



## Wrongful Convictions Without Punishment Trought Judicial Pardon Perspective *Fiqh Islamic Criminal Law*

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### ABSTRACT

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*This research aims to explore the concept of judicial forgiveness in criminal law reform and assess justice in criminal judgments from an Islamic law perspective. The research method used is normative legal research focusing on wrongful conviction without punishment in Islamic law and the new Criminal Code (KUHP). The data was collected through a desk study, in which the researcher analyzed various sources such as books, legal regulations, and academic journals. This research contributes significantly by highlighting the importance of judicial forgiveness in criminal law reform, particularly in achieving holistic justice for victims and perpetrators. By emphasizing human values and Islamic principles, this research presents a comprehensive view of how judicial forgiveness can be an alternative to the compensation system. The research findings emphasize that judicial forgiveness is a crucial step in improving the efficiency of the corrections system, reducing prison overcrowding, and restoring the social balance disrupted by crime. The research proposes that a judicial forgiveness approach can reduce reliance on imprisonment as the sole form of punishment, which is often ineffective and unfair, especially in minor crimes.*

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### 1. Introduce

Over-reliance on imprisonment as the primary punishment is outdated and not by the more progressive and recovery-oriented objectives of punishment. The retributive or retaliatory (lex talionis) view of all types of criminal offenses must be abandoned; apart from

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being no longer by the development of the objectives of punishment, it also creates new problems, one of which is overcrowding in correctional institutions (LAPAS).<sup>1</sup>

The punishment verdict through imprisonment in correctional facilities for all criminal offenders aims to improve the quality of the convict, realize his mistakes, not repeat his actions, and become a good and responsible citizen.<sup>2</sup> But this does not work effectively. There are still many criminal offenders who become recidivists, and the consequences caused to their victims are even more severe than their previous actions. In addition to these problems, overcrowding also occurs in prisons because all criminal offenders who are found guilty are sentenced to imprisonment even though the case is classified as a minor crime.<sup>3</sup>

Imprisonment, or what is now called correctional, is not the only solution that can be used to realize the purpose of punishment because it does not work effectively and can even hurt the sense of justice for the community, especially in cases of minor crimes which should be resolved without having to go through a prison sentence against the perpetrator. A sentence of 1 month and 15 days in prison with a probation period of 3 months was handed down to Minah for stealing three cocoa beans.<sup>4</sup>

The decision of imprisonment by judges for all types of crimes without considering the history and circumstances of the perpetrator, the consequences or losses incurred, and the forgiveness of the victim is a procedural legal approach that does not pay attention to the value of justice that lives in society, even though judges are not only law enforcers but also

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<sup>1</sup> Satria Nenda Eka Saputra and Muridah Isnawati, "Overcrowding Lembaga Pemasyarakatan (Lapas) Dalam System Pemidanaan Di Indonesia," *Pagaruyuang Law Journal* 6, no. 1 (2022): 52–70.

<sup>2</sup> Diah Ratna Sari Hariyanto and I Dewa Gede Dana Sugama, "Efektivitas Pemenuhan Ditengah Ide Pemidanaan Dengan Pendekatan Keadilan Restoratif," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 10, no. 2 (2021): 404, <https://doi.org/10.24843/jmhu.2021.v10.i02.p15>.

<sup>3</sup> M Aidil, "Penerapan Restorative Justice Terhadap Anak Sebagai Pelaku Tindak Pidana Asusila Dalam Perspektif Undang–Undang Nomor 17 Tahun 2016 Tentang Perubahan Kedua Atas Undang–Undang Nomor 23 Tahun 2002 Tentang Perlindungan Anak (Analisa Putusan No. 49/Pid. Sus. ," *Rechtsregel Jurnal Ilmu Hukum* 3, no. 1 (2020).

<sup>4</sup> Elma Fitria, "Formulasi Asas Permaafan Hakim Dalam Tindak Pidana Ringan Dalam," *Ensiklopedia Education Review* 5, no. 1 (2023): 91–100.

justice enforcers. Against these conditions, it is necessary to reform the law regarding the importance of sentencing guidelines for judges in deciding a criminal case.<sup>5</sup>

A guilty verdict without punishment through judicial pardon is one of the reforms in Indonesian criminal law (KUHP 2023). The decision to forgive the defendant was motivated by various cases of minor crimes that occurred but were still sentenced to punishment.<sup>6</sup>

Judicial pardon is regulated in Article 53 and Article 54 of the Criminal Code 2023, where the judge must ensure justice and law enforcement before making a decision on punishment. A judge's pardon, better known as a judicial pardon, is a decision given by a judge in the criminal justice system that grants pardon to a defendant who is proven to have committed a criminal offense.

In this context, judges have the authority to reduce or remove the sentence that would otherwise be given to the defendant based on specific considerations that may include factors such as genuine remorse, rehabilitation, or the defendant's personal circumstances. Judge forgiveness provides additional flexibility in sentencing, allowing judges to consider broader justice and social recovery and reintegration goals.<sup>7</sup>

Many other countries have also adopted the concept of authorized judges to grant pardons for minor offenses to prevent disproportionate detention and consider the needs, including the protection of society and the rehabilitation of the perpetrator. In the current Indonesian Criminal Code, no provision regulates the concept of Judicial pardon.<sup>8</sup>

Forgiveness in criminal law can be divided into two types: forgiveness by the judge (judicial pardon) and forgiveness by the victim or the victim's family. This pardon can only be given if the defendant is found guilty by Article 183 of the Criminal Procedure Code, but the judge considers that the act does not need to be punished. Forgiveness from the victim or the victim's family guides the judge in deciding the perpetrator of the criminal offense.

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<sup>5</sup> Failin Alin, "Sistem Pidana Dan Pemidanaan Di Dalam Pembaharuan Hukum Pidana Indonesia," *JCH (Jurnal Cendekia Hukum)* 3, no. 1 (2017): 14–31.

<sup>6</sup> Elma Fitria, "Formulasi Asas Permaafan Hakim Dalam Tindak Pidana Ringan Dalam Perspektif Keadilan," *Ensiklopedia Education Review* 5, no. 1 (2023): 91–100.

<sup>7</sup> Sugeng Jatmiko, "Rechterlijke Pardon (Pemaafan Hakim) Dalam Tindak Pidana Perpajakan," *HERMENEUTIKA: Jurnal Ilmu Hukum* 6, no. 1 (2022), <https://doi.org/10.33603/hermeneutika.v6i1.6774>.

<sup>8</sup> Fadjar Sukma and Chitto Cumbhadrika, "Urgensi Penerapan Rechterlijk Pardon Sebagai Pembaharuan Hukum Pidana Dalam Perspektif Keadilan Restoratif," *Gorontalo Law Review* 6, no. 1 (2023): 46–61.

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Therefore, the judge can consider whether the perpetrator's actions can be forgiven by the victim and/or the victim's family in determining the sentence.

Islamic law stipulates that clemency (pardon or forgiveness) is in the hands of the victim's family, not the government or the state. If the perpetrator apologizes to the victim's family, there is still hope for forgiveness. Therefore, Islamic law distinguishes between criminal acts committed intentionally, unintentionally, under duress, or even under duress, which can result in the punishment of wishes. Before the judge's decision is executed, the victim or the victim's family has the right to revoke or cancel the decision if they have forgiven the perpetrator's actions. Usually, the perpetrator is punished with a fine or cancellation of the sentence, which is considered penance for the victim.<sup>9</sup>

There is a difference between the Criminal Code and Islamic Criminal Law on forgiveness as an excuse to drop criminal charges. In the Criminal Code, forgiveness by the judge is regulated in the law. It is considered by the panel of judges, apart from forgiveness by the victim or his family. Meanwhile, in Islamic Criminal Law, only the victim or the victim's family has the right to grant forgiveness to the perpetrator about *jarimah*.<sup>10</sup>

This research aims to fill the gap in previous studies on judicial pardons. However, several previous studies have examined judicial pardons, and several previous scientific articles have discussed judicial pardons. However, none have specifically examined the Consideration of Welfare and Justice Dissecting the Application of Judicial Pardon in Islamic Criminal Law. For example, in M Farikhah's article related to research on 'The Concept of Judicial Pardon in Indigenous Peoples in Indonesia' in 2018 where the results of the research are the concept of forgiveness originating from the victim and the existence of sanctions to restore the damaged balance. Furthermore, research conducted by Arizal Anwar, who conducted research and development in *Humani (Law and Civil Society)* (2023) with an article entitled 'Judge Forgiveness (*Rechterlijk pardon*) in Criminal Law and Sentencing in the Perspective of Pancasila' which examines the application of the concept of

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<sup>9</sup> Muhammad Muslih Hisyam, "Tinjauan Asas Pemaafan Dalam Perspektif Hukum Islam Dan Hukum Indonesia Pada Perkara Tindak Pidana Pembunuhan," 2022.

<sup>10</sup> Vincent Patria Setyawan and Itok Dwi Kurniawan, "Permaafan Hakim Dalam Pembaruan Hukum Pidana Indonesia," *Jurnal Dunia Ilmu Hukum (JURDIKUM)* 1, no. 1 (2023): 20–24, <https://doi.org/10.59435/jurdikum.v1i1.97>.

judge forgiveness (Rechterlijk Pardon) if harmonized with the contents of the Draft Criminal Procedure Code (RKUHAP) based on the perspective of Pancasila. Research by Muh. Iksan Putra Kai, Dian Ekawaty Ismail, and Suwitno Yutye Imran in the World Journal of Legal and Political Sciences (2024) entitled 'The Principle of Judge Forgiveness in Criminal Law Reform in Indonesia' this discussion is related to the concept where judges can impose wrongful decisions without punishment in Rechterlijk Pardon. Research conducted by Indi Muhtar Ismail et al, in Humani (Law and Civil Society) (2023) entitled 'Legal Certainty in the Implementation of the Principle of Rechterlijk Pardon in Criminal Case Decisions' discusses Legal Certainty in the Implementation of the Principle of Rechterlijk Pardon in Criminal Case Decisions. However, one crucial aspect has not been explored by previous researchers, namely, Considering Welfare and Justice, Dissecting the Application of Judicial Pardon in Islamic criminal law.

## 2. Legal material and Methods

This research adopts the normative juridical research method, based on the positivist legal theory, which states that law is equal to written rules formulated and determined by authorized institutions or officials. This approach is used to explain the state of the object to be studied from the perspective of the discipline of Islamic criminal law. This research will discuss the newly emerging criminal law related to Wrongful Conviction through Judicial Pardon and how this impacts justice for victims from an Islamic perspective. Data was collected through desk research techniques, where researchers examined various literature sources such as books, laws and regulations, and academic journals.

The research began by identifying issues related to judicial pardons in the context of criminal law and Islamic law, particularly regarding how these pardons can affect justice for victims. Data was collected through a literature study, including books, academic journals, and relevant laws and regulations. This data collection process aims to understand the concept of judicial pardon comprehensively. The collected data is analyzed using a normative juridical approach. This analysis examines and discusses the vertical consistency between the pillars of law enforcement and regulations governing judicial pardons in criminal law reform efforts.

This research uses credible and reliable sources, such as academic books, peer-reviewed journals, and official laws and regulations, to ensure the validity and reliability of the data.

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In addition, a systematic and theory-based method of analysis is also used to ensure that the conclusions drawn are objective and justifiable.

### 3. Result and Discussion

#### 3.1 Judicial Pardon in Relation to the Reform of Criminal Law

Judicial pardon, or the *Rechtelijk Pardon* principle, is closely related to retributive and restorative theories in the Indonesian punishment system. The retributive theory emphasizes that punishment must be commensurate with the offense committed, aiming to give the perpetrator an appropriate reply. Judicial pardon avoids the rigidity and absolutism in sentencing, often arising from the pure application of retributive theory. By giving judges the flexibility to consider the context and individual circumstances of the offender, judicial pardon ensures that justice does not focus solely on retribution but also considers broader aspects of humanity and justice.<sup>11</sup>

In contrast, the restorative theory focuses on restoring the harm caused by criminal offenses through an inclusive process that involves all relevant parties, namely the victim, offender, and community. Judicial pardon integrates restorative principles by emphasizing punishment's humanitarian and educational aspects. It seeks to balance the need for justice for the victim and the potential for rehabilitation for the offender, which is central to restorative theory. Judicial pardon allows for a more in-depth consideration of the offender's circumstances and the impact of the criminal offence so that the sentencing process is not only punitive but also leads to healing and learning.<sup>12</sup>

In the Indonesian legal system context, the concept of judicial pardon was adopted to bridge the gap between retributive and restorative theories. By providing flexibility in sentencing, judges can avoid imposing disproportionate punishment and be more responsive to individual needs in each case. This concept is also in line with the values of Pancasila, which upholds wisdom and justice and integrates restorative aspects into the legal framework. Applying the *Rechtelijk Pardon* principle is expected to create a fairer and more

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<sup>11</sup> Ridwan Suryawan, "Asas *Rechtelijk Pardon* (Judicial Pardon) Dalam Perkembangan Sistem Peradilan Pidana Indonesia," *Indonesian Journal of Criminal Law and Criminology (IJCLC)* 2, no. 3 (2021): 170–77, <https://doi.org/10.18196/ijclc.v2i3.12467>.

<sup>12</sup> Muhammad Fatahillah Akbar, "Pembaharuan Keadilan Restoratif Dalam Sistem Peradilan Pidana Indonesia," *Masalah-Masalah Hukum* 51, no. 2 (2022): 199–208, <https://doi.org/10.14710/mmh.51.2.2022.199-208>.

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effective punishment system, which reflects a balance between appropriate retribution and meaningful restoration.

In the Criminal Code (KUHP), there is an innovation relating to forgiveness or pardon granted by a judge, which is known in foreign languages as non-imposing of a penalty, *rechterlijk pardon*, judicial pardon, or *dispense de Pena*. This is done to prevent the rigidity that may arise from general (*lex generalis*) and special (*lex specialis*) criminal law arrangements. The regulation of this matter was triggered by the need to correct the principle of legality judicially.

In normative juridical terms, the author aims to examine, discuss, and analyze the vertical consistency between the pillars of law enforcement and the regulations governing judicial pardons to reform criminal law through a new legal code. The aim is to find solutions to several problems and come to a rational conclusion.<sup>13</sup>

The principle of judge's forgiveness, which reflects human values as contained in Pancasila, is an essential foundation in criminal law reform. This approach can change the KUHP from rigid to more flexible and integrated. This material criminal law reform aims to improve the criminal implementation system by presenting the principle of judge's forgiveness as a solution to the problem of overcapacity in correctional institutions, which has been a severe problem in Indonesia.

Several studies support the application of judge forgiveness as a tool to achieve restorative justice—for example, research by Muh. Iksan Putra Kai et al. (2024) showed that judge forgiveness can reduce recidivism rates and increase victim satisfaction with the judicial process. A similar concept is known in the Dutch legal system as 'Rechtelijk Pardon,' where judges can decide not to punish if the negative impacts outweigh the benefits and consider the circumstances surrounding the offense.

Despite this support, some critics have raised concerns regarding judicial pardons, including:

1. Risk of Abuse of Authority: There are concerns that judicial pardons can be abused, thereby reducing the deterrent effect of criminal punishment and potentially creating injustice for victims who feel that the offender did not receive the appropriate punishment.

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<sup>13</sup> Dewi Rohayati, "Pengaturan Yudisial Pardon Dalam Pembaharuan Hukum Pidana Indonesia," *Wacana Pramarta* 15, no. 2 (2016): 2, <http://www.paramarta.web.id/index.php/paramarta/article/view/26%0Ahttp://www.paramarta.web.id/index.php/paramarta/article/download/26/6>.

2. Lack of Consistency in Application: Critics such as Adery Ardhan Saputro point out that the existing criminal justice system often does not involve the parties to the conflict directly, but rather only the state and the offender, which can lead to dissatisfaction on the part of victims who feel their rights are being ignored.
3. The Need for Victim Consent: Some research suggests that judge forgiveness should involve the victim's consent or apology first. This is in line with restorative justice principles that emphasize restoring the interests of the victim, offender, and community affected by a crime.
4. Potential Use of Legal Remedies: If the victim does not agree to the judge's pardon, there is a proposal to regulate legal remedies such as cassation to review the application of the pardon, ensuring that justice is maintained and the judge's decision does not disadvantage the victim.

In the Netherlands, the regulation on rechterlijk pardon is contained in Article 9a of the Dutch Criminal Code of 1984. This provision allows judges to consider the offense's severity, the perpetrator's condition, or the circumstances when or after the criminal offense occurred to grant a pardon. In practice, judges in the Netherlands can issue four types of decisions: acquittal (*vrijspraak*), acquittal from all charges (*ontslag van alle rechtvervolging*), conviction (*veroordeling*), and pardon (*rechterlijk pardon*). This arrangement covers both material and formal criminal law, making the application of *rechterlijk pardon* in the Netherlands more comprehensive and integrated.

In Greece, a similar concept is applied where the judge can grant forgiveness. However, the circumstances constituting the conditions for forgiveness do not oblige the judge to grant forgiveness. This is reflected in the use of the word 'may' which indicates flexibility in the granting of forgiveness.<sup>14</sup>

Based on the preceding, we know that a judge's pardon offers flexibility in sentencing, which is crucial to achieving proportionate justice. By allowing judges to consider individual circumstances and specific factors in each case, magistrate's pardons

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<sup>14</sup> Adery Ardhan Saputro, "Konsepsi Rechterlijk Pardon Atau Pemaafan Hakim Dalam Rancangan Kuhp," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 28, no. 1 (2016): 61, <https://doi.org/10.22146/jmh.15867>.

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help avoid disproportionate sentences, especially for minor offenses. This flexibility allows for a more humane approach in the criminal justice system, where genuine remorse and the offender's circumstances can be recognized and appreciated. In addition, the application of judicial forgiveness has a significant impact on reducing prison overcrowding. By avoiding incarceration for minor offenses, magistrate's pardons help manage prison populations more effectively, reduce the financial and operational burden on the detention system, and promote offender rehabilitation.

Judge forgiveness is also in line with the principles of restorative justice, which aims to restore harm and reintegrate the offender into society. This approach emphasizes the importance of offender rehabilitation and victim satisfaction, recognizing human values in sentencing decisions. However, judicial forgiveness is not always consistent across different jurisdictions, and there are concerns about potential abuse of power by judges. Some studies are concerned that forgiveness without involving victims may reduce the deterrent effect of criminal sentences and create injustice for victims. To address these challenges, some researchers suggest that judge forgiveness should involve the victim's prior consent or apology and provide a legal remedy mechanism for victims who disagree with the forgiveness to maintain justice. The judge's decision does not disadvantage the aggrieved party.

For example, in Indonesia, the Baiq Nuril case is proof that judge forgiveness is applied and can be a solution to applying judge forgiveness to Cases that occur. Prisons in Indonesia have A very high overcapacity of 196%. This means there are 265,840 prisoners in prison, far exceeding the ideal capacity of 135,561 people.

The case of unlawful killing of FPI soldiers is one example of the concept of the application of judge forgiveness because it refers to the pleidoi or memorandum of defense of the Attorney. so that the presiding judge status that the defendant cannot be sentencedn to punishment because of the existence of justification and excuse.

The principle of judicial pardon, currently formulated in the Criminal Code, is regulated in Article 51 and Article 54. The concept of judicial pardon has long existed and has spread throughout Indonesia. Its implementation varies in the community, and it is essential to note that forgiveness in the context of indigenous peoples does not necessarily mean the abolition of punishment. Although there is sanctioning, the aim is not only to fulfill

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the needs of the perpetrator and victim but also to restore the social balance disrupted by the crime.<sup>15</sup>

Judges should not arbitrarily establish the concept of Judicial Pardon as an alternative to their decisions. Other criminal law regulations must be regulated vertically and horizontally to achieve this. Legal certainty, justice, and expediency should be balanced or compromised, even if they are counterproductive.

In other words, although justice is law enforcement's primary goal, it is essential to maintain a balance between legal certainty and benefits. The aim is that the implementation of Judge's Pardon (Rechterlijk Pardon) does not deviate from the purpose of punishment, which is to tackle crime while allowing the perpetrator to be resocialized.<sup>16</sup>

The existence of substantive questions about the legal reality in Indonesia highlights the gap between what people expect or demand in the substance of Indonesian law (*das sollen*) and the objective facts in the reality of Indonesian law itself (*das sein*). Therefore, what is essential is not only the public's understanding of justice in criminal sentencing but also the understanding they should have of justice in criminal sentencing.

Regarding the disparity of judges' decisions in criminal justice, which is considered to hamper the achievement of the objectives of punishment, Harkristuti Harkrisnowo argues that the disparity is a common thing, considering that the law gives judges comprehensive authority in decision-making. However, in the context of applying the concept of judicial pardon, judges need to make decisions with an orientation that aims to realize the concept, as well as harmonize it with the objectives of punishment. Thus, the criminal disparity can be minimized.<sup>17</sup>

Article 54 of the first paragraph of Law No. 1 of 2023 on the Criminal Code regulates the matters that judges must consider when they make their decisions, including:

"(a) The form of guilt of the perpetrator of the crime; (b) The motive and purpose of committing the crime; (c) The inner attitude of the perpetrator of the crime; (d) The crime

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<sup>15</sup> Arizal Anwar, "Pemaafan Hakim (Rechterlijk Pardon) Dalam Hukum Pidana Dan Pemidanaan Dalam Perspektif Pancasila," 2017, 35.

<sup>16</sup> Arif Setiawan, "Konsep Permaafan Hakim (Rechterlijk Pardon) Dalam Pembaharuan RUU KUHP Dan RUU KUHAP," 2021.

<sup>17</sup> Mahraen, "Judicial Pardon Dalam Perkembangan Hukum Pidana Indonesia ( Studi KUHP 2023)," *Jurnal Ilmiah* 6 (2023): 142–51.

was committed premeditatedly or unpremeditatedly; (e) The manner of committing the crime; (f) The attitude and actions of the perpetrator after committing the crime; (g) The life history, social circumstances, and economic circumstances of the perpetrator of the crime; (h) The effect of the crime on the future of the perpetrator of the crime; (i) The effect of the crime on the victim or the victim's family; and forgiveness from the victim and/or the victim's family; and/or (j) The values of law and justice that live in the community."

When a judge faces a dilemma in reaching a decision, they can resort to *Rechterlijk Pardon* or the judge's apology. When a judge faces relatively small cases that he or she must examine, try, and decide, his or her conscience is often shocked. This results in an internal conflict between the desire to consider humanitarian factors and formalistic compliance with criminal law. In dealing with cases of minor criminal offenses, judges are often in an inner battle; determining an acquittal would contradict the principle of legal certainty and legality, asserting that the article of charge must punish every individual found guilty of a criminal offense.

A judge's pardon can be the leading solution to resolve the conflict between the obligation to implement the provisions of the criminal law and humanitarian considerations in enforcing decisions. Article 54 paragraph (1) of Law Number 1 Year 2023 on the Criminal Code refers to the considerations judges consider when granting *rechterlijk pardon*.<sup>18</sup>

As part of the criminal law reform undertaken by the new Criminal Code, the concept of judge's pardon, also known as *rechterlijk pardon*, was added to the judicial power. Its regulation and implementation must be aligned to see its benefits as part of a balanced legal system. This requires a deep conceptual understanding of criminal law reform as an *ius constituent* throughout the legal development..

In addition, it is also necessary to understand the differences between judge forgiveness and the amnesty policy currently provided for in the Criminal Code. This will assist in formulating the potential implementation of judge forgiveness more effectively. Thus, the regulation of judge forgiveness in criminal law reform reflects an effort to rejuvenate criminal law, not a step backward.<sup>19</sup>

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<sup>18</sup> Vincent Patria Setyawan and Itok Dwi Kurniawan, "Permaafan Hakim Dalam Pembaruan Hukum Pidana Indonesia."

<sup>19</sup> Abdurrahman Alhakim, "The Ideas of *Rechterlijk Pardon* As a Restorative Justice," *Ganesha Law Review* 5, no. 1 (2023): 1–12.

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One of Law of the Republic of Indonesia Number 1 of 2023 articles on the Criminal Code directly regulates the principle of legal excuse or judge's excuse. As part of the sentencing guidelines, paragraph 2 of Article 54 outlines this principle as follows:

*"The severity of the act, the personal circumstances of the perpetrator, or the circumstances at the time of the act or that occurred later can be a basis for consideration not to impose punishment or impose measures by taking into account aspects of justice and humanity."*<sup>20</sup>

In the criminal justice system, judges have the authority not to punish defendants proven to have committed a criminal offense through the Rechterlijk Pardon mechanism. However, before granting Rechterlijk Pardon, judges need to consider several criteria, namely carefully:

1. Consideration of the seriousness of the offense;
2. Consideration of the severity of the personal circumstances of the perpetrator and/or;
3. Consideration of the severity of the circumstances at the time the act was committed or circumstances that occurred later; and
4. With due regard to aspects of justice and humanity.<sup>21</sup>

The objectives of punishment through the perspective of utilitarianism, namely judge forgiveness, are as follows:

1. They prevent criminal acts by applying the law to deter people and protect society (social protection).
2. We are fostering convicts to build good character and value for the community and preparing them to live back in the community (rehabilitation and resocialization of convicts).
3. Repairing tensions caused by criminal offenses, restoring harmony, and creating peace in society (restitution of social balance).
4. Helping convicts to release guilt.<sup>22</sup>

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<sup>20</sup> KUHP, "Undang Undang Nomor 1 Tahun 2023 Tentang Kitab Undang Undang Hukum Pidana," no. UU (2023): Pasal 54 Ayat 2.

<sup>21</sup> Saputro, "Konsepsi Rechterlijk Pardon Atau Pemaafan Hakim Dalam Rancangan Kuhp."

<sup>22</sup> Mufatikhatul Farikhah, "The Judicial Pardon Arrangement as a Method of Court Decision in the Reform of Indonesian Criminal Law Procedure," *Padjadjaran Jurnal Ilmu Hukum* 8, no. 1 (2021): 1–25, <https://doi.org/10.22304/pjih.v8n1.a1>.

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Forgiveness in the form of a legal decision, as in any other case, is not exempt from consideration of the personal condition of the perpetrator, the gravity of the offense committed, and the consequences caused. However, not only that, but the relationship between the perpetrator and the victim is also an important consideration.

There are at least two reasons that can explain why the victims' interests are taken into consideration in forgiveness decisions. Firstly, formally, the victim is a party involved in the criminal justice process. However, the public prosecutor often represents their role because criminal law is public law. In addition, victims can also act as witnesses (victim-witnesses), and their testimony is highly considered in the judicial process. Secondly, in reality, the victim is the party who suffers from a crime, so logically, the suffering experienced by the victim will be a consideration for the judge in determining the attitude towards the perpetrator of the crime.

Until recently, the concept of forgiveness was very foreign, where a person is recognized as guilty but not sentenced to criminal punishment. However, according to the criminal concept, punishment is usually given to the person who is found guilty, except in cases of mental illness.<sup>23</sup>

In the context of the regulation on dispensation from punishment, the aim is not only to avoid short prison sentences, but also to avoid unnecessary prosecution from the viewpoint of public protection and rehabilitation of offenders. However, implementation is not as straightforward as one might hope, especially when it comes to the principles of justice and the merits of the law for the purposes of punishment and law enforcement. The concept of justice referred to here is relative, as legal justice can be subjective or individualistic, or include social justice for individuals seeking justice (*justiabelen*). Different people have different perspectives on justice; for example, what one person considers fair may not be considered fair by another.

Whether the justice served is vindictive or protective, or whether it is a combination of both, the question arises. This relates to the discretion of judges when granting pardons. In general, the purpose of law enforcement is to prevent and address criminal acts (both preventive and repressive) which may result in punishment or provide benefits from

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<sup>23</sup> Yustisia Jurnal Hukum et al., "Judicial Pardon: Renewal of Criminal Law Towards Minor Criminal Offense," *UNIVERSITAS SEBELAS MARET Yustisia Jurnal Hukum* 10, no. 3 (2021): 415–30, <http://jurnal.uns.ac.id>.

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punishment itself. Jeremy Bentham explained this advantage by describing the good as happiness and trying to avoid suffering or evil.<sup>24</sup>

There is no reason to grant or pardon the perpetrator's actions, even if the perpetrator is a child of a certain age or an elderly person who consciously acts in accordance with applicable norms or laws. Therefore, the granting of pardons as an alternative to judicial decisions is not done lightly but requires coordination between various criminal regulations, both vertically and horizontally.

There should be an appropriate balance or compromise between legal certainty, fairness, and benefit, although, in reality, the three are often in conflict. This means that in the process of granting pardons, although justice is the overriding principle, legal certainty, fairness, and benefit must be balanced in law enforcement. Thus, the application of pardons by judges will not deviate from the purpose of punishment, which is to address crime while providing opportunities for offenders to be rehabilitated in society.<sup>25</sup>

### **3.2 The Concept of Justice for Victims of Crime from the Perspective of Islamic Criminal Law**

The theory of *awful* in Islamic criminal law refers to the concept of forgiveness given by the victim or the victim's family to the perpetrator of a criminal offense. In this context, forgiveness is considered one of the ways of resolving criminal cases that can reduce or remove the punishment that should have been imposed, especially if the offender shows sincere remorse and the victim or his family is willing to forgive. This forgiveness is regulated in various Qur'anic verses that emphasize the importance of forgiveness and kindness.

Judicial pardon in the modern legal system has similarities to the theory of *Afwu* in Islamic criminal law, as both allow for leniency in sentencing based on humanist and moral considerations. In judicial pardon, judges can consider forgiveness from the victim or their

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<sup>24</sup> Mufatikhatul Farikhah, "Konsep Judicial Pardon (Pemaafan Hakim) Dalam Masyarakat Adat Di Indonesia," *Jurnal Media Hukum* 25, no. 1 (2018): 81–92, <https://doi.org/10.18196/jmh.2018.0104.81-92>.

<sup>25</sup> 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): 551.

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family as a mitigating factor, which is similar to how awful theory provides forgiveness as a form of settlement in Islamic criminal law.<sup>26</sup>

Islam upholds one of its principles. Allah's own attribute of justice, al-'Adlu, should be exemplified by His servants. Justice is a very important principle and is highly regarded in Islam. "Fair" means four things: balance, equality, non-discrimination, giving rights to the rightful, and judgment based on level and merit. According to the concept of divine justice, every entity receives the form and level of perfection that corresponds to its rights and potential.<sup>27</sup>

Fiqh jinayah views the victim as al-majniy 'alaih, meaning the party who suffers. This suffering relates to a person's rights. These include the rights to life, property, security, honor, and posterity. In the tradition of Islamic criminal law, the concept of protecting victims of criminal acts is not specifically discussed. The principles that encourage humans to do good to their fellow man are usually used when talking about victim protection.

Victims in the criminal justice process are often placed in a less important position than the perpetrators. In the positive criminal law framework, the focus is more on the offender, such as rehabilitation efforts, treatment of offenders, social reintegration, imprisonment, and various other aspects.

All efforts to ensure legal justice for victims of criminal acts must be given high priority and fought to be enforced. In Fiqh jinayah, sanctions or punishments in jinayah, also known as criminal law, are considered as one of the efforts to achieve the Shari'ah (maqāsid al-syarī'ah), namely to create a deterrent effect for perpetrators and other people who want to commit criminal acts.<sup>28</sup>

In Islam, justice is not only taught but also implemented in practice, even against those who do not like it. Justice must be maintained without discrimination, both against perpetrators and victims. In many analyses by orientalist, who are often not neutral and

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<sup>26</sup> Hisyam, "Tinjauan Asas Pemaafan Dalam Perspektif Hukum Islam Dan Hukum Indonesia Pada Perkara Tindak Pidana Pembunuhan."

<sup>27</sup> Fauzi Al-mubarak, "Keadilan Dalam Perspektif Islam," *ISTIGHNA: Jurnal Pendidikan Dan Pemikiran Islam* 1, no. 2 (2018): 115–43.

<sup>28</sup> Vivi Ariyanti, "Konsep Perlindungan Korban Dalam Sistem Peradilan Pidana Nasional Dan Sistem Hukum Pidana Islam," *Al-Manahij: Jurnal Kajian Hukum Islam* 13, no. 1 (2019): 33–48.

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create propaganda without objectivity, there is often a false picture of Islam as a religion that is cruel and opposed to justice.<sup>29</sup>

Justice is a term commonly heard among us. Any action that emphasizes equality of rights and obligations is considered a manifestation of “justice”. There are two formulations of justice, First, the perspective that considers justice as the harmony between the exercise of rights and the performance of obligations in accordance with the principle of “legal balance”, which means “the measure of rights and obligations”. Second is the perspective of jurists, who basically define justice as a balance between legal certainty and legal proportionality.<sup>30</sup>

In the context of common misconceptions regarding the power of the judge in dealing with ta'zir offenses, Abdul Qadir 'Audah, as cited by Kamali, points out that Sharia sets limits on the power of a judge. Therefore, judges are not fully authorized to determine and even decide to grant pardons or forgiveness to criminal suspects.<sup>31</sup>

Ultimately, justice refers to judges' efforts to find the truth and make legal decisions in cases where there are no clear formal rules. This is a type of procedural justice, which is the outer part of the law where substantive justice is applied. Substantive justice will only be a theoretical idea that does not affect real society in the absence of procedural justice. However, values such as expediency and legal certainty are also considered necessary in law enforcement in addition to justice.<sup>32</sup>

Anugerah Rizki Akbari revealed that the concept of pardon is known in criminal law as "rechterlijke pardon" or "judicial pardon." Both concepts mean that judges have the authority to grant pardons to defendants. This means that by considering certain factors, the judge can pardon the defendant even though he or she has been found guilty without

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<sup>29</sup> Hafizh Syadi Ismalla, “Perlindungan Terhadap Korban Dalam Situasi Pembunuhan Dan Penganiayaan Menurut Hukum Islam Serta Kaitannya Dengan Keadilan Restoratif,” *SAMLON: Samudra Law Journal* 1, no. 1 (2024): 12–26.

<sup>30</sup> A Ridwan Halim, *Pengantar Ilmu Hukum Dalam Tanya Jawab* (Ghalia Indonesia, 1985).

<sup>31</sup> Moh Khasan, “Prinsip-Prinsip Keadilan Hukum Dalam Asas Legalitas Hukum Pidana Islam,” *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 6, no. 1 (2017): 21–36.

<sup>32</sup> Sutrisno Sutrisno, Fenty Puluhulawa, and Lusiana Margareth Tijow, “Penerapan Asas Keadilan, Kepastian Hukum Dan Kemanfaatan Dalam Putusan Hakim Tindak Pidana Korupsi,” *Gorontalo Law Review* 3, no. 2 (2020): 168–87.

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imposing a sentence. The concept of pardon is often used in the resolution of criminal cases, but only in some cases. The victim or the victim's family can request forgiveness from the perpetrator of certain criminal offenses.

In addition, the principle of fines as an alternative to imprisonment in the reform of the Criminal Code can be incorporated into the concept of judicial pardon in Indonesia along with Fiqhi jinayah. It is also important to set clear conditions for a person to be eligible for a judicial pardon, such as the victim or his family being forgiven, payment of diyat or fine, and compensation of losses. By changing the formulation of judicial pardon, the philosophical aim is to create a system that seeks to properly protect the interests of the entire community so that the goal of holistic punishment can be achieved.<sup>33</sup>

The principle of forgiveness is regulated in Article 54, paragraph (2) of the New Criminal Code, which regulates the consideration of aspects of justice and humanity. In Islamic criminal law, there is a principle that can be chosen to resolve a problem; the principle is known as the principle of forgiveness. In the perspective of Fiqhi jinayah, this principle of forgiveness is known as Islamic criminal law (jinayah), especially in the context of jarimah qisas-diyat.<sup>34</sup>

Article 54 paragraph (1) of the New Criminal Code explains the judge's consideration in granting *Rechterlijk* pardon, meaning that in positive law, the authority to grant pardon lies with the judge. Meanwhile, in Fiqhi Jinayah, forgiveness or parole can be requested from the family, not by the judge. Therefore, when looking at the aspects of justice for victims of criminal acts from the perspective of Fiqhi jinayah, judicial pardon is not in accordance with the aspects of justice in Fiqhi jinayah. This is because the authority to grant forgiveness and pardon is given to the victim, not the judge.<sup>35</sup>

Based on the author's research, there are several steps that can be taken to develop the concept of judicial pardon in accordance with the context of Fiqhi jinayah. One of them is integrating Islamic concepts in the formulation, which must include a clear explanation of the types of criminal offenses that can be forgiven by judges to maintain legal stability. As

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<sup>33</sup> Farikhah, "Konsep Judicial Pardon (Pemaafan Hakim) Dalam Masyarakat Adat Di Indonesia."

<sup>34</sup> Hisyam, "Tinjauan Asas Pemaafan Dalam Perspektif Hukum Islam Dan Hukum Indonesia Pada Perkara Tindak Pidana Pembunuhan."

<sup>35</sup> Abdullah Ahmad Mukhtarzain, "Permaafan Dalam Pemidanaan Menurut Hukum Islam Dan Hukum Nasional," n.d., 936–59.

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in Fiqhi jinayah, where only Qishas punishment can be forgiven, which means a punishment commensurate with the act committed, especially in the case of murder.

Previously, research was conducted by Muhammad Muslih Hisyam et al., titled Review of the Principle of Forgiveness in the Perspective of Islamic Law and Indonesian Law in the Crime of Murder. The research has similarities in the concept of forgiveness in the crime of murder, but it is only limited to one case. It is different from our side, which is not only on the crime of murder but also discusses forgiveness in other crimes such as theft. Where in the case of theft crime, the one who can give forgiveness is the judge who decides a case.

#### 4. Conclusion

Judicial pardons have been implemented in various countries, including Indonesia, with cases such as Baiq Nuril showing that pardons can reduce prison overcapacity and focus on rehabilitation. In the Netherlands, judicial pardons are also used to manage the prison population effectively. This research provides a theoretical contribution by proposing a new model that integrates judicial pardons in Islamic criminal law, as well as methodological and practical contributions to criminal law reform. However, this research has limitations, such as the potential for abuse and non-uniformity of application, which requires further research to address these challenges and involve victims in the pardon process. By strengthening the theoretical framework through a more in-depth discussion of relevant legal principles and theories, this research provides a solid foundation for the implementation of judicial pardons that are aligned with the goals of justice and social harmony.

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