

## **Conflicts of Justice and Legal Certainty in the National Criminal Code: A Middle Way**

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### **Abstract**

*The research discusses the unclear meaning of Article 53 paragraph (2) of Law No. 1 of 2023 which states that "If in upholding law and justice as referred to in paragraph (1) there is a conflict between legal certainty and justice, judges must prioritize justice." Justice is used for judges to adjudicate cases and certain conditions are used as a benchmark for judges in making decisions. However, there are several existing definitions of justice, there are still many views. The norm in the article has a vagueness of meaning, making it difficult for judges to equate commensurate thoughts. The implication of vagueness results in disparity in the use of justice to be used by judges, this potential disparity needs to be prevented by mediating the conflict between justice and certainty and providing guidance for judges in using justice in their decisions. This research uses a normative research approach. The results showed that judges have the authority to choose justice that contains legal certainty because a just decision is a manifestation of legal certainty, justice itself is born with the freedom of judges. The formulation of Article 53 paragraph (2) of the Criminal Code needs to be interpreted correctly so that there is no disparity in decisions because justice is what the judge wants based on the law to create justice itself.*

**Keywords:** Judge; Justice; Legal Certainty

### **1. INTRODUCTION**

In previous research, there was an analysis of the review of the decision of the panel of judges on the case of death row inmate Ferdi Sambo at the cassation level which has judicial independence and independence. The paper is limited to Aristotle's theory of justice in which if the judge applies the death penalty, corrective justice for Ferdi Sambo and other death row inmates will not be realized even though the convict regrets his actions, the convict will still await the execution of the death penalty so that in this case the decision in the Ferdi Sambo cassation decision is an effort to fix something wrong in this case fixing Ferdi Sambo's soul, and prioritizing the right to life.<sup>1</sup>

Likewise with previous research that discusses the Restorative Justice Paradigm in Judges' Decisions, this paper interestingly describes how the purpose of punishment has developed in a more modern direction which is now known as restorative justice which prioritizes "recovery/repair". The restorative justice paradigm seeks to provide justice, legal certainty, and benefits as well as to realize progressive and responsive law, so it should be used as a paradigm for judges in deciding a case. However, it is unfortunate that the authority of judges in deciding a

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<sup>1</sup> Rizky P P Karo Karo, Fakultas Hukum, And Universitas Pelita, "Interpretasi Hakim Dan Rasa Keadilan Masyarakat Kajian Putusan Nomor 812 K / Pid / 2023 Judges Interpretation And The People ' S Sense Of Justice An Analysis Of Decision Number 812 K / Pid / 2023" 16, No. 3 (2024): 310–24, <https://doi.org/10.29123/Jy/V16i3.652>.

case is an *independent* domain without interference from anyone.<sup>2</sup> Therefore, the previous research was only limited to describing the authority of judges in handling cases resolved using restorative justice by criticizing the *independent* domain of a judge in handling cases. With the discussion above regarding the decision of a criminal case that has been decided by a judge, there are things that are disturbing due to the fact that the verdict is different from the minimum criminal provisions. As an example of a corruption case, where law enforcement against corruption should be carried out in an extraordinary way or can be said to be firm, comprehensive, sustainable, and with legal breakthroughs.<sup>3</sup> For the positivism school as one of the schools in the philosophy of law, of course, it will firmly oppose this idea because this understanding views that the law is only limited to written regulations, in this case the law, and judges cannot go beyond the provisions outlined by the law.<sup>4</sup> If this is analyzed using a different school, such as progressive law, which is said by Satjipto Rahardjo, that the law must follow the times with all the principles in it based on this and want to keep up with the times, then the idea of legal progressivity is built.<sup>5</sup> According to Satjipto Rahardjo, the most important part in the process of a judge adjudicating occurs when examining and deciding a case. Likewise, the opinion conveyed by a legal figure named Hans Kelsen that the law enforcement process carried out by judges is referred to as *konkretisierung* (*concretization*),<sup>6</sup> namely as a form of concretization of the legal norms above it.

From the explanation above, it can be assessed that between legal certainty and justice itself philosophically have differences that are difficult to unite. So that what is emphasized in the formulation of Article 53 paragraph (1) of the National Criminal Code becomes evident that justice and legal certainty can be in a state that can conflict. In addition, the explanation above and previous research has shown that there are differences in the use of justice, in the first writing the judge used corrective justice and the next writing showed that the judge used restorative justice, therefore it can be justified that there are differences in the use of justice itself in the conditions and situations of different cases.

Furthermore, discussing the conflict between justice and legal certainty must be interpreted that justice through a judge's decision is based on the judge's authority, so justice must be interpreted as a form of legal certainty. So with the birth of this research emphasizes on the understanding of thinking for judges about justice that has the potential for disparity so that no certainty is violated because justice arises from legal certainty itself.

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<sup>2</sup> Diah Ratna et al., "Paradigma Keadilan Restoratif Dalam Putusan Hakim," *Kertha Patrika* 42, no. 2 (August 30, 2020): 180–91, <https://doi.org/10.24843/KP.2020.V42.I02.P06>.

<sup>3</sup> Vivi Ariyanti, "Implementasi Asas Legalitas Dan Retroaktif Tentang Tindak Pidana Korupsi Dalam Perspektif Hukum Islam," *Al-Manahij: Jurnal Kajian Hukum Islam* 9, no. 1 (January 1, 2015): 167–77, <https://doi.org/10.24090/MNH.V9I1.519>.

<sup>4</sup> Faissal Malik, "Tinjauan Terhadap Teori Positivisme Hukum Dalam Sistem Peradilan Pidana Indonesia," *Jurnal Pendidikan Kewarganegaraan Undiksha* 9, no. 1 (November 14, 2021): 188–96, <https://doi.org/10.23887/JPKU.V9I1.31488>.

<sup>5</sup> Satjipto Rahardjo, *Membedah Hukum Progresif* (Jakarta: Penerbit Kompas, 2006).

<sup>6</sup> Alva Dio Rayfindratama Et Al., "Kebebasan Hakim Dalam Menjatuhkan Putusan Di Pengadilan," *Birokrasi: Jurnal Ilmu Hukum Dan Tata Negara* 1, no. 2 (July 6, 2023): 1–17, <https://doi.org/10.55606/BIROKRASI.V1I2.409>.

In relation to justice itself, which has not been clearly measured because justice itself has many views, this research will discuss the problems of judges in providing justice when judges are faced with conditions of conflict between justice and legal certainty as referred to in Article 53 paragraph (2) of Law number 1 of 2023 concerning the Criminal Code. The article wants to emphasize that judges who have the main task of trying a criminal case must prioritize justice in resolving criminal cases through the conscience of a judge. Because the law can determine what should be, what can be done, and what must be done.<sup>7</sup> This becomes important for this paper to provide a middle ground for the conditions of the *aquo* article so that in its enforcement there is no disparity in decisions by judges, if this condition is left unchecked, the disparity will create injustice which can also violate human rights through decisions that are not in accordance with supposed justice.

Judges provide justice by using the method of interpretation as an effort by the judge to explore the hidden meaning in the law, but if this is not possible, then the judge must create a law commonly said to be a legal vacuum in it, by setting aside existing regulations and creating laws that are felt to provide goodness and benefit for the parties in particular and the wider community in general.<sup>8</sup> A judge must certainly have a strong stance and full freedom in making a decision, the profession of judges can freely determine their beliefs based on the evidence seen in front of the trial.<sup>9</sup>

## 2. METHOD

This research uses a type of legal research that aims to find the truth of coherence, namely whether a legal rule is in accordance with legal norms or not and whether norms in the form of orders or prohibitions are in accordance with legal principles, and whether a person's actions are in accordance with legal norms or legal principles.<sup>10</sup> This research uses *statute approach* and *conceptual approach*. The *statute approach* method is an approach that is carried out by examining all laws and regulations related to the issue of Justice and Legal Certainty.<sup>11</sup> While the conceptual approach is an approach that originates from views and doctrines that develop in legal science.

## 3. RESULTS AND DISCUSSION

### 3.1 Judges as Givers of Justice and Legal Certainty

Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia explicitly states that "The State of Indonesia is a state of law".<sup>12</sup> As a state of law, all aspects of society, nationhood

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<sup>7</sup> Evi Hartanti, *Tindak Pidana Korupsi* (Jakarta: Sinar Grafika, 2007).

<sup>8</sup> Pontang Moerad, *Pembentukan Hukum Melalui Putusan Pengadilan Dalam Perkara Pidana* (Bandung: Alumni, 2005).

<sup>9</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media, 2005).

<sup>10</sup> Marzuki, 137.

<sup>11</sup> Marzuki, 137.

<sup>12</sup> Sekretariat Jenderal Mpr Ri, "Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Dalam Satu Naskah," *Jdih.Bapeten.Go.Id*, 1945.

and statehood, including government, must always be based on law. One of the important principles of the rule of law is the guarantee of the implementation of an independent judicial power, free from the influence of other powers to administer justice or can be said to be independent without being intimidated by any power to uphold law and justice. Article 24 paragraph (1) of the 1945 Constitution confirms that judicial power is an independent power to administer justice in order to uphold law and justice. One of the actors of judicial power is the Supreme Court as stipulated in Article 24 Paragraph (2) of the 1945 Constitution and one of the actors of the exercise of judicial power is the Judge. Moving on from this, of course, intersects with the realm of law enforcement which is then clarified in Article 1 of Law Number 48 of 2009<sup>13</sup> concerning Judicial Power which states that Judicial Power is the independent power of the State to administer justice in order to uphold law and justice based on Pancasila, for the implementation of the rule of law of the Republic of Indonesia, then in Article 10 of Law Number 48 of 2009 concerning Judicial Power states "The court is prohibited from refusing to examine, hear and decide a case submitted on the pretext that the law is absent or unclear, but is obliged to examine and try it, therefore in Article 5 of the Judicial Power Law states that "Judges and constitutional judges are obliged to explore, follow, and understand the values of law and a sense of justice that lives in society". A judge should be required to have the ability to explore the values of justice that live in society as a material consideration as outlined in the form of a decision that can be used as a reference in the form of Jurisprudence.

The presence of SEMA No. 10 of 2005 concerning Guidance and Instructions from Court Leaders to Judges/Council of Judges in Handling Cases which stipulates that the President of the Court can provide guidance or instructions to Judges/Council of Judges<sup>14</sup> is not contrary to what is stipulated in Article 24 paragraph (1) of the 1945 Constitution and the freedom of judges. Judges in carrying out their duties must be free and responsible. Judges may not be ordered or pressured by anyone. Judges in making decisions are not intervened by the Chief Justice but will be given advice or guidance when deciding a case. When there is a case that attracts public attention or is difficult to prove, then the Judge can seek advice from the Chief Justice or discuss with fellow Judges to make the fairest decision, because later the decision made and pronounced in an open session for the public becomes the decision of the Court even though the one responsible for the decision is the Judge / Panel of Judges who decided the case.

In the legal world, the profession of judge is categorized as a *noble* profession (*officium nobile*) whose orientation is service to humans or society<sup>15</sup> and is often described as God's representative in the world as a dispenser of justice. The position held by a judge is certainly not an easy thing to do, the task he carries out in handling cases is of course a lot of legal considerations that are

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<sup>13</sup> Republik Indonesia, *Undang-Undang Republik Indonesia Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman, Tambahan Lembaran Negara Republik Indonesia Nomor 5076*, 2009.

<sup>14</sup> Ri, "Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Dalam Satu Naskah."

<sup>15</sup> Vinsensius Tamelab et al., "Problematika Pelaksanaan Etika Profesi Hakim Dalam Dunia Peradilan," *Student Scientific Creativity Journal* 2, no. 1 (December 26, 2023): 123–35, <https://doi.org/10.55606/SSCJ-AMIK.V2I1.2650>.

passed when making decisions, but basically a judge has an independent domain to decide a case based on the interpretation of the law in accordance with the circumstances and the decision decided by a judge must be considered correct (*Res Judicata Pro veritate Habetur*).<sup>16</sup> And in this case the court's decision also applies *concretely* to the parties involved in the case (*in concreto*) and of course a judge must be able to create a call of conscience with nuances of justice and legal certainty in the midst of the hearts of the community itself. Judges' decisions are needed to examine, resolve and decide cases that have been submitted to the court. Decisions that have been handled by a judge are expected not to confuse problems or even cause new controversies for the community or other law enforcers.

Moving on from the above, the challenge of a judge must be able to create a series of legal facts that can be accepted by the wider community, in order to minimize public assumptions that become a debate of dissent. In such a challenging situation, choosing justice by putting aside legal certainty allows judges to choose to carry out their functions as in a decision that has permanent force, of course, it must describe justice for both parties who have problems, it is not easy for a judge to peg this as the main element of the law, namely justice itself because justice for one party is not necessarily fair for the other party, even justice itself has different explanations from the many opinions expressed. The above conditions appear to be a challenge faced by judges when faced with such conditions where judges must prioritize justice, even though justice itself is very relative and abstract to describe, because justice cannot be interpreted as a virtue if it does not have a connection with social aspects, especially in relation to human relations. Aristotle is more concerned with liveliness as an element that must be fulfilled in justice to become a virtue in the midst of society. In reality, justice is not one-sided. Therefore, it can be interpreted as a situation where everyone in life in the midst of society, nation and state obtains what is right for him, so that he is able to carry out his obligations.

There are several views on justice, namely, John Rawls' Justice as an alternative to utilitarianism theory. He argues that in a society governed by principles that have an ethical and ethical sense and place actions that can be said to be good (*utilitarianism*), it can be said that people will lose self-respect, therefore, services for common development will be lost. Rawls also argues that this theory is actually harsher than what society considers normal. Although sacrifices for the common good may be demanded, it is unjustified if these sacrifices are first demanded from individuals. According to John Rawls, an American philosopher who is considered one of the leading political philosophers of the 20th century, stated that "Justice is the first *virtue* of social institutions, as well as the truth of systems of thought".<sup>17</sup> In his statement, he conveyed the importance of fair and impartial policies that allow them to emerge from those who can

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<sup>16</sup> "Surat Edaran Mahkamah Agung Nomor 10 Tahun 2005 Tentang Bimbingan Dan Petunjuk Pimpinan Pengadilan Terhadap Hakim/Majelis Hakim Dalam Menangani Perkara," accessed October 14, 2024, <https://www.regulasip.id/book/19304/read>.

<sup>17</sup> "JDIH Mahkamah Agung RI," accessed October 14, 2024, <https://jdih.mahkamahagung.go.id/legal-product/sema-nomor-10-tahun-2005/detail>.

guarantee the interests of all people. Justice will be achieved if people can be guaranteed the same freedoms without economic and social distortions that should have been regulated and are expected to benefit those who are less fortunate.<sup>18</sup> This is in line with the judicial order in Indonesia, where Rawls emphasizes the main areas of justice by looking at the basic structure of society, all social, political, legal and economic institutions because the structure of social institutions has a fundamental influence on the prospects of individual life.<sup>19</sup>

Corrective justice is justice that focuses on guaranteeing, monitoring, and maintaining the distribution against the attack of unfair events.<sup>20</sup> related parties as a form of justice seeking that emphasizes restoring the situation to its original state and not looking from the side of retaliation. The basic foundation for the police to carry out *restorative justice* is Police Regulation Number 8 of 2021 concerning Handling Crimes Based on Restorative Justice. The specific material and formal requirements that must be carried out as a step towards achieving Restorative justice at the investigation stage by police investigators are:<sup>21</sup> Material Requirements: a). Does not cause unrest and/or rejection from the community; b). Does not have an impact on social conflict; c). Does not have the potential to divide the nation; d). Does not contain elements of radicalism and separatism; e). Not a repeat offender based on a court decision; and f). Not a perpetrator of terrorism, crimes against state security, corruption, and crimes against life. Form requirements: 1). Peace agreement from both parties, except for drug crimes; and 2). Fulfillment of victims' rights and perpetrators' responsibilities, except for drug crimes. Likewise, the role of the prosecutor's office has room to resolve cases through Restorative justice. The regulation is contained in the Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice.<sup>22</sup>

In addition to the police, the Public Prosecutor has the authority to decide the resolution of this case based on Restorative Justice because it is in accordance with the regulation. The public prosecutor must be able to analyze whether the criminal case meets the requirements as stipulated in Article 5 paragraph (1) before continuing the criminal justice process. Article 5 paragraph (1) reads:<sup>23</sup> A criminal case may be closed by law and the prosecution terminated based on Restorative Justice if it meets the following conditions: a. The suspect is a first time offender; b. The criminal offense is only punishable by a fine or a maximum imprisonment of 5 (five) years;

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<sup>18</sup> Neneng Putri Siti Nurhayati Andra Triyudiana, "Penerapan Prinsip Keadilan Sebagai Fairness Menurut John Rawls Di Indonesia Sebagai Perwujudan Dari Pancasila," *Das Sollen: Jurnal Kajian Kontemporer Hukum Dan Masyarakat* 02, no. 01 (2023): 1–25, <https://doi.org/10.11111/dassollen.xxxxxxx>.

<sup>19</sup> Damanhuri Fattah, "Teori Keadilan Menurut John Rawl," *Jurnal TAPIS* 9, no. 2 (2013): hlm 35.

<sup>20</sup> subhan amin, "Dosen STIESNU Bengkulu," *Keadilan Dalam Prespektif Filsafat Hukum Terhadap Masyarakat*, 2019.

<sup>21</sup> Christfael Noverio Sulung, "Penerapan Mekanisme Keadilan Restoratif (Restorative Justice) Di Tahap Penyidikan Oleh Kepolisian Daerah Sulawesi Utara," *Jurnal Fakultas Hukum Universitas Sam Ratulangi XIII*, no. 1 (2023): 1.

<sup>22</sup> Kadek Putra Yasa, Ni Putu Rai Yuliantini, and Dewa Gede Sudika Mangku, "Implementasi Keadilan Restoratif Terhadap Penyelesaian Tindak Pidana Pencurian Dalam Lingkup Keluarga Di Kejaksaan," *Jurnal Ilmu Hukum Sui Generis* 3, no. 3 (2023): 135–45.

<sup>23</sup> Antonius De Andrade Fahik, Anak Agung Sagung Laksmi Dewi, and I Made Minggu Widyantara, "Implementasi Peraturan Kejaksaan Republik Indonesia Nomor 15 Tahun 2020 (Studi Kasus Di Kejaksaan Negeri Jembrana)," *Jurnal Konstruksi Hukum* 3, no. 2 (2022): 240–45, <https://doi.org/10.55637/jkh.3.2.4805.240-245>.

and c. The criminal offense is committed with the value of the evidence or the value of the loss caused by the criminal offense is at most Rp2,500,000.00 (two million five hundred thousand rupiah). If, in the opinion of the public prosecutor, the criminal case at hand does not meet the above requirements, then the criminal justice process can continue as usual. However, if according to the public prosecutor the criminal case meets the requirements stipulated in the Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020, then the prosecutor has the right to submit a peace effort to the Head of the State Prosecutor's Office. Due to the many differences in views and norms that already exist but do not have a clear meaning or it can be said that the norm can cause more than one meaning (multi-interpretation) which of course will have implications for the norm to be vague or unclear. If there is a lack of clarity in the meaning of a law, then this can lead to legal uncertainty and difficulties in applying the law.

In the authority of a judge is to uphold the facts that exist in accordance with the *irah-irah* made at the head of the decision which reads "For the sake of justice based on God Almighty". Justice intended in the judge's decision is impartial to one of the litigants, recognizing the equal rights and obligations of both parties. In making a decision, the judge must comply with existing regulations so that the decision is in accordance with the justice desired by the community. In order to uphold justice, judges' decisions in court must be in accordance with the actual objectives of providing justice and legal certainty.

Judge decisions that reflect legal certainty, of course, in the process of resolving cases in court, have a role to find the right law. Judges in making decisions do not only refer to the law, because the law potentially does not clearly regulate the entire action or situation, so judges are expected to explore the legal values that live in the midst of the local community such as customary law and unwritten law which of course has lived in everyday life of the community. In this case the judge is obliged to find and formulate it in a decision. The concretization of finding justice that exists and lives in society is a manifestation of justice that has been done by judges, justice is not only formed through the application of law in the text of the Law, judges' decisions are part of the law enforcement process which has one of the legal objectives, namely legal truth. Legal certainty as outlined in the judge's decision is a product of law enforcement practitioners based on juridically appropriate trial facts from the results of the case settlement process at trial. If the judge is unable to see the law that lives in society, it is difficult for the judge to describe justice itself which is not meaningful in the hearts of the community. Therefore, court decisions must be nuanced with cases that actually occur so that judges can interpret the meaning of laws and other regulations that will be used as the basis for decisions. The application of the law must of course be in accordance with the case, so that judges can construct cases that are applied carefully, wisely and objectively which contain justice and legal certainty.

### **3.2 The Position of Justice and Legal Certainty in the Purpose of Law**

Justice and legal certainty are important because there is a form of equality before the law without any difference. When associated with the legal principle of formal legality which is

based on written and existing law, this becomes the basis for a law enforcer to be able to examine and try cases, of course, this understanding is the concept of thinking of a formal legalistic law enforcer. The implications of this are certainly a trigger for law enforcement that seems unfair in the midst of society and will injure the sense of justice in the midst of society, the justice it applies should not only be limited to the formulation of laws but justice is also present and grows alive in the midst of society. And justice as part of social values has a very broad meaning, even at some point it can conflict with the law as one of the social value systems.<sup>24</sup>

Law enforcers strive to achieve justice from the cases they handle, but it does not rule out the possibility that legal certainty is often neglected. Justice and legal certainty are two legal objectives that must be harmonized in order to run well in the world of legal practice. If a legal regulation is more likely to fulfill the demands of legal certainty, then the greater the possibility of the justice aspect being sidelined. The imperfection of legal regulations in practice can be overcome by interpreting the legal regulations in their application to concrete events. If law enforcement in its application to concrete events justice and legal certainty are mutually urgent, then in the hierarchy of the purpose of the law itself it should prioritize justice over legal certainty, because seeing from the main purpose of the law itself justice must be upheld as the theory of legal objectives conveyed by Gustav Radbruch who argues that to fulfill the purpose of law which has three basic values, namely justice, benefit and legal certainty. This is in line with Roscoe Pound as one of the jurists from Sociological Jurisprudence, famous for his theory that "*law as a tool of social engineering*".<sup>25</sup> It is also possible that this is the starting point for Satjipto Rahardjo's thinking by stating that, "the law is for humans, grip, optics or basic beliefs, not seeing the law as the central thing in law, but humans are the center of legal rotation. The law rotates with humans as its center. Law exists for humans, not humans for the law." Therefore, in relation to efforts to explore the values of justice that exist in society, an Indonesian legal figure, Prof. Dr. Satjipto Rahardjo once put forward a theory or view of law known as progressive legal theory. Satjipto Rahardjo said that in progressive law enforcement the law is not just what is in the law (*according to the letter*), but what is more important is the spirit and deepest meaning of the law (*to very meaning*).<sup>26</sup> It is important for law enforcers to not only be intellectually intelligent but must be filled with determination, a sense of empathy for the suffering of the nation, commitment and dedication, which is accompanied by the courage to solve legal problems out of habit.

Justice and law are closely related and the position of justice is certainly above the law, meaning that justice can be obtained on the basis of law because if it is not based on the existence of law

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<sup>24</sup>Inge Dwisvimiar, "Keadilan Dalam Perspektif Filsafat Ilmu Hukum," *Jurnal Dinamika Hukum* 11, no. 3 (2011): 522–31, <https://doi.org/10.20884/1.jdh.2011.11.3.179>.

<sup>25</sup>Hasaziduhu Moho, "Penegakan Hukum Di Indonesia Menurut Aspek Kepastian Hukum, Keadilan, Dan Hasaziduhu Moho. 'Penegakan Hukum Di Indonesia Menurut Aspek Kepastian Hukum, Keadilan, Dan Kemanfaatan.'" *Jurnal Warta* 13, No. 1 (2019): 138–49. Kemanfaatan," *Jurnal Warta* 13, no. 1 (2019): 138–49.

<sup>26</sup>Asiva Noor Rachmayani, "Deni Nuryadi, Teori Hukum Progresif Dan Penerapannya Di Indonesia, *Jurnal Ilmiah Hukum De'Jure: Kajian Ilmiah Hukum* 1, No 2 (2016).," *Jurnal Ilmiah Hukum De'Jure*, 2015, 6.



then justice will be difficult to realize, because law is a means of achieving justice. Conversely, if enforcing the law but cannot provide a sense of justice, then the purpose of law enforcement cannot be said to be achieved.<sup>27</sup> In addition, the main purpose of law is to create order as a form of framework that allows society to play an orderly, fair and safe role. For example, every human being has different interests that can sometimes cause problems. To deal with these conflicts, humans make provisions, namely laws that must be obeyed by the community, so that the interests of each community are maintained and protected. If the law is violated, then the person concerned will be given a penalty. Law is a state tool that functions to regulate people's lives in activities and interactions between fellow communities, both individuals and between community groups, meaning that with the existence of law, certainty and justice will be guaranteed in it.

On the other hand, justice refers to moral and ethical principles that seek to achieve fair and equal outcomes for all individuals. The importance of the relationship between law and justice is seen in efforts to ensure that the legal system not only follows legal formalities, but also achieves the desired outcome of justice and truth being upheld. This is particularly evident in law enforcement and the judicial process. Courts must act as watchdogs to ensure that the law is applied correctly and that the decisions made result in justice for all parties. This process involves the consideration of evidence, arguments, and moral norms.

There are facts in the case of a 92-year-old grandmother sentenced to 1 month for cutting down a durian tree in 2018. 92-year-old Saulina Sitorus was sentenced to 1 month and 14 days in prison for cutting down a durian tree belonging to her relative, Japaya Sitorus in Toba Samosir, North Sumatra, to build her ancestor's grave. Saulina's six children were also implicated in the case and sentenced by a panel of judges at the Balige District Court to 4 months and 10 days in prison.<sup>28</sup> This verdict attracted attention because during the trial, witnesses whose houses were close to the location never saw Japaya planting the durian trees in question. Peace efforts had been made before. Japaya asked for hundreds of millions of money as a condition of reconciliation because she was upset and as compensation for cutting down the trees. However, Saulina and her six children could not fulfill these conditions because they did not have the money.<sup>29</sup> The example of this case proves that the judge was forced to choose legal certainty by putting aside justice, in fact the condition of the elderly defendant was not worthy of a sentence of 1 month and 14 days imprisonment. From this, it can be seen that faced with legal certainty and justice, in the end the judge chose to impose a verdict that was very visible in the absence of justice because it was only

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<sup>27</sup> Iskandar Wibawa, "Implementasi Asas Kepastian Hukum Yang Berkeadilan Berdasar Cita Hukum Bangsa Indonesia (Kajian Putusan Pengadilan Negeri Banyumas Tentang Kasus Mbah Minah)," *YUDISIA : Jurnal Pemikiran Hukum Dan Hukum Islam* 8, no. 1 (2018): 18, <https://doi.org/10.21043/yudisia.v8i1.3221>, No. 1 (2018),

<sup>28</sup> Rama Fathailah Yulianto, "Pemberian Bimbingan Pribadi Sosial Terhadap Narapidana Lanjut Usia Sebagai Upaya Peningkatan Kualitas Hidup," *Prospektif Pengaturan Euthanasia Di Indonesia Ditinjau Dari* 5, no. 2 (2018): 94–100. <http://dx.doi.org/10.31289/jiph.v8i1.4297>

<sup>29</sup> "Tebang Sebuah Pohon, Nenek 92 Tahun Divonis 1 Bulan Penjara - News Liputan6.Com," accessed October 14, 2024, <https://www.liputan6.com/news/read/3244141/tebang-sebuah-pohon-nenek-92-tahun-divonis-1-bulan-penjara>.

sentenced to 1 month even though it was clear in legal certainty that Japaya could be sentenced to 5 years in prison.

### **3.3 Conflicts of Justice and Legal Certainty**

Talking about legal certainty certainly has a real nature, while justice can be applied but is abstract so that when a judge decides a case sometimes the value of justice is not always achieved because of the abstract nature of justice. Therefore, when judges are faced with legal issues, at least justice is the top priority for judges. Because the law is not solely seen from the point of view of written law or judges as the mouthpiece of the law, but there are still many rules that live in society that can be referred to by judges to provide justice. In this case, of course, there is a clash between the formal legal certainty contained in Article 1 paragraph (1) of the Criminal Code and the law that lives in the midst of society. There is a clash between formal law (KUHP) and the law that lives in society. If we look at Article 53 paragraph (2) of *the Criminal Code* which states that "*If in upholding law and justice as referred to in paragraph (1) there is a conflict between legal certainty and justice, the judge shall prioritize justice.*" This article does not reflect the sense of justice that has been decided by judges as a result of judges who prioritize written law alone without looking at the circumstances, just as the law is equated with legislation. The surrounding community even views the processing of Nenek Minah to the court as not reflecting the community's sense of justice, as they feel that they have been treated arbitrarily by a high-ranking party, in this case PT Rumpun Sari Antan.<sup>30</sup>

From the case of Nenek Minah, the question is whether the judges in deciding cases have paid attention to the law that really lives in the midst of society (justice in society) in addition to positive law. The justice that the law itself seeks to achieve is Justice based on God Almighty, as stated at the beginning of every judge's decision. Therefore, the solution that can be implemented by a judge in the future when deciding a case is not only based on the law, the implication is not only to produce justice products based on the law but also need to pay attention to other sides such as laws that live in society. So that judges are expected and required to realize the value of justice not only based on the law (written law) but are able to formulate and describe justice that lives in society through the decisions made.

### **3.4 Justice as the Ultimate Goal of Law**

Pancasila as the ideology of the Indonesian nation, is stated in the fifth principle, namely "Social justice for all Indonesian people". This has become a pledge of the entire Indonesian nation represented by Soekarno Hatta on August 17, 1945 which is contained in the Preamble of the 1945 Constitution in the fourth paragraph. Thus, social justice for all Indonesian people is the ideal of the entire Indonesian nation which must be the responsibility of the government to realize it, one of which is a judge who must be able to apply justice when making a decision on the case

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<sup>30</sup> Surya Desismansyah Eka Putra, "Bingkai Keadilan Hukum Pancasila Dalam Perspektif Hukum Dan Relevansinya Dengan Keadilan Di Indonesia," *Jurnal Pendidikan Pancasila Dan Kewarganegaraan* 1, no. 1 (2014): 49–57, <http://journal.um.ac.id/index.php/jppk/article/view/5515>.

he handles. Therefore, it is no stranger to the verdict that is often read out by a judge in a trial which reads "For the sake of justice based on God Almighty".<sup>31</sup> Based on this, in the legal system, the justice to be upheld by the judge can certainly be realized by producing a decision that does not take sides with one of the parties and the decision can be reflected in upholding the equal rights and obligations of both parties.

Justice itself is one of the important things that will not be separated from the purpose of the law itself, actually justice is not written in the text but the legislator has seen that in the formation of legislation products based on justice which is part of the purpose of law, as in the ethical theory that the purpose of law is solely to realize justice (*justice*) contained in the theory of classical legal objectives while in modern standard priority theory in modern theory, namely the purpose of law includes justice, expediency and legal certainty for the welfare of society. Along with the existence of these legal objectives, legal certainty itself has a concrete form, namely in the implementation and enforcement of an action that does not look at the background of the individual who does it. According to Radbruch, the purpose of law is to achieve justice as a common goal can provide different directions.<sup>32</sup> Because the purpose of law is to uphold the public interest in society, protect human rights, and achieve justice in living together. These goals do not contradict each other, but fulfill the basic concept, namely that humans must live in society and society wants to be well regulated by the government based on legal products that have been formed.

On the other hand, the theory of legal certainty is supported by Hans Kelsen's statement that the rule of law must be a clear guide for all individuals.<sup>33</sup> Referring to this, the law must stand upright as a fundamental rule of man, then in contrast to the viewpoint of Legal Positivism, justice is seen as the purpose of law, but it is fully realized that the relativity of justice is often obscured by another important element, namely the element of legal certainty. The adage that is always heard is *Suum jus, summa injuria; summa lex, summa crux*. This expression means that a harsh law will hurt, unless justice can help it, because this will be a relevant benchmark for the form of legal guidelines in essence must be certain and fair. So a judge formally lays the basis of his legal considerations based on the text of the law (legal form) and justice becomes the principle contained in the decision. However, what often happens is that the meaning of justice becomes narrow if one party thinks that the judge's decision is unfair to him and this then raises the idea that there is always a disparity between justice and injustice. That indeed the meaning of justice may not be the same or in other words have different perspectives.

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<sup>31</sup>Edi Rosadi, "Putusan Hakim Yang Berkeadilan," *Badamai Law Journal* 1, no. 2 (2016): 381, <https://doi.org/10.32801/damai.v1i2.1850>.

<sup>32</sup>Heru Suyanto and Handar Subhandi Bakhtiar, "Paradigma Keadilan : Konsep Dan Praktek," *Jurnal De Lege Ferenda Trisakti* 9, no. 2 (2023): 9–17, <https://doi.org/10.25105/ferenda.v1i1.16551>.

<sup>33</sup>Agatha Putri Gracia Uliana Purba, Cicilia Julyani Tondy, and Irhamsah Irhamsah, "Kepastian Hukum Ahli Waris Personal Guarantee Yang Turut Dipailitkan Akibat Pailitnya Debitor Prinsipal," *ARMADA : Jurnal Penelitian Multidisiplin* 2, no. 1 (2024): 94–102, <https://doi.org/10.55681/armada.v2i1.1154>.

Furthermore, there is an adage held by legal practitioners "*Fiat Justitia Ruat Coelum*" which means "*Let justice be served even though the sky will fall*" as well as the present time that the author will put forward. In the Pekanbaru District Court decision number 1038/Pid.B/LH/2019/PN Pbr.<sup>34</sup> In this position case, a farmer was charged with violating Article 98 paragraph (1) of Law Number 32 of 2009 concerning environmental protection and management because of his act of clearing land by burning which accidentally spread to shrubs and eventually caused the burning of 400 square meters of land. From this case, the judge considered the principle of *Rechterlijk Pardon* that initially the defendant intended to clear the bushes by collecting and piling them up to be burned. In addition, before burning the bushes, the defendant had made barriers to prevent the fire from spreading to other areas. Therefore, based on these facts, the Panel of Judges was of the opinion that the principle of *strict liability* which was used as the basis for the prosecutor's indictment could not be applied in this case because the principle of *strict liability* applies in handling environmental cases in the civil realm and not in handling environmental cases in the criminal realm. In addition, the imposition of punishment against the defendant who is a small farmer and is elderly will ultimately harm the sense of justice in the community. Furthermore, the Panel of Judges also provided additional considerations related to the authority of judges to grant *pardon (rechterlijk pardon)* which is based on the idea of avoiding rigidity in punishment, as a form of correction to the principle of legality, the implementation of the 4th principle of "wisdom of wisdom" as a concrete form of punishment that is not only based on punishment and guilt alone but also considers efforts to realize the objectives of punishment.<sup>35</sup> In this decision, the judge acquitted the defendant of all charges of the public prosecutor. From this case, it is very clear that justice for the defendant by taking into account the consequences of the loss, circumstances or conditions of the perpetrator in committing a criminal offense as a condition for *rechterlijk pardon* in Article 54 paragraph (2) of Law Number 1 of 2023 concerning the National Criminal Code, in the *aquo* case it is clearly illustrated that justice and legal certainty are upheld as a result of the legal objectives inherent in decision making in imposing decisions by judges.

#### 4. CONCLUSION

The conflict between justice and legal certainty in Article 53 paragraph (2) of the Criminal Code has been answered that justice is in a higher position because justice is the main purpose of the law itself, while legal certainty which is part of the purpose of law cannot provide justice because it is only limited to the formulation in the law without assessing whether the implementation of the formulation of the article has provided justice for the community. This is in line with the explanation that the law is for humans not humans for the law, from this explanation it can be

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<sup>34</sup> Ma, "Putusan Pn Lubuk Lingau Nomor 794/Pid.B/2014/Pn Llg," Direktori Putusan: Mahkamah Agung Republik Indonesia, 2015, <https://putusan3.mahkamahagung.go.id/direktori/putusan/fab658e71449259125c2d7930a1ce3be.html>.

<sup>35</sup> Indi Muhtar Ismail, Dominikus Rato, and Bayu Dwi Anggono, "Kepastian Hukum Penerapan Asas Rechterlijk Pardon Pada Putusan Perkara Pidana," *Jurnal Humani* 13, no. 2 (2023): 398–412.

understood that the location of justice is not limited to the formulation of the law but what lives in the conscience of judges and society. A law enforcer, especially a judge, in deciding a case is expected not only to be limited to the law but the judge must also be able to provide justice that comes from conscience and as in the basis of the decision, namely "For the Sake of Justice Based on God Almighty". Suggestions in this study if there are different views on justice itself, it is necessary to determine the definition of justice or justice that will be used in the application of Article 53 paragraph (2) of Law Number 1 Year 2023 concerning the Criminal Code.

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