

Judicial Pardon Without a Verdict Category: Rechterlijk Pardon and Narcotics Sentencing in Indonesia's Criminal Law Reform

1st Faissal Malik
2nd Bayu Lesmana Taruna
3rd Apriyanto Nusa
4th Fence M Wantu
5th Ahmed Mosselhi

¹Universitas Khairun, Indonesia.
^{2,4}Universitas Negeri Gorontalo, Indonesia.
³ Universitas Ichsan Gorontalo, Indonesia.
⁵ Abu Dhabi University, Indonesia.

✉ faissalmalik@unkhair.ac.id

Article Info

Submitted: January 1, 2026
Revised: June 22, 2026
Accepted: August 21, 2026

Keywords:

Judicial Pardon; Legal Certainty;
Moral Justice; Narcotics
Sentencing.

How to cite [Chicago Manual of Style 17th edition (full note)]:
Faissal Malik, Bayu Lesmana Taruna, Apriyanto Nusa, Fence M Wantu, Ahmed Mosselhi, "Judicial Pardon Without a Verdict Category: Rechterlijk Pardon and Narcotics Sentencing in Indonesia's Criminal Law Reform," *Jambura Law Review* 8, no. 1 (2026): 574–602.

Abstract

Law Number 1 of 2023 on the Indonesian Criminal Code introduces rechterlijk pardon (judicial pardon) in Article 54 paragraph (2), empowering a court to declare a defendant guilty while withholding punishment or measures in the interests of justice and humanity. This article argues that the principal obstacle to that instrument is not judicial culture but an unresolved procedural status. Law Number 20 of 2025 on the Criminal Procedure Code retains the three-verdict architecture inherited from Law Number 8 of 1981 — conviction, acquittal, and discharge from all charges — and therefore supplies no judgment form in which a pardon can be pronounced, recorded, or reviewed. The study employs normative legal research combining statutory, conceptual, doctrinal, and functional comparative approaches, examining Article 54 paragraph (2) against Article 9a of the Dutch Criminal Code, Article 138 of the Dutch Code of Criminal Procedure, and Dutch case law classifying a finding of guilt without punishment as a conviction. Three findings follow. First, judicial pardon is doctrinally irreducible to discharge from all charges, because it presupposes rather than negates criminal liability. Second, in narcotics cases judicial pardon requires explicit criteria confining it to assessed users and excluding traffickers. Third, judicial pardon reconciles legal justice with moral justice only where discretion is procedurally disciplined. The article proposes recognizing judicial pardon as a fourth verdict category and recommends corresponding amendment of the Criminal Procedure Code.

@2026 – Faissal Malik, Bayu Lesmana Taruna, Apriyanto Nusa, Fence M Wantu, Ahmed Mosselhi.
Under the license CC BY-SA 4.

Introduction

The relationship between legal guilt and deserved punishment is among the oldest unsettled questions in criminal law. Every mature sentencing system eventually confronts cases in which the state has proved everything the law requires and yet punishment appears excessive, pointless, or cruel. Legal systems have answered that problem in different institutional registers: through executive clemency, through prosecutorial discretion not to charge, through statutory mitigation, and — more recently — through express judicial authority to convict without imposing a sanction. The choice among these registers is not merely technical. It determines who decides that punishment should be withheld, on what grounds, subject to what review, and with what consequences for the equality of treatment that legality is meant to secure.¹

Indonesia has now made that choice. Law Number 1 of 2023 on the Criminal Code (KUHP), which entered into force in January 2026, shifts the statutory orientation of Indonesian sentencing from retribution toward corrective, restorative, and rehabilitative aims. The former Criminal Code, inherited from the colonial *Wetboek van Strafrecht*, contained no express sentencing purposes or guidelines and centered on the offense and the offender as objects of punishment.² Law Number 1 of 2023 regulates sentencing objectives and guidelines in Chapter III, expands the catalogue of principal penalties in Article 65 paragraph (1) beyond imprisonment and fines to include confinement, supervision, and community service, and — most consequentially for this article — introduces *rechterlijk pardon* in Article 54 paragraph (2). That provision permits a court to treat the minor nature of the offense, the personal circumstances of the offender, and the circumstances at the time of the offense or arising thereafter as grounds for not imposing punishment or measures, having regard to justice and humanity.³ The provision is not entirely new to Indonesian law: Article 70 of Law Number 11 of 2012 on the Juvenile Criminal Justice System already contained a materially identical formula for children.⁴ What is new is its generalization to adult offenders across the ordinary criminal law. The juvenile precedent is instructive but not simply transferable: comparative work on juvenile responsibility shows that Indonesian judges applying that jurisdiction blend legal, sociological, and customary considerations in ways that a specialized child-protection framework both permits and channels.⁵ The adult jurisdiction has no equivalent framework, which is one reason the criteria governing the general power must be supplied elsewhere.

Narcotics offenses are where the reform will be tested most severely. They are the largest single source of Indonesia's prison population, and the composition of that population is dominated by drug cases rather than by the serious violent or economic crimes that

¹ Simon McKenzie, "Mercy and International Criminal Justice," *Journal of International Criminal Justice* 23, no. 2 (2025): 273–90, <https://doi.org/10.1093/jicj/mqaf012>.

² Sudarto, *Hukum dan Hukum Pidana* (Bandung: Penerbit Alumni, 1981), 70–71.

³ Elucidation of Article 54 paragraph (2) of Law Number 1 of 2023 on the Criminal Code.

⁴ Lukman Hakim, *Penerapan Konsep Pemaafan Hakim (Rechterlijk Pardon) dalam Sistem Peradilan Pidana di Indonesia: Optimalisasi Teori Dualistis di dalam Sistem Pemidanaan* (Yogyakarta: Graha Ilmu, 2019).

⁵ Syamsuddin Muchtar, Irwansyah, Ahsan Yunus, Arnita Pratiwi Arifin, and Markham Faried, "Juvenile Criminal Responsibility in Justice Systems: A Comparative Study of Judicial Interpretations in Indonesia and Australia," *Jambe Law Journal* 7, no. 2 (2024): 371–94, <https://doi.org/10.22437/home.v7i2.387>.

punitive rhetoric typically invokes.⁶ Reports on Indonesian corrections have consistently linked overcrowding to the custodial handling of drug users rather than to trafficking enforcement alone,⁷ and the regulatory framework has for more than a decade instructed courts to divert users toward medical and social rehabilitation rather than imprisonment.⁸ Narcotics offenses therefore present the paradigm case for judicial pardon: a category of conduct that is unambiguously unlawful, frequently committed by people whose culpability is entangled with dependency and social vulnerability, and routinely answered with imprisonment that serves neither deterrence nor reintegration.

Existing scholarship on *rechterlijk pardon* in Indonesia falls into four strands, and locating this article requires distinguishing them carefully, because the fourth comes close to the problem addressed here. The first strand is conceptual and pre-legislative. Working from the draft Criminal Code, Saputro reconstructed judicial pardon as a departure from the strict either/or of conviction and acquittal and identified its four statutory limitations.⁹ Farikhah pursued a comparative reconceptualization of judicial pardon against Western legal systems.¹⁰ Yosuki and Tawang analyzed the formulation policy behind the concept and located its normative anchor in the values of Pancasila.¹¹ These studies established the concept's intellectual pedigree, but they were written when Article 54 paragraph (2) was still a draft provision and could not address its operation under an enacted code.

The second strand is doctrinal and post-enactment. Ismail, Rato, and Anggono examined the implications of applying judicial pardon for legal certainty,¹² and Aisy has more recently proposed a structured decision-making model treating judicial pardon as a component of a broader paradigmatic shift in sentencing.¹³ Both engage Article 54

⁶ Nixon Randy Sinaga, *The Crisis of Overcrowded Prisons in Indonesia: Barriers to Accessing Alternatives to Imprisonment* (International Drug Policy Consortium and LBH Masyarakat, 2024).

⁷ Rully Novian et al., *Strategi Menangani Overcrowding di Indonesia: Penyebab, Dampak, dan Penyelesaiannya*, ed. Zainal Abidin and Anggara (Jakarta: Institute for Criminal Justice Reform, 2018); Angkasa, "Over Capacity Narapidana di Lembaga Pemasyarakatan: Faktor Penyebab, Implikasi Negatif, serta Solusi dalam Upaya Optimalisasi Pembinaan Narapidana," *Jurnal Dinamika Hukum* 10, no. 3 (2010), <https://doi.org/10.20884/1.jdh.2010.10.3.46>.

⁸ Supreme Court Circular Letter (SEMA) Number 4 of 2010 on the Placement of Drug Abusers, Victims of Drug Abuse, and People with Drug Dependency in Medical and Social Rehabilitation Institutions; Joint Regulation of the Supreme Court and Others Number 01/PB/MA/III/2014 on the Handling of People with Drug Dependency and Victims of Drug Abuse.

⁹ Adery Ardhan Saputro, "Konsepsi Rechterlijk Pardon atau Pemaafan Hakim dalam Rancangan KUHP," *Mimbar Hukum* 28, no. 1 (2016): 61–76, <https://doi.org/10.22146/jmh.15867>.

¹⁰ Mufatikhatul Farikhah, "Rekonseptualisasi Judicial Pardon dalam Sistem Hukum Indonesia (Studi Perbandingan Sistem Hukum Indonesia dengan Sistem Hukum Barat)," *Jurnal Hukum & Pembangunan* 48, no. 3 (2018): 556–88, <https://doi.org/10.21143/jhp.vol48.no3.1746>.

¹¹ Aska Yosuki and Dian Andriawan Daeng Tawang, "Kebijakan Formulasi Terkait Konsepsi Rechterlijke Pardon (Pemaafan Hakim) dalam Pembaharuan Hukum Pidana di Indonesia," *Jurnal Hukum Adigama* 1, no. 1 (2018): 49–73, <https://doi.org/10.24912/adigama.v1i1.2136>.

¹² Indi Muhtar Ismail, Dominikus Rato, and Bayu Dwi Anggono, "Implikasi Penerapan Asas Rechterlijk Pardon dalam Putusan Perkara Pidana Ditinjau dari Perspektif Kepastian Hukum," *Hukum dan Masyarakat Madani* 13, no. 2 (2023): 398–412, <https://doi.org/10.26623/humani.v13i2.7964>.

¹³ Rohadhatul Aisy, "Judicial Pardon as a Humanizing Approach to Criminal Sentencing: Reconstructing Judicial Decisions under the New Indonesian Criminal Code," *The Digest: Journal of Jurisprudence and Legislation* 6, no. 2 (2025): 151–74, <https://doi.org/10.15294/digest.v6i2.37174>.

paragraph (2) as substantive law. Neither examines whether Indonesian criminal procedure supplies a judgment form capable of carrying it.

The third strand is emerging and case-based: Panggabean, Saefullah, and Budiman analyze two of the first district court decisions applying Article 54 paragraph (2), in assault and negligent homicide, through a proportionality lens.¹⁴ That work confirms that the provision is being used, but its cases lie outside narcotics, and it does not interrogate the procedural classification of the resulting judgments.

The fourth strand is procedural, and it must be addressed directly rather than assimilated to the others. Alfret and Frans observed, as early as 2023, that neither the Criminal Procedure Code then in force nor the Bill that would replace it contained a pardon judgment among the recognized types, and they proposed recognizing it as a new type of judgment.¹⁵ Julranda, Zhafirin, and Rambe characterize the absence of implementing rules for Article 54 paragraph (2) as a *rechtsvacuum*, warn that it invites judicial arbitrariness, and press the case for technical regulation to protect victims' rights and equal access to justice.¹⁶ Krisnamurti argues for harmonizing the principle across the Criminal Code, the Criminal Procedure Code, and the Law on Judicial Power, and concludes that implementation requires clear procedural safeguards and standardized parameters if substantive justice is not to displace legal certainty.¹⁷ This strand has therefore already identified the procedural silence and called for it to be filled.

What the fourth strand has not done is threefold, and it is here that the present study is located. First, it argues from the *absence* of a category to the *need* for one without settling what kind of judgment a pardon actually is; none of these studies works through the classification question — whether a pardon judgment is a conviction, an acquittal, or a discharge from all charges — or tests an answer against a system that has resolved it. Second, the two earlier contributions were written before Law Number 20 of 2025 was enacted and therefore addressed a Bill rather than a promulgated Code; the question is no longer what the legislature might do but what follows from what it has done. Third, none of the four strands descends from the general call for regulation to the criteria that would govern the instrument in the offense category where it matters most. A demand for “clear parameters” is not itself a parameter.

Read together, the four strands share a common analytical position. The first three treat *rechterlijk pardon* as a problem of substantive criminal law — of when a judge may

¹⁴ Chandra Marojahan Panggabean, Saefullah, and Anwar Budiman, “Judicial Pardon Under Article 54(2) of the 2023 Criminal Code: A Proportionality Analysis of Sentencing in the Garut and Mempawah District Court Decisions,” *Journal of Law, Politic and Humanities* 6, no. 5 (2026): 4086–4100, <https://doi.org/10.38035/jlph.v6i5.3535>.

¹⁵ Alfret and Mardian Putra Frans, “Konsep Putusan Pemaaf oleh Hakim (Rechterlijk Pardon) sebagai Jenis Putusan Baru dalam KUHAP,” *Krtha Bhayangkara* 17, no. 3 (2023): 587–600, <https://doi.org/10.31599/krtha.v17i3.2968>.

¹⁶ Rizky Julranda, Fhildzha Zhafirin, and Sultan Rambe, “Rechtsvacuum Penerapan Rechterlijk Pardon dalam Pembaruan Hukum Acara Pidana di Indonesia,” *Judex Laguens* 3, no. 2 (2025): 267–88, <https://doi.org/10.25216/ikahi.3.2.8.2025.267-288>.

¹⁷ Hana Krisnamurti, “Harmonisasi Asas Permaafan Hakim (Judicial Pardon) dalam Hukum Positif Indonesia untuk Mencapai Keadilan yang Bermartabat,” *Jurnal Litigasi* 26, no. 2 (2025): 104–34, <https://doi.org/10.23969/litigasi.v26i2.22645>.

forgive — and assume that procedure will accommodate whatever substantive law authorizes. The fourth rejects that assumption but stops at the diagnosis. The assumption is unwarranted and the diagnosis is incomplete. Indonesian criminal procedure recognizes three species of judgment, and Law Number 20 of 2025 on the Criminal Procedure Code (KUHP) reproduces that architecture in Article 187 without adding a fourth. A judgment that declares guilt and withholds punishment fits none of the three. It is not an acquittal, because guilt is established. It is not a conviction in the ordinary sense, because no sanction follows. It is not a discharge from all charges, because that category presupposes that proven facts do not constitute an offense or that criminal liability is excluded — precisely what a judicial pardon denies. What the literature has not asked is what kind of judgment a pardon therefore is, what follows from the answer, and what the gap means for the offense category where the power matters most.

This gap is not a matter of drafting tidiness. Three consequences follow from it, and they run in ascending order of seriousness. Procedurally, a judgment without a recognized category has no settled rules on how it is pronounced, how it is entered in court records, whether it generates a criminal record, and — critically — whether and by whom it may be appealed. Doctrinally, if judicial pardon is assimilated to discharge from all charges for want of an alternative, the assimilation will corrupt both concepts: discharge will come to include cases of established liability, and pardon will lose the declaration of guilt that distinguishes it from exculpation. Institutionally, an instrument whose legal effects are uncertain is an instrument judges have every professional reason to avoid, which converts Article 54 paragraph (2) from an operative sentencing power into a symbolic norm. The gap therefore threatens to defeat the reform precisely where the reform was most needed.

The importance of resolving it extends beyond Indonesia. The question of how a legal system institutionalizes leniency without surrendering legal certainty is a general problem of comparative criminal law, and Southeast Asia is where it is currently most acute in the drug field. Thailand's 2021 Narcotics Code reoriented drug offenses toward rehabilitation; Malaysia abolished the mandatory death penalty in 2023, restoring sentencing discretion in drug cases; several other states in the region continue to treat drug offenses as among the most serious crimes.¹⁸ Across these jurisdictions the reform question is the same: how to give courts room to individualize punishment in drug cases without producing arbitrariness. The stakes for Indonesia specifically are sharpened by an existing critique: Arifin and colleagues argue that the new Penal Code sits uneasily with international standards on human rights, due process, and equality before the law, and that the compromises it embodies bear on judicial integrity.¹⁹ An unclassified pardon power is precisely the kind of provision that critique anticipates — generous in substance, indeterminate in operation. Indonesia's experience with Article 54 paragraph

¹⁸ Wing-Cheong Chan, "Death Penalty for Drug Offenders in Southeast Asia: Weakening of Resistance to Change?," *International Journal for Crime, Justice and Social Democracy* 14, no. 4 (2025): 133–44, <https://doi.org/10.5204/ijcjsd.3681>.

¹⁹ Ridwan Arifin, Riska Alkadri, Robert Brian Smith, Nucharee Nuchkoom Smith, and Wahyudin, "Indonesia's New Penal Code: Harmonizing with Global Justice or Defying International Norms?," *Lex Scientia Law Review* 8, no. 1 (2024): 561–94, <https://doi.org/10.15294/lslr.v8i1.14271>.

(2) is a controlled instance of that problem, because Indonesia has legislated the substantive power while leaving the procedural container unbuilt.

Accordingly, this article addresses two questions. The first asks how Article 54 paragraph (2) of Law Number 1 of 2023 can be procedurally accommodated within Law Number 20 of 2025 so that judicial pardon decisions carry determinate legal consequences. The second asks under what normative criteria judicial pardon may be applied to narcotics offenders, particularly users and people with dependency, without eroding equality before the law and legal certainty.

The article's central argument is that judicial pardon is a distinct species of judgment — a conviction in the doctrinal sense, since it rests on an express declaration of proven guilt, but a conviction from which the sanction has been deliberately withheld — and that Indonesian criminal procedure must recognize it as a fourth verdict category if Article 54 paragraph (2) is to function.

The claim to novelty must be stated with care, because the observation that Indonesian criminal procedure lacks a pardon judgment is not new. It belongs to Alfret and Frans, and the call for implementing regulation belongs to Julranda and colleagues and to Krisnamurti.^{20 21 22} What this article adds is four things. First, it answers the classification question those studies leave open, arguing that judicial pardon is doctrinally a conviction rather than a discharge from all charges, and supporting that answer with comparative authority: the Dutch Supreme Court has held that a finding of guilt without imposition of punishment under Article 9a of the Dutch Criminal Code constitutes a conviction.²³ Second, it conducts a controlled rather than illustrative comparison, showing that the Netherlands solved the same problem by pairing Article 9a with a corresponding provision of its Code of Criminal Procedure, and stating the criteria by which comparators were selected. Third, it analyzes the enacted Law Number 20 of 2025 rather than a Bill, which converts the question from what the legislature might do into what follows from what it has done. Fourth, and most substantially, it descends from the general demand for parameters to the parameters themselves, supplying an operational test for the narcotics context that distinguishes pardon from rehabilitation and from measures, specifies eligibility and exclusion criteria, and identifies the safeguards without which judicial mercy becomes indistinguishable from judicial caprice.

The article contributes to scholarship on three levels. Theoretically, it specifies the relationship between legal justice and moral justice as a relationship of procedural discipline rather than of substitution, arguing that mercy earns legitimacy in a legality-

²⁰ Alfret and Mardian Putra Frans, "Konsep Putusan Pemaaf oleh Hakim (Rechterlijk Pardon) sebagai Jenis Putusan Baru dalam KUHAP," *Krtha Bhayangkara* 17, no. 3 (2023): 587–600, <https://doi.org/10.31599/krtha.v17i3.2968>.

²¹ Rizky Julranda, Fhildzha Zhafirin, and Sultan Rambe, "Rechtvacuum Penerapan Rechterlijk Pardon dalam Pembaruan Hukum Acara Pidana di Indonesia," *Judex Laguens* 3, no. 2 (2025): 267–88, <https://doi.org/10.25216/ikahi.3.2.8.2025.267-288>.

²² Hana Krisnamurti, "Harmonisasi Asas Permaafan Hakim (Judicial Pardon) dalam Hukum Positif Indonesia untuk Mencapai Keadilan yang Bermartabat," *Jurnal Litigasi* 26, no. 2 (2025): 104–34, <https://doi.org/10.23969/litigasi.v26i2.22645>.

²³ Hoge Raad, 21 June 2024, ECLI:NL:HR:2024:917 (holding that a *schuldigverklaring zonder oplegging van straf* under Article 9a of the Dutch Criminal Code constitutes a conviction).

based system only when it is exercised in a determinate form and remains open to limited review. Doctrinally, it establishes that judicial pardon cannot be absorbed into existing verdict categories and offers a definition of the fourth category together with its constituent elements. Practically, it provides legislators with a concrete amendment target and courts with criteria that make the distinction between drug users and traffickers operable at the sentencing stage.

Problem Statement

This study addresses two research questions: *first*, How should Article 54 paragraph (2) of Law Number 1 of 2023 on the Criminal Code be procedurally accommodated within Law Number 20 of 2025 on the Criminal Procedure Code so that judicial pardon decisions produce determinate legal consequences, including as to their form, their status as convictions, and the availability of legal remedies?, *second*, Under what normative criteria may *rechterlijk pardon* be applied to narcotics offenders, particularly users and people with dependency, without undermining equality before the law and legal certainty?

Methods

This study is normative legal research. Its object is the internal coherence of a legal system: the relationship between a substantive norm conferring a sentencing power and the procedural norms that must give that power a determinate form.²⁴ The study makes no empirical claim about the frequency, distribution, or outcome of judicial pardon decisions in Indonesian courts, and it does not present sentencing statistics or judicial behavior data. Where the article characterizes judicial practice, it does so on the basis of the regulatory and scholarly sources cited, and it identifies such characterizations as provisional. Four approaches are used, and each is employed for a specific analytical task rather than listed as a formality.

The **statutory approach** establishes the positive-law premises of the argument. The primary legal materials examined are: Four approaches are employed in this study, each serving a distinct analytical function rather than being included merely as a methodological formality. The statutory approach establishes the positive-law premises of the analysis through examination of Law Number 1 of 2023 on the Criminal Code (particularly Articles 51–54, 64, and 65), Law Number 20 of 2025 on the Criminal Procedure Code, Law Number 8 of 1981 on the Criminal Procedure Code, Law Number 11 of 2012 on the Juvenile Criminal Justice System (particularly Article 70), Law Number 35 of 2009 on Narcotics, Law Number 48 of 2009 on Judicial Power, Supreme Court Circular Letter Number 4 of 2010, and the 2014 Joint Regulation on the handling of persons with drug dependency and victims of drug abuse. These materials are examined to identify the applicable normative framework, its internal relationships, and potential tensions relevant to the study’s analysis. These materials are read for what they authorize, what they omit, and where the omissions conflict.

The **conceptual approach** is used to construct the two analytical concepts that the research questions presuppose and that existing scholarship leaves undefined: legal

²⁴ Peter Mahmud Marzuki, *Penelitian Hukum*, rev. ed. (Jakarta: Prenadamedia Group, 2014), 93–95.

justice and moral justice. These are not treated as rhetorical flourishes but as criteria with identifiable content, developed in Section 3.1 below and then applied to test proposed sentencing outcomes.

The **doctrinal approach** is used to classify judicial pardon among the recognized species of criminal judgment. This involves analyzing the constitutive elements of conviction, acquittal, and discharge from all charges, and testing whether a judgment under Article 54 paragraph (2) satisfies the elements of any of them. The classification question is analytically prior to the reform question, because the content of the required amendment depends on what kind of judgment a pardon is.

The **comparative approach** is functional and deliberately narrow. Comparison is confined to jurisdictions that satisfy two criteria: they must possess a *judicial* power to convict without imposing punishment, as distinct from executive clemency, and that power must be traceable in both their substantive and their procedural codes so that the substance–procedure relationship — the object of this study — can be observed. The Netherlands satisfies both criteria fully and is therefore the principal comparator: Article 9a and Article 77 of the Dutch Criminal Code confer the power, Article 138 of the Dutch Code of Criminal Procedure provides the procedural form, and Indonesian criminal law shares a codificatory lineage with Dutch law that makes the transfer of doctrinal categories intelligible. France satisfies the criteria partially, through *dispense de peine*, and is used as a secondary check on whether the Dutch solution is idiosyncratic. Common-law jurisdictions are treated with caution and used only where they offer a genuinely judicial analogue — absolute and conditional discharge — rather than executive pardon. The historical English material on royal pardons that has featured in earlier Indonesian scholarship is not comparative evidence for the present question, since it concerns a prerogative of the Crown rather than a power of the court, and it is therefore not relied upon here. Southeast Asian material is used for a different purpose: not to derive doctrinal solutions but to establish the regional significance of the sentencing-discretion problem in drug cases.²⁵

Analysis proceeds through systematic and teleological interpretation of the statutory materials, conceptual analysis of the two justice criteria, and controlled functional comparison. The study has three limitations that should be stated. First, because it is normative, its claims about how courts will behave under an amended procedure are predictions grounded in doctrine rather than findings. Second, at the time of writing, judicial practice under Article 54 paragraph (2) is in its earliest stage, and the reported decisions applying the provision arise outside the narcotics context;²⁶ the article therefore treats the narcotics application as prospective and normative rather than as an observed pattern. Third, Dutch and French materials are consulted through primary

²⁵ Wing-Cheong Chan, “Death Penalty for Drug Offenders in Southeast Asia: Weakening of Resistance to Change?,” *International Journal for Crime, Justice and Social Democracy* 14, no. 4 (2025): 133–44, <https://doi.org/10.5204/ijcjsd.3681>.

²⁶ Chandra Marojahan Panggabean, Saefullah, and Anwar Budiman, “Judicial Pardon Under Article 54(2) of the 2023 Criminal Code: A Proportionality Analysis of Sentencing in the Garut and Mempawah District Court Decisions,” *Journal of Law, Politic and Humanities* 6, no. 5 (2026): 4086–4100, <https://doi.org/10.38035/jlph.v6i5.3535>.

provisions and secondary scholarship rather than through systematic case-law analysis in those jurisdictions.

The Procedural Gap: Judicial Pardon and the Three-Verdict Architecture of Indonesian Criminal Procedure

1. The Substantive Norm and Its Three Indeterminate Elements

Article 54 paragraph (2) of Law Number 1 of 2023 provides that the minor nature of the offense, the personal circumstances of the offender, the circumstances existing at the time the criminal act was committed, and subsequent developments may serve as grounds for considering the non-imposition of punishment or other measures, taking into account the interests of justice and humanity. Three features of the provision determine everything that follows. It presupposes a completed adjudication of guilt: pardon operates after liability is established, not instead of establishing it. It is discretionary rather than mandatory, since the statute says such grounds “may serve” as considerations. And it withholds both punishment and measures, which distinguishes it from a sentence of a different kind.

Each of the three grounds is indeterminate, and the indeterminacy is of a different character in each case. The **minor nature of the offense** is undefined in the statute and in its elucidation. Barda Nawawi Arief identified this indeterminacy as a weakness of the pardon provision.²⁷ The criticism is well taken, but it is incomplete, because indeterminacy here may be a deliberate legislative choice: fixing the category by reference to the statutory penalty range would confine pardon to petty offenses and defeat its purpose, which is to reach cases where the abstract gravity of the offense diverges from its concrete gravity. The real question is therefore not whether the term should be defined but at what level of generality. Four candidate criteria are available: the statutory maximum penalty, which is objective but insensitive to the individual case; the actual harm caused, which is sensitive but unstable across offense types; the offender’s role and degree of participation, which tracks culpability; and the social danger presented by the conduct, which tracks the protective function of punishment. This article argues that the last three should be applied cumulatively and that the first should operate only as an exclusionary filter, in the manner developed in Section 2.3 below. Critically, the Dutch formulation differs on precisely this point: Article 9a of the Dutch Criminal Code refers to the *geringe ernst van het feit*, the minor gravity or significance of the act, which directs attention to the concrete seriousness of what occurred, whereas the Indonesian formula directs attention to the character of the offense as a type.²⁸ The difference is not stylistic. It determines whether pardon is available in a serious offense category where the particular instance is trivial — the situation of many drug possession cases.

²⁷ Barda Nawawi Arief, *Kapita Selekta Hukum Pidana* (Bandung: Citra Aditya Bakti, 2003), 8.

²⁸ Indi Muhtar Ismail, Dominikus Rato, and Bayu Dwi Anggono, “Implikasi Penerapan Asas Rechterlijk Pardon dalam Putusan Perkara Pidana Ditinjau dari Perspektif Kepastian Hukum,” *Hukum dan Masyarakat Madani* 13, no. 2 (2023): 398–412, <https://doi.org/10.26623/humani.v13i2.7964>.

The **personal circumstances of the offender** are also undefined in Article 54 paragraph (2), although the elucidation of Article 22 of the Criminal Code uses the same phrase in the context of participation, associating it with age, position, profession, and mental disorder.²⁹ It would be a doctrinal error to transplant that meaning. Article 22 concerns the differential liability of principals and accessories, and the personal circumstances it contemplates are those that individualize liability among participants in a single offense. Article 54 paragraph (2) concerns whether an established liability should be answered with a sanction at all. The two provisions ask different questions, and the same phrase must be read to different effect. In the pardon context, personal circumstances properly encompass factors bearing on the offender's capacity, vulnerability, and prospects: dependency and its severity, mental health condition, socioeconomic vulnerability, coercion or exploitation by others, absence of prior convictions, voluntary submission to treatment, demonstrated remorse, and dependent-care responsibilities. Whether these must be established by professional assessment or may be evaluated by the court on the trial record is a question the statute leaves open; Section 2.4 below argues that in narcotics cases the assessment route is not optional, because the factual predicate for pardon coincides with the factual predicate for rehabilitation.

The **circumstances at the time of the offense and subsequent developments** introduce a temporal dimension that the other grounds lack. This element allows post-offense conduct — reconciliation with the victim, restitution, entry into treatment — to bear on sentencing. It must be distinguished from the defenses of necessity and duress, which negate liability rather than dispense with sanction. The distinction is that between a defendant who is not criminally liable and a defendant who is liable but ought not to be punished, and it is the same distinction that will prove decisive for the classification question below. The reported decisions applying Article 54 paragraph (2) so far have leaned heavily on this element, relying on peace agreements, victim forgiveness, and compensation.³⁰

2. The Procedural Silence

Substantive authority is inert unless procedure supplies a form in which it can be exercised. Law Number 8 of 1981 on the Criminal Procedure Code recognized three species of judgment: conviction, understood as a judgment imposing some sanction (*veroordeling tot enigerlei sanctie*); acquittal (*vrijspraak*); and discharge from all charges (*ontslag van rechtsvervolging*).³¹ Law Number 20 of 2025 carries that tripartite scheme forward without adding a category for judicial pardon.³² The omission was foreseen: Alfret and Frans noted that the Bill preceding the new Code did not include a pardon

²⁹ Anandy Satrio P., "Rechterlijk Pardon: Gagasan dan Tantangan Instrumen Humanis," *MARINews*, August 2025, <https://marinews.mahkamahagung.go.id/artikel/rechterlijk-pardon-gagasan-dan-tantangan-instrumen-humanis-0tY>.

³⁰ Chandra Marojahan Panggabean, Saefullah, and Anwar Budiman, "Judicial Pardon Under Article 54(2) of the 2023 Criminal Code: A Proportionality Analysis of Sentencing in the Garut and Mempawah District Court Decisions," *Journal of Law, Politic and Humanities* 6, no. 5 (2026): 4086–4100, <https://doi.org/10.38035/jlph.v6i5.3535>.

³¹ M. Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP: Penyidikan dan Penuntutan* (Jakarta: Ghalia Indonesia, 2007), 317.

³² Law Number 8 of 1981 on the Criminal Procedure Code; Law Number 20 of 2025 on the Criminal Procedure Code.

judgment among the recognized types and urged that one be added.³³ The recommendation was not adopted. The Criminal Code has therefore created a sentencing outcome for which the Criminal Procedure Code provides no vehicle.

The consequences are concrete rather than theoretical. A court that wishes to apply Article 54 paragraph (2) must decide, without statutory guidance, how to formulate the operative part of its judgment; whether the judgment constitutes a conviction for purposes of criminal record, recidivism, and civil disqualifications; whether the prosecution may appeal or seek cassation; and what the position of the defendant is if the prosecution does. Comparative institutional analysis of the path from verdict to imprisonment shows that the categories in which judgments are cast are what allocate responsibility for their execution and supervision across institutions;³⁴ a judgment outside the recognized categories is therefore a judgment for which no institution has a defined role. Under these conditions, the rational course for a risk-averse judge is to impose a nominal sentence rather than a pardon, which produces the outcome the reform was designed to prevent. Julranda, Zhafirin, and Rambe describe the resulting condition as a *rechtsvacuum* and emphasize a further dimension that the procedural literature has otherwise neglected: the absence of settled rules leaves victims without a defined position in relation to a pardon judgment, and unequal access to justice is as much a risk of the gap as judicial arbitrariness is.³⁵ The point generalizes: reform of the criminal justice system depends on synchronization among its components rather than on the improvement of any single component in isolation.³⁶

3. Why Judicial Pardon Is Not Discharge from All Charges

The most likely fate of an unclassified pardon judgment is assimilation to discharge from all charges, since that is the only existing category in which a defendant leaves court without a sanction despite the facts having been proved. This article argues that the assimilation is doctrinally impermissible.

Discharge from all charges applies where the facts alleged are proved but do not constitute the offense charged, or where criminal liability is excluded by a justification or an excuse. Its ratio is that the defendant is **not criminally liable**. Judicial pardon has the opposite premise: the offense is proved, liability is established, and the court says so expressly in its judgment. What the court withholds is the sanction, on grounds of justice

³³ Alfret and Mardian Putra Frans, "Konsep Putusan Pemaaf oleh Hakim (Rechterlijk Pardon) sebagai Jenis Putusan Baru dalam KUHAP," *Krtha Bhayangkara* 17, no. 3 (2023): 587–600, <https://doi.org/10.31599/krtha.v17i3.2968>.

³⁴ Anis Widyawati, Ade Adhari, and Ridwan Arifin, "Who Executes Justice? Comparative Institutional Paths from Verdict to Prison," *Jambura Law Review* 8, no. 1 (2026): 160–89, <https://doi.org/10.33756/jlr.v1i1.31642>.

³⁵ Rizky Julranda, Fhildzha Zhafirin, and Sultan Rambe, "Rechtsvacuum Penerapan Rechterlijk Pardon dalam Pembaruan Hukum Acara Pidana di Indonesia," *Judex Laguens* 3, no. 2 (2025): 267–88, <https://doi.org/10.25216/ikahi.3.2.8.2025.267-288>.

³⁶ Fence M. Wantu, Jufryanto Puluhalawa, Anis H. Bajrektarevic, Mellisa Towadi, and Vifi Swarianata, "Renewal of the Criminal Justice System Through the Constante Justitie Principle That Guarantees Justitiabelen's Satisfaction," *Jurnal IUS Kajian Hukum dan Keadilan* 10, no. 3 (2022): 502–10, <https://doi.org/10.29303/ius.v10i3.1115>.

and humanity. To classify pardon as discharge would therefore require the proposition that a defendant may simultaneously be liable and not liable.

The doctrinal cost of the confusion runs in both directions. If discharge expands to accommodate cases of established liability, it ceases to mark the boundary of criminal responsibility and becomes a residual category for any unpunished defendant, which weakens the analytical work it performs elsewhere in the system. If pardon is absorbed into discharge, it loses the declaration of guilt that constitutes it. That declaration is not incidental. It is what allows judicial pardon to affirm the norm while relieving the individual, and it is what distinguishes forgiveness from exculpation. A pardon without a recorded finding of guilt communicates that no wrong occurred; a pardon with such a finding communicates that a wrong occurred and that the state has chosen, for reasons it must state, not to inflict suffering in response. Only the second is intelligible as mercy.³⁷

Law Number 1 of 2023 does not clearly indicate whether judicial pardon is to be understood as a ground excluding criminal liability — a justification or an excuse — or as a sentencing decision that presupposes liability. The analysis above resolves that ambiguity in favor of the second reading, which is the only reading consistent with the requirement that the court declare the defendant proven guilty.

4. The Dutch Solution as a Controlled Comparison

The Netherlands is the appropriate comparator not because Indonesian law descends from Dutch law, but because Dutch law has confronted the identical structural problem and solved it in both codes.

Article 9a of the Dutch Criminal Code provides that where the court considers it advisable in view of the minor gravity of the act, the personality of the offender, or the circumstances under which the act was committed or which arose subsequently, it may determine in the judgment that no punishment or measure shall be imposed.³⁸ Article 77 of the same code provides a basis for resolving a case without punishment where the conduct is of negligible significance. Remmelink describes the resulting judgment as a declaration of guilt without imposition of a penalty.³⁹ Dutch sentencing doctrine treats the mechanism as performing two functions: a safety valve (*veiligheidsklep*) against the rigidity of tariff-based sentencing, and an emergency exit (*nooddeur*) for cases the legislature could not anticipate.

Two features of the Dutch model bear directly on the Indonesian problem, and they are precisely the features that Indonesian scholarship has not examined. The first is procedural. The Dutch power to convict without punishment is not left to find its own form. It is provided for in the Code of Criminal Procedure, in Article 138 of the *Wetboek van Strafvordering*, and Dutch criminal procedure accordingly recognizes four species of judgment rather than three: conviction, acquittal, discharge from all charges, and the

³⁷ Simon McKenzie, “Mercy and International Criminal Justice,” *Journal of International Criminal Justice* 23, no. 2 (2025): 273–90, <https://doi.org/10.1093/jicj/mqaf012>.

³⁸ Andi Hamzah, *Perbandingan Hukum Pidana Beberapa Negara*, 3rd ed. (Jakarta: Sinar Grafika, 2024), 18.

³⁹ Jan Remmelink, *Hukum Pidana: Komentaris atas Pasal-Pasal Terpenting dari Kitab Undang-Undang Hukum Pidana*, trans. Tristram Pascal Moeliono (Jakarta: Gramedia Pustaka Utama, 2003), 456.

judgment declaring guilt without imposition of punishment.⁴⁰ The substantive innovation was matched by a procedural one. This is the step Indonesia has not taken, and it is the whole of the gap identified in this article.

The second is classificatory, and it resolves the doctrinal question posed in Section 1.3 from the perspective of a system that has lived with the institution for decades. In a judgment of 21 June 2024, the Dutch Supreme Court held that a *schuldigverklaring zonder oplegging van straf* — a finding of guilt without imposition of punishment under Article 9a — constitutes a conviction for the purposes of a statutory provision referring to persons convicted of a criminal offense. The Court reasoned from the legislative history that the mechanism was introduced as a form of conviction, and that what matters is that a judge has established guilt, not whether a penalty followed.⁴¹ The holding confirms the argument advanced above: judicial pardon belongs on the conviction side of the acquittal–conviction divide, and its distinctiveness lies in the withholding of the sanction, not in the absence of liability.

Four differences between Article 9a and Article 54 paragraph (2) have been identified in Indonesian scholarship, and three of them can now be assessed with greater precision. The Dutch provision refers to the minor gravity of the act while the Indonesian provision refers to the minor nature of the offense, which — as argued in Section 1.1 — shifts attention from the concrete instance to the offense type. The Dutch provision has been read as directing application once its conditions are satisfied, whereas the Indonesian “may” preserves discretion even where the grounds are made out.⁴² The Indonesian provision expressly incorporates justice and humanity, which the Dutch text does not, and Yosuki reads this as the entry point of Pancasila values, particularly the second principle, into the sentencing framework.⁴³ The fourth difference is the procedural one, and it is decisive: the Dutch provision has been harmonized with criminal procedure, and the Indonesian provision has not.⁴⁴

France offers a secondary confirmation that the Dutch answer is not idiosyncratic. French law recognizes *dispense de peine*, a declaration of guilt without penalty, within its criminal procedure framework.⁴⁵ The convergence of two civil-law systems on the same institutional design — a substantive power paired with a procedural form — indicates that the pairing is functionally necessary rather than a peculiarity of Dutch drafting.

⁴⁰ Tony Paul Marguery, *Unity and Diversity of the Public Prosecution Services in Europe: A Study of the Czech, Dutch, French, and Polish Systems* (Groningen: Faculty of Law, University of Groningen, 2008).

⁴¹ Hoge Raad, 21 June 2024, ECLI:NL:HR:2024:917 (holding that a *schuldigverklaring zonder oplegging van straf* under Article 9a of the Dutch Criminal Code constitutes a conviction).

⁴² Mufatikhatul Farikhah, “Rekonseptualisasi Judicial Pardon dalam Sistem Hukum Indonesia (Studi Perbandingan Sistem Hukum Indonesia dengan Sistem Hukum Barat),” *Jurnal Hukum & Pembangunan* 48, no. 3 (2018): 556–88, <https://doi.org/10.21143/jhp.vol48.no3.1746>.

⁴³ Aska Yosuki and Dian Andriawan Daeng Tawang, “Kebijakan Formulasi Terkait Konsepsi Rechterlijke Pardon (Pemaafan Hakim) dalam Pembaharuan Hukum Pidana di Indonesia,” *Jurnal Hukum Adigama* 1, no. 1 (2018): 49–73, <https://doi.org/10.24912/adigama.v1i1.2136>.

⁴⁴ Indi Muhtar Ismail, Dominikus Rato, and Bayu Dwi Anggono, “Implikasi Penerapan Asas Rechterlijk Pardon dalam Putusan Perkara Pidana Ditinjau dari Perspektif Kepastian Hukum,” *Hukum dan Masyarakat Madani* 13, no. 2 (2023): 398–412, <https://doi.org/10.26623/humani.v13i2.7964>.

⁴⁵ Barda Nawawi Arief, *Kapita Selekta Hukum Pidana* (Bandung: Citra Aditya Bakti, 2003), 8.

Common-law jurisdictions require a different treatment, and earlier Indonesian discussions of judicial pardon have not always drawn the necessary distinction. The historical English practice of royal pardon, including the pardon granted by Charles II to Danby and the later commodification of pardons for payment,⁴⁶ is an executive prerogative, not a judicial power. It bears on the general history of clemency and on the reasons for transferring the power to courts, but it is not comparative evidence about how a judicial power to convict without punishment should be procedurally formed. Where common-law systems do have a genuinely judicial analogue — absolute and conditional discharge — the comparison would be apposite, but it would require analysis of those mechanisms rather than of the prerogative. This article therefore treats the common-law material as historical background to the emergence of judicial, rather than executive, forgiveness, and does not rest any doctrinal conclusion on it. Tait's account of the long relationship between punishment and forgiveness, reaching back to the Code of Hammurabi, is used in the same background register.⁴⁷

5. Judicial Pardon as a Fourth Verdict Category

The analysis supports a specific reform proposal. Law Number 20 of 2025 should be amended to recognize judicial pardon as a fourth species of criminal judgment, constituted by the following elements. *First*, the court finds the defendant legally and convincingly proven guilty of the offense charged, and states that finding expressly in the operative part of the judgment. This element distinguishes pardon from acquittal and from discharge from all charges.

Second, the court determines that no punishment and no measure shall be imposed, by reference to the grounds enumerated in Article 54 paragraph (2). This element distinguishes pardon from conviction with sentence, including from a suspended or nominal sentence. *Third*, the judgment must contain special reasoning. The court must state which of the statutory grounds it relies upon, what facts establish each, and why the imposition of punishment would be contrary to justice and humanity in the case before it. This requirement is the principal safeguard against arbitrariness, because it converts an unreviewable intuition into a stated ground that can be evaluated, compared across cases, and criticized. *Fourth*, the judgment is a conviction for classificatory purposes. Its status as such should be stated in the Criminal Procedure Code, together with its consequences for criminal records and for any subsequent proceeding in which prior conviction is material.

Fifth, a limited legal remedy should be available. The manuscript literature has suggested that pardon judgments should be final and non-appealable, on the analogy of decisions of the Constitutional Court, in order to protect legal certainty and the distinctive character of the pardon. That proposal should be rejected in its unqualified form. A criminal judgment affects the prosecution, the victim, and the public interest, and an entirely unreviewable discretionary power to withhold punishment would create a category of

⁴⁶ Mc Knight, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King* (University Press of Hawaii, 1981), 21; Hewitt, *The Queen's Pardon* (London: Cassell, 1978), 174.

⁴⁷ David Tait, "Pardons in Perspective: The Role of Forgiveness in Criminal Justice," *Federal Sentencing Reporter* 13 (2001), <https://doi.org/10.1525/fsr.2000.13.3-4.134>.

decision immune to correction for legal error, for misclassification of a trafficker as a user, or for improper influence. The better solution is a remedy limited in scope rather than excluded: review should be available for error of law, for failure to satisfy the special reasoning requirement, and for abuse of discretion, but not for mere disagreement with the court's assessment of the grounds. This preserves the finality that gives pardon its practical value while retaining the correction mechanism that legality requires. It also answers the victim-protection concern raised in the procedural literature: where a pardon judgment is reviewable for legal error, the victim's interest is not extinguished by the court's decision to withhold punishment but remains capable of vindication through the prosecution's exercise of that remedy.⁴⁸ The principle that like cases be decided alike — *similia similibus* — and the guarantee of equality before the law both depend on the availability of some route by which inconsistent exercises of the power can be identified and corrected.⁴⁹ *Sixth*, in narcotics cases the category should be confined by explicit criteria, developed in Section 2 below.

Krisnamurti reaches a compatible conclusion from a different direction, arguing that harmonization must extend across the Criminal Code, the Criminal Procedure Code, and the Law on Judicial Power, and that implementation requires procedural safeguards and standardized parameters if judicial discretion in favour of substantive justice is not to erode legal certainty.⁵⁰ The proposal advanced here specifies what those safeguards and parameters should be at the level of the judgment itself, which is where the harmonization has to take effect.

From the standpoint of legal positivism, this proposal is a response to a genuine objection rather than a concession to it. Positivist analysis of the kind associated with Austin and Kelsen insists that criminal norms be formulated so as to yield determinate legal consequences.⁵¹ On that criterion, Article 54 paragraph (2) as currently supported by procedure fails: it authorizes an outcome whose consequences are undetermined. The objection is not that judicial pardon is incompatible with legal certainty, but that pardon *without procedural form* is. Supplying the form answers the objection on its own terms. Judicial discretion exercised within a defined judgment category, subject to a stated-reasons requirement and to limited review, is not a derogation from legal certainty; it is legal certainty applied to an area the legislature has deliberately left to individualized judgment.

⁴⁸ Rizky Julranda, Fhildzha Zhafirin, and Sultan Rambe, "Rechtvacuum Penerapan Rechterlijk Pardon dalam Pembaruan Hukum Acara Pidana di Indonesia," *Judex Laguens* 3, no. 2 (2025): 267–88, <https://doi.org/10.25216/ikahi.3.2.8.2025.267-288>.

⁴⁹ Law Number 48 of 2009 on Judicial Power; Agam Sakti, Nina Aprianingsih, and Saifun Nufus, "Implementation of the Principle of Equality Before the Law in Corruption Court Decisions," *Jurnal Ruang Hukum* 1, no. 1 (2022): 17–22, <https://doi.org/10.58222/juruh.v1i1.251>.

⁵⁰ Hana Krisnamurti, "Harmonisasi Asas Permaafan Hakim (Judicial Pardon) dalam Hukum Positif Indonesia untuk Mencapai Keadilan yang Bermartabat," *Jurnal Litigasi* 26, no. 2 (2025): 104–34, <https://doi.org/10.23969/litigasi.v26i2.22645>.

⁵¹ Faissal Malik, "Tinjauan terhadap Teori Positivisme Hukum dalam Sistem Peradilan Pidana Indonesia," *Jurnal Pendidikan Kewarganegaraan Undiksha* 9, no. 1 (2021): 188–96, <https://doi.org/10.23887/jpku.v9i1.31488>.

1. Legal Justice and Moral Justice as Analytical Criteria

The two concepts have been used in Indonesian scholarship on judicial pardon largely as evocations — moral justice standing for humanity, conscience, and Pancasila, legal justice standing for legality and certainty. Used that way they cannot do analytical work, because they cannot generate a determinate answer in any particular case. This article gives each a definition with identifiable content and then uses them as criteria against which sentencing outcomes are tested.

Legal justice is justice realized through the form of law. Its constitutive elements are legality, in the sense that outcomes are traceable to enacted norms; equality before the law, in the sense that persons in relevantly similar positions are treated alike; consistency, in the sense that the reasoning applied in one case is available in the next; due process, in the sense that outcomes are reached through prescribed procedure; and legal certainty, in the sense that the consequences of conduct are ascertainable in advance. Legal justice is therefore intrinsically comparative and prospective: it evaluates a decision not only by its content but by its relation to other decisions and by its intelligibility to future actors.

Moral justice is justice measured against the substantive claims of the person. Its constitutive elements are human dignity, in the sense that a person is not treated merely as an instrument of general deterrence; proportionality, in the sense that the burden imposed bears a defensible relation to culpability and harm; compassion, in the sense that suffering is not inflicted where it serves no purpose the law can articulate; restoration, in the sense that the response addresses the harm and the conditions that produced it; and social reintegration, in the sense that the response leaves the person capable of resuming a lawful life. Moral justice is intrinsically individual and retrospective-cum-prospective: it evaluates a decision by what it does to this person and what it makes possible for them.

The relationship between the two is the article's central theoretical claim, and it can be stated as follows: **judicial pardon is justified where the strict application of legal guilt would produce a punishment that is formally lawful but morally disproportionate; its legitimacy depends entirely on procedural safeguards that prevent judicial discretion from becoming arbitrary.** Both halves of the proposition are necessary. Without the first, pardon has no ground: if lawful punishment were always morally acceptable, there would be nothing for pardon to correct. Without the second, pardon has no legitimacy: an unconstrained power to withhold punishment on grounds of individual conscience would itself violate legal justice, because it would make the consequence of identical conduct depend on which judge heard the case.

This formulation has a corollary that Indonesian discussions of judicial pardon have tended to avoid. Moral justice does not override legal justice; it operates within a space that legal justice defines and polices. Article 54 paragraph (2) is itself an enacted norm, and its exercise is therefore an act of legality, not an exception to it. What makes a pardon lawful is not the judge's moral conviction but the statutory authorization, the satisfaction

of the statutory grounds, the stated reasoning, and the availability of review. The Indonesian framework supports this reading: Law Number 1 of 2023 makes sentencing purposes and guidelines an integral part of the requirements for imposing punishment, so that the pardon decision is structurally continuous with, rather than an escape from, the sentencing rules.⁵² The reference in Article 2 of the Criminal Code to law living within society, and the derivation of the pardon institution from Pancasila as the source of Indonesian law, situate the instrument within the national legal order rather than outside it.⁵³

2. Why Narcotics Offenses Are the Hard Case

Narcotics offenses test the framework more severely than the offense types in which Article 54 paragraph (2) has so far been applied, and for reasons that are structural rather than accidental. First, the offense category is heterogeneous in a way that its statutory treatment obscures. Narcotics law addresses conduct ranging from organized importation to personal possession by a person with dependency. These are different phenomena with different culpability profiles and different appropriate responses, yet they are prosecuted under a single legislative framework whose penalty structure is oriented toward the serious end.

Second, the distinction between users and traffickers is factually contested at trial rather than given. Quantity thresholds, possession of packaging or scales, communications evidence, and prior conduct are all probative but none is decisive, and the same physical evidence is frequently consistent with both characterizations. This is why the Indonesian framework has for over a decade relied on assessment as an institutional mechanism: Supreme Court Circular Letter Number 4 of 2010 directs the placement of drug abusers, victims of abuse, and people with dependency in medical and social rehabilitation institutions,⁵⁴ and the Joint Regulation of 2014 establishes procedures for handling people with dependency and victims of drug abuse.⁵⁵ The persistence of custodial outcomes for users despite this framework is one of the reform problems that judicial pardon might address. There is now published evidence of that persistence in an adjacent field. Examining sixteen decisions of the Balikpapan District Court in 2024, Pancasilawati, Herlambang, and Naffati found that although Indonesian law makes diversion the primary response for children in conflict with the law, cases involving narcotics offenses were almost invariably answered with imprisonment, accompanied by symbolic interventions such as vocational training; they conclude that restorative justice functioned in those proceedings as rhetorical language rather than as substantive practice.⁵⁶ The finding concerns juvenile justice rather than the adult jurisdiction with

⁵² Articles 51, 52, and 53 of Law Number 1 of 2023 on the Criminal Code, which include among the purposes of sentencing the fostering of remorse and the relief of guilt in the convicted person.

⁵³ Fence M. Wantu and Fenty Puluhalawa, *Teori Hukum: Dinamika Suatu Perdebatan* (Yogyakarta: UII Press, 2025); Fence M. Wantu, Rustam Hs. Akili, and Marten Bunga, *Filsafat Hukum: Suatu Perenungan* (Yogyakarta: UII Press, 2024).

⁵⁴ Supreme Court Circular Letter (SEMA) Number 4 of 2010 on the Placement of Drug Abusers, Victims of Drug Abuse, and People with Drug Dependency in Medical and Social Rehabilitation Institutions.

⁵⁵ Joint Regulation of the Supreme Court and Others Number 01/PB/MA/III/2014 on the Handling of People with Drug Dependency and Victims of Drug Abuse.

⁵⁶ Abnan Pancasilawati, Saifuddin Herlambang, and Abdel Kadir Naffati, "Symbolic Restorative Justice in the Courtroom: Navigating the Intersection of Justice and Child Welfare in Indonesian Juvenile Court

which this article is principally concerned, and it cannot be generalized beyond its sample. Its significance here is narrower and more precise: it shows that in the one field where Indonesian law has for over a decade mandated a non-custodial response, narcotics offenses have proved the most resistant category. That is a reason to expect resistance in the adult jurisdiction as well, and a reason to insist that a pardon power for narcotics cases be equipped with criteria rather than left to judicial disposition.

Third, the systemic consequences are severe. Drug cases dominate the special-crimes segment of Indonesia's prison population by a very wide margin — a proportion far exceeding corruption, illegal logging, terrorism, and money-laundering cases combined⁵⁷—and the resulting overcrowding imposes financial burdens on the state, degrades conditions for all detainees, and undermines the reintegrative function that Law Number 1 of 2023 makes a purpose of sentencing.⁵⁸ Comparative criminal-policy scholarship on the right to rehabilitation supports the proposition that integrated approaches combining prevention, rehabilitation, and restoration sustain social order more effectively over the long term than escalating severity.⁵⁹ Restorative approaches are nevertheless of limited direct assistance here. Restorative justice is organized around the restoration of relationships between an offender, an identified victim, and a community,⁶⁰ and it seeks common ground between the claims of justice and shared social interests.⁶¹ Drug possession by a user typically involves no individual victim with whom restoration can be negotiated, so the restorative model cannot supply the reasoning that Article 54 paragraph (2) requires in this offense class. What survives from the restorative tradition is its underlying commitment to reintegration rather than exclusion, and it is that commitment, rather than the victim–offender mechanism, that judicial pardon carries into the narcotics field.

Fourth — and this is the point at which moral and legal justice come into open tension — narcotics use is legally prohibited, so the question arises when it can be morally unjust to punish someone for conduct the law forbids. The answer this article proposes is that punishment becomes morally problematic where the offender is more accurately understood as a person experiencing dependency, health-related harm, or social vulnerability than as a dangerous criminal actor, because in that configuration imprisonment fails the proportionality test, treats the person's condition as an aggravating rather than a mitigating circumstance, and forecloses the rehabilitative

Decisions," *Volksgeist: Jurnal Ilmu Hukum dan Konstitusi* 8, no. 2 (2025): 619–37, <https://doi.org/10.24090/volksgeist.v8i2.15328>.

⁵⁷ Nixon Randy Sinaga, *The Crisis of Overcrowded Prisons in Indonesia: Barriers to Accessing Alternatives to Imprisonment* (International Drug Policy Consortium and LBH Masyarakat, 2024).

⁵⁸ Novian et al., *Strategi Menangani Overcrowding di Indonesia*; Wulan Dwi Yulianti, "Upaya Menanggulangi Overkapasitas di Lembaga Pemasyarakatan di Indonesia," *Hukum dan Masyarakat Madani* 11, no. 1 (2021): 163–78, <https://doi.org/10.26623/humani.v11i1.2953>.

⁵⁹ Karlo Nikoleishvili, "Prisoners' Right to Rehabilitation: Micro and Macro Level Indicators for the Assessment of the Fulfilment of States' Positive Obligation," *German Law Journal* 26, no. 4 (2025): 668–82, <https://doi.org/10.1017/glj.2025.15>.

⁶⁰ I. Made Wahyu Chandra Satriana and Ni Made Liana Dewi, *Sistem Peradilan Pidana Perspektif Restorative Justice*, ed. I. Gusti Ngurah Parikesit Widiatedja (Denpasar: Udayana University Press, 2021).

⁶¹ Dewi Asri Yustia, Faris Fachrizal Jodi, Ananda Chrisna D. Panjaitan, and Fareed Mohd Hassan, "Restorative Justice: Finding Common Ground Between Justice and Shared Interests," *Jambura Law Review* 8, no. 1 (2026): 229–49, <https://doi.org/10.33756/jlr.v1i1.32646>.

purpose that the sentencing framework itself endorses. This is not an argument that drug use should be lawful, nor that all users should escape sanction. It is an argument that where the state's own legal framework identifies rehabilitation as the appropriate response, imposing imprisonment instead is a failure of legal justice as well as of moral justice.

3. A Normative Test for Applying Judicial Pardon in Narcotics Cases

Judicial pardon should not be available to narcotics offenders as a class. This section proposes a cumulative test with an exclusionary filter, designed so that the criteria are capable of consistent application and of appellate scrutiny.

Exclusionary criteria. Judicial pardon should be categorically unavailable where the offender is established to have participated in trafficking, distribution, production, or importation, whatever the quantity involved; where the offense involved the supply of narcotics to a minor; where the offender occupied an organizing or financing role; or where the offense was accompanied by violence or by the use of a weapon. These exclusions are not derived from the quantity of the substance but from the offender's function within the supply structure, which is the factor that tracks culpability. Consistently with the general logic of the instrument, judicial pardon is also inappropriate for offenses whose gravity is categorically incompatible with the withholding of all sanction, including corruption, homicide, terrorism, and sexual violence.

Eligibility criteria. Where no exclusionary criterion applies, judicial pardon may be considered only where the following conditions are cumulatively satisfied:

1. the offender's conduct is confined to personal use or to possession for personal use;
2. dependency or vulnerability is established through an assessment procedure rather than asserted;
3. the offender has no prior conviction for a narcotics offense involving supply;
4. the offender has submitted to, or has undertaken to submit to, medical or social rehabilitation; and
5. the imposition of imprisonment would, on the record, be disproportionate to the offender's culpability and destructive of their prospects of reintegration.

Reasoning requirement. The judgment must state, in respect of each criterion, the evidence relied upon. In narcotics cases this requirement is more demanding than in the reported non-narcotics applications of Article 54 paragraph (2), where reconciliation with an identified victim, restitution, and victim forgiveness provided a visible evidentiary basis for the pardon.⁶² Drug offenses generally lack an individual

⁶² Chandra Marojahan Panggabean, Saefullah, and Anwar Budiman, "Judicial Pardon Under Article 54(2) of the 2023 Criminal Code: A Proportionality Analysis of Sentencing in the Garut and Mempawah District Court Decisions," *Journal of Law, Politic and Humanities* 6, no. 5 (2026): 4086–4100, <https://doi.org/10.38035/jlph.v6i5.3535>.

complainant, so the reasoning cannot rest on reconciliation and must instead rest on assessment findings, the offender's role, and the proportionality analysis.

The test is deliberately restrictive. Its purpose is to make judicial pardon available in the class of cases where the divergence between formal lawfulness and moral proportionality is greatest, while ensuring that the instrument cannot become a route by which supply-side offenders escape sanction. A permissive test would not survive the equality objection, because it would produce outcomes that could not be justified to defendants convicted of comparable conduct who were not pardoned.

4. Judicial Pardon Distinguished from Rehabilitation, Measures, and Non-Custodial Sanctions

A recurring conflation in discussions of drug sentencing must be resolved, because the proposal above depends on it. Judicial pardon is not rehabilitation, and it is not a non-custodial sentence. Judicial pardon withholds all punishment and all measures. Rehabilitation, by contrast, is itself a response imposed on the offender: it is a measure, it carries obligations, and it may be enforced. Where a defendant is legally guilty and the appropriate response is treatment, the correct disposition is an order for rehabilitation, not a pardon — because a pardon, properly understood, leaves the offender subject to nothing. Similarly, where the appropriate response is a lighter sanction, the correct disposition is one of the alternative principal penalties that Law Number 1 of 2023 now makes available, including supervision and community service. That option is more substantial than it appears, because the new Code's turn toward *ultimum remedium* is accompanied by a structured classification of fines designed to reduce sentencing inconsistency, and scholarship on that classification treats it as a deliberate instrument for relieving prison overcrowding while preserving deterrence.⁶³ A sentencing framework that has been equipped with graduated non-custodial responses cannot justify treating pardon as the only alternative to imprisonment. The distinction matters practically as well as doctrinally, because the effectiveness of rehabilitation as a disposition depends on the sustainability of the rehabilitative model behind it and on its capacity to reduce recidivism rather than merely to relocate the offender;⁶⁴ a pardon that is used as a substitute for an unavailable or unreliable rehabilitation program would answer an institutional deficiency with the extinction of the state's response altogether.

This yields a graduated structure of dispositions for narcotics cases in which liability is established. Alternative principal penalties apply where a sanction is warranted but imprisonment is not. Rehabilitation applies as a measure where the offender's condition requires treatment and treatment can be ordered. Judicial pardon applies only in the residual class of cases: where the offender has already undergone or is independently committed to treatment, where their role and culpability are minimal, and where any

⁶³ Maidah Purwanti, Sigid Suseno, Idris Idris, and Erika Magdalena Chandra, "Criminal Law Reform Through the Classification: Toward a Restorative Sanctions in Indonesian Immigration Law," *Lex Scientia Law Review* 9, no. 1 (2025): 105–38, <https://doi.org/10.15294/lslr.v9i1.21929>.

⁶⁴ Rafika Nur, Darmawati, Hijrah Lahaling, Handar Subhandi Bakhtiar, and Ahmad Fakhrurrazi Mohammed Zabidi, "A Sustainable Rehabilitation Model for Children in Conflict with the Law: Conceptually Toward Global Protection and Recidivism Reduction," *Jambura Law Review* 8, no. 1 (2026): 30–54, <https://doi.org/10.33756/jlr.v1i1.31177>.

further sanction or measure would serve no purpose the sentencing framework recognizes. Judicial pardon is thus the narrowest of the three, and the failure to distinguish it from rehabilitation risks both over-application, by treating pardon as a general route to non-custodial handling of drug users, and under-application, by treating the availability of rehabilitation as a reason never to pardon. The sentencing provisions of the Criminal Code and the procedural framework must be aligned so that judges are able to select among these dispositions on the record; where procedural provisions constrain the range of sanctions that may be imposed on narcotics offenders below what Articles 64 and 65 of the Criminal Code contemplate, that constraint should be removed.

5. The Risks of Judicial Pardon

A serious treatment of judicial pardon must state its dangers as fully as its promise, and Indonesian scholarship has generally not done so. The first risk is **sentencing disparity**. A discretionary power exercised without stated criteria will produce different outcomes for similar cases, and the resulting inconsistency is a direct injury to equality before the law.⁶⁵ The mitigation is the criteria and reasoning requirements proposed above, together with the publication of pardon judgments so that a body of comparable reasoning can develop. Indonesian law is not without machinery here. Supreme Court Regulation Number 1 of 2020 introduced sentencing guidelines for the principal corruption offenses, and Djatmika and colleagues argue, in that setting, that disparity is best addressed through ordinary remedies such as appeal and cassation rather than through extraordinary judicial review, on the ground that disparity is multi-causal and not reducible to judicial error.⁶⁶ That analysis supports the position taken in Section 1.5: the appropriate response to inconsistent pardon judgments is an ordinary and limited remedy, not the extraordinary review that unqualified finality would eventually force litigants to attempt.

The second risk is **subjective moral reasoning**. Because Article 54 paragraph (2) refers expressly to justice and humanity, it invites the judge to reason from moral premises. Where those premises are unstated, the judgment becomes unreviewable in substance. The mitigation is not to exclude moral reasoning — the statute requires it — but to demand that it be articulated in terms capable of being assessed by another court.

The third risk is **misclassification**. In narcotics cases specifically, the boundary between user and supplier is the boundary between eligibility and exclusion, and errors on that boundary are consequential in both directions. A trafficker misclassified as a user escapes sanction entirely; a user misclassified as a supplier receives a sentence calibrated for conduct they did not commit. This is the strongest argument for the limited legal remedy

⁶⁵ Agam Sakti, Nina Aprianingsih, and Saifun Nufus, “Implementation of the Principle of Equality Before the Law in Corruption Court Decisions,” *Jurnal Ruang Hukum* 1, no. 1 (2022): 17–22, <https://doi.org/10.58222/juruh.v1i1.251>.

⁶⁶ Prija Djatmika, Wahbi Rahman, Dwi Edi Wibowo, Robert Lengkong Weku, and Noor Dzuhaidah Osman, “Legal Policy of Disparity in Sentencing as a Ground for Judicial Review in Indonesia Corruption Cases,” *Volksgeist: Jurnal Ilmu Hukum dan Konstitusi* 8, no. 2 (2025): 503–20, <https://doi.org/10.24090/volksgeist.v8i2.13287>.

proposed in Section 1.5, and against the suggestion that pardon judgments should be wholly final.

The fourth risk is **abuse of discretion**, including improper influence in a category of case where the financial stakes for organized supply networks are high. A power to extinguish criminal consequences is, by its nature, a power worth corrupting. The historical English experience in which pardons became purchasable is instructive precisely here: it illustrates what happens to a clemency power that is unconstrained and unreviewable, and it is the reason the power was ultimately relocated to courts.⁶⁷ Relocating it to courts, however, does not by itself supply the constraint; the constraint must come from the reasoning requirement, from reviewability, and from the transparency of published judgments.

These risks do not argue against judicial pardon. They argue against judicial pardon without a procedural form — which is precisely the situation Indonesian law is currently in.

6. The Evidentiary Base and Its Present Limits

The reported applications of Article 54 paragraph (2) so far arise outside the narcotics context. Panggabean, Saefullah, and Budiman analyze two district court decisions in which the provision was applied — one concerning assault and one concerning negligent homicide — in both of which the courts relied on reconciliation, victim forgiveness, compensation, and the offender's personal circumstances.⁶⁸ Those decisions confirm that Article 54 paragraph (2) is operative rather than dormant, show that courts are applying it principally through the third statutory ground, and demonstrate that pardon judgments are being formulated notwithstanding the absence of a procedural category — which raises, without answering, the question of how they have been classified for record and remedy purposes.

No narcotics decision applying the provision has yet been reported, and for a straightforward reason: the new Criminal Code entered into force only in January 2026. What can be examined instead, and what this section examines, is a narcotics decision handed down immediately before the reform. Such a decision cannot show how judicial pardon operates. It can show, with a precision that no normative argument achieves on its own, what the architecture the reform is meant to change actually produced, and where an instrument like Article 54 paragraph (2) would have to intervene.

The decision is that of the Makassar District Court of 21 February 2024 in case number 1525/Pid.Sus/2023/PN Mks.⁶⁹ Its facts may be stated briefly. The defendant, aged

⁶⁷ Hewitt, *The Queen's Pardon* (London: Cassell, 1978), 174.

⁶⁸ Chandra Marojahan Panggabean, Saefullah, and Anwar Budiman, "Judicial Pardon Under Article 54(2) of the 2023 Criminal Code: A Proportionality Analysis of Sentencing in the Garut and Mempawah District Court Decisions," *Journal of Law, Politic and Humanities* 6, no. 5 (2026): 4086–4100, <https://doi.org/10.38035/jlph.v6i5.3535>.

⁶⁹ Decision of the Makassar District Court (Pengadilan Negeri Makassar) Number 1525/Pid.Sus/2023/PN Mks, 21 February 2024, Directory of Decisions of the Supreme Court of the Republic of Indonesia, <https://putusan3.mahkamahagung.go.id>.

nineteen and unemployed, was summoned by telephone to a house where three other men were present. Synthetic cannabinoid material — later identified by the Provincial Police Forensic Laboratory as MDMB-4en-PINACA, a Group I substance, with a net weight of 5.9222 grams across the ten sachets tested — was lying on the bedroom floor. The defendant was invited by one of the others to consume it and did so with them. While he was present, that other man handed a sachet containing ten smaller sachets to a fourth person, a minor tried separately, for onward sale at a price negotiated between Rp500,000 and Rp300,000. Police arrested all four at the scene. The substance belonged to a fifth man, who remained at large; the house belonged to another of those present.

On those facts the court found the defendant guilty, as a joint participant, of conspiracy to act as an intermediary in the trade of Group I narcotics under Article 114 paragraph (1) in conjunction with Article 132 paragraph (1) of the Narcotics Law. It sentenced him to five years' imprisonment and a fine of Rp800,000,000, with six months' imprisonment in default — precisely the sentence the prosecution had requested. Four features of the judgment bear directly on the argument of this article.

First, the decision displays the binary architecture in operation. Before proceeding to sentence, the court recorded that it had not found in the proceedings anything capable of extinguishing the defendant's criminal liability, "whether as a justification or as an excuse," and concluded that he was therefore accountable and must be convicted and sentenced. That formulation is not a drafting habit; it is an accurate statement of the exits from punishment that Indonesian law then made available. Either liability was negated — by a justification or an excuse — or a sentence followed. There was no third position in which the court might affirm guilt and decline to punish. Article 54 paragraph (2) creates exactly that third position, which is why it cannot be classified as either of the two the court canvassed, and why Section 1.3 argues that assimilating it to discharge from all charges collapses the distinction the reform was enacted to draw.

Second, the judgment records mitigation and gives it no effect. Among the mitigating circumstances the court listed were that the defendant had been courteous throughout the proceedings, had admitted his conduct candidly, had not obstructed the examination, had expressed remorse for everything he had done, and was "still young and still able to change." The court also set out, at some length, that sentencing is not directed at retribution alone but must be proportionate to the degree of fault and must serve corrective, preventive, and educative purposes, as Article 8 paragraph (2) of the Law on Judicial Power requires. Having said all of this, it imposed five years — the statutory minimum for the offense charged — together with a fine of Rp800,000,000. The mitigating findings, and the sentencing philosophy recited above them, altered the outcome by nothing at all. This is what mitigation within a tariff amounts to when the tariff has a floor: the reasoning is available, the language of proportionality and correction is used, and the sentence is the one the statute would have produced without any of it. The distinction drawn in Section 2.4 between a lighter sanction, a measure, and the withholding of punishment is not academic; a court confined to the first has no way of acting on findings of the kind this court made.

Third, the case makes concrete the formulation problem identified in Section 1.1. Under the Indonesian text, judicial pardon turns on "the minor nature of the offense," which directs

attention to the character of the offense as a type. An offense under Article 114 paragraph (1), carrying a five-year minimum, is not minor as a type, and on that reading no conduct prosecuted under it could ever come within Article 54 paragraph (2), whatever the individual's role. Under the Dutch formulation, which asks after the *geringe ernst van het feit* — the minor gravity of the concrete act — the question would at least be open: what was in issue here was a single transaction of a few grams, negotiated by someone else, involving a nineteen-year-old who had been summoned to the house and invited to consume. Whether that concrete act is minor is a question a court could answer either way. The point is that the Indonesian formulation prevents the question from being asked at all. This is a defect of drafting with substantial consequences, and it is visible in this decision in a way that abstract comparison of the two texts does not convey.

Fourth, and most consequentially for the test proposed in Section 2.3, the assessment framework did not visibly operate. The forensic report on which the court relied recorded that MDMB-4en-PINACA was identified both in the seized sachets and in the defendant's urine. The court's own findings of fact state that he was told to consume the substance and did so with the others present. Yet across thirty-two pages the judgment contains no reference to Supreme Court Circular Letter Number 4 of 2010, to the Joint Regulation of 2014, to an integrated assessment team, to dependency, or to medical or social rehabilitation. The framework that Indonesian law has maintained for more than a decade for identifying drug users, and that Section 2.2 identified as the institutional mechanism on which the user-trafficker distinction depends, is simply absent from the reasoning.

That absence must be interpreted carefully, and it does not support the conclusion that the defendant should have been pardoned. He should not have been, and the test proposed in Section 2.3 would exclude him: the court found that he knowingly participated, as an intermediary, in a transaction in which narcotics were handed over for sale, and the exclusionary filter proposed above bars anyone so found from the instrument, whatever the quantity involved. This article does not argue that this decision reached the wrong result.

What the decision demonstrates is narrower and more useful. It shows that a record can contain, simultaneously, the evidentiary marks of consumption — a positive urine result, a finding of consumption at the scene at another's instruction — and a finding of participation in supply, and that the boundary between the two can be resolved without the assessment evidence that Indonesian law contemplates for exactly that purpose. That is the misclassification risk of Section 2.5, observed in a single case rather than asserted in the abstract. It is also the strongest available argument for the second of the eligibility criteria proposed in Section 2.3, that dependency be established through an assessment procedure rather than asserted or inferred: a pardon power grafted onto a system in which assessment does not reliably run would not correct the boundary problem but would relocate it, from the choice of charge to the choice of disposition, and place it beyond scrutiny.

The evidentiary reach of this analysis should be stated plainly. It rests on one decision, of one panel, in one district court, decided under the law as it stood before the provision at issue existed. It establishes nothing about the frequency of any practice and supports no

claim about Indonesian courts generally. Its function here is diagnostic: it shows the architecture this article proposes to change, operating on facts of the kind the proposal is addressed to, and it identifies the institutional precondition — a functioning assessment procedure — on which the proposal depends. The systematic analysis of narcotics decisions that would allow the test in Section 2.3 to be evaluated against a body of practice remains to be undertaken, and can only be undertaken once decisions applying Article 54 paragraph (2) in narcotics cases begin to accumulate. Stating that limitation is preferable to asserting patterns in judicial practice without the decisions that would establish them..

7. Regional and Comparative Significance

The Indonesian problem is a local instance of a regional and global one. Southeast Asian states have moved unevenly but perceptibly away from uniformly punitive drug sentencing: Thailand's Narcotics Code of 2021 reoriented the field toward rehabilitation, Malaysia's abolition of the mandatory death penalty in 2023 restored judicial discretion in drug cases, and several states maintain execution moratoria, even as others have reversed direction.⁷⁰ What unites these developments is that each transfers sentencing judgment from the legislature to the court, and each therefore raises the same second-order question: how discretion is to be structured so that individualization does not become inconsistency.

Indonesia's answer to that question will be watched, because Indonesia has legislated an unusually explicit form of the power. Article 54 paragraph (2) does not merely permit a lighter sentence; it permits no sentence at all, on grounds that include humanity. If Indonesia succeeds in giving that power a determinate procedural form with articulated criteria and limited review, it will have produced a model of institutionalized leniency that other codified systems facing the same drug-sentencing pressures can examine. If it does not, Article 54 paragraph (2) will illustrate a more general lesson about legal reform: that a substantive innovation unaccompanied by procedural implementation does not produce a modest version of its intended effect, but rather no effect at all. The relevance of this beyond Indonesia is that many reforming jurisdictions legislate substantive sentencing innovations in isolation from their procedural codes, and this case demonstrates the specific mechanism by which such reforms fail.

The broader theoretical stake is the place of mercy in a system committed to legality. Scholarship on mercy in criminal justice argues that a merciful disposition acknowledges the shortcomings of general rules, attends to the particular circumstances of the offender, and requires humility about what adjudication can know — while cautioning that mercy openly displayed can weaken the expressive function of criminal justice.⁷¹ Judicial pardon is a legislative attempt to have both: the norm is affirmed by the express declaration of guilt, and the person is relieved by the withholding of the sanction. Whether that attempt

⁷⁰ Wing-Cheong Chan, "Death Penalty for Drug Offenders in Southeast Asia: Weakening of Resistance to Change?," *International Journal for Crime, Justice and Social Democracy* 14, no. 4 (2025): 133–44, <https://doi.org/10.5204/ijcjsd.3681>.

⁷¹ Simon McKenzie, "Mercy and International Criminal Justice," *Journal of International Criminal Justice* 23, no. 2 (2025): 273–90, <https://doi.org/10.1093/jicj/mqaf012>.

succeeds turns on whether the declaration of guilt is genuinely recorded and the withholding genuinely reasoned — which is to say, it turns on procedure.

Conclusion

This article concludes that *rechterlijk pardon* under Article 54 paragraph (2) of Law Number 1 of 2023 constitutes a distinct form of criminal judgment that cannot be accommodated within the three-verdict architecture of Law Number 20 of 2025. It presupposes criminal guilt but deliberately withholds punishment and therefore belongs on the conviction side of the acquittal–conviction divide, requiring explicit procedural recognition and determination of its consequences for criminal records, execution, and legal remedies. In narcotics cases, its application should be subject to a cumulative and exclusionary test: it should be unavailable to offenders involved in trafficking, distribution, production, importation, supplying minors, organizing or financing, or violence, and should otherwise be considered only where the conduct is confined to personal use, dependency or vulnerability is objectively established, no prior supply-related conviction exists, rehabilitation has been undertaken or accepted, and imprisonment would be disproportionate. Such discretion must remain procedurally disciplined through statutory authorization, reasoned judgments, publication, and review for errors of law or abuse of discretion, thereby reconciling legal and moral justice without compromising equality before the law.

The study therefore recommends that Law Number 20 of 2025 be amended to recognize judicial pardon as a fourth form of criminal judgment and to define its constitutive elements, record status, reasoning requirements, and available remedies, with corresponding harmonization of narcotics and juvenile justice legislation. The Supreme Court and relevant institutions should subsequently develop consistent guidance on evidentiary assessment, judgment formulation, and publication, while courts should exercise the power through transparent and articulated reasoning. Although this normative study cannot yet establish how the proposed framework will operate in judicial practice, it provides a procedural model and substantive criteria that can be tested through future empirical analysis of decisions, comparative research on sentencing discretion in Southeast Asia, and further study of the reliability of assessment mechanisms in narcotics cases.

References

- Aisy, Rohadhatul. "Judicial Pardon as a Humanizing Approach to Criminal Sentencing: Reconstructing Judicial Decisions under the New Indonesian Criminal Code." *The Digest: Journal of Jurisprudence and Legisprudence* 6, no. 2 (2025): 151–74. <https://doi.org/10.15294/digest.v6i2.37174>.
- Alfret, and Mardian Putra Frans. "Konsep Putusan Pemaaf oleh Hakim (Rechterlijk Pardon) sebagai Jenis Putusan Baru dalam KUHP." *Krtha Bhayangkara* 17, no. 3 (2023): 587–600. <https://doi.org/10.31599/krtha.v17i3.2968>.
- Angkasa. "Over Capacity Narapidana di Lembaga Pemasyarakatan: Faktor Penyebab, Implikasi Negatif, serta Solusi dalam Upaya Optimalisasi Pembinaan Narapidana." *Jurnal Dinamika Hukum* 10, no. 3 (2010). <https://doi.org/10.20884/1.jdh.2010.10.3.46>.

- Arifin, Ridwan, Riska Alkadri, Robert Brian Smith, Nucharee Nuchkoom Smith, and Wahyudin. "Indonesia's New Penal Code: Harmonizing with Global Justice or Defying International Norms?" *Lex Scientia Law Review* 8, no. 1 (2024): 561–94. <https://doi.org/10.15294/lslr.v8i1.14271>.
- Chan, Wing-Cheong. "Death Penalty for Drug Offenders in Southeast Asia: Weakening of Resistance to Change?" *International Journal for Crime, Justice and Social Democracy* 14, no. 4 (2025): 133–44. <https://doi.org/10.5204/ijcjsd.3681>.
- Djatmika, Prija, Wahbi Rahman, Dwi Edi Wibowo, Robert Lengkong Weku, and Noor Dzuhaidah Osman. "Legal Policy of Disparity in Sentencing as a Ground for Judicial Review in Indonesia Corruption Cases." *Volksgeist: Jurnal Ilmu Hukum dan Konstitusi* 8, no. 2 (2025): 503–20. <https://doi.org/10.24090/volksgeist.v8i2.13287>.
- Farikhah, Mufatikhatul. "Rekonseptualisasi Judicial Pardon dalam Sistem Hukum Indonesia (Studi Perbandingan Sistem Hukum Indonesia dengan Sistem Hukum Barat)." *Jurnal Hukum & Pembangunan* 48, no. 3 (2018): 556–88. <https://doi.org/10.21143/jhp.vol48.no3.1746>.
- Hakim, Lukman. *Penerapan Konsep Pemaafan Hakim (Rechterlijk Pardon) dalam Sistem Peradilan Pidana di Indonesia: Optimalisasi Teori Dualistis di dalam Sistem Pemidanaan*. Yogyakarta: Graha Ilmu, 2019.
- Hamzah, Andi. *Perbandingan Hukum Pidana Beberapa Negara*. 3rd ed. Jakarta: Sinar Grafika, 2024.
- Harahap, M. Yahya. *Pembahasan Permasalahan dan Penerapan KUHAP: Penyidikan dan Penuntutan*. Jakarta: Ghalia Indonesia, 2007.
- Hewitt. *The Queen's Pardon*. London: Cassell, 1978.
- Hoge Raad (Supreme Court of the Netherlands). Judgment of 21 June 2024, ECLI:NL:HR:2024:917.
- Ismail, Indi Muhtar, Dominikus Rato, and Bayu Dwi Anggono. "Implikasi Penerapan Asas Rechterlijk Pardon dalam Putusan Perkara Pidana Ditinjau dari Perspektif Kepastian Hukum." *Hukum dan Masyarakat Madani* 13, no. 2 (2023): 398–412. <https://doi.org/10.26623/humani.v13i2.7964>.
- Joint Regulation of the Supreme Court and Others Number 01/PB/MA/III/2014 on the Handling of People with Drug Dependency and Victims of Drug Abuse.
- Julranda, Rizky, Fhildzha Zhafirin, and Sultan Rambe. "Rechtvacuum Penerapan Rechterlijk Pardon dalam Pembaruan Hukum Acara Pidana di Indonesia." *Judex Laguens* 3, no. 2 (2025): 267–88. <https://doi.org/10.25216/ikahi.3.2.8.2025.267-288>.
- Knight, Mc. *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*. University Press of Hawaii, 1981.
- Krisnamurti, Hana. "Harmonisasi Asas Permaafan Hakim (Judicial Pardon) dalam Hukum Positif Indonesia untuk Mencapai Keadilan yang Bermartabat." *Jurnal Litigasi* 26, no. 2 (2025): 104–34. <https://doi.org/10.23969/litigasi.v26i2.22645>.
- Law Number 8 of 1981 on the Criminal Procedure Code (KUHP).
- Law Number 35 of 2009 on Narcotics.
- Law Number 48 of 2009 on Judicial Power.
- Law Number 11 of 2012 on the Juvenile Criminal Justice System.
- Law Number 1 of 2023 on the Criminal Code (KUHP).
- Law Number 20 of 2025 on the Criminal Procedure Code (KUHP).

- Malik, Faissal. "Tinjauan terhadap Teori Positivisme Hukum dalam Sistem Peradilan Pidana Indonesia." *Jurnal Pendidikan Kewarganegaraan Undiksha* 9, no. 1 (2021): 188–96. <https://doi.org/10.23887/jpku.v9i1.31488>.
- Marguery, Tony Paul. *Unity and Diversity of the Public Prosecution Services in Europe: A Study of the Czech, Dutch, French, and Polish Systems*. Groningen: Faculty of Law, University of Groningen, 2008.
- Marzuki, Peter Mahmud. *Penelitian Hukum*. Revised edition. Jakarta: Prenadamedia Group, 2014.
- McKenzie, Simon. "Mercy and International Criminal Justice." *Journal of International Criminal Justice* 23, no. 2 (2025): 273–90. <https://doi.org/10.1093/jicj/mqaf012>.
- Muchtar, Syamsuddin, Irwansyah, Ahsan Yunus, Arnita Pratiwi Arifin, and Markham Faried. "Juvenile Criminal Responsibility in Justice Systems: A Comparative Study of Judicial Interpretations in Indonesia and Australia." *Jambe Law Journal* 7, no. 2 (2024): 371–94. <https://doi.org/10.22437/home.v7i2.387>.
- Nawawi Arief, Barda. *Kapita Selekta Hukum Pidana*. Bandung: Citra Aditya Bakti, 2003.
- Nikoleishvili, Karlo. "Prisoners' Right to Rehabilitation: Micro and Macro Level Indicators for the Assessment of the Fulfilment of States' Positive Obligation." *German Law Journal* 26, no. 4 (2025): 668–82. <https://doi.org/10.1017/glj.2025.15>.
- Novian, Rully, Supriyadi Widodo Eddyono, Ajeng Gandini Kamilah, et al. *Strategi Menangani Overcrowding di Indonesia: Penyebab, Dampak, dan Penyelesaiannya*. Edited by Zainal Abidin and Anggara. Jakarta: Institute for Criminal Justice Reform, 2018.
- Nur, Rafika, Darmawati, Hijrah Lahaling, Handar Subhandi Bakhtiar, and Ahmad Fakhurrazzi Mohammed Zabidi. "A Sustainable Rehabilitation Model for Children in Conflict with the Law: Conceptually Toward Global Protection and Recidivism Reduction." *Jambura Law Review* 8, no. 1 (2026): 30–54. <https://doi.org/10.33756/jlr.v1i1.31177>.
- Pancasilawati, Abnan, Saifuddin Herlambang, and Abdel Kadir Naffati. "Symbolic Restorative Justice in the Courtroom: Navigating the Intersection of Justice and Child Welfare in Indonesian Juvenile Court Decisions." *Volksgeist: Jurnal Ilmu Hukum dan Konstitusi* 8, no. 2 (2025): 619–37. <https://doi.org/10.24090/volksgeist.v8i2.15328>.
- Panggabean, Chandra Marojahan, Saefullah, and Anwar Budiman. "Judicial Pardon Under Article 54(2) of the 2023 Criminal Code: A Proportionality Analysis of Sentencing in the Garut and Mempawah District Court Decisions." *Journal of Law, Politic and Humanities* 6, no. 5 (2026): 4086–4100. <https://doi.org/10.38035/jlph.v6i5.3535>.
- Purwanti, Maidah, Sigid Suseno, Idris Idris, and Erika Magdalena Chandra. "Criminal Law Reform Through the Classification: Toward a Restorative Sanctions in Indonesian Immigration Law." *Lex Scientia Law Review* 9, no. 1 (2025): 105–38. <https://doi.org/10.15294/lslr.v9i1.21929>.
- Rommelink, Jan. *Hukum Pidana: Komentar atas Pasal-Pasal Terpenting dari Kitab Undang-Undang Hukum Pidana*. Translated by Tristam Pascal Moeliono. Jakarta: Gramedia Pustaka Utama, 2003.
- Sakti, Agam, Nina Aprianingsih, and Saifun Nufus. "Implementation of the Principle of Equality Before the Law in Corruption Court Decisions." *Jurnal Ruang Hukum* 1, no. 1 (2022): 17–22. <https://doi.org/10.58222/juruh.v1i1.251>.

- Saputro, Adery Ardhan. "Konsepsi Rechterlijk Pardon atau Pemaafan Hakim dalam Rancangan KUHP." *Mimbar Hukum* 28, no. 1 (2016): 61–76. <https://doi.org/10.22146/jmh.15867>.
- Satriana, I Made Wahyu Chandra, and Ni Made Liana Dewi. *Sistem Peradilan Pidana Perspektif Restorative Justice*. Edited by I Gusti Ngurah Parikesit Widiatedja. Denpasar: Udayana University Press, 2021.
- Satrio P., Anandy. "Rechterlijk Pardon: Gagasan dan Tantangan Instrumen Humanis." *MARINews*, August 2025. <https://marinews.mahkamahagung.go.id/artikel/rechterlijk-pardon-gagasan-dan-tantangan-instrumen-humanis-0tY>.
- Sinaga, Nixon Randy. *The Crisis of Overcrowded Prisons in Indonesia: Barriers to Accessing Alternatives to Imprisonment*. International Drug Policy Consortium and LBH Masyarakat, 2024.
- Sudarto. *Hukum dan Hukum Pidana*. Bandung: Penerbit Alumni, 1981.
- Supreme Court Regulation (PERMA) Number 1 of 2020 on Sentencing Guidelines for Articles 2 and 3 of the Anti-Corruption Law.
- Supreme Court Circular Letter (SEMA) Number 4 of 2010 on the Placement of Drug Abusers, Victims of Drug Abuse, and People with Drug Dependency in Medical and Social Rehabilitation Institutions.
- Tait, David. "Pardons in Perspective: The Role of Forgiveness in Criminal Justice." *Federal Sentencing Reporter* 13 (2001). <https://doi.org/10.1525/fsr.2000.13.3-4.134>.
- Wantu, Fence M., Jufryanto Puluhulawa, Anis H. Bajrektarevic, Mellisa Towadi, and Vifi Swarianata. "Renewal of the Criminal Justice System Through the Constante Justitie Principle That Guarantees Justitiabelen's Satisfaction." *Jurnal IUS Kajian Hukum dan Keadilan* 10, no. 3 (2022): 502–10. <https://doi.org/10.29303/ius.v10i3.1115>.
- Wantu, Fence M., Rustam Hs. Akili, and Marten Bunga. *Filsafat Hukum: Suatu Perenungan*. Yogyakarta: UII Press, 2024.
- Wantu, Fence M., and Fenty Puluhulawa. *Teori Hukum: Dinamika Suatu Perdebatan*. Yogyakarta: UII Press, 2025.
- Widyawati, Anis, Ade Adhari, and Ridwan Arifin. "Who Executes Justice? Comparative Institutional Paths from Verdict to Prison." *Jambura Law Review* 8, no. 1 (2026): 160–89. <https://doi.org/10.33756/jlr.v1i1.31642>.
- Wetboek van Strafrecht* (Netherlands), Articles 9a and 77.
- Wetboek van Strafvordering* (Netherlands), Article 138.
- Yosuki, Aska, and Dian Andriawan Daeng Tawang. "Kebijakan Formulasi Terkait Konsepsi Rechterlijke Pardon (Pemaafan Hakim) dalam Pembaharuan Hukum Pidana di Indonesia." *Jurnal Hukum Adigama* 1, no. 1 (2018): 49–73. <https://doi.org/10.24912/adigama.v1i1.2136>.
- Yulianti, Wulan Dwi. "Upaya Menanggulangi Overkapasitas di Lembaga Pemasyarakatan di Indonesia." *Hukum dan Masyarakat Madani* 11, no. 1 (2021): 163–78. <https://doi.org/10.26623/humani.v11i1.2953>.
- Yustia, Dewi Asri, Faris Fachrizal Jodi, Ananda Chrisna D. Panjaitan, and Fareed Mohd Hassan. "Restorative Justice: Finding Common Ground Between Justice and Shared Interests." *Jambura Law Review* 8, no. 1 (2026): 229–49. <https://doi.org/10.33756/jlr.v1i1.32646>.