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Sentencing Guidelines as an Instrument Reconciling Judicial Consistency and Judicial Independence under Indonesia's National Criminal Code

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Abstract

Sentencing disparity weakens legal certainty, equality before the law and public trust in Indonesian courts, and Law No 1 of 2023 on the Criminal Code, in force since 2 January 2026, is the first Indonesian statute to state the purposes of sentencing and the considerations a judge must weigh. This normative study asks whether these provisions can improve the consistency of sentencing without undermining judicial independence. It combines statutory, conceptual and comparative approaches, analysing Articles 51 to 55 of the Code, Supreme Court regulations on sentencing, and the empirical and doctrinal literature on guidelines in the United States and in England and Wales. That literature indicates that guidelines reduce unwarranted disparity only where they combine standardised factors, a starting point or range, reasoned departures, data for evaluation and attention to prosecutors. Article 54 supplies the first of these alone: it lists mandatory considerations but sets no starting point, no rule on departures and no monitoring. Its effect on consistency therefore depends on sectoral Supreme Court regulations, one of which no longer matches the Code's offence ranges. Guidelines restrict judicial independence only when they dictate outcomes; when they structure reasons they make independence accountable. A sentencing regulation for general offences, a sentencing database and a duty to explain departures are recommended.

Keywords



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Sentencing; Discretion; Consistency; Disparity; Independence; Guidelines

Introduction

Two defendants who commit similar offences in similar circumstances should receive similar sentences, yet in many legal systems they do not. Disparity of this kind is not always wrong: sentences must be fitted to the culpability of the offender and the harm of the offence. It becomes a problem when it flows from the personal preferences of the judge, local sentencing habits or the lack of any common method rather than from legally relevant differences between the cases.[1] Unstructured discretion then becomes a source of injustice, because no mechanism ensures that it is exercised consistently and proportionately.[2] In Indonesia, the former Criminal Code (the Dutch-era *Wetboek van Strafrecht*) stated no purposes of punishment and no considerations for the judge, so that similar offences could attract markedly different punishments without a transparent justification, and the sentencing process rested on abstract statutory maxima and the judge's own assessment.[3]

Law No 1 of 2023 on the Criminal Code (*Kitab Undang-Undang Hukum Pidana*, the National Criminal Code) changes this. Since it took effect on 2 January 2026, together with Law No 20 of 2025 on Criminal Procedure and Law No 1 of 2026 on the Adjustment of Criminal Penalties,[4][5][6] the Code states the purposes of sentencing (art 51), forbids sentencing that degrades human dignity (art 52), tells the judge to prefer justice over legal certainty when the two conflict (art 53) and lists the considerations the judge must weigh, together with the power to refrain from punishing in minor cases (art 54).[7] These provisions are often called sentencing guidelines (*pedoman pemidanaan*). Whether they can in fact make sentences more consistent, and whether they sit comfortably with the independence the Constitution guarantees to judges,[8] are the questions this article addresses.

Earlier Indonesian studies explain the new provisions but do not test them. Supriadin presents the guidelines as part of a purposive system in which punishment is only a means to the objectives of the criminal law system,[9] and

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[1] Andrew Ashworth, *Sentencing and Criminal Justice*, 6th ed (Cambridge: Cambridge University Press, 2015) at 72.
[2] *Ibid* at 72–74.
[3] Supriadin, "Pedoman Pemidanaan dalam Rekonstruksi Sistem Hukum Pidana Nasional 2023–2024 [Sentencing Guidelines in the Reconstruction of the National Criminal Law System 2023–2024]" (2024) 21:1 *Lex Jurnalica* 134 at 137.
[4] Law No 1 of 2023 on the Criminal Code (Indonesia).
[5] Law No 20 of 2025 on Criminal Procedure (Indonesia).
[6] Law No 1 of 2026 on the Adjustment of Criminal Penalties (Indonesia).
[7] Law No 1 of 2023, *supra* note 4, arts 51–54.
[8] Constitution of the Republic of Indonesia 1945, art 24(1).
[9] Supriadin, *supra* note 3 at 137.

Pratama's normative study of article 54(1) concludes that judges must apply the factors in that paragraph in their sentencing decisions.[10] Commentary on judicial pardon has noted that the procedure for such a decision was left unclear in the draft Code of Criminal Procedure,[11] and the debate about the corruption sentencing regulation of 2020 already raised the objection that sentencing tables make judges "like calculators".[12] Comparative scholarship, by contrast, has produced evidence on what guidelines achieve. Commission-based guidelines in the United States have been reviewed over forty years;[1314] the federal guidelines there appear on balance to have reduced inter-judge disparity,[15] that disparity appears to have grown once the guidelines became advisory,[16] and a study of the assault guideline in England and Wales found that legal factors explained more of the variation in sentences after the guideline took effect.[17]

The gap is that no study located for this article applies these conditions to Law No 1 of 2023, and none considers the two Supreme Court regulations that now surround it: Regulation No 1 of 2020, whose statutory basis was replaced when the Code took effect,[18] and Regulation No 2 of 2026 on terrorism sentencing, the first guideline issued under the Code.[19] The article therefore asks three questions: (1) what do the Code and the related Supreme Court instruments provide on the purposes and considerations of sentencing; (2) under what conditions do guidelines enhance consistency according to comparative evidence, and does Indonesian law meet them; and (3) are such guidelines compatible with judicial independence? Its

[10] M Ilham Wira Pratama, "Penerapan Pasal 54 Ayat (1) KUHP oleh Hakim dalam Menjatuhkan Putusan Pemidanaan [Application of Article 54(1) of the Criminal Code by Judges in Imposing Sentences]" (2024) 5:3 *Indonesian Journal of Criminal Law and Criminology* 127.

[11] Ady Thea DA, "Begini Tantangan Implementasi Rechterlijke Pardon KUHP Nasional [Challenges in Implementing Judicial Pardon under the National Criminal Code]" (30 April 2025), online: *Hukumonline* <https://www.hukumonline.com/berita/a/begini-tantangan-implementasi-rechterlijke-pardon-kuhp-nasional-lt68122e0543caf>.

[12] Aida Mardatillah, "Dua Profesor Ini Sebut Perma Pemidanaan Perkara Tipikor Batasi Kemandirian Hakim [Two Professors Say the Sentencing Regulation for Corruption Cases Limits Judicial Independence]" (6 August 2020), online: *Hukumonline* <https://www.hukumonline.com/berita/a/dua-profesor-ini-sebut-perma-pemidanaan-perkara-tipikor-batasi-kemandirian-hakim-lt5f2bfe025dc90/>.

[13] Richard S Frase, "Forty Years of American Sentencing Guidelines: What Have We Learned?" (2019) 48 *Crime and Justice* 79, DOI: <10.1086/701503>.

[14] Michael Tonry, "Fifty Years of American Sentencing Reform: Nine Lessons" (2019) 48 *Crime and Justice* 1.

[15] Paul J Hofer, Kevin R Blackwell & R Barry Ruback, "The Effect of the Federal Sentencing Guidelines on Interjudge Sentencing Disparity" (1999) 90:1 *Journal of Criminal Law and Criminology* 239.

[16] Crystal S Yang, "Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker" (2014) 89:4 *New York University Law Review* 1268.

[17] Jose Pina-Sanchez & Robin Linacre, "Enhancing Consistency in Sentencing: Exploring the Effects of Guidelines in England and Wales" (2014) 30:4 *Journal of Quantitative Criminology* 731, DOI: <10.1007/s10940-014-9221-x>.

[18] Saiful Arif, "Eksistensi Perma 1/2020 Pasca KUHP Baru, Apakah Masih Relevan? [The Existence of Perma 1/2020 after the New Criminal Code: Is It Still Relevant?]" (28 September 2026), online: *Dandapala* <https://www.dandapala.com/opini/detail/eksistensi-perma-12020-pasca-kuhp-baru-apakah-masih-relevan>.

[19] I Kadek Apdila Wirawan, "WKMA Yudisial: Pedoman Pemidanaan Bukan Borgol Melainkan Kompas Bagi Hakim [Deputy Chief Justice for Judicial Affairs: Sentencing Guidelines Are a Compass, Not Handcuffs, for Judges]" (4 September 2026), online: *Dandapala* <https://dandapala.com/article/detail/wkma-yudisial-pedoman-pemidanaan-bukan-borgol-melainkan-kompas-bagi-hakim>.

purpose is to state, on the law in force in October 2026, what guidelines can and cannot be expected to achieve and what Indonesia still needs to add.

Research Method

This is normative (doctrinal) legal research using statutory, conceptual and comparative approaches. The primary legal materials are the 1945 Constitution, Law No 1 of 2023 on the Criminal Code, Law No 1 of 2026, Law No 20 of 2025, Law No 48 of 2009 on Judicial Power, Supreme Court Regulations No 1 of 2020 and No 2 of 2026, and the United States Supreme Court decisions in *Blakely* and *Booker*. The secondary materials are journal articles, books and professional commentary on sentencing, selected for the purpose of the comparison: the United States and England and Wales were chosen because they have operated guideline systems for decades and have been the subject of empirical evaluation. Only the findings stated in the abstracts or main arguments of the empirical studies are relied on, and their limits are noted. The analysis is qualitative. The conditions under which guidelines promote consistency were drawn from the comparative literature and applied to the Indonesian instruments in a table of mechanisms. The article does not analyse court decisions or sentencing statistics in Indonesia, which would be needed to measure disparity; this is a limitation (see the Conclusion). The law is stated as at October 2026.

Results and Discussion

Disparity, Consistency and Structured Discretion

Consistency is a form of the principle that like cases should be treated alike, and it is part of the legitimacy of criminal justice.[20] It does not mean identical sentences. Where offenders differ in culpability, role, the harm caused or personal circumstances, different sentences are warranted; unwarranted disparity is variation that cannot be explained by factors the law treats as relevant, such as the judge's preferences, the habits of a particular court or the absence of any standard. The Council of Europe has said as much: consistency is a legitimate aim of sentencing policy, individualisation remains essential, and variations should be explicable by legitimate factors.[21] In Indonesia the Supreme Court's Deputy Chief Justice for Judicial Affairs made the same point in September 2026: a difference

[20] Ashworth, *supra* note 1 at 72.

[21] Council of Europe, Committee of Ministers, *Recommendation No R (92) 17 to Member States Concerning Consistency in Sentencing* (Strasbourg: Council of Europe, 1992).

between sentences is not automatically a wrongful disparity, and the aim of a guideline is a common method of assessment, not uniform judgments.[22]

The concept of structured discretion follows. A sentencing guideline does not abolish discretion but gives it shape, and the comparative literature describes three ways in which it does so.[23][24] First, it fixes the factors that may and must be considered, so that the judge neither overlooks essential aspects of the case nor introduces irrelevant ones. Second, it prescribes the order of assessment, for example by assessing the seriousness of the offence, selecting a starting point and then adjusting it for aggravating and mitigating circumstances. Third, it supplies ranges or a matrix as a frame of reference. A departure remains possible but must be explained. The difference between these three techniques matters for the analysis below: the first goes to the content of the judge's reasoning, the second and the third to its structure and its result. A system that adopts only the first has standardised the vocabulary of sentencing, not the way sentences are reached.

How consistency is measured also affects what can be claimed for a guideline. Two approaches recur in the literature. One asks how much of the variation in sentences can be explained by legally relevant variables such as the type and seriousness of the offence, the role of the offender, previous convictions and the impact on the victim: the larger the share explained, the more consistent the system, and the larger the unexplained remainder, the stronger the indication of unwarranted disparity. The English study discussed below uses this approach.[25] The other compares sentences between judges and between courts, controlling for case characteristics, to see whether the identity of the judge makes a difference, as in the American study of inter-judge disparity.[26] Both approaches need data on cases and outcomes. Indonesia has not yet built the data on which either could be used, and for that reason this article can assess the design of the guidelines but not their results.

Consistency has an institutional dimension as well. Where disparity is measured, it is a product of the whole process and not only of the judge: a study of federal sentencing after the guidelines became advisory attributes part of the disparity to prosecutors, who appear to apply mandatory minimum penalties selectively, and shows that studies controlling only for the presumptive sentence overlook

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[22] "Bahas PERMA 2/2026, WKMA Suharto Tekankan Konsistensi Pemidanaan Bagi Hakim [Discussing Perma 2/2026, Deputy Chief Justice Suharto Stresses Consistency in Sentencing]" (28 September 2026), online: *Dandapala* <https://www.dandapala.com/article/detail/bahas-perma-22026-wkma-suharto-tekankan-konsistensi-pemidanaan-bagi-hakim>.

[23] Michael Tonry, *Sentencing Matters* (Oxford: Oxford University Press, 1996) at 48.

[24] Andrew von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005).

[25] Pina-Sanchez & Linacre, *supra* note 17.

[26] Yang, *supra* note 16.

disparities arising at the charging and plea stages.[2728] For Indonesia this means that a guideline directed at judges alone cannot be expected to eliminate disparity, an observation to which the article returns.

Comparative Evidence: When Guidelines Work

The United States is the principal source of experience. Reform from the 1970s replaced indeterminate sentencing, in which judges and parole boards held wide authority, with guidelines drafted by sentencing commissions. Frase's review of forty years of that experience reports that, since 1980, some twenty-two jurisdictions have adopted guidelines and nineteen still keep them, that no two systems are alike, and that commission-drafted guidelines endorsed by the American Bar Association and the American Law Institute are the only reform model that has so far succeeded; a good system needs a permanent, independent and adequately funded commission, recommendations informed by impact assessments, and a balance between rules and discretion.[29] Reviewing the same period, Tonry draws nine lessons from American reform.[30] The federal guidelines took effect on 1 November 1987 under the Sentencing Reform Act of 1984 and set sentences by a matrix combining the offence level and the defendant's criminal history.[31] An early evaluation found that they appeared on balance to have reduced aggregate inter-judge disparity but with problem areas, a result the authors called a qualified success.[32]

The mandatory character of the federal guidelines did not survive constitutional challenge. In *Blakely*, the Supreme Court held that facts increasing a sentence above the standard range must be found by a jury;[33] in *Booker* it applied the reasoning to the federal guidelines and made them advisory, so that judges must still calculate the range but may depart from it.[34] The empirical consequence is contested. Yang, using data on almost 400,000 defendants linked to their judges, reports that inter-judge disparities roughly doubled after the guidelines became advisory,[35] while Starr and Rehavi find no evidence that racial disparity rose and emphasise that the

[27] *Ibid*.
[28] Sonja B Starr & M Marit Rehavi, "Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker" (2013) 123:1 *Yale Law Journal* 2.
[29] Frase, *supra* note 13.
[30] Tonry, Fifty Years, *supra* note 14.
[31] Hofer, Blackwell & Ruback, *supra* note 15.
[32] *Ibid* at 239–240.
[33] Blakely v Washington, 542 US 296 (2004).
[34] United States v Booker, 543 US 220 (2005).
[35] Yang, *supra* note 16.

largest disparities arise before sentencing, in prosecutors' charging decisions.[36] These findings are not inconsistent: the first concerns variation among judges and the second racial disparity and the stage at which it arises. Together they show that how binding and how reasoned a guideline is shapes its effect, and that restricting only the judge may displace discretion to the prosecutor.

England and Wales developed a different model, in which the Sentencing Council issues offence-specific guidelines in steps: the judge assesses the seriousness of the offence, identifies a starting point and category range, and then adjusts for aggravating and mitigating factors.[37][38] Pina-Sanchez and Linacre used Crown Court Sentencing Survey data to compare sentences before and after the assault guideline of 2011. Legal factors explained more of the variation after the guideline, unexplained variation fell and, in matched cases, the variance of sentence length fell significantly; the authors caution, however, that the improvement cannot be conclusively attributed to the guideline.[39] The English evidence is therefore encouraging but not proof, and it concerns one offence type in a common-law system.

Taking the evidence together, five conditions emerge under which guidelines can be expected to promote consistency: (1) they standardise the legally relevant factors; (2) they provide a starting point or range and a sequence of steps; (3) departures are allowed but must be explained; (4) data are collected and the guidelines are evaluated and revised; and (5) the role of prosecutors and other actors is anticipated. The first three concern the structure of the guideline itself and are supported by the English study and by the American experience of advisory guidelines; the fourth is stressed in the American reviews,[40] and the Council of Europe recommends statistics and empirical research as instruments of consistency;[41] the fifth follows from the studies of prosecutors.[42] These conditions are drawn from jurisdictions with commissions and large datasets, so they are a yardstick and not a prediction for a codified civil-law system such as Indonesia's.

Sentencing Provisions of Law No 1 of 2023

[36] Starr & Rehavi, *supra* note 28.
[37] Julian V Roberts, "Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues" (2013) 76:1 *Law and Contemporary Problems* 1.
[38] Andrew Ashworth & Julian V Roberts, eds, *Sentencing Guidelines: Exploring the English Model* (Oxford: Oxford University Press, 2013).
[39] Pina-Sanchez & Linacre, *supra* note 17.
[40] Frase, *supra* note 13.
[41] Council of Europe, *Recommendation No R (92) 17*, *supra* note 21.
[42] Starr & Rehavi, *supra* note 28.

The Code opens its sentencing provisions with purposes. Article 51 lists four: to prevent offences by upholding legal norms to protect society; to rehabilitate and reintegrate convicts through guidance so that they become good and useful members of society; to resolve the conflict caused by the offence, restore balance and bring security and peace to the community; and to foster remorse and release the convict from feelings of guilt.[43] Article 52 adds that sentencing is not meant to degrade human dignity.[44] The shift from retribution as the sole rationale to a combination of prevention, rehabilitation, restoration and remorse is a change of paradigm, and it is a precondition of any guideline, because a judge cannot weigh sentencing factors without knowing what the sentence is for.

The purposes and the factors are meant to be read together, and the link can be traced in the text. The preventive purpose points to the offender's inner attitude, whether the offence was planned, and the manner of commission, which indicate how dangerous the conduct was; the rehabilitative purpose points to the offender's history, circumstances and conduct after the offence, and to the effect of the sentence on the offender's future; the restorative purpose points to the effect on the victim and the victim's forgiveness; and the purpose of fostering remorse relates to conduct after the offence. This mapping is the author's own reading and not a statement of the Code, which does not say which purpose each factor serves. The absence of such a statement is itself significant: the Code does not rank the purposes, so two judges who accept the same facts may give different weight to prevention and to restoration and reach different sentences in good faith. Only guidance beyond the Code can narrow that difference.

Article 53 is the Code's statement of method. In trying a criminal case the judge must uphold law and justice, and if the two conflict the judge must give priority to justice.[45] Doctrinally this rests on Radbruch's formula, under which the conflict between justice and legal certainty cannot be resolved once and for all and legal certainty gives way only where injustice becomes intolerable.[46] The provision matters for guidelines in two ways. It confirms that the Code does not intend mechanical sentencing, and it also sets a limit on any numerical guideline, since a range that produces an unjust sentence in a particular case must yield.

Article 54(1) is the core of the guidelines. A judge must consider: (a) the form of the offender's guilt; (b) the motive and purpose of the offence; (c) the offender's inner

[43] Law No 1 of 2023, *supra* note 4, art 51.
[44] *Ibid*, art 52.
[45] *Ibid*, art 53.
[46] Frank Haldemann, "Gustav Radbruch vs Hans Kelsen: A Debate on Nazi Law" (2005) 18:2 *Ratio Juris* 162.

attitude; (d) whether the offence was planned; (e) the manner in which it was committed; (f) the offender's conduct after the offence; (g) the offender's personal history, social and economic circumstances; (h) the effect of the sentence on the offender's future; (i) the effect on the victim or the victim's family; (j) forgiveness by the victim and/or the victim's family; and (k) the legal values and justice living in society.[47] The Elucidation treats the list as a help to the judge in finding the proportionate sentence and, on the reading adopted here, as not closed. Three features deserve comment. The list is mandatory in form, which is the reason Pratama concludes that judges must apply each element;[48] it does not rank or weight the factors, so that the same factors can support different outcomes; and factor (k) links sentencing to the recognition of living law in article 2 of the Code,[49] which brings a source of variation between regions that guidance must control if local values are not to produce new disparities.

Article 54(2) adds judicial pardon (*rechterlijk pardon*, *pemaafan hakim*). The minor nature of the act, the personal circumstances of the offender, or the circumstances at the time of the offence and afterwards may be taken as a ground not to impose punishment or a measure, with regard to justice and humanity.[50] Article 55 provides that a person is not released from criminal liability if he or she intentionally caused the circumstances that would be a ground excluding punishment.[51] Pardon is a decision of guilt without a sentence and thus an exception to the duty to punish. It exposes the judge to social risk, because the defendant has often been presented to the public as a criminal before trial, and commentators have noted that the procedure for the decision was left unclear at the draft stage of the new Code of Criminal Procedure.[52] How Law No 20 of 2025 deals with the form of the pardon decision should be checked against the enacted text. The point for present purposes is that pardon is a discretion the Code opens but, like the rest of article 54, does not structure.

Alternatives to imprisonment also depend on the judge's assessment. Community service may be imposed where the offence is punishable by imprisonment of less than five years and the judge would impose imprisonment of no more than six months or a fine not above category II, after weighing the matters the article lists.[53]

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[47] Law No 1 of 2023, *supra* note 4, art 54(1).
[48] Pratama, *supra* note 10.
[49] Law No 1 of 2023, *supra* note 4, art 2.
[50] *Ibid*, art 54(2).
[51] *Ibid*, art 55.
[52] Thea, *supra* note 11.
[53] Law No 1 of 2023, *supra* note 4, art 85(1).

The Code thus gives judges more sentencing options and more reasons to consider, but no instrument tells them when to choose one option over another. That is the gap that guidelines of the second kind, with ranges and steps, are designed to fill.

Supreme Court Regulations as Sectoral Guidelines

Indonesia has so far obtained numerical guidance only from the Supreme Court. Regulation No 1 of 2020 provides sentencing steps for convictions under articles 2 and 3 of the corruption law, for natural persons: the judge classifies the state loss into categories, assesses the level of culpability, impact and gain, identifies a range, adjusts for aggravating and mitigating circumstances and then sets the sentence.[54] It is the closest Indonesian counterpart of the English steps. Critics argued from the outset that it limits judicial independence and makes the judge "like a calculator" who must follow a table of categories, and that a guideline limited to two articles is unusual.[55] The claims made for its success are harder to assess. It is said to have curbed disparity in corruption cases, but the article found no evaluation that compares sentences before and after it, so the claim is at present a hypothesis.

The Code has since changed the ground under the regulation. Articles 2 and 3 of the corruption law, to which it is tied, were replaced by articles 603 and 604 of the Code, which carry different ranges of imprisonment and fines. The Supreme Court has neither revoked nor replaced Regulation No 1 of 2020, but an ad hoc corruption judge argues that its calculation method no longer corresponds to the statutory ranges although its spirit remains consistent with article 54, and that it should be revised quickly, with a choice between quantitative and qualitative parameters.[56] The point is of general interest. A numerical guideline is tied to the offence provisions it implements, so every change in statutory ranges requires its revision, and the Code's and the Law on Adjustment of Criminal Penalties's rewriting of penalties makes this a recurring task.[57]

Regulation No 2 of 2026 is the first sentencing guideline issued under the Code; it concerns certain terrorism offences and was promoted by the Supreme Court in September 2026.[58][59] The assessment stages reported in the Court's presentation are the scale of impact, the role of the defendant, a matrix of ranges, and aggravating and mitigating circumstances. The guideline was prepared with reference to

[54] Supreme Court Regulation No 1 of 2020 on Sentencing Guidelines for Articles 2 and 3 of the Law on the Eradication of Corruption (Indonesia).
[55] Mardatillah, *supra* note 12.
[56] Arif, *supra* note 18.
[57] Law No 1 of 2026, *supra* note 6.
[58] Supreme Court Regulation No 2 of 2026 on Sentencing Guidelines for Certain Terrorism Offences (Indonesia).
[59] "Bahas PERMA 2/2026", *supra* note 22.

comparative practice, including Australia's. The Deputy Chief Justice described it as a "compass" and not "handcuffs", said that independence means freedom from all forms of intervention and not unlimited freedom, and added that every sentencing discretion must be supported by clear, rational and accountable legal reasoning that explains openly why a particular sentence was imposed.[60]

Testing Articles 51–55 against the Conditions

Table 1 sets the five conditions drawn from the comparative evidence against the Indonesian instruments.

Table 1. Conditions for consistency and their presence in Indonesian sentencing instruments

Condition	Comparative practice	Law No 1 of 2023 (arts 51–55)	Supreme Court Regulations No 1 of 2020 and No 2 of 2026
1. Standardised factors	Offence level and criminal history (US federal); factors in guideline steps (England and Wales)	Yes: eleven factors in art 54(1), pardon in art 54(2); not weighted	Yes: culpability, impact, gain (2020); scale of impact and role (2026)
2. Starting point or range, steps	Matrix (US federal); seriousness, starting point and category range (England and Wales)	No: no starting point or sequence for general offences	Yes, for corruption under arts 2–3 (2020, tied to superseded provisions) and for certain terrorism offences (2026)
3. Reasoned departures	Advisory guidelines still require the range to be calculated and departures to be justified	General duty of reasoned decisions (Law No 48 of 2009, art 53) and priority for justice (art 53 of the Code); no rule on departures, since there is no benchmark	The 2026 guideline is presented with a duty of clear reasoning for discretion
4. Data and evaluation	Sentencing commissions and surveys; Council of Europe recommends statistics	No sentencing commission or database established by the Code	No evaluation of the 2020 regulation found
5. Other actors	Prosecutors' charging and plea decisions (US studies)	Not addressed in arts 51–55	Not addressed

Source: author's analysis of the instruments and studies cited. Entries on what the Code and the regulations do not provide state the result of the author's reading and should be checked against the texts.

On this test Articles 51 to 55 satisfy the first condition and not the others. Article 54 standardises the vocabulary of sentencing: every judge in every court must consider the same eleven matters and may not ignore the victim's position or the offender's conduct after the offence. That is a real gain, and it makes the reasons for a sentence easier to review on appeal. But the comparative evidence shows that a list of factors alone does not synchronise the starting point: judges who begin from different baselines can use the same factors to justify very different outcomes. The Code offers no baseline other than the statutory maximum and minimum of each offence, no steps and no duty to explain a departure from a benchmark because there is none.

[60] Wirawan, *supra* note 19.

It follows that the claim that articles 51 to 54 transform unfettered discretion into structured discretion must be qualified. They structure the content of the judge's reasoning but not its path or its outcome. Their contribution to consistency is potentially real but unproven, and it will depend on three developments outside the Code: sectoral or general guidelines issued by the Supreme Court, the practice of appellate and cassation courts in reviewing the reasons given, and the collection of sentencing data. The Code leaves the last to others. The risk is that the guidelines remain "law on the books": present in the text, while sentencing in practice varies as before. This risk is greater for factor (k), living law, and for pardon, which are the most open-textured elements and the ones for which no judicial method exists yet.

The sectoral regulations narrow the gap but unevenly. Regulation No 2 of 2026 contains the structure the Code lacks, but for a single group of offences; Regulation No 1 of 2020 has lost its statutory anchor. For offences that occur in large numbers, such as narcotics offences and sexual violence, which prior scholarship identifies as high-frequency candidates for guidelines, no equivalent exists. Because prosecutors' charging decisions shape the range within which the judge sentences, a sentencing guideline that does not reach them leaves one source of disparity untouched, as the American studies show.

Judicial Independence and Structured Discretion

The 1945 Constitution declares judicial power to be independent for the purpose of upholding law and justice,[61] and the Judicial Power Law prohibits interference in judicial affairs by parties outside the judiciary, except as the Constitution permits.[62] The same Law obliges judges to explore, follow and understand the legal values and sense of justice living in society.[63] Independence in this sense is freedom from extra-judicial pressure; it is not freedom from the law, and it has always coexisted with statutory sentencing ranges, with appeal and cassation, and with the duty to give reasons. A rule that tells a judge which matters to weigh does not interfere in the sense of the Law, because it comes from the legislature, to which the judge is subject.

Indonesian legal thought has long distinguished two attitudes to the judge's task. On a legalist view, the judge applies written law and nothing else; on a progressive view the judge must also seek the law beyond the text, using interpretation and construction and the ethical values of society. The Code adopts neither in pure form.

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[61] 1945 Constitution, *supra* note 8, art 24(1).
[62] Law No 48 of 2009 on Judicial Power (Indonesia), art 3(2).
[63] *Ibid*, art 5(1).

Article 54 is written law, and it directs the judge to weigh matters that lie beyond the elements of the offence, among them the victim's forgiveness and the values living in society. For this reason sentencing guidelines are best seen not as a victory of the legalist over the progressive judge but as a framework in which progressive reasoning is made visible and testable. A sentence that departs from a benchmark for reasons of justice remains possible; what the guideline changes is that the reasons must be stated.

The objection that guidelines "shackle" the judge is nevertheless serious when the guideline prescribes results. The criticism voiced against Regulation No 1 of 2020, that tables turn judges into calculators and conflict with the Judicial Power Law,[64] has the most force in respect of binding numerical ranges issued by an authority other than the legislature. Three distinctions help. First, a guideline can bind the judge's method and leave the outcome open, as the English steps and the Supreme Court's 2026 statement do; the English guideline does not oblige the judge to impose a particular sentence but gives all judges a common starting point.[6566] Secondly, a guideline can be presumptive, allowing departure for stated reasons, which preserves individual justice and is the practice abroad;[67] a rule of "comply or explain" meets the concern about independence better than an absolute rule. Thirdly, article 53 of the Code supplies an internal safeguard, because it requires justice to prevail over legal certainty where the two conflict. The American experience shows the danger on the other side: when guidelines were made binding, constitutional challenge followed and the guidelines were made advisory.[68]

On this analysis consistency and independence are not opposed so long as the guideline is understood as a method for giving reasons. The position can be put in one sentence: independence guarantees that nobody else decides the sentence, and structured discretion requires the judge who decides to show how. A judge who must explain a sentence by reference to defined factors, and to a range if one exists, is more, not less, protected against the suspicion of bias or pressure. This reading is also consistent with the view of the Supreme Court's leadership that discretion must be accompanied by clear and accountable reasoning.[69] The Code's own design

[64] Mardatillah, *supra* note 12.
[65] Roberts, *supra* note 37.
[66] "Bahas PERMA 2/2026", *supra* note 22.
[67] Booker, *supra* note 34.
[68] *Ibid*.
[69] Wirawan, *supra* note 19.

points to the same balance: the legislature supplied the factors and left the weighing to the judge.

Comparison with Earlier Research

Table 2 places the findings against the studies discussed in the introduction.

Table 2. Earlier research and the contribution of this article

Study	Focus and finding	Contribution of this article
Supriadin (2024)	Sentencing guidelines as part of a purposive system of criminal law	Tests the guidelines against conditions for consistency and shows only the first condition is met
Pratama (2024)	Judges must apply each factor in article 54(1)	Shows that the mandatory list standardises factors but not starting points, steps or outcomes
Mardatillah (2020); Arif (2026)	Criticism of Regulation No 1 of 2020 for limiting independence; its loss of fit with arts 603–604	Places the debate in the independence analysis and adds Regulation No 2 of 2026
Hofer et al (1999); Yang (2014)	Federal guidelines reduced disparity on balance; disparity roughly doubled once advisory	Uses both to show that binding force and reasoning shape effect
Pina-Sanchez & Linacre (2014)	More variation explained by legal factors after the English assault guideline; attribution uncertain	Uses as support for steps, with the caveat about attribution
Frase (2019)	Features of a well-designed commission system	Basis for the data and evaluation condition

Source: compiled from the studies cited.

The findings agree with the Indonesian commentary that the Code improves sentencing reasoning, and they add a qualification: improvement in reasoning is not the same as improvement in consistency. They agree with Pina-Sanchez and Linacre that structured guidelines are associated with a larger share of variation explained by legal factors, but not that this proves a causal effect. They agree with Yang and with Starr and Rehavi that the design and binding force of a guideline matter and that disparity may move to prosecutors. They differ from the assumption in much Indonesian writing that listing considerations in the Code is enough to reduce disparity; on the comparative evidence, it is not.

The comparison also shows where the Indonesian debate is likely to turn. In the United States, the argument over the guidelines was settled in part by constitutional law, by the rule that facts raising a sentence must be found by a jury; in Indonesia the corresponding question is the legal source and force of a Supreme Court regulation that guides sentencing. The critics of the 2020 regulation questioned it on this ground,[70] and the answer given in 2026 is the language of a compass and not handcuffs.[71] Whether a regulation of that kind is enough, or whether the legislature should enact the structure in the Code or in a sentencing statute, is the next question

[70] Mardatillah, *supra* note 12.
[71] Wirawan, *supra* note 19.

for research and for reform. A statutory basis would remove the doubt about the force of the guideline, but it would also make the guideline harder to revise, a problem already visible in the case of the 2020 regulation.

Conclusion

Articles 51 to 55 of Law No 1 of 2023 give Indonesian sentencing, for the first time, stated purposes, a mandatory list of considerations and a power of pardon, and they settle that justice prevails over legal certainty when the two conflict. They are best described as guidelines that standardise the content of the judge's reasoning. They do not by themselves structure the path to a sentence: the Code sets no starting point, steps or duty to explain departures, and no sentencing data, so that comparative conditions for consistency are met only in part and the effect on disparity is untested. The Supreme Court's sectoral regulations fill part of the gap: Regulation No 2 of 2026 contains the structure, while Regulation No 1 of 2020 has lost its statutory anchor and awaits revision. Guidelines are compatible with judicial independence if they bind the method and require reasons, not the result.

Four recommendations follow. First, the Supreme Court should decide the future of Regulation No 1 of 2020 and should consider a general sentencing regulation for offences with high frequency, using the stepped model of Regulation No 2 of 2026 and a presumptive rather than absolute rule of "comply or explain". Second, courts should be required to state how each factor in article 54(1) was weighed and, where a benchmark exists, why a departure was made. Third, a sentencing database should be set up so that consistency can be measured and guidelines revised. Fourth, guidance on pardon and living law should be developed so that the most open-textured parts of article 54 do not generate new disparities. The procedural position under the new Code of Criminal Procedure and the role of prosecutors should be included in that work.

The study has limits. It is doctrinal; it does not analyse Indonesian court decisions or sentencing statistics; it relies on foreign evidence from common-law systems with commissions; and some entries in Table 1 state the author's reading of the texts and should be confirmed against the enacted instruments. Future research should measure disparity before and after Regulations No 1 of 2020 and No 2 of 2026 and study decisions applying article 54 since 2 January 2026.

What would a fuller guideline add? Without prescribing a design, the comparative materials suggest a short list. A general sentencing regulation could group offences by seriousness and require the judge to record, in order, the category of the offence, the starting point or range for that category, the aggravating and mitigating matters

drawn from article 54(1), and the sentence reached. Where the sentence falls outside the range the judgment should say why. The Supreme Court could collect the resulting data and publish it, as sentencing commissions do abroad, so that the guideline can be revised in the light of practice. Such a regulation would leave the weighing of each factor to the judge and would therefore be consistent with article 53 of the Code. It would also address the weakness identified above: the Code standardises the factors but not the way in which they are combined.

The legal character of these regulations should not be passed over. A Supreme Court regulation fills gaps in procedure and in the administration of justice, and its force against a judge sitting in a lower court rests on the Supreme Court's supervisory position over the courts below it; it cannot amend the Code. This explains the drafting of the 2026 statements in terms of method and of reasons, and not of outcomes. It also explains why the objection that a regulation of this kind conflicts with the Judicial Power Law, though made against the 2020 text,[72] is best answered by showing that the regulation guides the exercise of a power the Code gives to the judge and does not substitute another rule for the Code. The tension would remain if a regulation set binding sentences for specific categories without allowing departure; no such rule is reported in the sources consulted for the 2026 guideline.

Two further points complete the picture of the statutory framework. First, the duty to give reasons is general, not specific to sentencing. The Judicial Power Law makes judges accountable for their decisions and requires every decision to contain legal reasoning based on correct grounds,[73] so that a sentence unsupported by reference to the matters in article 54(1) is open to challenge on appeal. That is a useful lever, but it is a general safeguard and not a rule about departures from a benchmark. Secondly, the interaction of article 54(1)(k) with the recognition of living law in article 2 is a source of uncertainty. A judge may take into account the customary values of a community in deciding the sentence, which can promote substantive justice locally, but without common methods the same offence may be treated differently in different regions on the strength of different perceptions of local values. The guidelines have to perform here the function of a bridge: they must make the incorporation of local values reasoned and reviewable, and keep it within the limits of proportionality that apply nationally.

[72] Mardatillah, *supra* note 12.

[73] Law No 48 of 2009, *supra* note 62, art 53.

Ethics and Data Availability

This normative legal research did not involve human participants or personal data, so ethical approval was not required. All legal materials used are publicly available.

Use of Generative AI

Generative AI was used only to improve the language of this article (grammar, clarity and style). The authors reviewed the output and are responsible for the content of the article.

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References

Constitution of the Republic of Indonesia 1945.

Law No 1 of 2023 on the Criminal Code (Indonesia).

Law No 48 of 2009 on Judicial Power (Indonesia).

Law No 20 of 2025 on Criminal Procedure (Indonesia).

Law No 1 of 2026 on the Adjustment of Criminal Penalties (Indonesia).

Supreme Court Regulation No 1 of 2020 on Sentencing Guidelines for Articles 2 and 3 of the Law on the Eradication of Corruption (Indonesia).

Supreme Court Regulation No 2 of 2026 on Sentencing Guidelines for Certain Terrorism Offences (Indonesia).

Blakely v Washington, 542 US 296 (2004).

United States v Booker, 543 US 220 (2005).

Arif, Saiful. "Eksistensi Perma 1/2020 Pasca KUHP Baru, Apakah Masih Relevan? [The Existence of Perma 1/2020 after the New Criminal Code: Is It Still Relevant?]" (28 September 2026), online: *Dandapala* <https://www.dandapala.com/opini/detail/eksistensi-perma-12020-pasca-kuhp-baru-apakah-masih-relevan>.

Ashworth, Andrew. *Sentencing and Criminal Justice*. 6th ed. Cambridge: Cambridge University Press, 2015.

Ashworth, Andrew & Julian V Roberts, eds. *Sentencing Guidelines: Exploring the English Model*. Oxford: Oxford University Press, 2013.

von Hirsch, Andrew & Andrew Ashworth. *Proportionate Sentencing: Exploring the Principles*. Oxford: Oxford University Press, 2005.

Council of Europe, Committee of Ministers. *Recommendation No R (92) 17 to Member States Concerning Consistency in Sentencing*. Strasbourg: Council of Europe, 1992.

"Bahas PERMA 2/2026, WKMA Suharto Tekankan Konsistensi Pemidanaan Bagi Hakim [Discussing Perma 2/2026, Deputy Chief Justice Suharto Stresses Consistency in Sentencing]" (28 September 2026), online: *Dandapala* <https://www.dandapala.com/article/detail/bahas-perma-22026-wkma-suharto-tekankan-konsistensi-pemidanaan-bagi-hakim>.

Frase, Richard S. "Forty Years of American Sentencing Guidelines: What Have We Learned?" (2019) 48 *Crime and Justice* 79, DOI: <10.1086/701503>.

Haldemann, Frank. "Gustav Radbruch vs Hans Kelsen: A Debate on Nazi Law" (2005) 18:2 *Ratio Juris* 162.

Hofer, Paul J, Kevin R Blackwell & R Barry Ruback. "The Effect of the Federal Sentencing Guidelines on Interjudge Sentencing Disparity" (1999) 90:1 *Journal of Criminal Law and Criminology* 239.

Mardatillah, Aida. "Dua Profesor Ini Sebut Perma Pemidanaan Perkara Tipikor Batasi Kemandirian Hakim [Two Professors Say the Sentencing Regulation for Corruption Cases Limits Judicial Independence]" (6 August 2020), online: *Hukumonline* <https://www.hukumonline.com/berita/a/dua-profesor-ini-sebut-perma-pemidanaan-perkara-tipikor-batasi-kemandirian-hakim-lt5f2bfe025dc90/>.

Pina-Sanchez, Jose & Robin Linacre. "Enhancing Consistency in Sentencing: Exploring the Effects of Guidelines in England and Wales" (2014) 30:4 *Journal of Quantitative Criminology* 731, DOI: <10.1007/s10940-014-9221-x>.

Pratama, M Ilham Wira. "Penerapan Pasal 54 Ayat (1) KUHP oleh Hakim dalam Menjatuhkan Putusan Pemidanaan [Application of Article 54(1) of the Criminal Code by Judges in Imposing Sentences]" (2024) 5:3 *Indonesian Journal of Criminal Law and Criminology* 127.

Roberts, Julian V. "Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues" (2013) 76:1 *Law and Contemporary Problems* 1.

Starr, Sonja B & M Marit Rehavi. "Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker" (2013) 123:1 *Yale Law Journal* 2.

Supriadin. "Pedoman Pemidanaan dalam Rekonstruksi Sistem Hukum Pidana Nasional 2023–2024 [Sentencing Guidelines in the Reconstruction of the National Criminal Law System 2023–2024]" (2024) 21:1 *Lex Jurnalica* 134.

Thea DA, Ady. "Begini Tantangan Implementasi Rechterlijke Pardon KUHP Nasional [Challenges in Implementing Judicial Pardon under the National

Criminal Code]" (30 April 2025), online: *Hukumonline* <https://www.hukumonline.com/berita/a/begini-tantangan-implementasi-rechterlijke-pardon-kuhp-nasional-lt68122e0543caf>.

Tonry, Michael. *Sentencing Matters*. Oxford: Oxford University Press, 1996.

Tonry, Michael. "Fifty Years of American Sentencing Reform: Nine Lessons" (2019) 48 *Crime and Justice* 1.

Wirawan, I Kadek Apdila. "WKMA Yudisial: Pedoman Pemidanaan Bukan Borgol Melainkan Kompas Bagi Hakim [Deputy Chief Justice for Judicial Affairs: Sentencing Guidelines Are a Compass, Not Handcuffs, for Judges]" (4 September 2026), online: *Dandapala* <https://dandapala.com/article/detail/wkma-yudisial-pedoman-pemidanaan-bukan-borgol-melainkan-kompas-bagi-hakim>.

Yang, Crystal S. "Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker" (2014) 89:4 *New York University Law Review* 1268.