting*
- Wright, C. (1998). Truth: A Traditional Debate Reviewed. *Canadian Journal of Philosophy Supplementary Volume*, 24, 31-74. <https://doi.org/10.1080/00455091.1998.10717495>
- Yudhatama, C. F., & Pangestika, E. Q. (2024). Restorative Justice Model through the Imposition of Compensation Punishment as the Main Punishment in Crimes Against Property. *Rechtsnormen Journal of Law*, 2(2), 156-163. <https://doi.org/10.55849/rjl.v2i2.712>
- Yunanto, Y. (2019). MENERJEMAHKAN KEADILAN DALAM PUTUSAN HAKIM. *Jurnal Hukum Progresif*, 7(2), 192-205. <https://doi.org/10.14710/hp.7.2.192-205>
- YUSUF, M., LIMPO, I. Y., MAULIANA, D., MALLARANGENG, A. B., & HM, M. (2017). ROLE OF THE JUDGE IN CREATING JUSTICE AS AN INSTRUMENT OF SOCIAL CHANGE. *University Of Bengkulu Law Journal*, 1(1), 11-18. <https://doi.org/10.33369/ubelaj.1.1.11-18>
- Yusuf, Muhammad Rifai, Briliyan Erna Wati, Muhammad Harun, and Tri Nurhayati. (2021) "Overview of the Judge's Forgiveness Concept Its Relation to The Legal Interests of

Criminal Victims (RKUHP Concept Study)". *Walisongo Law Review (Walrev)* 3, no. 1: 63–86. <https://doi.org/10.21580/walrev.2021.3.1.8724>