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Judicial Pardon in Indonesian Criminal Law: A Comparison with the Netherlands

Putusan Pemaafan oleh Hakim dalam Perkara Pidana Indonesia dan Belanda

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Abstract

Article 54(2) of Law No. 1 of 2023 introduces judicial pardon into Indonesian criminal law, empowering a court to refrain from imposing punishment upon an accused whose guilt has been established. The provision is modelled upon Article 9a of the Dutch Criminal Code, yet Indonesian procedural law recognises only three categories of judgment and supplies no form for a finding of guilt without punishment. This study compares the two arrangements and examines the consequences of that asymmetry. Employing normative legal research with statutory, case, and comparative approaches, it finds that the Netherlands resolved the problem by enacting Article 353 of its Code of Criminal Procedure alongside Article 9a, whereas Indonesia has codified the substantive power without its procedural vehicle, leaving the criteria of application undetermined. It recommends a fourth category of judgment and judicial guidelines defining the minor nature of the act.

Abstrak

Pasal 54 ayat (2) Undang-Undang Nomor 1 Tahun 2023 memperkenalkan pemaafan hakim ke dalam hukum pidana Indonesia, yang memberi kewenangan kepada pengadilan untuk tidak menjatuhkan pidana terhadap terdakwa yang kesalahannya telah terbukti. Ketentuan tersebut berkiblat pada Pasal 9a KUHP Belanda, namun hukum acara pidana Indonesia hanya mengenal tiga jenis putusan dan tidak menyediakan bentuk putusan bagi pernyataan bersalah tanpa pemidanaan. Penelitian ini membandingkan kedua pengaturan tersebut dan mengkaji konsekuensi ketimpangan itu. Dengan penelitian hukum normatif melalui pendekatan perundang-undangan, kasus, dan perbandingan, penelitian ini menemukan bahwa Belanda menyelesaikan persoalan tersebut dengan mengundangkan Pasal 353 Wetboek van Strafvordering berdampingan dengan Pasal 9a, sedangkan Indonesia mengodifikasi kewenangan materiilnya tanpa sarana proseduralnya, sehingga kriteria penerapannya tidak tertentu. Penelitian ini merekomendasikan penambahan jenis putusan keempat dan pedoman yudisial mengenai makna ringannya perbuatan.

A. INTRODUCTION

1. Background

A criminal court that has found an accused guilty has traditionally had only one remaining question to answer, namely what punishment to impose. Law No. 1 of 2023 concerning the Criminal Code has added a second. Article 54(2) provides that the minor nature of the act, the personal circumstances of the offender, or the circumstances at the time the offence was committed as well as those arising subsequently may serve as a ground for not imposing a punishment or a measure, taking into account considerations of justice and humanity.[1] The Elucidation to that paragraph identifies the provision as the principle of *rechterlijk pardon* or judicial pardon, which confers upon the judge the authority to pardon a person who has been found guilty of a criminal offence.[2] The Code entered into force on 2 January 2026, so that the power is now operative rather than prospective.

The provision did not originate in Indonesia. Its direct model is Article 9a of the Dutch *Wetboek van Strafrecht*, which provides that where the judge considers it advisable in connection with the slight gravity of the act, the personality of the offender, or the circumstances in which the act was committed or which have since arisen, he may determine in the judgment that no punishment or measure shall be imposed.[3] The correspondence between the two texts is close to exact, and the literature treats Article 9a as the source from which the Indonesian formulation was drawn.[4] Jan Remmelink, whose commentary on the Dutch Code is the standard reference for Indonesian readers, records that the arrangement was conceived in connection with the law of criminal procedure as much as with substantive criminal law.[5]

That last observation identifies the problem this article examines. In the Netherlands the substantive power in Article 9a is accompanied by a procedural

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1 Law No. 1 of 2023 concerning the Criminal Code, art. 54(1) and (2) and the Elucidation thereto.

2 Anggi Rejeki Bangun, "Pemaafan Hakim (Rechterlijk Pardon) dalam Kitab Undang-Undang Hukum Pidana (KUHP) Baru di Sistem Pemidanaan Indonesia," *Ius Civile: Refleksi Penegakan Hukum dan Keadilan* 9, no. 2 (2025): 403, https://doi.org/10.35308/jic.v9i2.13035.

3 Wetboek van Strafrecht (Netherlands), art. 9a.

4 Budimansyah et al., "Comparison of the Judicial Forgiveness (Rechterlijk Pardon) between Civil Law System and Islamic Law System: Finding the Formulation of the Principle of Rechterlijk Pardon in Indonesian Criminal Law," *International Journal of Educational Review, Law and Social Sciences* 3, no. 4 (2023): 4, https://doi.org/10.54443/ijerlas.v3i4.946.

5 Jan Remmelink, *Hukum Pidana: Komentar atas Pasal-Pasal Terpenting dari Kitab Undang-Undang Hukum Pidana Belanda dan Padanannya dalam Kitab Undang-Undang Hukum Pidana Indonesia*, trans. Tristam P. Moeliono (Jakarta: Gramedia Pustaka Utama, 2003), 697–703.

provision, Article 353 of the *Wetboek van Strafvordering*, which prescribes what the court is to do in the judgment when Article 9a is applied.[6] Indonesian law contains no equivalent. Article 191 of Law No. 8 of 1981 recognised three categories of judgment, namely acquittal, discharge from all legal prosecution, and conviction,[7] and the new Criminal Procedure Code enacted as Law No. 20 of 2025 was drafted without a provision corresponding to Article 353.[8] A finding of guilt unaccompanied by punishment accordingly has no procedural form in which to be expressed.

Scholarship has identified the gap but has not resolved it. One study observes that the concept is clearly present in Article 54(2) of the 2023 Criminal Code but was not formulated in the draft Criminal Procedure Code which performs the procedural function, while adding that it does not follow that the concept cannot be applied.[9] Others have argued for the addition of a fourth category of judgment to Article 191,[10] and for the recognition of a pardoning judgment as a new species of decision within the procedural code.[11] A further body of work addresses the revitalisation of judicial pardon within the reform of criminal procedure more generally.[12]

The substantive conditions of the power raise a second difficulty. Article 54(2) refers to the minor nature of the act without defining it, and the Elucidation adds little. Research on the point warns that where a provision admits of multiple interpretations it generates inconsistency among courts, and questions whether the formulation satisfies the principle of *lex certa*, which requires that a criminal provision be clear, certain, and detailed so that it does not produce ambiguity.[13] A recent international study has sought to establish criteria for the minor nature of the act as the basis of a decision

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6 Wetboek van Strafvordering (Netherlands), art. 353.
7 Law No. 8 of 1981 concerning the Criminal Procedure Code, art. 191.
8 Law No. 20 of 2025 concerning the Criminal Procedure Code.
9 Mahraen, "Judicial Pardon dalam Perkembangan Hukum Pidana Indonesia (Studi KUHP 2023)," *Iuris Notitia: Jurnal Ilmu Hukum* 1, no. 1 (2023): 2, https://doi.org/10.69916/iuris.v1i1.40.
10 Bunga Kharisma Octafiana and Frans Simangunsong, "Urgensi Penambahan Putusan Permaafan Hakim (Rechterlijk Pardon) dalam Pasal 191 KUHAP," *IURIS STUDIA: Jurnal Kajian Hukum* 5, no. 3 (2024): 657, https://doi.org/10.55357/is.v5i3.672.
11 Alfret and Mardian Putra Frans, "Konsep Putusan Pemaaf oleh Hakim (Rechterlijk Pardon) sebagai Jenis Putusan Baru dalam KUHAP," *Krtha Bhayangkara* 17, no. 3 (2023): 583, https://doi.org/10.31599/krtha.v17i3.2968.
12 U. W. Sutrisno, A. Irawan, and A. F. K. Pradana, "Revitalisasi Judicial Pardon dalam Pembaruan Hukum Acara Pidana di Indonesia," *Al Hukmu: Journal of Islamic Law and Economics* 3, no. 2 (2024): 6, https://doi.org/10.54090/hukmu.560.
13 Imanuel Nazara, Krisna Burhanudin, and Mardian Putra Frans, "Makna Yuridis Tindak Pidana yang Sifatnya Ringan dalam Konsep Judicial Pardon Ditinjau Berdasarkan Asas Legalitas," *Widya Yuridika: Jurnal Hukum* 8, no. 1 (2025): 44.

to grant leniency.[14] Until such criteria are settled, the application of the provision rests upon the disposition of the individual panel.

A third set of questions concerns the relation of judicial pardon to the restorative justice paradigm with which it is frequently associated. The literature is divided. One line of argument treats judicial pardon as an expression of restorative justice and as a response to the over-capacity of correctional institutions produced by a sentencing practice centred upon imprisonment.[15] A second insists upon the distinction, holding that restorative justice and judicial pardon possess distinct aspects although *rechterlijke pardon* originates in a restorative approach, so that the two operate in parallel.[16] The distinction matters practically, since restorative processes ordinarily require the participation of the victim whereas Article 54(2) does not.

Indonesian law is not wholly without antecedents. Commentators have noted the resemblance between the new provision and the conditional sentence regulated in Article 14a of the former Criminal Code, under which a sentence was pronounced but not executed unless a condition was breached.[17] The resemblance is instructive but partial: a conditional sentence is a sentence, whereas judicial pardon withholds the sentence altogether while retaining the finding of guilt. Research on the policy formulation of the provision has accordingly proposed that additional conditions be attached before it is applied.[18]

Institutional developments have proceeded in parallel. The Supreme Court has issued guidelines for the adjudication of criminal cases on the basis of restorative justice,[19] and a circular letter providing guidance on the implementation of the 2023

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[14] Henin Dyah Syafrina et al., "Criteria for the Minor Nature of the Act in Judicial Pardon Decisions in the Context of the Reform of Indonesian Criminal Law," *Veredas do Direito* 23, no. 14 (2026): e237923, https://doi.org/10.18623/rvd.v23.7923.

[15] Abdurrakhman Alhakim, "The Ideas of Rechterlijk Pardon as a Restorative Justice Approach: From Vengeance to Recovery?," *Ganesha Law Review* 5, no. 1 (2023): 3, https://doi.org/10.23887/glr.v5i1.1769.

[16] Andi Arham Tenri Sanna, "Tantangan dan Peluang: Paradigma Pemidanaan Mengenai Restorative Justice sebagai Rechterlijke Pardon dalam KUHP Nasional," *Jurnal Interpretasi Hukum* 6, no. 1 (2025): 63, https://doi.org/10.22225/juinhum.6.1.11975.61-76.

[17] Wetboek van Strafrecht voor Nederlandsch-Indië, as applied by Law No. 1 of 1946, art. 14a.

[18] Muhammad Yusuf Syakir and Herman Sujarwo, "Kebijakan Permaafan Hakim (Rechterlijk Pardon) dalam KUHP Baru," *Syariati: Jurnal Studi Al-Qur'an dan Hukum* 9, no. 1 (2023): 111, https://doi.org/10.32699/syariati.v9i1.4655.

[19] Supreme Court Regulation concerning Guidelines for the Adjudication of Criminal Cases on the Basis of Restorative Justice (2024).

Criminal Code and the 2025 Criminal Procedure Code.[20] The emergence of such instruments indicates that the judiciary has recognised the need for guidance, and the first studies of application at first instance have begun to appear, concluding that judicial pardon must not be understood as leniency without foundation but as a measure governed by proportionality, humanity, and restorative justice.[21]

The practical significance of the provision is considerable. Indonesian sentencing practice has long been centred upon imprisonment, with consequences for the capacity of correctional institutions that the literature has documented at length, and a power to withhold punishment altogether offers a route out of that pattern that neither conditional sentencing nor the diversion schemes already in operation supplies.[22] At the same time the power is capable of misuse, and research examining the provision against the principles of justice, legal certainty, and utility cautions that it must be read as an instrument reinforcing the character of Indonesian criminal law rather than as an avenue of escape from it.[23]

Two features of the Indonesian reception deserve notice at the outset. The first is that the concept entered Indonesian legal discourse long before it entered Indonesian law: it was discussed in relation to the draft Criminal Code for more than a decade, and the principal doctrinal treatments date from that period.[24] The second is that a number of Indonesian courts invoked the idea before any statutory basis existed, which generated a distinct question concerning the retroactive application of a concept that had not yet been enacted.[25] Both features shape the literature upon which this article draws, since much of it was written when the provision was still prospective.

Existing scholarship supplies the elements of a comparison but has not assembled

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[20] Circular Letter of the Supreme Court No. 1 of 2026 concerning Guidelines for the Implementation of the 2023 Criminal Code and the 2025 Criminal Procedure Code.

[21] Murni Karmila Salampessy, "Rechterlijk Pardon sebagai Diskresi Yudisial pada Pengadilan Negeri Ambon," *Journal of Governance, Government, and Legal Studies* 2, no. 2 (2026): 7.

[22] Alhakim, "The Ideas of Rechterlijk Pardon as a Restorative Justice Approach," 9.

[23] Derry Angling Kesuma, "Pengaturan dan Konsep Pemaafan Hakim (Rechterlijk Pardon atau Judicial Pardon) dalam Perspektif KUHP Nasional: Analisis terhadap Asas Keadilan, Kepastian Hukum, dan Kemanfaatan," *Lex Librum: Jurnal Ilmu Hukum* 12, no. 2 (2026): 262, https://doi.org/10.46839/lljih.v12i2.2025.

[24] Adery Ardhan Saputro, "Konsepsi Rechterlijk Pardon atau Pemaafan Hakim dalam Rancangan KUHP," *Mimbar Hukum* 28, no. 1 (2016): 72, https://doi.org/10.22146/jmh.15867.

[25] Indi Muhtar Ismail, "Juridical Analysis of the Rechterlijk Pardon Concept Implementation in Ordinary Criminal Act Associated with the Non-Retroactive Principle in Indonesian Criminal Law," *International Journal of Multicultural and Multireligious Understanding* 11, no. 10 (2024): 312, https://doi.org/10.18415/ijmmu.v11i10.6157.

them. Comparative studies of the Indonesian and Dutch arrangements exist,[26] as do analyses of the draft Criminal Code against Article 9a,[27] and comparisons extending to Greece and Portugal.[28] None of these, however, examines the procedural asymmetry between the two systems, that is to say the presence of Article 353 of the Dutch Code of Criminal Procedure alongside Article 9a and the absence of any equivalent in Indonesian law, nor assesses the consequences of that asymmetry now that the 2023 Code has entered into force. That gap constitutes the novelty of this article.

This study finds that the Netherlands enacted the substantive power and its procedural vehicle together, whereas Indonesia has enacted the former without the latter; that the resulting gap is compounded by the absence of criteria defining the minor nature of the act; and that both deficiencies are capable of remedy by instruments already within the competence of the Supreme Court, pending legislative amendment.

2. Research Questions

Proceeding from the background set out above, this study addresses three questions. First, how is judicial pardon regulated in Article 54(2) of Law No. 1 of 2023, and what are its substantive conditions? Second, how is *rechterlijk pardon* regulated in the Netherlands under Article 9a of the *Wetboek van Strafrecht* and Article 353 of the *Wetboek van Strafvordering*? Third, what are the implications of the comparison for Indonesian criminal procedure, and what reforms follow?

The three questions are sequential. The first establishes the Indonesian position, the second the Dutch position, and the third draws from their juxtaposition conclusions that neither system, considered alone, would yield.

3. Research Methods

This study employs normative legal research, which treats law as a system of norms and seeks a prescription concerning what ought to be done in respect of a given legal issue rather than a description of social behaviour.[29] Three approaches are combined. The statutory approach is directed at Article 54(1) and (2) of Law No. 1 of 2023 together with the Elucidation thereto, Article 191 of Law No. 8 of 1981, Law No. 20

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[26] Aulia Rizka Estiningtyas, Ulfatul Hasanah, and Rusmilawati Windari, "Comparison of the Legal Regulation of the Rechterlijk Pardon in Indonesia and the Netherlands," *Jurnal Suara Hukum* 6, no. 1 (2024): 165, https://doi.org/10.26740/jsh.v6n1.p162-186.

[27] "Comparison of Rechterlijk Pardon Concept on 2019 Criminal Code Bill with the Dutch Criminal Code" (2022): 7.

[28] Budimansyah et al., "Comparison of the Judicial Forgiveness (Rechterlijk Pardon)," 9.

[29] Peter Mahmud Marzuki, *Penelitian Hukum*, rev. ed. (Jakarta: Kencana Prenada Media, 2014), 133–137.

of 2025, and Article 14a of the former Criminal Code, with Article 9a of the *Wetboek van Strafrecht* and Article 353 of the *Wetboek van Strafvordering* as comparators. The case approach is directed at the first decisions applying the provision and at the published analyses of them. The conceptual approach draws upon the theory of sentencing purposes,[30] upon the doctrine of criminal law reform as formulated in Indonesian scholarship,[31] and upon the Dutch doctrinal treatment of Article 9a.[32]

The comparative approach is employed in its functional form. The two systems are compared not institution by institution but by reference to the common problem that each has sought to solve, namely how a court that has found guilt established may nonetheless withhold punishment, and how such an outcome is to be expressed in a judgment. Primary legal materials comprise the instruments enumerated above; secondary legal materials comprise scholarly monographs and peer-reviewed articles; tertiary materials comprise legal dictionaries and encyclopaedias. The materials were collected through documentary study and analysed qualitatively by means of interpretation, systematisation, and comparison.

B. DISCUSSION/ ANALYSIS

The discussion follows the sequence of the three research questions. The first section examines the Indonesian regulation of judicial pardon; the second examines the Dutch arrangement; and the third draws out the implications of the comparison and sets out prescriptive proposals.

1. Judicial Pardon in Article 54(2) of the 2023 Criminal Code

a. Placement within the Sentencing Guidelines

The first feature of the Indonesian arrangement is its placement. Article 54 forms part of the sentencing guidelines, the first paragraph enumerating the matters a court must consider in determining sentence and the second conferring the power to withhold punishment altogether.[33] The arrangement is deliberate and consequential. Judicial pardon is not framed as a ground excluding criminal liability, nor as a procedural bar,

[30] Muladi and Barda Nawawi Arief, *Teori-Teori dan Kebijakan Pidana* (Bandung: Alumni, 2010), 49–56.
[31] Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru* (Jakarta: Kencana, 2011), 86–93.
[32] J. de Hullu, *Materieel Strafrecht: Over Algemene Leerstukken van Strafrechtelijke Aansprakelijkheid naar Nederlands Recht* (Deventer: Wolters Kluwer, 2018), 583–590.
[33] Law No. 1 of 2023 concerning the Criminal Code, art. 54(2).

but as the outer limit of the sentencing discretion that the first paragraph structures.[34] Research on the first applications emphasises the point, observing that because the provision is placed within the sentencing guidelines it operates as part of the reasoning by which a sentence is determined rather than as an exception standing outside it.[35]

Two consequences follow. The first is that the finding of guilt is preserved. The accused is not acquitted and is not discharged from prosecution; the court determines that the offence has been proved and that the accused committed it, and then declines to attach a sanction.[36] The second is that the matters enumerated in the first paragraph remain relevant, so that a court applying the second paragraph must still reason by reference to the purposes of sentencing. Barda Nawawi Arief's formulation of criminal law policy, from which the Indonesian reception of the concept largely derives, treats this subordination of the sanction to the purpose it is meant to serve as the central innovation of the new Code.[37]

Commentators have described the resulting outcome as a fourth species of judgment alongside acquittal, discharge, and conviction.[38] That description is accurate as a statement of substance and inaccurate as a statement of form, since no such species exists in the procedural code. The discrepancy is examined in the third section of this discussion.

b. The Substantive Conditions

Article 54(2) states three grounds and two qualifying considerations. The grounds are the minor nature of the act, the personal circumstances of the offender, and the circumstances at the time the offence was committed as well as those arising subsequently. The qualifying considerations are justice and humanity.[39] The three grounds are expressed disjunctively, so that on the face of the text any one of them may suffice, while the two considerations operate cumulatively upon whichever ground is relied upon.

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[34] Arianda Lastiur Paulina and Eva Achjani Zulfa, "Sentencing Guidelines and Rechterlijk Pardon in Article 54 Paragraph (1) and (2) of the Criminal Code 2023," *LITERACY: International Scientific Journals of Social, Education, Humanities* 3, no. 3 (2024): 12, https://doi.org/10.56910/literacy.v3i3.1977.

[35] Salampessy, "Rechterlijk Pardon sebagai Diskresi Yudisial," 14.

[36] Mahraen, "Judicial Pardon dalam Perkembangan Hukum Pidana Indonesia," 5.

[37] Arief, *Bunga Rampai Kebijakan Hukum Pidana*, 141.

[38] Nova Yolandya Sitanggang, La Syarifudin, and Nur Aripkah, "Tinjauan Yuridis Asas Pemaafan Hakim dalam Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana," *Demokrasi: Jurnal Riset Ilmu Hukum, Sosial dan Politik* 3, no. 1 (2026): 3, https://doi.org/10.62383/demokrasi.v3i1.1525.

[39] Law No. 1 of 2023 concerning the Criminal Code, art. 54(2).

The first ground has attracted the most attention and the most criticism. The Elucidation indicates that the provision contemplates offences of a minor character, but the Code supplies no definition, and research on the point observes that the absence of criteria leaves judges without guidance as to which elements are to be weighed.[40] The difficulty is not merely practical. A provision that confers a power to withhold punishment upon an undefined criterion sits uneasily with the principle of *lex certa*, which requires that criminal provisions be formulated with sufficient clarity to exclude ambiguity.[41] The recent attempt to establish criteria for the minor nature of the act proceeds from precisely that concern.[42]

The second ground, the personal circumstances of the offender, is more familiar, since comparable considerations already inform Indonesian sentencing practice through the mitigating circumstances conventionally recited in judgments. The third ground is the most novel, because it extends to circumstances arising after the offence. That extension is the textual basis for the association of the provision with restorative justice, since reparation made to the victim, reconciliation between the parties, and the conduct of the accused following the offence all fall within it.[43]

The two qualifying considerations deserve emphasis. Justice and humanity are not additional grounds but constraints upon the exercise of the power, and they operate in both directions. They permit a court to withhold punishment where its imposition would be inhumane, and they equally preclude a court from withholding punishment where to do so would be unjust to the victim or to the community.[44] Research analysing the provision against the principles of justice, legal certainty, and utility concludes that the three must be balanced rather than ranked, and that judicial pardon is an instrument of criminal law reform which reinforces the character of Indonesian criminal law rather than a licence for leniency.[45]

c. The Problem of the Victim

A conspicuous feature of Article 54(2) is what it does not require. The provision

[40] Nazara, Burhanudin, and Frans, "Makna Yuridis Tindak Pidana yang Sifatnya Ringan," 51.
[41] Eddy O. S. Hiariej, *Prinsip-Prinsip Hukum Pidana* (Yogyakarta: Cahaya Atma Pustaka, 2016), 411–418.
[42] Syafrina et al., "Criteria for the Minor Nature of the Act in Judicial Pardon Decisions," e237923.
[43] Fitri Sukma and Candra Cumbhadrika, "Urgensi Penerapan Rechterlijk Pardon sebagai Pembaharuan Hukum Pidana dalam Perspektif Keadilan Restoratif," *Gorontalo Law Review* 6, no. 1 (2023): 46, https://doi.org/10.32662/golrev.v6i1.2678.
[44] Kesuma, "Pengaturan dan Konsep Pemaafan Hakim," 268.
[45] Kesuma, "Pengaturan dan Konsep Pemaafan Hakim," 268.

makes no reference to the victim, does not require the victim's consent, and does not require that reparation have been made.[46] Scholarship on the policy formulation of the provision has identified this as a defect and has proposed that the agreement of the victim be added as a condition, observing that a court may otherwise pardon an accused where the victim does not consent.[47] A similar concern animates the literature on the relationship between judicial pardon and restorative justice, since a restorative process that excludes the victim is restorative in name only.[48]

The contrary argument should not be dismissed. Judicial pardon is a public power exercised in the public interest, and to make its exercise conditional upon the consent of a private party would transfer to the victim a decision that properly belongs to the court. The Dutch provision likewise contains no such requirement.[49] A workable position, consistent with the text, is that the attitude of the victim falls within the third ground as a circumstance arising subsequently, so that it must be considered without being decisive.[50] Table 1 sets out the structure of the provision.

Table 1. Structure of Article 54(2) of the 2023 Criminal Code

Element	Content	Character	Principal difficulty
First ground	Minor nature of the act	Disjunctive	Undefined; tension with lex certa
Second ground	Personal circumstances of the offender	Disjunctive	Overlaps with conventional mitigating circumstances
Third ground	Circumstances at the time of the act and arising subsequently	Disjunctive	Textual basis for restorative considerations
First consideration	Justice	Cumulative constraint	Operates both to permit and to preclude pardon
Second consideration	Humanity	Cumulative constraint	Requires reasoning beyond the gravity of the act
Position of the victim	Not mentioned	Absent	Consent not required; proposals to add it

Source: processed from Article 54(2) of Law No. 1 of 2023 and the Elucidation thereto.

d. Antecedents in Indonesian Law

Article 54(2) is new, but the idea that a court may respond to proven guilt with

[46] Law No. 1 of 2023 concerning the Criminal Code, art. 54(2).
[47] Syakir and Sujarwo, "Kebijakan Permaafan Hakim," 116.
[48] Sanna, "Tantangan dan Peluang," 72.
[49] Wetboek van Strafrecht (Netherlands), art. 9a.
[50] Sukma and Cumbhadrika, "Urgensi Penerapan Rechterlijk Pardon," 55.

something less than punishment is not. Three antecedents deserve examination, because each illuminates what the new provision does and does not add.

The first is the conditional sentence regulated in Article 14a of the former Criminal Code, under which a court pronounced a sentence but directed that it not be executed unless the convicted person committed a further offence within a specified period.[51] Scholarship on the new provision has noted the resemblance and treated Article 54(2) as in substance a development of the same idea.[52] The resemblance is real but should not be overstated. A conditional sentence is a sentence: it exists, it is recorded, and it revives upon breach. Judicial pardon withholds the sentence entirely, so that nothing exists to revive. The difference is one of kind rather than of degree, and it is precisely the difference that the absence of a procedural category obscures.

The second antecedent is the category of minor offences, for which Indonesian procedural law has long provided an abbreviated procedure and a restricted range of sanctions. That category supplies a quantitative benchmark that the drafters of Article 54(2) did not adopt,[53] and the decision not to adopt it is significant: the provision is not confined to offences classified as minor, but extends to any offence whose commission in the particular case was minor in nature. The scope of the provision is therefore wider than the term suggests, and studies examining its potential application to regulatory offences confirm that the reach extends beyond petty theft and comparable matters.[54]

The third antecedent is judicial practice. Before the enactment of the Code, a number of panels reasoned in terms recognisably those of judicial pardon, invoking the slight gravity of the act and the personal circumstances of the accused as grounds for a nominal sentence or for a sentence equal to time already served.[55] Such decisions were not applications of Article 54(2), which did not then exist, and their precedential value is accordingly limited; but they establish that the need the provision addresses was felt by Indonesian judges before the legislature responded to it.[56] Research analysing those

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[51] Wetboek van Strafrecht voor Nederlandsch-Indië, art. 14a.
[52] Syakir and Sujarwo, "Kebijakan Permaafan Hakim," 116.
[53] Nazara, Burhanudin, and Frans, "Makna Yuridis Tindak Pidana yang Sifatnya Ringan," 51.
[54] Sugeng Jatmiko, "Rechterlijk Pardon (Pemaafan Hakim) dalam Tindak Pidana Perpajakan," *Hermeneutika: Jurnal Ilmu Hukum* 6, no. 1 (2022): 4, https://doi.org/10.33603/hermeneutika.v6i1.6774.
[55] Ismail, "Juridical Analysis of the Rechterlijk Pardon Concept Implementation," 318.
[56] Nefa Claudia Meliala, "Rechterlijk Pardon (Pemaafan Hakim): Suatu Upaya Menuju Sistem Peradilan Pidana dengan Paradigma Keadilan Restoratif," *Jurnal IUS: Kajian Hukum dan Keadilan* 8, no. 3 (2020): 492, https://doi.org/10.29303/ius.v8i3.820.

earlier decisions observes that the panels positioned the concept as a form of pardon extended to the accused rather than as a structured exercise of sentencing discretion,[57] which is a further reason why guidance upon the criteria of application is now required.

2. Rechterlijk Pardon in the Netherlands

a. Article 9a of the Wetboek van Strafrecht

The Dutch provision is cast in terms that the Indonesian text closely follows. Article 9a provides that where the judge considers it advisable in connection with the slight gravity of the act, the personality of the offender, or the circumstances in which the act was committed or which have since arisen, he may determine in the judgment that no punishment or measure shall be imposed.[58] The three grounds correspond to the three grounds of Article 54(2), and the structure of the discretion is the same.

Two differences of formulation deserve notice. The first is that the Dutch text contains no counterpart to the Indonesian reference to justice and humanity. The Indonesian drafters added those considerations, and the addition is a genuine refinement rather than a redundancy, since it requires the court to articulate the values informing its decision rather than merely to assert that the exercise of the power is advisable.[59] The second is that Article 9a is expressed as a power of the judge to determine in the judgment, which directs attention to the form of the judgment in a manner that Article 54(2), placed among the sentencing guidelines, does not.

The literature characterises Article 9a as a sentencing guideline intended to be flexible rather than rigid, and it is in that light that the provision has been received into Indonesian scholarship.[60] Dutch doctrinal treatment situates it within the general law of sanctions as the limiting case of the court's discretion not to punish.[61] Article 9a was inserted into a Code that has been amended on a very large number of occasions, and its status as an insertion is itself significant: it was added to an existing structure rather than designed into one, which is the position in which Indonesian law now finds itself.[62]

b. Article 353 of the Wetboek van Strafvordering

The decisive difference lies in the procedural code. Article 353 of the *Wetboek van*

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57 Ismail, "Juridical Analysis of the Rechterlijk Pardon Concept Implementation," 318.
58 Wetboek van Strafrecht (Netherlands), art. 9a.
59 Estiningtyas, Hasanah, and Windari, "Comparison of the Legal Regulation of the Rechterlijk Pardon," 178.
60 "Comparison of Rechterlijk Pardon Concept on 2019 Criminal Code Bill," 12.
61 De Hullu, *Materieel Strafrecht*, 596.
62 "Comparison of Rechterlijk Pardon Concept on 2019 Criminal Code Bill," 12.

Strafvordering addresses what is to occur in the judgment where Article 9a of the Criminal Code is applied.[63] The Netherlands therefore enacted the substantive power and the procedural vehicle together, so that a court applying Article 9a knows what form its judgment is to take and what consequential orders it must make.

Remmelink's observation that *rechterlijk pardon* was originally incorporated into the Dutch law of criminal procedure is instructive here.[64] The concept is not simply a substantive rule that happens to require procedural implementation; it is a proposition about the form of judgments, namely that a court may pronounce guilt and withhold sanction in a single decision. A legal system that recognises the substantive rule without providing for the form has recognised only half of the concept.

The resulting species of decision is described in the comparative literature as a declaration of guilt without the imposition of punishment, and it is distinguished from acquittal, from discharge, and from conviction accompanied by a suspended sentence.[65] The distinction from a suspended sentence is important, because a suspended sentence is a sentence whose execution is deferred and which revives upon breach of a condition, whereas under Article 9a no sentence comes into existence at all.[66] The analysis extends beyond the avoidance of short terms of imprisonment, since it concerns the expressive function of the judgment rather than the management of the prison population.[67]

The expressive dimension of the Dutch arrangement deserves separate emphasis, because it is the feature most readily lost in transplantation. A judgment under Article 9a states two things at once: that the accused committed the offence, and that the court has decided that no sanction is appropriate. Each statement does work. The first vindicates the victim and records that the conduct was wrongful; the second communicates that the criminal law is capable of restraint.[68] A system that can express only one of the two, whether by acquitting an accused who is in fact guilty or by convicting and imposing a nominal penalty, communicates something other than what

63 Wetboek van Strafvordering (Netherlands), art. 353.
64 Remmelink, *Hukum Pidana*, 710.
65 Ni Putu Inten Kusuma Yanti, Nurini Aprilianda, and Faizin Sulistio, "A Judge's Pardon as a Form of Judgment: A Juridical Review of Aspects of Legal Certainty," *International Journal of Humanities Education and Social Sciences* 5, no. 1 (2025): 414.
66 Wetboek van Strafrecht voor Nederlandsch-Indië, art. 14a.
67 Yanti, Aprilianda, and Sulistio, "A Judge's Pardon as a Form of Judgment," 420.
68 Yanti, Aprilianda, and Sulistio, "A Judge's Pardon as a Form of Judgment," 420.

the court intends.[69]

That observation bears directly upon the Indonesian position. Where a court applies Article 54(2) but must record the outcome within the category of conviction, the resulting judgment will on its face resemble a conviction with an unusually light sentence, and the restraint that the court intended to communicate will be legible only to a reader of the reasoning.[70] The expressive loss is not merely symbolic: it affects how the decision is reported, how it is treated in subsequent proceedings, and how the public understands the function of the provision.[71]

It is worth adding that the Dutch provision has not generated the difficulties sometimes predicted of judicial pardon in the Indonesian debate. The literature does not record that Article 9a has produced systematic leniency or widespread inconsistency, which is attributable in part to the structural features described above and in part to the obligation to give reasons that attaches to every Dutch criminal judgment.[72] The Indonesian anxiety on this score is understandable but is better addressed by requiring reasons than by restricting the power.[73]

c. Comparative Position of Other Civil Law Systems

The Dutch arrangement is not unique. Comparative studies record that judicial forgiveness has been employed in civil law countries including the Netherlands, Greece, and Portugal, and that there are similarities in the criminal codes of the three.[74] The Indonesian literature has drawn upon that wider body of practice in assessing the comparative strengths and weaknesses of the various formulations.[75]

The wider comparison supports two observations. The first is that the concept is well established within the civil law tradition and does not represent an importation from restorative or common law sources, whatever its affinities with them.[76] The second is that systems adopting it have generally done so by amending the law of criminal procedure alongside the substantive code, which is the practice Indonesia has not

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69 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 Legisprudence* 6, no. 2 (2025): 5, https://doi.org/10.15294/digest.v6i2.37174.

70 Alfret and Frans, "Konsep Putusan Pemaaf oleh Hakim sebagai Jenis Putusan Baru dalam KUHAP," 592.

71 Mahraen, "Judicial Pardon dalam Perkembangan Hukum Pidana Indonesia," 5.

72 De Hullu, *Materieel Strafrecht*, 596.

73 Kesuma, "Pengaturan dan Konsep Pemaafan Hakim," 268.

74 Budimansyah et al., "Comparison of the Judicial Forgiveness (Rechterlijk Pardon)," 9.

75 Bangun, "Pemaafan Hakim (Rechterlijk Pardon) dalam Kitab Undang-Undang Hukum Pidana," 410.

76 Nyoman Adi Putra Adytia et al., "The Rechtelijk Pardon Concept in Reforming the Penal System to Realize Restorative Justice in Indonesia," *Indonesia Law Reform Journal* 4, no. 1 (2024): 93.

followed. Table 2 sets the two systems side by side.

A further point of comparison concerns the institutional setting within which the power operates. Dutch criminal procedure confers upon the prosecution a broad discretion to dispose of cases without trial, with the consequence that many matters in which punishment would serve no purpose are resolved before a court is seised of them at all. Article 9a therefore operates as a residual instrument applied to the smaller number of such cases that nonetheless proceed to judgment.[77] Indonesian procedure has no equivalent discretion of comparable breadth, so that Article 54(2) may be called upon to perform a function that in the Netherlands is discharged earlier in the process and by a different organ.[78]

That difference has a consequence for the expected frequency of application. If the Indonesian provision is to absorb cases that a Dutch prosecutor would never have brought, it will be invoked more often than Article 9a and in a wider range of circumstances, which strengthens rather than weakens the case for guidance upon its criteria.[79] It also suggests that reform of prosecutorial discretion and reform of the sentencing power are complementary rather than alternative routes to the same objective.[80]

Table 2. Judicial Pardon in Indonesia and the Netherlands Compared

Aspect	Indonesia	Netherlands
Substantive provision	Article 54(2), Law No. 1 of 2023	Article 9a, Wetboek van Strafrecht
Placement	Within the sentencing guidelines	Within the general law of sanctions
Grounds	Minor nature of the act; personal circumstances; circumstances at the time and arising subsequently	Slight gravity of the act; personality of the offender; circumstances at the time and arising subsequently
Qualifying considerations	Justice and humanity	None stated in the text
Procedural provision	None; Article 191 of Law No. 8 of 1981 recognises three categories of judgment	Article 353, Wetboek van Strafvordering
Form of judgment	Not provided for	Declaration of guilt without imposition of punishment
Position of the victim	Not mentioned; proposals to require consent	Not mentioned
Date of entry into force	2 January 2026	Inserted into an existing code

77 De Hullu, *Materieel Strafrecht*, 596.
78 Meliala, "Rechterlijk Pardon (Pemaafan Hakim)," 501.
79 Syafrina et al., "Criteria for the Minor Nature of the Act in Judicial Pardon Decisions," e237923.
80 Adytia et al., "The Rechtelijk Pardon Concept in Reforming the Penal System," 99.

Source: processed from Law No. 1 of 2023, Law No. 8 of 1981, the Wetboek van Strafrecht, and the Wetboek van Strafvordering.

3. Implications of the Comparison and Prescriptive Proposals

a. Article 191 and the Three Categories of Judgment

The asymmetry disclosed by Table 2 is the central finding of this study. Article 191 of Law No. 8 of 1981 provided for three categories of judgment: where the offence is not proved the accused is acquitted; where the act is proved but does not constitute an offence the accused is discharged from all legal prosecution; and where the offence is proved the accused is convicted and sentenced.[81] A judgment finding guilt established and imposing no sanction falls within none of the three, and the enactment of Law No. 20 of 2025 did not supply the missing category.[82]

Three responses to that gap are discernible in the literature. The first holds that the absence of a procedural form does not prevent application, so that a court may apply Article 54(2) and express the outcome within the existing category of conviction, pronouncing guilt and declining to attach a sentence.[83] The second holds that a fourth category should be added to Article 191 or to its successor.[84] The third treats the pardoning judgment as a new species of decision whose characteristics require separate elaboration.[85]

The first response is the only one presently available to a court, and it is defensible. A sentencing guideline necessarily operates within the category of conviction, since it presupposes that guilt has been established, and nothing in Article 191 requires that a conviction be accompanied by a sanction. The difficulty is that a judgment so expressed is indistinguishable on its face from a conviction with a nominal sentence, which obscures the very distinction the provision was enacted to create and complicates the position on appeal, on the criminal record, and in respect of any civil claim.[86] The second and third responses are therefore preferable as a matter of reform, and the Dutch model supplies the template.[87]

b. Judicial Pardon and Restorative Justice

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81 Law No. 8 of 1981 concerning the Criminal Procedure Code, art. 191.
82 Law No. 20 of 2025 concerning the Criminal Procedure Code.
83 Mahraen, "Judicial Pardon dalam Perkembangan Hukum Pidana Indonesia," 5.
84 Octafiana and Simangunsong, "Urgensi Penambahan Putusan Permaafan Hakim dalam Pasal 191 KUHAP," 663.
85 Alfret and Frans, "Konsep Putusan Pemaaf oleh Hakim sebagai Jenis Putusan Baru dalam KUHAP," 592.
86 Sutrisno, Irawan, and Pradana, "Revitalisasi Judicial Pardon dalam Pembaruan Hukum Acara Pidana di Indonesia," 12.
87 Wetboek van Strafvordering (Netherlands), art. 353.

The relation between judicial pardon and restorative justice requires careful statement, because the two are frequently conflated. The case for identifying them rests upon shared objectives: both displace retribution as the organising principle of the response to crime, both attend to the position of the offender and the victim rather than to the gravity of the act alone, and both have been advanced as responses to the over-capacity of correctional institutions.[88] The literature on the shift from a retributive to a restorative paradigm treats judicial pardon as one of its principal instruments.[89]

The case for distinguishing them is equally strong. Restorative justice is a process, ordinarily requiring the participation of the victim and oriented towards agreement; judicial pardon is a judicial determination made within adjudication and requiring no such participation. Research addressing the question directly concludes that the two possess distinct aspects although judicial pardon originates in a restorative approach, and that they operate in parallel rather than as one.[90] On that view the Supreme Court guidelines on the adjudication of criminal cases on the basis of restorative justice[91] and the provision in Article 54(2) address overlapping but non-identical territory, and the relation between them requires clarification.[92]

The practical importance of the distinction lies in the conditions of application. If judicial pardon is an instrument of restorative justice, it is natural to require that a restorative process have taken place, and the proposals to make the victim's agreement a condition follow.[93] If it is an independent sentencing power, no such requirement follows, and the attitude of the victim operates as one circumstance among others.[94] The Indonesian text supports the second characterisation; the Indonesian literature frequently assumes the first.

A subsidiary question concerns the consequences of a pardoning judgment once pronounced. Because Indonesian law provides no category for such a decision, it is unsettled whether it may be appealed by the prosecution, how it is to be recorded for the

88 Alhakim, "The Ideas of Rechterlijk Pardon as a Restorative Justice Approach," 9.
89 Ayu Agustin and Achmad Sulchan, "Dualisme Keadilan Retributif dan Restoratif dalam Sistem Peradilan Pidana Indonesia," *Jurnal Sosial Teknologi* 5, no. 10 (2025): 3990, https://doi.org/10.59188/jurnalsostech.v5i10.32448.
90 Sanna, "Tantangan dan Peluang," 72.
91 Supreme Court Regulation concerning Guidelines for the Adjudication of Criminal Cases on the Basis of Restorative Justice.
92 Circular Letter of the Supreme Court No. 1 of 2026.
93 Syakir and Sujarwo, "Kebijakan Permaafan Hakim," 116.
94 Sukma and Cumbhadrika, "Urgensi Penerapan Rechterlijk Pardon," 55.

purposes of a subsequent prosecution, and what effect it has upon a civil claim arising from the same facts.[95] In the Netherlands these questions are answered by the procedural provision and by the general law of judgments.[96] The Indonesian literature has begun to address them, but no settled position has emerged, and the absence of one is itself an argument for enacting the missing category rather than relying upon construction.[97]

c. Criteria for the Minor Nature of the Act

Whatever view is taken of the relation to restorative justice, the criterion of the minor nature of the act requires definition. Three approaches are available. The first is quantitative, defining minor offences by reference to the maximum penalty prescribed, as Indonesian law already does in other contexts. The approach has the merit of certainty and the defect of rigidity, since an offence carrying a substantial maximum may be committed in a trivial manner.[98]

The second is qualitative, directing attention to the harm actually caused, the degree of culpability, and the impact upon the victim. The recent attempt to establish criteria proceeds in this direction,[99] and it corresponds to the Dutch practice of treating Article 9a as a flexible guideline rather than a rule with fixed boundaries.[100] Its defect is the inverse of the first approach, namely that it affords little predictability to the accused or the prosecutor.

The third, which is preferred here, is a combination: a quantitative threshold defining the outer limit of the provision's availability, within which a qualitative assessment governs. Such a structure would preserve the flexibility that the Dutch experience shows to be essential while satisfying the requirement of *lex certa* at the level of availability.[101] A judicial instrument would be the appropriate vehicle, since the assessment is one of application rather than of definition.[102]

d. Judicial Pardon and the Purposes of Sentencing

A question that the Indonesian literature has largely left aside concerns the relation between judicial pardon and the purposes of sentencing stated elsewhere in the Code.

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95 Sutrisno, Irawan, and Pradana, "Revitalisasi Judicial Pardon dalam Pembaruan Hukum Acara Pidana di Indonesia," 12.
96 Wetboek van Strafvordering (Netherlands), art. 353.
97 Alfret and Frans, "Konsep Putusan Pemaaf oleh Hakim sebagai Jenis Putusan Baru dalam KUHAP," 592.
98 Nazara, Burhanudin, and Frans, "Makna Yuridis Tindak Pidana yang Sifatnya Ringan," 51.
99 Syafrina et al., "Criteria for the Minor Nature of the Act in Judicial Pardon Decisions," e237923.
100 "Comparison of Rechterlijk Pardon Concept on 2019 Criminal Code Bill," 12.
101 Hiariej, *Prinsip-Prinsip Hukum Pidana*, 430.
102 Paulina and Zulfa, "Sentencing Guidelines and Rechterlijk Pardon," 18.

Article 54 forms part of the sentencing guidelines, and a court applying the second paragraph is therefore reasoning within a framework whose premise is that punishment serves identifiable ends.[103] To withhold punishment is accordingly not to abandon that framework but to conclude that in the particular case no end would be served by imposing a sanction.

That conclusion can be reached by more than one route, and the routes have different implications. Where the purpose in view is deterrence, the question is whether the finding of guilt is itself sufficient to deter; where it is rehabilitation, whether the offender stands in need of any intervention; where it is the restoration of the balance disturbed by the offence, whether that balance has already been restored by reparation or reconciliation.[104] A judgment that simply asserts that the act was minor without identifying which purpose would fail to be served leaves the reasoning incomplete.[105] Studies of the first applications record precisely that concern, observing that judicial pardon must not be understood as unreasoned leniency but as a determination resting upon proportionality, humanity, and the interests of the victim.[106]

Barda Nawawi Arief's account of criminal law policy supplies the theoretical foundation for that requirement. On his analysis the central reform effected by the new Code is the subordination of the sanction to the purpose it is intended to serve, with the consequence that every sentencing decision, including a decision not to sentence, must be justified by reference to that purpose rather than by reference to the gravity of the act alone.[107] Sudarto's earlier formulation of the relation between law and criminal law points in the same direction.[108] A guideline on the application of Article 54(2) would accordingly do well to require not merely that the grounds be identified but that the purpose rendered otiose be named.[109]

This requirement also supplies a workable answer to the objection that judicial pardon undermines legal certainty. Certainty in sentencing is not secured by uniformity of outcome but by transparency of reasoning: a decision whose grounds are stated and whose logic can be tested on appeal is predictable in the relevant sense even where its

[103] Law No. 1 of 2023 concerning the Criminal Code, art. 54(2).
[104] Muladi and Arief, *Teori-Teori dan Kebijakan Pidana*, 78.
[105] Aisy, "Judicial Pardon as a Humanizing Approach to Criminal Sentencing," 14.
[106] Salampessy, "Rechterlijk Pardon sebagai Diskresi Yudisial," 14.
[107] Arief, *Bunga Rampai Kebijakan Hukum Pidana*, 141.
[108] Sudarto, *Hukum dan Hukum Pidana* (Bandung: Alumni, 2007), 42–49.
[109] Paulina and Zulfa, "Sentencing Guidelines and Rechterlijk Pardon," 18.

outcome is unusual.[110] The Dutch treatment of Article 9a as a flexible guideline rests upon the same premise, the flexibility being tolerable because the reasoning is disclosed.[111]

e. Limits of the Comparison

Three limits qualify the analysis. The first concerns sentencing culture. Dutch criminal practice is characterised by a markedly rehabilitative orientation and by a prosecutorial discretion to dispose of cases without trial, so that Article 9a operates within a system in which many minor matters never reach a court at all. Indonesian practice has historically been more retributive,[112] with the consequence that a provision transplanted from the Dutch context may be called upon to perform a larger function than it performs at home.[113]

The second concerns the evidentiary base. The 2023 Code entered into force on 2 January 2026, and the body of decisions applying Article 54(2) remains small. The first studies of application at first instance are promising but preliminary,[114] and the conclusions offered here are accordingly propositions about the structure of the provision rather than assessments of its operation. Earlier studies examining the application of the concept before the Code entered into force addressed decisions in which judges invoked the idea without any statutory basis, which raises distinct questions concerning retroactivity.[115]

The third concerns the field of application. Much of the Indonesian literature assumes that judicial pardon will operate upon minor offences against property and person. Studies addressing its potential application to regulatory offences, such as taxation, indicate that the provision may have a wider reach than is commonly assumed,[116] and the questions that arise in such contexts, including the relation between pardon and the recovery of state losses, are not addressed in this article.[117]

A final observation concerns the sequencing of reform. The three deficiencies identified in this discussion, namely the absence of a procedural category, the absence of

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[110] Kesuma, "Pengaturan dan Konsep Pemaafan Hakim," 268.
[111] "Comparison of Rechterlijk Pardon Concept on 2019 Criminal Code Bill," 12.
[112] Agustin and Sulchan, "Dualisme Keadilan Retributif dan Restoratif dalam Sistem Peradilan Pidana Indonesia," 3993.
[113] Meliala, "Rechterlijk Pardon (Pemaafan Hakim)," 501.
[114] Salampessy, "Rechterlijk Pardon sebagai Diskresi Yudisial," 14.
[115] Ismail, "Juridical Analysis of the Rechterlijk Pardon Concept Implementation," 318.
[116] Jatmiko, "Rechterlijk Pardon (Pemaafan Hakim) dalam Tindak Pidana Perpajakan," 11.
[117] Rahmansyah Fadlul Al Karim Rambe, Muhammad Aufa Abdillah Sihombing, and Nurhoneyda Winata P., "Implikasi Perlindungan Hak Asasi Manusia dalam Hukum Pidana," *Jurnal Ilmiah Penegakan Hukum* 11, no. 1 (2024): 26, https://doi.org/10.31289/jiph.v11i1.11182.

criteria, and the unsettled position of the victim, are of unequal urgency. The first is the most pressing, because it arises in every case in which the provision is applied and because its consequences extend to appeal, to the criminal record, and to any associated civil claim.[118] The second arises only where the first ground is relied upon, since a court invoking the personal circumstances of the offender or circumstances arising subsequently does not need to determine whether the act was minor.[119] The third is the least urgent, because the attitude of the victim can already be accommodated within the third ground as the text stands.[120]

f. Prescriptive Proposals

Three measures follow from the analysis. The first is the addition of a fourth category of judgment to the Criminal Procedure Code, providing that where the court finds the offence proved and the accused guilty but determines under Article 54(2) of the Criminal Code that no punishment or measure is to be imposed, it shall so declare in the judgment. Article 353 of the *Wetboek van Strafvordering* supplies a drafting model requiring no conceptual innovation,[121] and the proposal has already been advanced in the Indonesian literature.[122] Pending legislative amendment, a Supreme Court instrument prescribing the form of such judgments would secure most of the benefit.[123]

The second is the issuance of guidelines defining the minor nature of the act along the combined quantitative and qualitative lines proposed above. The existing circular letter providing guidance on the implementation of the 2023 Criminal Code and the 2025 Criminal Procedure Code is the natural vehicle,[124] and the criteria developed in the recent comparative literature supply the substance.[125] Guidelines of this kind would reduce the inconsistency that an undefined criterion inevitably produces without converting a flexible guideline into a rigid rule.[126]

The third concerns the position of the victim. Rather than requiring the victim's consent, which would transfer a public power to a private party, the appropriate course

[118] Sutrisno, Irawan, and Pradana, "Revitalisasi Judicial Pardon dalam Pembaruan Hukum Acara Pidana di Indonesia," 12.
[119] Syafrina et al., "Criteria for the Minor Nature of the Act in Judicial Pardon Decisions," e237923.
[120] Sukma and Cumbhadrika, "Urgensi Penerapan Rechterlijk Pardon," 55.
[121] Wetboek van Strafvordering (Netherlands), art. 353.
[122] Octafiana and Simangunsong, "Urgensi Penambahan Putusan Permaafan Hakim dalam Pasal 191 KUHAP," 663.
[123] Alfret and Frans, "Konsep Putusan Pemaaf oleh Hakim sebagai Jenis Putusan Baru dalam KUHAP," 592.
[124] Circular Letter of the Supreme Court No. 1 of 2026.
[125] Syafrina et al., "Criteria for the Minor Nature of the Act in Judicial Pardon Decisions," e237923.
[126] "Comparison of Rechterlijk Pardon Concept on 2019 Criminal Code Bill," 12.

is to require that the court state in its reasoning what account it has taken of the victim's position and of any reparation made or offered. The requirement is consistent with the third ground in Article 54(2), which extends to circumstances arising subsequently,[127] and it answers the concern expressed in the literature without the structural difficulty that a consent requirement would introduce.[128] It would also clarify the relation between judicial pardon and the Supreme Court's restorative justice guidelines.[129]

Taken together, the three measures would complete a reform that the legislature has so far half enacted. The substantive innovation in Article 54(2) is of considerable value: it allows a court to record that an offence occurred while recognising that punishing it would serve no purpose, which is an outcome that neither acquittal nor conviction with a nominal sentence expresses accurately.[130] What the provision lacks is the procedural form in which to express that outcome and the criteria by which to identify the cases that warrant it, and both deficiencies were avoided in the Netherlands by the simple expedient of amending the two codes together.[131] Table 3 summarises the framework.

Table 3. Prescriptive Framework

Issue	Present position in Indonesia	Dutch comparator	Prescription
Form of judgment	No fourth category; expressed as conviction without sanction	Article 353, Wetboek van Strafvordering	Fourth category added to the Criminal Procedure Code; interim Supreme Court instrument
Minor nature of the act	Undefined; tension with lex certa	Treated as a flexible guideline	Combined quantitative threshold and qualitative assessment
Position of the victim	Not mentioned; proposals to require consent	Not mentioned	Obligation to state what account was taken of the victim's position
Relation to restorative justice	Conflated in much of the literature	Treated as part of the law of sanctions	Clarified by judicial instrument as parallel rather than identical
Appeal and record	Consequences unsettled	Settled by the procedural provision	Consequences stated expressly in the amending instrument

Source: processed from the analysis undertaken in this study.

[127] Law No. 1 of 2023 concerning the Criminal Code, art. 54(2).
[128] Syakir and Sujarwo, "Kebijakan Permaafan Hakim," 116.
[129] Supreme Court Regulation concerning Guidelines for the Adjudication of Criminal Cases on the Basis of Restorative Justice.
[130] Aisy, "Judicial Pardon as a Humanizing Approach to Criminal Sentencing," 14.
[131] Estiningtyas, Hasanah, and Windari, "Comparison of the Legal Regulation of the Rechterlijk Pardon," 178.

C. CONCLUSIONS

Article 54(2) of Law No. 1 of 2023 introduces judicial pardon into Indonesian criminal law by empowering a court to refrain from imposing punishment or a measure on the ground of the minor nature of the act, the personal circumstances of the offender, or the circumstances at the time of the offence and arising subsequently, subject to considerations of justice and humanity, the provision being placed within the sentencing guidelines so that the finding of guilt is preserved while the sanction is withheld. The Dutch arrangement upon which it is modelled consists of two provisions rather than one, Article 9a of the Wetboek van Strafrecht conferring the substantive power in terms that the Indonesian text closely follows, and Article 353 of the Wetboek van Strafvordering prescribing the form of the judgment in which that power is expressed, so that a Dutch court applying the power knows what kind of decision it is making. The comparison therefore discloses an asymmetry: Indonesia has enacted the substantive power without its procedural vehicle, with the consequence that a finding of guilt unaccompanied by punishment must be expressed within a category of judgment designed for convictions that carry a sanction, and the difficulty is compounded by the absence of any criterion defining the minor nature of the act, which leaves the application of the provision to the disposition of the individual panel and sits uneasily with the principle of lex certa. It is accordingly recommended that a fourth category of judgment be added to the Criminal Procedure Code upon the model of Article 353, that guidelines be issued defining the minor nature of the act by combining a quantitative threshold with a qualitative assessment, and that courts be required to state what account they have taken of the victim's position rather than to obtain the victim's consent.

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