

## LEGISLATION AND IMPLICATIONS OF ARTICLE 54 PARAGRAPH (2) OF THE KUHP CONCERNING THE LAW OF PARDON IN CRIMINAL PROVISION IN INDONESIA

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### Abstract

Law Number 1 of 2023 concerning the Criminal Code (KUHP) introduces the concept of *rechterlijk pardon* or judicial forgiveness in Article 54 paragraph (2). This provision grants judges discretionary authority to release perpetrators from criminal penalties by considering the severity of the act, the perpetrator's personal circumstances, or the circumstances after the crime, as long as they take into account a sense of justice and humanity. This article aims to analyze the legal ratio and practical implications of Article 54 paragraph (2) of the Criminal Code by reviewing the philosophical, sociological, and legal foundations of the birth of this norm. The research method used is normative juridical with a statutory, case, and comparative approach. The results of the study indicate that this provision is a correction to the overly rigid principle of legality while also opening up space for judges to balance legal certainty, justice, and expediency. The implication is that judges have broader discretion to uphold substantive justice, including integration with the values of restorative justice. However, without clear technical guidelines, this provision has the potential to give rise to subjectivity and disparity in decisions. Therefore, the effectiveness of the application of Article 54 paragraph (2) of the Criminal Code is very dependent on the consistency of the judge's interpretation, the existence of implementing regulations, and adequate supervision.

**Keywords:** *Criminal Code, Rechterlijk Pardon, Legislative Ratio, Judicial Discretion, Criminal Reform*

### INTRODUCTION

Reforming Indonesian criminal law is a long-awaited and important agenda. The old Criminal Code, in effect since the Dutch colonial era, is considered no longer in line with the values of justice in Indonesian society. One fundamental problem is its highly positivistic nature and emphasis on the principle of absolute legality, so that judges are often viewed merely as mouthpieces of the law (*la bouche de la loi*) (Sudikno Mertokusumo, 2010). This condition creates a rigid judiciary and ignores aspects of substantive justice. The phenomenon of criminalization of minor cases has sharply criticized the criminal justice system. The case of Grandma Minah in Banyumas for stealing three cocoa pods, or the case of Grandma Rasminah for taking used household appliances, symbolize the injustice resulting from overly formalistic legal application (Kompas.com., 2009). In such situations, judges lack a strong enough normative basis to acquit defendants of crimes, even though morally and from a substantive justice perspective, the punishment feels inappropriate.

The overcrowding of correctional institutions further exacerbates the problem. Data from the Directorate General of Corrections shows that the number of inmates far exceeds the available capacity (Directorate General of Corrections, 2022). Many minor criminal cases still result in imprisonment, thus not only creating a burden for the state but also potentially damaging the future of offenders who should be able to be rehabilitated. In response, a new Criminal Code was born, ratified through Law Number 1 of 2023. One important innovation is the recognition of the concept of *rechterlijk pardon* in Article 54 paragraph (2). This article allows judges to refrain from sentencing defendants if there are justifiable reasons, such as the minor nature of the act, the perpetrator's personal circumstances, or the circumstances after the act, while still considering a sense of justice and humanity. This paper focuses on two main issues. What is the legal rationale behind the enactment of Article 54 paragraph (2) of the Criminal Code concerning legal pardon? And what are the implications of this provision for criminal justice practices in Indonesia?

## **LITERATURE REVIEW**

Historically, the concept of legal pardon originated in Dutch criminal law, as stipulated in Article 9a of the Criminal Code (WvS). This provision authorizes judges to withhold punishment even if the defendant is found guilty, if there are mitigating reasons, whether related to the nature of the act or the defendant's personal circumstances. This principle acknowledges that criminal punishment is not always the best way to enforce the law, especially in minor cases. A similar provision is also found in the Somali Criminal Code, specifically Article 147, which allows judges to grant pardons based on factors such as age, personal circumstances, or the seriousness of the crime. This demonstrates that the practice of legal pardon is not unique to continental legal systems, but has also developed in various other legal systems as an instrument of sentencing moderation. In criminal law doctrine, several theories are relevant to understanding the position of legal pardon. Gustav Radbruch emphasized that the law must reflect three fundamental values: legal certainty (*rechtssicherheit*), justice (*gerechtigkeits*), and utility (*zweckmabigkeit*). (Radbruch, G. 2006). All three must be placed in balance, because the dominance of one can sacrifice the others. John Rawls, through his theory of justice as fairness, emphasized the importance of distributive justice, where legal policies must provide greater protection to vulnerable groups in society. (Rawls, J. 1999). Meanwhile, Jeremy Bentham, in his theory of utilitarianism, emphasized that punishment is only legitimate if it provides greater benefits than harms. (Bentham, J., 2009). If punishment actually causes suffering that is disproportionate to its benefits, then imposing punishment becomes counterproductive.

In the context of Indonesian criminal law, the concept of *rechterlijk pardon* aligns with the thinking of national legal experts. Barda Nawawi Arief emphasized that criminal policy must be humanistic, that is, not merely imposing punishment, but also considering aspects of community protection, the interests of victims, and the rehabilitation of perpetrators (Arief, B. N., 2012). Muladi added that a modern criminal justice system must combine the goals of social protection with the goal of rehabilitating perpetrators, so that punishment should not be viewed merely as a means of retribution (Muladi, 1995). These two views support the idea that discretionary space for judges is important to balance legal certainty with humanitarian values. Previous studies have also emphasized the importance of judicial discretion to prevent overcriminalization and overcrowding in correctional institutions. For example, a study by Heriyadi, Listiana, and Lay emphasized the need for flexibility in legal policy to prevent all cases from ending in prison sentences. (Heriyadi, Listiana, E., & Lay, Y. N., 2018). Without discretion, judges have the potential to be trapped in decisions that are legally-formally correct but contrary to substantive justice. The presence of Article 54 paragraph (2) of the Criminal Code is seen as a breakthrough because it provides normative legitimacy to judges to carry out corrective functions against rigid criminal law, so that decisions can be more in accordance with the principles of justice, benefit, and humanity.

## **METHOD**

This research uses a normative juridical method. This method was chosen because the focus of the study is the legal norms written in the Criminal Code and the doctrines developing in criminal law. The analysis was conducted using three main approaches:

1. Statute approach: examining the provisions of Article 54 paragraph (2) of the Criminal Code and related regulations such as Supreme Court Regulation Number 1 of 2024 concerning Guidelines for Adjudicating Criminal Cases Based on Restorative Justice;
2. Case approach: reviewing relevant decisions, such as Rengat District Court Decision No. 2/Pid.Sus-Anak/2021 concerning a child who committed minor theft and Nunukan District Court Decision No. 287/Pid.Sus/2021 concerning the distribution of illegal cosmetics;
3. Comparative approach: reviewing the practice of *rechterlijk pardon* in the Netherlands and Somalia as a comparative reference.

Data was collected through a literature review, including legislation, court decisions, and academic literature. The analysis was conducted prescriptively to formulate legal arguments and provide recommendations.

## **RESULTS AND DISCUSSION**

One of the most important parts in examining the reform of the Criminal Code is understanding the purpose and implications of the birth of Article 54 paragraph (2), which introduces the concept of *rechterlijk pardon* or judicial forgiveness. This article did not exist in a vacuum, but is the result of a long dynamic of academic debate, criticism of criminal justice practices, as well as pressing sociological and legal needs in Indonesian society. This provision is a response to various weaknesses of the previous criminal law system which was considered too rigid, inflexible, and tended to give rise to excessive criminalization. Therefore, to understand the significance of its existence, it is necessary to analyze further the ratio legis or philosophical, sociological, and legal reasons for the formation of

Article 54 paragraph (2) of the Criminal Code, as well as examine its practical implications for judges in carrying out their criminal justice functions in Indonesia.

### **Legislative Ratio for the Formation of Article 54 Paragraph (2) of the Criminal Code**

Article 54 paragraph (2) of the Criminal Code was born as part of a new paradigm of Indonesian criminal law that is oriented towards the humanization of law. This humanization of criminal law emphasizes that punishment can no longer be seen solely as an instrument of state revenge against perpetrators of criminal acts, but must be positioned as a means to achieve dignified justice. In other words, punishment must be adjusted to the human condition of the perpetrator, the objective nature of the act committed, and the impact it has on society. This paradigm emerged as a response to growing criticism in society that the current criminal system is too formalistic, mechanical, and does not take into account the moral and social aspects of a criminal case. (Arief, B. N. 2012). Philosophically, Article 54 paragraph (2) emphasizes the principle of *ultimum remedium*, namely that punishment can only be imposed as a last resort when other legal instruments are no longer adequate. This principle prevents the emergence of excessive criminalization and ensures that punishment is truly placed proportionally according to the objectives of legal protection. This thinking is in line with the idea of Gustav Radbruch who emphasized that the law must encompass three main values: legal certainty, justice, and Laws that prioritize certainty without considering justice and utility will lose their moral legitimacy. (Radbruch, G., 2006). Therefore, the application of Article 54 paragraph (2) of the Criminal Code can be seen as a normative instrument that helps judges maintain a balance between legal certainty and substantive justice. Furthermore, this norm is also consistent with the principle of proportionality, namely that punishment must be commensurate with the level of error and the harm caused.

Disproportionate punishment will actually give rise to new injustices and damage the legitimacy of the criminal justice system. (Ashworth, A., 2010). From a sociological perspective, Article 54 paragraph (2) is highly relevant in addressing the problems of over-criminalization and overcrowding that have burdened the correctional system in Indonesia. Data from the Directorate General of Corrections shows that prisons are, on average, more than double their normal capacity, and the majority of inmates are perpetrators of minor crimes or drug users. This situation not only creates state budget problems but also creates a correctional environment that is not conducive to the development of prisoners. (Directorate General of Corrections, 2022). In this context, Article 54 paragraph (2) functions as a filtering mechanism that allows judges not to impose prison sentences on perpetrators of minor crimes. Thus, this norm can reduce the burden on prisons while minimizing the negative effects of imprisonment, such as social stigmatization (labeling effect) which often damages the future of perpetrators, especially when they come from vulnerable groups such as children or the poor. (Goffman, E., 1963).

From a legal perspective, Article 54 paragraph (2) represents a fundamental correction to the principle of legality, which has been rigidly understood in the old Criminal Code. For decades, the principle of legality has positioned judges merely as *la bouche de la loi*, namely mouthpieces of the law whose task is solely to apply the rules without room to assess aspects of substantive justice. As a result, many court decisions are formally valid, but morally considered unjust by society. With the presence of this new norm, judges are given legal legitimacy to consider substantive justice in addition to legal certainty. However, this broad discretionary authority must be exercised carefully and accountably, through clear legal considerations and rational arguments in decisions, so as not to give rise to arbitrariness. (Mertokusumo, S., 2010). A classic example that often attracts public attention is the case of Grandma Minah in Banyumas who was sentenced for stealing three cocoa pods and the case of Grandma Rasminah who was sentenced for taking used household items. These two cases demonstrate the rigid face of criminal law, where the judge was forced to impose a sentence because all elements of the crime had been proven, even though morally the act should not be worthy of punishment. If Article 54 paragraph (2) had been in effect at that time, the judge would have had a clear normative basis for not imposing a sentence on the two defendants, so that the resulting decision would not only be legally valid, but also in line with the community's sense of justice. (Kompas.com., 2009).

### **Practical Implications for Judges**

The implementation of Article 54 paragraph (2) of the Criminal Code has important implications for the changing role of judges in the criminal justice system. Judges are no longer positioned solely as *la bouche de la loi* or mouthpieces of the law who only interpret legal texts rigidly, but are instead required to be protectors of the values of substantive justice. This paradigm shift requires judges to be more sensitive to the social and moral context of a case, and to have the courage to make decisions that reflect the community's sense of justice. Judges are not merely carrying out the technical function of law enforcement. law, but also plays a role as a substantive actor that maintains the moral legitimacy of the justice system. (Friedman, L. M., 2002).

The authority granted by Article 54 paragraph (2) also expands the scope of judicial discretion. In deciding a

case, judges now not only consider whether the formal elements of the crime have been fulfilled, but also assess the individual factors of the defendant. This includes age, economic condition, level of remorse, the existence of reconciliation with the victim, and the social impact that may arise if the sentence is imposed. With this scope of discretion, judges have a greater opportunity to encourage the achievement of restorative justice, where the emphasis is no longer solely on revenge, but on restoring the relationship between the perpetrator, the victim, and the community. This orientation is in line with Andrew Ashworth's view that wise sentencing must take into account the social context and must not ignore the possibility of recovery outside of imprisonment. (Ashworth, A., 2010). Furthermore, Article 54 paragraph (2) of the Criminal Code is closely related to Supreme Court Regulation Number 1 of 2024, which emphasizes the importance of a restorative justice approach in resolving criminal cases. The presence of this regulation emphasizes that punishment is not an end in itself, but rather a means to achieve broader justice. Based on this, judges can use Article 54 paragraph (2) as a normative bridge to align decisions with the spirit of restorative justice, namely emphasizing victim recovery, social reintegration of perpetrators, and harmony in society. The combination of the new Criminal Code and this Supreme Court regulation provides strong legitimacy for judges to be more flexible in issuing decisions that support humanitarian values.

However, it is important to recognize that broad discretionary powers also carry their own risks. Without clear technical guidelines, the application of Article 54 paragraph (2) can lead to disparities in decisions between similar cases. Sharp differences in decisions for cases with nearly identical circumstances can create a perception of injustice in the public eye. Furthermore, discretionary space also has the potential to be abused if not strictly monitored. Therefore, the Supreme Court needs to issue more detailed guidelines regarding the application of Article 54 paragraph (2), so that judges have the same normative reference in issuing decisions. On the other hand, the Judicial Commission must also strengthen its oversight role to ensure that judicial discretion is used consistently, transparently, and in accordance with the principles of accountability. (Indonesian Judicial Commission., 2021).

Several court decisions in Indonesia can serve as examples to observe the direction of the application of judicial discretion in line with the spirit of Article 54 paragraph (2). Rengat District Court Decision No. 2/Pid.Sus-Anak/2021, for example, acquitted a child from a criminal sentence on the grounds that rehabilitation was more appropriate than imprisonment. This consideration affirms the principle that the best interests of the child must be prioritized in the judicial process. Meanwhile, Nunukan District Court Decision No. 287/Pid.Sus/2021 granted a housewife a suspended sentence, taking into account the defendant's dire socio-economic conditions. These two decisions demonstrate that judges have begun to internalize humanitarian values in criminal justice practices. With the presence of Article 54 paragraph (2) of the Criminal Code, judges now have an explicit legal basis to use humanitarian considerations as a legitimate basis in making decisions.

The discussion of the legal ratio and practical implications of Article 54 paragraph (2) of the Criminal Code shows that this provision does not merely add variety to norms in the criminal justice system, but also has fundamental consequences for the direction of criminal law reform in Indonesia. This norm integrates the values of humanization, proportionality, and restorative justice into criminal justice practice, while also providing space for judges to become substantive actors who balance legal certainty with justice. However, the discretionary authority held by judges must still be exercised responsibly to avoid excessive subjectivity or disparity in decisions. Thus, Article 54 paragraph (2) of the Criminal Code can truly function as a corrective instrument in the criminal justice system, while also becoming an important foundation for realizing more dignified justice in Indonesia.

## CONCLUSION

Article 54 paragraph (2) of the Criminal Code is an important breakthrough in criminal law reform in Indonesia. Its legislative ratio is based on the philosophy of legal humanization, the need to reduce excessive criminalization, and the drive to balance legal certainty, justice, and expediency. The implication is that judges have a strategic role in upholding substantive justice with broader discretionary powers. However, this authority must be exercised carefully so as not to give rise to excessive subjectivity or disparity in decisions. Recommendations that can be submitted are that the Supreme Court needs to issue technical guidelines regarding the application of Article 54 paragraph (2) of the Criminal Code, education and training for judges need to be strengthened so that they are able to use discretion wisely, Empirical research needs to be conducted on the application of Article 54 paragraph (2) after the Criminal Code comes into effect, to measure its effectiveness, the public and academics need to be involved in monitoring and evaluating the implementation of this norm, so that it does not deviate from its original purpose. Therefore, the existence of Article 54 paragraph (2) of the Criminal Code can truly be an instrument for bringing more humane justice to the Indonesian criminal law system.

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