

Harmonization Of The Phrase “Minor Nature Of The Act” With The Principle Of Legality In The Implementation Of *Rechterlijk Pardon* In Indonesia

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Abstract

The phrase “*minor nature of the act*” in the concept of *rechterlijk pardon* as regulated in Law No. 1 of 2023 has not yet been accompanied by interpretative guidelines. This situation may result in biased interpretations, leading to legal uncertainty and inconsistency in future law enforcement. This study examines the ideal regulation of the phrase “*minor nature of the act*” in *rechterlijk pardon* to ensure harmony with the principle of legality. The research employs normative legal methods, utilizing statutory, conceptual, case, and comparative approaches. The findings indicate that the phrase “*minor nature of the act*” should be limited to specific criminal offenses eligible for pardon, as exemplified in Portugal, in order to prevent multiple interpretations that could result in discrimination in law enforcement.

Keywords: Minor Nature of the Act, *Rechterlijk Pardon*, Legality.

INTRODUCTION

The enactment of Law No. 1 of 2023 on the Criminal Code, which replaces the *Wetboek van Strafrecht* (Law No. 1 of 1946 on Criminal Law Regulations) previously in force in Indonesia, has brought about significant changes. The new code shifts the penal system, which was previously focused on punishment and rehabilitation, toward a restorative justice approach.¹

Unlike the old Criminal Code, Law No. 1 of 2023 introduces new sentencing schemes in the form of sentencing purposes and guidelines. By incorporating sentencing objectives into the penal framework, punishment is no longer perceived as an absolute consequence.²

¹ Eddy O.S. Hiariej dan Topo Santoso, 2025, *Anotasi KUHP Nasional*, Cet. Kedua, Depok, Rajawali Pres, p. 108

² Aska Yosuka Dan Dian Adriawan Daeng Tawang, 2018, “Kebijakan Formulasi Terkait Konsepsi *Rechterlijke Pardon* (Permaafan Hakim) Dalam Pembaharuan Hukum Pidana Di Indonesia”, *Jurnal Hukum Adigama*, Vol. 1, No. 1, p. 3

The paradigm shift from a retributive to a restorative model has important implications, including the incorporation of *living law*, the reclassification of the death penalty from a principal punishment to a special (alternative) sanction, the addition of non-penal measures, and the introduction of the concept of *rechterlijk pardon*.

The concept of *rechterlijk pardon* — a judicial pardon or clemency by judges — is a genuinely new feature introduced in Law No. 1 of 2023.³ This concept is deemed capable of reflecting the noble values embedded in Indonesia's national criminal law, which is grounded in the philosophy of Pancasila.⁴

According to Barda Nawawi Arief, the introduction of the *rechterlijk pardon* is based on the following considerations:⁵

1. To prevent the absolutism of punishment by providing a safeguard mechanism (*veiligheidsjlep*).
2. As a form of judicial correction to the principle of legality.
3. As an implementation or integration of the value of “wise prudence” inherent in Pancasila.
4. As an embodiment of the “purpose of punishment” within sentencing requirements, whereby judicial pardon must take into account the objectives of sentencing.

The *rechterlijk pardon* is regulated in Article 54 (2) of Law No. 1 of 2023 on the Criminal Code, which states:

*“The minor nature of the act, the personal circumstances of the offender, or the circumstances at the time the crime was committed and thereafter may serve as grounds for the court to refrain from imposing a sentence or to impose non-penal measures, taking into account considerations of justice and humanity.”*⁶

Schaffmeister and Nico Keijzer note that prior to the existence of such provisions in the Netherlands, judges had occasionally felt that certain cases did not warrant punishment. However, they were still compelled to impose penalties, even if minimal. A well-known Indonesian example is the case of *Nenek Minah*, who was sentenced to one month and fifteen days' imprisonment with a three-month probation for stealing three cocoa pods. Judges were bound by three options: imposing punishment, acquittal, or dismissal of charges. Many argued that

³ *Ibid.*, p. 3

⁴ Aristo Evandy A. Barlian dan Barda Nawawi Arief, 2017, “Formulasi Ide Pemaafan Hakim (*Rechterlijk Pardon*) dalam Pembaharuan Sistem Pemidanaan Indonesia,” *Jurnal Law Reform*, Vol. 13, No. 1, p. 34

⁵ Barda Nawawi Arief, 2008, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru*, Cetakan Pertama, Semarang, Grafikatama Jaya, p. 77

⁶ Indonesia, Pasal 54 Ayat (2) KUHP (Kitab Undang-Undang Hukum Pidana), LN Tahun 2023 Nomor 1, TLN Nomor 684.

punishment in such a case was inappropriate, as it violated the sense of justice in society.⁷

The main issue lies in the elements of *rechterlijk pardon* set out in Article 54(2) of Law No. 1 of 2023, which form the requirements for granting judicial pardon. These elements include the minor nature of the act, the personal circumstances of the offender, and the circumstances surrounding the offense and its aftermath.⁸

The element of “minor nature of the act” is particularly problematic due to its broad interpretative scope, which lacks a precise definition. This raises concerns about divergent perspectives among law enforcers in determining what constitutes a minor act. A similar issue had arisen under Law No. 11 of 2012 on the Juvenile Criminal Justice System (SPPA), where Article 70 contained a parallel provision:

“The minor nature of the act, the personal circumstances of the child, or the circumstances at the time the crime was committed and thereafter may serve as grounds for the court to refrain from imposing a sentence or to impose non-penal measures, taking into account considerations of justice and humanity.”⁹

This provision was invoked in case No. 2/Pid.Sus-Anak/2021/PN.Rgt, where the court granted judicial pardon on the basis of Article 70 of the SPPA, arguing that the offense warranted diversion. However, the offense involved aggravated theft under Article 363 (1) (3) of the Criminal Code, which does not qualify as a minor offense.¹⁰

Furthermore, when examined in light of the principle of legality —a fundamental tenet of criminal law— the wording of Article 54(2) appears inconsistent. The principle of legality is expressly articulated in Article 1 (1) of Law No. 1 of 2023:

“No act shall be punishable except by virtue of a penal provision in legislation that was already in force before the act was committed.”¹¹

⁷ Fikrotul Jadidah, 2022, “Kasus Nenek Minah Ditinjau dari Perspektif Teori Hukum Positivisme”, *Jurnal Iblam Law Review*, Iblam School Of Law, Vol. 2 No. 3, p. 141

⁸ Indonesia, Pasal 54 Ayat (2) KUHP (Kitab Undang-Undang Hukum Pidana), LN Tahun 2023 Nomor 1, TLN Nomor 684.

⁹ Indonesia, Pasal 70 Undang-Undang Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak, LN Tahun 2012 Nomor 153, TLN Nomor 5332.

¹⁰ Annisa Nur Fadhilah Syahputra dan Erny Herlin Setyorini, 2024, “Analisis Pemaafan Hakim Ditinjau dari Ringannya Perbuatan yang Dilakukan oleh Anak”, *Jurnal Magister Hukum Law and Humanity*, Fakultas Hukum Universitas 17 Agustus 1945 Surabaya, Vol. 2, No. 3, p. 291

¹¹ Indonesia, Pasal 1 Ayat (1) KUHP (Kitab Undang-Undang Hukum Pidana), LN Tahun 2023 Nomor 1, TLN Nomor 684.

The principle of legality protects against arbitrariness in criminal law enforcement.¹² Its core components include *lex scripta*, *lex certa*, *lex stricta*, and *lex praevia*. The phrase “minor nature of the act” arguably violates *lex certa* and *lex stricta*, as it lacks clarity and precision.¹³

As such, the phrase remains ambiguous and opens the door to multiple or overly broad interpretations by future law enforcers, thereby jeopardizing legal certainty. In the authors’ preliminary analysis, the phrase should be limited, similar to the judicial pardon provisions in Portugal. This study therefore seeks to formulate an ideal regulatory model for the phrase “minor nature of the act” so that it harmonizes with the principle of legality.

RESEARCH METHOD

This study employs normative legal research, conducted through a statute approach, a conceptual approach, a case approach, and a comparative approach. The primary, secondary, and tertiary legal materials were collected through library research. The data and information obtained were analyzed descriptively and analytically in the discussion section of this paper. The conclusions and recommendations regarding the ideal regulation of the phrase “*minor nature of the act*” in the implementation of *rechterlijk pardon* in Indonesia were then drawn deductively.

RESULTS AND DISCUSSION

Legal Uncertainty in the Phrase “*Minor Nature of the Act*” in Article 54(2) of Law No. 1 of 2023 Concerning *Rechterlijk Pardon*

1. Regulation and Implementation of *Rechterlijk Pardon* in Law No. 11 of 2012 on the Juvenile Criminal Justice System

The implementation of *rechterlijk pardon* has occurred in Indonesia as an actualization of Article 70 of Law No. 11 of 2012 on the Juvenile Criminal Justice System (JCJS), which stipulates:

*“The minor nature of the act, the personal circumstances of the child, or the circumstances at the time the crime was committed and thereafter may serve as grounds for the court to refrain from imposing a sentence or to impose non-penal measures, taking into account considerations of justice and humanity.”*¹⁴

Article 70 of the JCJS served as a judicial consideration in decision No. 2/Pid.Sus-Anak/2021/PN.Rgt. In this case, a child in conflict with the law had

¹² Indi Nuroini, Desember 2023, “Penegakan Hukum dalam Penerapan Hukum Pidana Dalam Penggunaan Perspektif Ilmiah Hukum Pidana”, *Jurnal Yurisprudencia*, Fakultas Hukum Universitas Bhayangkara Surabaya, Vol. 9, No. 2, p. 192

¹³ Ateng Sudibyo Dan Aji Halim Rahman, Juli 2021, “Dekontruksi Asas Legalitas dalam Hukum Pidana”, *Jurnal Presumption Of Law*, Vol. 3, No. 1, p. 56

¹⁴ Indonesia, Pasal 70 Undang-Undang Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak, LN Tahun 2012 Nomor 153, TLN Nomor 5332.

stolen a motorcycle from inside a house. The public prosecutor indicted the child under Article 363 (1) (3) of the Criminal Code concerning aggravated theft in conjunction with Article 1 (1) of the JCJS, which carries a maximum sentence of seven years' imprisonment.

In its ruling, the court refrained from imposing punishment or measures, referring to the diversion provisions set out in Article 9 (1) of the JCJS. That article classifies offenses into serious crimes —such as terrorism, drug trafficking, rape, and murder— and ordinary crimes. Theft, while criminalized, is not categorized as a serious crime but rather as an ordinary one. Accordingly, the court considered the case as involving an ordinary offense.¹⁵

Thus, Article 70 of the JCJS became the basis for the court's pardon. The interpretation was reinforced by Article 9 (1) of the JCJS on diversion. However, this outcome reflects the absence of an agreed standard for what constitutes "*minor nature of the act*." Judges were compelled to rely on their own interpretations, thereby confirming how legal uncertainty arises in the absence of clear interpretative guidelines. As Cesare Beccaria argued, interpretative discretion in criminal law is a pernicious practice.¹⁶

The judicial practice in the above case represents *rechtvinding* (judicial law-making). *Rechtvinding* occurs when provisions are vague, ambiguous, or incomplete, requiring judges to fill normative gaps. This confirms the absence of explicit limits for interpreting the element "*minor nature of the act*" in Article 70 of the JCJS, which is also present in Article 54 (2) of Law No. 1 of 2023.

2. The Absence of the Phrase "*Minor Nature of the Act*" in Indonesian Legislation

In addition to its application in case No. 2/Pid.Sus-Anak/2021/PN.Rgt —where the judge relied on his own interpretation by referring to the diversion provisions— the phrase "*minor nature of the act*" cannot be found in any Indonesian legislation other than the JCJS Law.

In existing Indonesian criminal legislation, the only comparable phrase is "*minor criminal offense*." This phrase appears in the following regulations:

- a) Supreme Court Regulation No. 12 of 2012 on the Adjustment of Limits for Minor Criminal Offenses and the Amount of Fines in the Criminal Code.
- b) Decision of the Director General of the General Judiciary of the Supreme Court No. 1691/DJU/SK/PS.00/12/2020 on Restorative Justice.
- c) Regulation of the Prosecutor's Office No. 15 of 2020 on the Termination of Prosecution Based on Restorative Justice.

¹⁵ Annisa Nur Fadhillah Syahputra dan Erny Herlin Setyorini, 2024, "Analisis Pemaafan Hakim Ditinjau dari Ringannya Perbuatan yang Dilakukan oleh Anak", *Op. Cit.*, p. 291

¹⁶ E. Fernando M. Manullang, 2019, *Legisme, Legalitas dan Kepastian Hukum*, Cetakan Ketiga, Jakarta, Prenadamedia Group, p. 110.

These regulations essentially deal with the classification of minor criminal offenses under Articles 364, 373, 379, 407, and 482 of the former Criminal Code, which cover offenses punishable by a maximum of three months' imprisonment and/or causing material losses not exceeding IDR 2,000,000.

The problem arises when certain acts, although minor in execution, have serious consequences. Such cases align more closely with the idea of "*minor nature of the act*." For example, in electoral crimes, polling station officers who mark unused ballots commit an act punishable under Article 532 of Law No. 17 of 2017 on General Elections, with a maximum sentence of four years' imprisonment and a fine of up to IDR 48,000,000.¹⁷

This offense may be seen as a relatively minor act, yet it has serious consequences threatening state sovereignty by undermining democracy. Here, the act is minor in nature, but the impact is severe. Such divergent perspectives inevitably create interpretive ambiguity.

This tension is further exacerbated by the fact that criminal legislation explicitly recognizes only the category of minor criminal offenses (*tindak pidana ringan*). These offenses are strictly defined within legislation, whereas the phrase "*minor nature of the act*" is more closely tied to subjective normative assessments. Such assessments are products of interpretation and analysis by law enforcers, with no guarantee of consistency in their application.

3. Legal Uncertainty In The Phrase "*Minor Nature Of The Act*" In Article 54 (2) Of Law No. 1 Of 2023

The element of "*minor nature of the act*" in Article 54(2) of Law No. 1 of 2023 lacks interpretative guidelines or specific limitations. The key issue is whether the phrase can be equated with or derived from the classification of "minor offenses." In the academic draft of Law No. 1 of 2023, a "very minor offense" is defined as one punishable by less than one year's imprisonment and/or a category I or category II fine.

However, the academic draft does not clarify the correlation between the phrase "*minor nature of the act*" and "very minor offenses," leaving its meaning broad and without clear interpretive standards. This ambiguity generates legal uncertainty.

Such vagueness results in inconsistency in law enforcement, which directly contradicts the principle of legal certainty. Because the phrase lacks standardized meaning, different judges may interpret it differently. As Hans Kelsen emphasized in his theory of legal certainty, consistency in law enforcement is a critical indicator of a just legal system.¹⁸

¹⁷ Indonesia, Pasal 532 Undang-Undang Nomor 17 Tahun 2027 tentang Pemilihan Umum, LN Tahun 2017 Nomor 182, TLN Nomor 6109.

¹⁸ E. Fernando M. Manullang, 2016, *Legisme, Legalitas dan Kepastian Hukum*, Op. Cit., p. 23

Without legal certainty, undesirable consequences and discrimination in law enforcement are inevitable, making it difficult for justice seekers to attain substantive justice. Legal certainty requires the law to be clear, fixed, and consistently applied.¹⁹

In law enforcement, justice and legal certainty are essential elements. Justice cannot be achieved without legal certainty, and vice versa. Only when both are present can law fulfill its function of ensuring order and fairness.²⁰

In Indonesia, however, legal enforcement often appears skewed. It tends to be harsh on petty crimes committed by ordinary citizens, while more lenient toward serious crimes committed by elites or those with high social standing. Law enforcement is frequently likened to an inverted pyramid: sharp downward but blunt upward.²¹

Such a condition illustrates how the elite, who occupy a high social stratification in society, receive privileged positions in law enforcement. An example is the case of Gregorius Ronald Tannur, the son of a government official, who was involved in an assault that resulted in death. According to the police investigation, Ronald allegedly assaulted his girlfriend, which subsequently led to her death.²²

For instance, the case of Gregorius Ronald Tannur, the son of a public official, illustrates this imbalance. He was accused of assault leading to the death of his partner. Prosecutors charged him under Article 338 of the Criminal Code, alternatively Article 351 (3), or Article 359 in conjunction with Article 351 (1). Surprisingly, the court acquitted him. The three judges who decided the case were later arrested by the Attorney General's Office.²³

This example highlights the unequal reality of law enforcement in Indonesia, where elites often receive privileged treatment in the judicial process. If the phrase "*minor nature of the act*" in Law No. 1 of 2023 is left without clear limitations, such discriminatory practices are likely to persist. Historically, such bias has always favored those with higher social status.

Regulation of *Rechterlijk Pardon* in Other Jurisdictions

1. *Rechterlijk Pardon* in Civil Law / Continental European Countries

¹⁹ R. Tony Prayogo, 2016, "Penerapan Asas Kepastian Hukum dalam Peraturan Mahkamah Agung Nomor 1 Tahun 2011 tentang Hak Uji Materiil dan dalam Peraturan Mahkamah Konstitusi Nomor 06/Pmk/2005 tentang Pedoman Beracara dalam Pengujian Undang-Undang", *Jurnal Legislasi Indonesia*, Vol. 13, No. 2, p. 193

²⁰ *Ibid.*, p. 721

²¹ Dadin E. Saputra, Juni 2015, Hubungan Antara *Equality Before the Law* dalam Penegakan Hukum di Indonesia dengan Harmonisasi Konflik Antar Lembaga Penegak Hukum, *Banjarmasin Syariah Jurnal Ilmu Hukum*, Fakultas Syariah dan Ekonomi Islam, Vol. 15, No. 1, p. 19

²² Amir Baihaqi, "Rangkuman Lengkap Kasus Ronald Tannur Berujung Tiga Hakim Ditangkap", <https://www.detik.com/jatim/hukum-dan-kriminal/d-7604482/rangkuman-lengkap-kasus-ronald-tannur-berujung-3-hakim-ditangkap>, Diakses 23 September 2025, Pukul 00.30 WIB.

²³ *Ibid.*

a) Greece

Greek criminal law does not explicitly use the term *rechterlijk pardon* or judicial pardon. However, the concept can be inferred from the provisions of the Greek Penal Code, which state that courts may refrain from imposing punishment under certain conditions, namely: ²⁴

- 1) The offense is very minor.
- 2) Consideration of the offender's malicious character.
- 3) Imposition of punishment is deemed ineffective as a means of preventing recidivism (special deterrence).

From this formulation, judicial pardon is evident in the phrase "*the court may refrain from imposing punishment.*" The words "*may*" and "*refrain*" signify the judge's authority to withhold or abstain from imposing a penalty. This demonstrates that judges hold absolute discretion to decide, based on their assessment, whether to impose a sentence or not.

b) Portugal

In Portugal, judicial pardon is known as *dispensa de pena* or *non-imposing of penalty*. Article 74(1) of the Portuguese Penal Code of 1983 stipulates: "*No penalty shall be imposed for offenses punishable by a maximum of six months' imprisonment or a fine not exceeding 180 daily fines (calculated on the offender's daily income).*"²⁵ Thus, pardon may be granted in cases where:

- 1) The offense carries a maximum of six months' imprisonment; or
- 2) Combined penalties (imprisonment and fine) do not exceed 180 daily fines.

The formulation of offenses that may receive *Dispensa de Pena* (judicial pardon) can be categorized as minor crimes, in which the imposed criminal sanction is a maximum of six months' imprisonment and a combined penalty of up to 180 daily fines (three months). This formulation is clearer and more explicit compared to pardons in other countries, as it is explicitly stipulated in the Criminal Code to whom such pardon may be granted.

Following the 2006 reform of the Portuguese Penal Code, Article 74 was amended to reduce the limit to 120 daily fines. The pardon also applies if: (1) the unlawfulness of the act and the culpability of the offender are considered minimal, (2) the harm or loss caused is negligible or has been compensated within one year, (3) preventive considerations do not outweigh the granting of pardon, taking into account the offender's family, the victim's family, and the

²⁴ Barda Nawawi Arief, 2003, *Beberapa Masalah Perbandingan Hukum Pidana*, Jakarta, Raja Grafindo Persada, p. 79

²⁵ Albert Aries, 2021, "Judicial Pardon as Perfection of the Implementation of legality Principle in Sentencing", *International Journal of Research In Business and Social Science*, Vol. 11, No. 1, p. 353

surrounding community. All of these elements must be met cumulatively before a judge may grant judicial pardon.²⁶

2. *Rechterlijk Pardon di Negara-Negara Common Law/Anglo Saxon*

a) United States

The concept of pardon in the United States differs somewhat from that in other countries. In the United States, pardon takes the form of an institution commonly referred to as the plea or plea bargain. In principle, a plea contains two essential elements: an admission and a justification of the alleged criminal act, accompanied by arguments of justification and a request to the Public Prosecutor to be excused or pardoned for the act committed.²⁷

Plea bargaining is regulated under Rule 11 subsection (d) of the Federal Rules of Criminal Procedure, which prohibits the court from accepting a guilty plea without first hearing the defendant's statement as to whether the plea was made voluntarily, free from coercion or undue pressure, and not induced by any promise made by the Public Prosecutor outside the plea agreement. To protect defendants from prosecutorial arbitrariness in the plea bargaining process, the rule stipulates that the court shall not accept a guilty plea before conducting sufficient inquiry to establish that a factual basis exists for the plea. If these provisions are violated, the plea agreement cannot be accepted by the court, and the judicial process will automatically proceed to trial.

Another distinction between the concept of pardon in the United States and that in other countries lies in the limited role of judges in resolving cases through plea bargaining. Case resolution under this mechanism often does not reach the trial stage. Instead, negotiations take place between the prosecutor and the defendant (including charge bargaining, fact bargaining, and sentencing bargaining) after the defendant enters a guilty plea.²⁸

These negotiations may result in several possible agreements, such as the prosecutor deciding not to bring charges or to file reduced charges, the prosecutor recommending a specific sentence to the judge, or both parties agreeing on a particular sentence to be imposed.²⁹

b) England

In England, pardon is not typically granted by judges or law enforcement but is instead seen as a prerogative power rooted in social hierarchy.

²⁶ Barda Nawawi Arief, 2003, *Beberapa Masalah Perbandingan Hukum Pidana*, Op. Cit., p. 83.

²⁷ Sanford H Kadish and Monrad G. Paulsen, 1975, *Criminal Law and Its Processes Cases and Materials*, Boston, Rown and Company, p. 557

²⁸ Regina Rauxloh, 2021, *Plea Bargaining in National and International Law*, London, Routledge, p. 27

²⁹ Ladito R. Bagaskoro, 2021, "Rekonseptualisasi Jalur Khusus dalam Rancangan KUHAP Sebagai Bentuk Reformasi Sistem Peradilan Pidana Indonesia", *Jurnal Arena Hukum*, Vol. 14, No. 1, p. 204

Defendants must rely on the mercy and discretion of juries or, in some instances, the Crown's prerogative of mercy.³⁰

This reflects a system where judicial pardon is less about codified law and more about discretionary power and social honor, extending across different judicial levels. It highlights the distinctively irrational and prerogative-based nature of pardon in the English system.³¹

Among the countries reviewed, Portugal's regulation of judicial pardon is considered the most ideal. Its clarity in defining eligible offenses —limited to crimes punishable by a maximum of six months' imprisonment or 120 daily fines— offers certainty, consistency, and fairness. This stands in contrast to Indonesia, where the vague phrase "*minor nature of the act*" risks inconsistent and discriminatory application.³²

Formulation of Criminal Law Policy on the Phrase "*Minor Nature of the Act*" in Line with the Principle of Legality

The principle of legality constitutes a fundamental pillar of criminal law. It arose as a reaction against the absolutism of monarchs, under which certain acts (*crimina extra ordinaria*) could be punished even though they were not stipulated in law. This led to arbitrary and unstable law enforcement.³³

The principle of legality serves to protect citizens from potential abuse of state power. In criminal procedure, it functions to prevent arbitrariness on the part of law enforcement officials, ensuring that criminal law operates in the public interest by safeguarding and restoring public order disrupted by crime.³⁴

The principle of legality, in its concept, embodies meanings that serve as parameters of the very existence of the principle itself. The meanings contained within the principle of legality are as follows:³⁵

1. No act may be prohibited or punishable unless previously defined in statutory law.
2. Analogy may not be used to determine the existence of a criminal act.
3. Criminal law provisions may not be applied retroactively.

³⁰ Andi Hamzah, 2022, *Perbandingan Hukum Pidana di 18 Negara*, Depok, Rajawali Pers, p. 23

³¹ Andi Hamzah, 2022, *Perbandingan Hukum Pidana di 18 Negara*, *Op. Cit.*, p. 25

³² Albert Aries, 2021, "Judicial Pardon as Perfection of the Implementation of legality Principle in Sentencing", *Op. Cit.*, p. 353

³³ Lidya Suryani Widayati, November 2011, Perluasan Asas Legalitas Dalam RUU KUHP, *Jurnal Negara Hukum*, Vol. 2, No. 2, p. 310

³⁴ Tristam P. Moeliono dan Widati Wulandari, 2015, "Asas Legalitas dalam Hukum Acara Pidana: Kritikan terhadap Putusan MK tentang Praperadilan", *Jurnal Hukum Ius Quia Iustum*, Fakultas hukum Universitas Padjajaran Bandung, Vol. 2, No. 4, p. 599

³⁵ Jan Remmelink, 2003, *Hukum Pidana: Komentas atas Pasal-Pasal Terpenting dari Kitab Undang-Undang Hukum Pidana Belanda dan Padanannya dalam Kitab Undang-Undang Hukum Pidana Indonesia*, Jakarta, Gramedia Pustaka Utama, p. 357

In addition, the principle of legality also encompasses fundamental principles contained within it, namely as follows:³⁶

1. Lex scripta, criminal law must be codified in writing.
2. Lex certa, criminal provisions must be clear.
3. Lex stricta, provisions must be applied strictly without analogy.
4. Lex praevia, criminal law cannot be applied retroactively (the principle of non-retroactivity).

In the authors' view, Article 54 (2) of Law No. 1 of 2023 on *rechterlijk pardon* risks creating loopholes, particularly through the phrase "*minor nature of the act*." Without clear parameters, this phrase may be exploited by legal actors, including so-called *judicial mafias*. Therefore, the scope of "*minor nature of the act*" must be explicitly defined—identifying what acts qualify as "minor" and what penalties are applicable. Portugal provides a valuable reference point. There, judicial pardon (*dispensa de pena*) is limited to offenses punishable by a maximum of six months' imprisonment or 120 daily fines. The Portuguese approach ensures clarity and predictability while restricting judicial discretion to a reasonable scope.³⁷

To illustrate the differences, the following table compares the Indonesian and Portuguese frameworks:

Table
Comparison of the Regulation of *Rechterlijk Pardon* in Indonesia and Portugal

<i>Rechterlijk Pardon</i> in Indonesia	<i>Rechterlijk Pardon</i> in Portugal
No maximum penalty threshold; interpretation relies on the phrase " <i>minor nature of the act</i> ".	Limited to offenses punishable by a maximum of six months' imprisonment or 120 daily fines.
Considers the offender's personal circumstances.	Not explicitly regulated.
Considers circumstances at the time of the offense.	Not explicitly regulated.
Provisions are not cumulative; any element may suffice.	Provisions are cumulative; all elements must be satisfied.

³⁶ ELSAM, 2005, *Asas Legalitas KUHP dalam Rancangan 2005*, Posiston Paper Avokasi RUU KUHP Seri 1, Jakarta, p. 5-8

³⁷ Albert Aries, 2021, "Judicial Pardon as Perfection of the Implementation of legality Principle in Sentencing", *Op. Cit.*, p. 353

In light of this comparison, the authors argue that Indonesia should establish clear limits for the phrase “*minor nature of the act*”. Although this may appear rigid, such limitations are necessary to reduce disparities in judicial decisions and minimize discriminatory law enforcement. Establishing clear parameters would provide certainty, harmonize *rechterlijk pardon* with the principle of legality, and enhance public trust in the criminal justice system.

CONCLUSION

The phrase “*minor nature of the act*” in the provisions of *rechterlijk pardon* under Article 54 (2) of Law No. 1 of 2023 raises both conceptual and practical problems. The absence of clear parameters for what constitutes a “*minor act*” creates the risk of ambiguity and legal uncertainty. Its overly broad interpretive scope opens the door to inconsistent application across cases and jurisdictions, thereby undermining the principle of legal certainty, one of the fundamental pillars of criminal law.

Comparative practice shows that other jurisdictions, such as Portugal, provide more ideal models of judicial pardon by establishing concrete indicators for determining whether an act qualifies as minor —such as the extent of harm caused, the social impact of the offense, and the degree of culpability of the offender. These restrictions narrow judicial discretion, making its application more consistent and equitable.

Without limitations, the phrase “*minor nature of the act*” risks distorting the principle of *lex stricta* under the principle of legality, which requires criminal provisions to be clearly and rigidly defined. This principle exists to prevent analogical interpretation that could disadvantage defendants or produce unequal treatment before the law.

It is therefore imperative to reformulate and limit the meaning of the phrase “*minor nature of the act*.” Such reform can be achieved through implementing regulations, official explanatory notes, or recognized legal doctrine, all of which would provide clear guidance to law enforcers. Absent such limitations, discriminatory practices, sentencing disparities, and abuse of judicial discretion are likely to increase, ultimately eroding public trust in Indonesia’s criminal justice system.

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