

The Application of Judicial Pardon in Minor Criminal Offenses; An Analytical Study on the Relevance of Fiqh Jinayah within the Indonesian Criminal Justice System

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[Received: February 03, 2025] [Reviewed: May 2, 2025] [Revised: May 14, 2025] [Accepted: May 20, 2025]

[Published: May 31, 2025]

How to Cite:

Rahman, Abdul, Islamul Haq, Muliati Muliati, and Alfiansyah Anwar. 2025. "The Application of Judicial Pardon in Minor Criminal Offenses: An Analytical Study on the Relevance of Fiqh Jinayah Within the Indonesian Criminal Justice System". *Shautuna: Jurnal Ilmiah Mahasiswa Perbandingan Mazhab* 6 (2): 347-364. <https://doi.org/10.24252/shautuna.v6i2.55607>

Abstract

This research aims to examine the concept of forgiveness in minor crimes from the perspective of fiqh jinayah and analyze the gap between the principle of judicial forgiveness in Indonesian positive law and Islamic legal values. Judicial pardons in the Indonesian legal system are special powers given to judges to mitigate or exempt perpetrators from criminal sanctions, especially for minor crimes that do not have a significant impact on society. This concept is a form of judicial discretion in which judges can refrain from imposing sentences even if the defendant is proven guilty. This research uses a normative method with a conceptual and legislative approach, through an analysis of Law Number 1 of 2023 concerning the Criminal Code (KUHP) and jinyayah fiqh literature. The results of the study show that judicial pardon for minor crimes has similar principles to forgiveness in fiqh jinayah, such as consideration of the benefit of the community (maslahah), protection of victims' rights, and the application of proportionate punishment so as not to cause excessive deterrent effects. These findings indicate that judicial pardons can be integrated as an alternative mechanism for resolving minor criminal cases while upholding the principles of restorative justice and a balance between the rights of victims and the rehabilitation of perpetrators. The integration of the values of fiqh jinayah into the concept of judicial forgiveness has the potential to enrich Indonesia's positive legal practice in realizing a more humanistic and beneficial criminal justice system.

Keywords: Judicial Pardon; Misdemeanors; Fiqh Jinayah; Criminal Law; Criminal Justice.

Abstrak

Penelitian ini bertujuan untuk mengkaji konsep pemaafan dalam tindak pidana ringan dalam perspektif fiqh jinayah serta menganalisis kesenjangan antara prinsip pemaafan yudisial dalam hukum positif Indonesia dengan nilai-nilai hukum Islam. Pengampunan yudisial dalam sistem hukum Indonesia merupakan kewenangan khusus yang diberikan kepada hakim untuk meringankan atau membebaskan pelaku dari sanksi pidana, khususnya pada tindak pidana ringan yang tidak menimbulkan dampak signifikan bagi masyarakat. Konsep ini menjadi bentuk diskresi yudisial di mana hakim dapat menahan diri untuk tidak menjatuhkan hukuman meskipun terdakwa terbukti bersalah. Penelitian ini menggunakan metode normatif dengan

pendekatan konseptual dan perundang-undangan, melalui analisis Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana (KUHP) dan literatur fiqh jinayah. Hasil penelitian menunjukkan bahwa pemaafan yudisial untuk tindak pidana ringan memiliki kesamaan prinsip dengan pemaafan dalam fiqh jinayah, seperti pertimbangan kemaslahatan masyarakat (maslahah), perlindungan hak korban, dan penerapan hukuman yang proporsional agar tidak menimbulkan efek jera berlebihan. Temuan ini mengindikasikan bahwa pemaafan yudisial dapat diintegrasikan sebagai mekanisme alternatif penyelesaian perkara pidana ringan dengan tetap menjunjung prinsip keadilan restoratif dan keseimbangan antara hak korban dan rehabilitasi pelaku. Integrasi nilai-nilai fiqh jinayah ke dalam konsep pemaafan yudisial berpotensi memperkaya praktik hukum positif Indonesia dalam mewujudkan sistem peradilan pidana yang lebih humanis dan maslahat.

Kata Kunci: Pengampunan Yudisial; Pelanggaran Ringan; Fiqh Jinayah; Hukum pidana; Peradilan Pidana.

Introduction

The phenomenon of minor criminal acts in Indonesia is often in the spotlight of the justice system, especially positive law and prevailing social norms. Minor offenses, such as minor theft, minor assault, or administrative violations, generally involve perpetrators who do not have significant malicious intent. However, even though there is no malicious intent, these actions still have the potential to disrupt public order and security. Based on the statistical data from the National Criminal Information Center (Criminal Investigation Agency of the Indonesian National Police) recorded that 3535 cases of minor crimes occurred between January and June 2022. This data shows an average increase of 18% each month, indicating a fairly significant upward trend.¹ Although these actions are considered violations of the law, they do not always require severe punishments that often have a negative impact on the perpetrator's future. This is where the role of judicial pardon becomes important because it provides an alternative solution through reduced sentences for perpetrators of minor crimes.²

In the modern justice system, the concept of judicial pardon appears as a promising instrument in law enforcement, thus representing normative law in providing space for moral considerations, justice, and humanity in court decisions.³ However, judicial pardon still faces various challenges both in terms of normative and paradigmatic, thus hampering its

¹ Pusat Informasi Kriminal Nasional Bareskrim Polri, "Jurnal Data Pusiknas Bareskrim Polri Tahun 2022 Edisi 2023," pusiknas.polri.go.id, 2023, https://pusiknas.polri.go.id/jurnal_detail/jurnal_data_pusiknas_bareskrim_polri_tahun_2022_edisi_2023.

² Robi Assadul Bahri, "Penafsiran Asas Judicial Pardon Dalam Kitab Undang-Undang Hukum Pidana Baru," *Journal of Interdisciplinary Legal Perspectives* 1, no. 1 (2024): 16–32, <https://doi.org/10.70837/m6wxns71>.

³ Fajar 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, <https://doi.org/10.32662/golrev.v6i1.2678>.

effectiveness in realizing true justice.⁴ On the other hand, this also limits the role of judges as social engineers who should be able to respond to social complexity in every case.⁵ This situation creates a legal vacuum in protecting the accused; in short, this problem can be overcome through a restorative justice approach.

Fiqh jinayah, an Islamic law that discusses criminal law, has a different concept in understanding the judge's pardon for perpetrators of minor crimes.⁶ In this system, the term '*afw*' is known, which means to provide forgiveness directly to drop the demands of *qishash* or *hudud* in several types of crimes.⁷ In cases of minor crimes (*ta'zir*), the judge's authority (*qadhi*) is broader in determining sanctions or even freeing the perpetrator from punishment if it is considered that punishment will not provide greater benefits. The significant difference in the role of judges in positive law lies in its emphasis on written formal legality, while *fiqh jinayah* takes its principles from the *Al-Qur'an*, *hadith*, *ijma'*, and *qiyas*, thus providing space for interpretation of the universal values of criminal law.⁸

Socially, this phenomenon is rooted in the imbalance between the legal system, which tends to be formal, and society, which is faced with various social, economic, and cultural problems. Granting leniency or even forgiveness to perpetrators of minor crimes is considered to be able to improve the social conditions of the perpetrators and reduce the long-term impacts that can arise from laws that are too harsh. However, in practice, the application of judicial pardon to minor crimes does not always run smoothly. Various challenges arise, both in terms of fair law enforcement and in the interpretation of the values of social justice contained in the judge's decision.⁹

⁴ Reno Hanggara, Rina Rohayu, and Ufran, "Penyelesaian Perkara Tindak Pidana Penyandang Disabilitas Anak Dalam Sistem Hukum Pidana Anak Di Indonesia," *JURNAL DARUSSALAM: Pemikiran Hukum Tata Negara Dan Perbandingan Hukum* 4, no. 2 (2023): 129–160, <https://doi.org/10.59259/jd.v4i2.192>.

⁵ Nurfadilah Nurfadilah et al., "Aliran Hukum Sociological Jurisprudence Dalam Perspektif Filsafat Hukum," *Al Qalam: Jurnal Ilmiah Keagamaan Dan Kemasyarakatan* 18, no. 6 (2024): 4280–90, <https://doi.org/10.35931/aq.v18i6.4164>.

⁶ Noveria Devy Irmawanti and Barda Nawawi Arief, "Urgensi Tujuan Dan Pedoman Pemidanaan Dalam Rangka Pembaharuan Sistem Pemidanaan Hukum Pidana," *Jurnal Pembangunan Hukum Indonesia* 3, no. 2 (2021): 217–27, <https://doi.org/10.14710/jphi.v3i2.217-227>.

⁷ Evhy Sekarwangi Putri and Muh Yusril Faudzi, "Peran Pemimpin Dalam Menangani Konflik Keamanan Nasional: Perspektif Etika Politik Islam," *Ethics and Law Journal: Business and Notary* 2, no. 2 (2024): 202–217, <https://doi.org/10.61292/eljbn.204>.

⁸ Rahmi Oktavia and Asy'ari Asy'ari, "Sanksi Pidana Terhadap Perempuan Pengguna Narkoba : Studi Komparatif Antara Hukum Positif Dan Fikih Jinayah," *JIMMI: Jurnal Ilmiah Mahasiswa Multidisiplin* 1, no. 1 (2024): 182–201, <https://doi.org/10.71153/jimmi.v1i2.122>.

⁹ Sukma Diah Ayu Lestari, "Latar Belakang Dan Implikasi Pemberlakuan Asas Rechterlijk Pardon Di Dalam Kitab Undang-Undang Hukum Pidana 2023" (Yogyakarta: Universitas Islam Indonesia, 2023), <https://dspace.uui.ac.id/handle/123456789/44995>.

In terms of literature, the concept of judicial pardon is regulated by several legal provisions in Indonesia, one of which is in the Criminal Code. However, studies on the application of judicial pardon to minor crimes from the perspective of *fiqh jinayah* are still limited. *Fiqh jinayah*, which is a branch of Islamic law that regulates criminal acts and their sanctions, provides guidance on forgiveness and punishment for perpetrators of criminal acts. In this perspective, punishment is not only in the form of retaliation but must also pay attention to the public interest and efforts to improve the individual.¹⁰ Therefore, this study will explore the application of judicial pardon to minor crimes by linking the principles contained in *fiqh jinayah*.

In addition, the implementation of the justice system still faces significant challenges, such as unequal access to justice and variations in judges' interpretations in deciding cases. This study highlights theoretical aspects and conducts practical analysis related to the application of judicial pardon in various minor criminal cases that occur in Indonesian courts. Currently, the only legal case resolution mechanism in Indonesia is through a formal process, which results in decisions based on the principle of formal justice. However, a simple and time-consuming problem-solving method has been introduced through the institution of forgiveness. This institution is one of the important instruments that can help speed up the case resolution process without ignoring the principle of substantive justice.¹¹

Previous studies on judicial pardon focus on the procedural aspects and its position in the Indonesian legal system. For example, Muyassaroh (2023) emphasized judicial pardon as a judge's discretion in granting leniency to overcome the excess capacity of correctional institutions without directly linking it to the normative dimensions of Islamic law. Likewise, Nurdin's study (2022) highlighted the role of socio-economic factors of the perpetrator in granting forgiveness by the judge but did not elaborate on its relationship with the principles of *fiqh jinayah*, which emphasize the moral, social, and rehabilitation aspects of the perpetrator. Meanwhile, a study by Muhammad Muslih Hisyam and Ufran (2022) explained the doctrine of forgiveness in Islamic criminal law, especially in cases of *qisas* and *diyat*, but has not bridged its conceptual relevance with the Indonesian criminal law system contextually, especially in cases of minor crimes. In fact, in the context of national law, the practice of judicial pardon in minor cases has a strong intersection with the principle of

¹⁰ Saila Riskina Hasti, "Alasan Pemaafan Dalam Hukum Pidana Studi Perbandingan Hukum Pidana Positif Dan Hukum Pidana Islam" (UIN Ar-Raniry Banda Aceh, 2022), <https://repository.ar-raniry.ac.id/id/eprint/25427/>.

¹¹ Umar al-Tamimi, "Lembaga Pemanfaatan Sebagai Alternatif Penyelesaian Perkara Pidana Perspektif Hukum Islam," *Jurnal Diskursus Islam* 1, no. 3 (2013): 449–82, <https://doi.org/10.24252/jdi.v1i3.6641>.

restorative justice, as noted by Setiawan (2021), although this principle is still not a primary consideration in judges' decisions. Therefore, the novelty of this study lies in the integrative effort to analyze the relevance of the concept of forgiveness in *fiqh jinayah* with the practice of judicial pardon in the Indonesian criminal justice system, especially for minor crimes, by considering the principles of restorative justice. This study fills the gap in the literature that has not comprehensively connected Islamic doctrine, judicial discretion, and the values of justice in the positive legal system and provides alternative thinking toward reforming a more humane and contextual approach to sentencing.

The novelty of this study lies in the integration of the concept of judicial pardon in the Indonesian legal system with the principles of *fiqh jinayah* for handling minor criminal cases. Although there have been many studies discussing judicial pardon in general, studies that combine these two perspectives are still very rare in the academic literature. This study also provides deeper insight into how the concept of judicial pardon can be applied in the context of Indonesian law, which is based on The Five Principles (*Pancasila*) while taking into account the holistic principles of Islamic law. With this approach, the study focuses on formal legal matters so as to ensure that victims' rights and social justice remain the main priority in every decision taken.

This study aims to comprehensively explore the application of the concept of judicial pardon to perpetrators of minor crimes, both from the perspective of positive law in Indonesia and based on the principles of *fiqh jinayah*. The main focus of this study lies in comprehensive insight into the integration of judicial pardon mechanisms through the litigation system in Indonesia. In addition, it aims to investigate how the principles of *fiqh jinayah* can contribute new perspectives in judicial decision-making, especially in cases involving minor crimes. Moreover, these findings can be suggestions for improving future policies, especially in developing regulations that are more in line with the demands of social justice for defendants of minor crimes, thus trying to propose a balanced approach that aligns law enforcement with the protection of individual rights in society.

Research Methods

The study employed a normative approach method with a descriptive-analytical design on minor crimes, both from the perspective of *fiqh jinayah* and the positive legal system in Indonesia. This approach allowed for a comprehensive exploration of the principles underlying judicial pardon, as well as how the concept was integrated into judicial practice in

both legal systems. This study examined and compared various legal norms and principles related to judicial pardon and examined their relevance to the concepts of forgiveness in *fiqh jinayah*, especially those related to minor crimes. Research sources were divided into two main groups, namely primary sources and secondary sources. Primary sources included direct information resulting from research or observations conducted by the author himself. This source usually came from experts or specialists in the relevant field. In contrast, secondary sources consisted of legal documents as the main reference, such as the Criminal Procedure Code, the Criminal Code, and other relevant regulations with the concept of judicial pardon. In addition, this study also examined literature in the form of books, journals, scientific articles, theses, and dissertations that were relevant, which discussed judicial pardon in the context of criminal law and *fiqh jinayah*.

All of these sources were analyzed to understand the application of judicial pardon in minor criminal cases and its relationship to the principles contained in *fiqh jinayah*. The data was collected and analyzed using qualitative analysis techniques. This analysis approach prioritized understanding the contents of the legal documents and literature reviewed by conducting content analysis to explore the legal principles related to judicial pardon and forgiveness in *fiqh jinayah*. In addition, this study also used comparative analysis techniques to compare various legal approaches in the two systems and to assess the extent to which the application of judicial pardon to minor criminal cases in the context of Indonesian law could be synergized with the principles in *fiqh jinayah*. This methodology aimed to achieve a more comprehensive meaning of the concept of judicial pardon and its implications for the supremacy of law in Indonesia.

Results and Discussion

1. Judicial Pardon for Minor Crimes

This study identifies that the application of judicial pardon for minor crimes in Indonesia is based on a number of important factors, including the nature and type of crime, the background of the perpetrator, and humanitarian considerations contained in the principle of restorative justice. Judicial pardon is more often given to perpetrators of minor crimes who do not have great evil intentions and do not have a negative impact on society. Criminal acts in the context of judicial pardon include minor theft, minor assault, and

administrative violations. This forgiveness aims to avoid excessive punishment for perpetrators who do not have a detrimental social impact.¹²

The granting of forgiveness by a judge (judicial pardon) refers to Article 54, paragraph 2 of Law Number 1 of 2023 concerning the Criminal Code, which stipulates that factors such as the level of minor errors, the condition of the suspect, the cause of the crime being committed, and the development of circumstances after the crime is committed so that it is possible not to impose a certain sentence or sanction. This provision is applied by taking into account the principles of justice and human values.¹³

According to the explanation given in Law Number 1 of 2023 concerning the Criminal Code, this provision is referred to as the principle of *rechtelijke* pardon or judicial pardon. This principle is a reference for judges in granting pardons to perpetrators who are proven to have committed minor crimes. The pardon must be stated explicitly in the judge's decision while still emphasizing that the defendant has been proven legally and convincingly guilty of committing the crime charged.

Based on the text and explanation of Article 54, paragraph 2 (Criminal Code), it can be interpreted as granting discretionary authority to judges under the principle of judicial pardon to consider pardon for defendants involved in minor crimes. However, the implementation of this discretion requires a clear and systematic interpretation framework to ensure that judges apply it consistently, objectively, and in accordance with the principles of justice. Without adequate guidelines, the application of this principle risks producing inconsistent decisions or potential abuse of power, thereby damaging public trust in the justice system.¹⁴

The provisions in the Criminal Procedure Code in the formal criminal law basis explicitly limit the types of decisions into three categories, namely acquittal, dismissal from legal charges, and sentencing decisions in this context, for judges as a space to provide forgiveness, even though the perpetrator is still proven and convincingly committed a crime. Therefore, the question arises regarding the type of decision that is most relevant to be applied in a situation like this. Given that the criminal act by the defendant has been proven,

¹² Ika Mulianti, "Penerapan Asas Permaafan Hakim (Rechterlijk Pardon) Dalam Penyelesaian Perkara Tindak Pidana Ringan Sebagai Upaya Pembaharuan Hukum Pidana Nasional" (Universitas Batanghari Jambi, 2023), <http://repository.unbari.ac.id/2665/>.

¹³ Pemerintah Pusat Indonesia, "Undang-Undang (UU) Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana," jdih.setneg.go.id § (2023), <https://peraturan.bpk.go.id/Details/234935/uu-no-1-tahun-2023>.

¹⁴ Raden Roro Fara Anissa Putri, "Urgensi Keberadaan Dan Model Pengaturan Ideal Judicial Pardon Dalam Kitab Undang-Undang Hukum Pidana (KUHP) Di Indonesia" (Universitas Islam Indonesia, 2024), <https://dspace.uui.ac.id/handle/123456789/49612>.

the judge does not have room to provide a verdict of acquittal and release from all legal charges in cases involving the granting of forgiveness. This condition creates its own challenges in formulating a form of decision that is in accordance with the principles of justice and legal certainty.¹⁵

Based on the results of a study conducted by Mastoha (2024), the implementation of the practice of judicial pardon in Indonesia has actually been carried out by judges in Indonesia and is stated in the considerations of their decisions, which explain that if the perpetrator is sentenced to a criminal sentence, this will not provide justice and benefit to the perpetrator because the judge's decision imposes a conditional sentence (probation).¹⁶

In addition, the judge's consideration in granting pardon for minor crimes is greatly influenced by the socio-economic factors of the perpetrator. In some cases, judges consider the background of the perpetrator, who comes from a low-income background, with the aim of giving them the opportunity to improve their behavior without having to get involved in criminal litigation.¹⁷ Thus, the principle of rehabilitation and efforts to restore relations between the perpetrator and the community are part of restorative justice. Judges also often give perpetrators the opportunity to show good intentions in improving themselves, such as by participating in a rehabilitation program or bearing compensation for the victim.¹⁸

However, although judicial pardon is more often applied to minor crimes, not all cases receive such leniency. The decision to grant judicial pardon is still limited by existing legal principles, which emphasize the importance of not damaging social justice. Criminal cases that are considered quite detrimental to the victim or the wider community, even though they are classified as minor, can still be subject to heavier sanctions ¹⁹. For example, traffic violations result in accidents; even though the perpetrator only made a minor mistake, there

¹⁵ Alfret and Mardian Putra Frans, "Konsep Putusan Pemaaf Oleh Hakim (Rechterlijk Pardon) Sebagai Jenis Putusan Baru Dalam KUHAP," *KRTHA BHAYANGKARA* 17, no. 3 (2023): 587–600, <https://doi.org/10.31599/krtha.v17i3.790>.

¹⁶ Mas Toha Wiku Aji, "Praktik Pemaafan Hakim (Rechterlijk Pardon) Dalam Sistem Peradilan Pidana Indonesia" (Universitas Islam Sultan Agung Semarang, 2024), <https://repository.unissula.ac.id/35572/>.

¹⁷ Sisno Pujinoto, Anis Mashdurohatun, and Achmad Sulchan, "Juridical Analysis of Application of Forgiveness (Rechterlijk Pardon) as a Basis of Judge Consideration in Deciding the Criminal," *Jurnal Daulat Hukum* 3, no. 2 (2020): 307–12, <https://doi.org/10.30659/jdh.v3i2.10085>.

¹⁸ Ayu Dian Ningtia and Ahmad Faris Shofa, "Sinkronasi Konsep Pemaafan Hakim Sebagai Wujud Asas Restorative Justice Dalam Hukum Acara Pidana," *Risalah Hukum* 20, no. 1 (2024): 33–40, <https://doi.org/10.30872/risalah.v20i1.1372>.

¹⁹ Roli Pebrianto and Muhammad Panji Prabu Dharma, "Pemaafan Pelaku Tindak Pidana Pembunuhan Dalam Hukum Islam Dan Relevansinya Dengan UU No. 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana," *Journal of Contemporary Law Studies* 1, no. 4 (2024): 227–36.

are still impacts that need to be taken into account by the judge, so a pardon is not always given in cases like this.

Judicial pardon in the context of minor crimes also shows that there is room for humanitarian considerations in the Indonesian justice system. In some cases, judges decide to grant pardons on the grounds that the perpetrator has the potential to contribute better to society as long as he is not punished too harshly. The granting of pardons is often based on the consideration that punishment that is too harsh will actually harm the perpetrator's future, especially if the crime committed is incidental or triggered by external factors that can be understood humanly.

The decision to grant a judicial pardon is also often taken by looking at how much influence the perpetrator's actions have on society or the victim. If the losses incurred are very small and the perpetrator shows a responsible attitude, then forgiveness is considered the right step to avoid excessive punishment.²⁰ This approach refers to the principle of justice, which emphasizes efforts to improve social stigma and improve relations between the perpetrator, victim, and society in a comprehensive manner. In this case, judicial pardon is not only understood as a form of punishment but also as a step that is more humanitarian and constructive in the context of law enforcement.²¹

Judicial pardon for minor crimes is also driven by the value of social justice that emphasizes the restoration of losses caused by the crime. In this case, forgiveness is not only seen as a reduction in punishment but more as an effort to improve the condition of the perpetrator, who is considered able to function positively in society.²² For example, in cases of traffic violations, where the perpetrator does not cause significant physical harm or victims, the judge prefers to give light sanctions or alternative punishments that do not harm the perpetrator's future.

The results of this study attempt to provide judicial forgiveness in cases of minor crimes that have a strong basis in the principles of restorative justice and rehabilitation. Granting forgiveness not only considers formal legal aspects but also takes into account the socio-economic conditions of the perpetrator and the potential for self-improvement possessed by the perpetrator. This decision aims to create a balance between law

²⁰ Bahri, "Penafsiran Asas Judicial Pardon Dalam Kitab Undang-Undang Hukum Pidana Baru."

²¹ Ahmad Ropei, "Penerapan Restorative Justice Sebagai Alternatif Penyelesaian Masalah Pidana Berdasarkan Hukum Pidana Islam," *AL-KAINAH: Journal of Islamic Studies* 1, no. 2 (2022): 40–83, <https://doi.org/10.69698/jis.v1i2.14>.

²² Zafirah Maschaer Masiming, "Perspektif Ide Rechterlijk Pardon Dalam Penyelesaian Perkara Anak Yang Berkonflik Dengan Hukum" (Universitas Hasanuddin, 2020).

enforcement and the restoration of social relations so that the defendant gets space for self-introspection without having to undergo punishment considered excessive.²³

The judge's pardon decision underlines the importance of flexibility in the justice system in Indonesia, which does not only focus on a retributive approach but also includes restorative aspects. By implementing the concept of forgiveness, the justice system provides space for perpetrators of minor crimes to reflect on their mistakes. This approach also shows a commitment to the principle of social justice by respecting each individual as an integral part of the wider society.

2. Judicial Pardon for Minor Crimes from a *Jinayah Fiqh* Perspective

This study found that the application of judicial pardon for minor crimes in Indonesia is driven by various factors, such as the nature of the crime, the background of the perpetrator, and the principle of restorative justice. This forgiveness tends to be given to perpetrators who commit minor crimes that do not cause major losses to society, such as minor theft, minor assault, or administrative violations. In this case, the judge considers humanitarian factors, including the socio-economic conditions of the perpetrator, which allow them to be given the opportunity to improve themselves without having to serve too severe a sentence.²⁴ This result is in line with *fiqh jinayah*, where pardon for perpetrators of minor crimes is not only possible but also recommended if it can lead to the welfare of individuals and society.²⁵

The application of this forgiveness, especially regarding minor crimes, has a positive impact on restorative justice. The supremacy of law in Indonesia, judicial forgiveness provides an opportunity for perpetrators to return to society without creating stigmatization or detrimental social impacts, in accordance with the goals of rehabilitation. In Islamic criminal law, a similar principle is found in the teachings regarding *ta'zir* punishment imposed by judges based on consideration and justice, where forgiveness and leniency are often considered if the perpetrator shows remorse, good faith, and a desire to improve themselves.

²³ Sukma and Cumbhadrika, "Urgensi Penerapan Rechterlijk Pardon Sebagai Pembaharuan Hukum Pidana Dalam Perspektif Keadilan Restoratif."

²⁴ Abdullah Ahmad Mukhtarzain, "Permaafan Dalam Pemidanaan Menurut Hukum Islam Dan Hukum Nasional," *Jurnal Idea Hukum* 4, no. 1 (2018): 936–59, <https://doi.org/10.20884/1.jih.2018.4.1.95>.

²⁵ Suplinta Ginting, "Pemaafan Oleh Korban Dan/Atau Keluarga Korban Terhadap Pelaku Tindak Pidana Ditinjau Dari Hukum Pidana Islam Dan RUU KUHP Sebagai Pertimbangan Hakim Dalam Menjatuhkan Putusan" (Universitas Sumatera Utara, 2018), <https://repositori.usu.ac.id/handle/123456789/5091>.

Forgiveness, in this context, both in the Indonesian legal system and *fiqh jinayah*, emphasizes restoring social relations rather than simply retaliation or punishment.²⁶

Some characteristics of *ta'zir* crimes can be summarized as follows:²⁷

- a. The punishment given depends on the judge's consideration;
- b. The judge has the authority to release the perpetrator from punishment while the victim is given room for forgiveness. In making a decision, the judge can consider mitigating or aggravating factors;
- c. If proven guilty, the judge has the freedom to determine sanctions, including giving a punishment that is considered very appropriate or even not imposing a punishment at all;
- d. The conditions of the parties are a factor that influences the severity or lightness of the punishment, even allowing for forgiveness.

Several scholars have different views regarding *ta'zir* sanctions, including:²⁸

- a. According to the Malikiyah and Hanbaliyah schools of thought (*mazhab*), the application of *ta'zir* is mandatory like *hudud*, because it is a form of reprimand that is prescribed to uphold the rights of Allah. Therefore, *ulil amri* must not ignore it;
- b. Based on the Syafi'i school of thought (*mazhab*), *ta'zir* is not mandatory. *Ulil Amri* can choose not to apply it if the law is not related to human rights (*Adami* rights) or the interests of the public interest.
- c. According to the Hanafiyah school of thought (*mazhab*), *ta'zir* is mandatory if it is related to human rights (*Adami* rights) because individual rights cannot be abolished except by the party who has those rights. Therefore, the judge is not authorized to grant pardon in this case.
- d. If *ta'zir* is related to the rights of Allah, the decision to implement it is in the hands of the judge. If the judge considers that the application of the punishment brings benefits, then the punishment is carried out. However, if there is no benefit in its implementation, the judge may choose not to impose a sentence, which means that the perpetrator receives forgiveness from the judge. This opinion is in line with the view of Ibn al-Hamam, who stated that the obligation of a leader in enforcing *ta'zir*

²⁶ Sigit Eko Prabowo, "Perbandingan Penerapan Konsep Permaafan Hakim (Rechterlijk Pardon) Dalam Rkuhp Dan Sistem Hukum Pidana Islam," 2022.

²⁷ Ahmad Syarbaini, "Teori Ta'zir Dalam Hukum Pidana Islam," *Ius Civile: Refleksi Penegakan Hukum Dan Keadilan* 2, no. 2 (2019): 1–10, <https://doi.org/10.35308/jic.v2i2.967>.

²⁸ Darsi Darsi and Halil Husairi, "Ta'zir Dalam Perspektif Fiqh Jinayat," *Al-Qisthu: Jurnal Kajian Ilmu-Ilmu Hukum* 16, no. 2 (2019): 60–64, <https://doi.org/10.32694/qst.v16i2.787>.

law related to the rights of Allah is flexible and can be eliminated if it does not bring benefits to the perpetrator of the crime.

From these various views, it can be concluded that if *ta'zir* is related to human rights, punishment may not be abolished by the authorities except with the consent of the party who has that right. On the other hand, if *ta'zir* is related to Allah's rights and does not bring benefits, then the authorities (judges) can cancel or not carry it out.

The urgency of this study is that the judge's consideration in granting forgiveness does not only take into account the type of crime committed but also looks at the social background of the perpetrator. Providing forgiveness to perpetrators from weak socio-economic groups reflects the humanitarian element in this decision. This is in line with the principles in *jinayah fiqh*, where forgiveness and leniency in punishment can be given if the perpetrator's condition is influenced by external factors such as poverty or lack of knowledge. In *jinayah fiqh*, there is room for forgiveness based on humanitarian principles, with the aim of maintaining the public benefit and avoiding unnecessary suffering for the perpetrator.

The application of judicial pardon in cases of minor crimes is also in line with the principle of restorative justice, which aims to improve the relationship between the perpetrator and the victim. In this case, forgiveness is not only intended as a reduction in punishment but also as a step to reduce conflict and restore harmony in society. This concept is very much in line with the principle in *fiqh jinayah*, which prioritizes *sulh* (peace) between the perpetrator and the victim, which is considered better than physical punishment or retaliation. *Sulh* in Islamic criminal law can lead to a reduction or even elimination of punishment if the victim is willing to forgive the perpetrator and accept compensation for the losses incurred.

However, not all minor crimes can be decided with forgiveness. The decision to forgive is still bound by existing legal provisions. If the crime committed has a major impact on the victim or society, even though it is categorized as minor, forgiveness may not be granted. For example, in cases of crimes that lead to public damage or major losses for the victim, such as fraud with significant economic impact, forgiveness may be deemed inappropriate. In Islamic criminal law, this is also strictly regulated, where in some cases, such as hudud (crimes that have fixed penalties), there is no room for forgiveness if the punishment has been determined by sharia, but for lighter violations, such as *ta'zir*, forgiveness, and leniency can be granted.²⁹

²⁹ Budimansyah et al., "Comparison Of The Judicial Forgiveness (Rechterlijk Pardon) Between Civil Law System And Islamic Law System (Finding The Formulation Of The Principle Of Rechterlijk Pardon In Indonesian Criminal

Criminal law teaches that the punishment imposed must always consider the principles of justice, welfare, and balance between the rights of the victim and the rights of the perpetrator.³⁰ In this case, the judge's forgiveness of the perpetrator of a minor crime can be seen as a form of implementing the principle of *al-maslahah* (public welfare) in Islamic law. The judge can reduce or exempt the perpetrator's sentence if it is felt that this will benefit society as a whole, such as avoiding greater crimes or improving the perpetrator's behavior. This decision must, of course, consider the interests of the victim, and if forgiveness is given, the victim must agree or receive sufficient compensation.

The normative comparison between the Criminal Code and *Fiqh Jinayah* shows a difference in paradigm in responding to minor criminal acts. The Criminal Code normatively regulates punishment based on formal and material elements that have been previously determined in written norms.³¹ In contrast, *Fiqh Jinayah* recognizes the classification of criminal acts into *hudud*, *qishash-diyat*, and *ta'zir*; therefore, it usually includes minor violations; the judge has full discretion to impose or even eliminate punishment based on social conditions, the circumstances of the perpetrator, and the potential benefits that can arise from forgiveness.³² In this context, forgiveness by the judge is not only permitted but, in some circumstances, becomes the main thing if imprisonment or punishment causes wider social harm.

Construction of *fiqh jinayah*, the legitimacy of judicial pardon can be found through the dynamic and contextual legal *istinbath* method.³³ Qiyas, as a method of analogy to similar cases that already have a basis in texts, can be used to determine the permissibility of judicial pardon by analogizing cases where the sentence can be suspended on the basis of public interest. *Istihsan*, as a method of legal preference that deviates from qiyas in order to avoid difficulties or losses, supports the practice of judicial pardon when punishment is seen as not bringing good or is contrary to the principle of justice. As for *maslahah mursalah*, the explicit

Law)," *International Journal of Educational Review, Law And Social Sciences (IJERLAS)* 3, no. 4 (2023): 1198–1210, <https://doi.org/10.54443/ijerlas.v3i4.946>.

³⁰ Seva Maya Sari, *Fiqh Jinayah (Pengantar Memahami Hukum Pidana Islam)* (Jambi: PT. Sonpedia Publishing Indonesia, 2023).

³¹ Muchamad Huzaaeni and Achmad Hasan Basri, "Legislative Policy and Accountability for Pollution Crimes by Ship Operations in Indonesian Waters," *Indonesian Journal of Law and Society* 4, no. 1 (2023): 51–93, <https://doi.org/10.19184/ijls.v4i1.38415>.

³² Hisamudin Rahimzai and Naqibulla Mushfiq, "Ta'zir Punishment and Delegated Authority in Accordance with Islamic Jurisprudence and Afghanistan's Enacted Laws," *Integrated Journal for Research in Arts and Humanities* 3, no. 5 (2023): 1–14, <https://doi.org/10.55544/ijrah.3.5.1>.

³³ Adi Syahputra Sirait, Mhd. Syahnan, and Budi Sastra Panjaitan, "Community Service Order Punishment: Alternatives in The Criminal Law System From Maqāṣid Al-Sharī'ah Perspective," *Nurani: Jurnal Kajian Syari'ah Dan Masyarakat* 24, no. 2 (2024): 273–96, <https://doi.org/10.19109/nurani.v24i2.24276>.

consideration of common interests in providing strong legitimacy for judges to make decisions on punishment or forgiveness based on public interest, social stability, and protection of human values.³⁴

However, although judicial pardon has a positive impact on efforts to rehabilitate perpetrators, this study also found limitations in its application. One of the main limitations is that the application of judicial pardon in practice is not always consistent between one region and another, depending on the judge's interpretation of the applicable law. In addition, the decision to pardon often depends on external factors, such as social or political influences, that can affect the objectivity of the judge. In the context of Islamic criminal law, the application of forgiveness can also vary depending on the views of different scholars, who interpret the principles of *fiqh jinayah* in different ways.³⁵ The limitation of this study is that only a small number of perpetrators of minor crimes received judicial pardons, while the majority are still serving their sentences. This shows that although judicial pardon has the potential to provide space for rehabilitation, it is still limited by stricter legal norms and does not always provide a solution for every perpetrator.³⁶ In Islamic criminal law, although forgiveness is possible in many cases, there are still strict limitations, such as in the case of hudud, which does not provide space for forgiveness in terms of punishments that have been determined by sharia.

Conclusion

Judicial pardon is a legal concept that is at the intersection between the need to enforce legal norms objectively and the demands of substantive justice that considers social welfare and the individual conditions of the perpetrator. Thus, the solution to answer the problem of over-criminalization of minor violations and the increasing burden on correctional institutions. In addition, from the perspective of *Fiqh Jinayah*, the concept of judicial pardon is not only recognized but also becomes an integral part of the Islamic criminal justice system, especially in the context of minor crimes or *ta'zir*. Judges in Islamic law have quite broad

³⁴ Marisa Rizki, Moh Bahrudin, and Syamsul Hilal, "Istinbath Maslahah Mursalah Method in Economics," *Al-Fadilah: Islamic Economics Journal* 2, no. 2 (2024): 120–36, <https://doi.org/10.61166/fadilah.v2i2.46>.

³⁵ Sri Endah Wahyuningsih, "The Implementation Of Flexibility Punishment Principles In Islamic Law In The Renewal Of Indonesian's Criminal Code," in *The 4 Rd International Conference and Call for Paper Faculty of Law* (Sultan Agung Islamic University, 2023), 24–33, <https://jurnal.unissula.ac.id/index.php/pdih4/article/view/3995>.

³⁶ Moh Khasan, "Perspektif Islam Dan Psikologi Tentang Pemaafan," *Jurnal At-Taqqaddum* 9, no. 1 (2017): 69–94, <https://doi.org/10.21580/at.v9i1.1788>.

authority to consider social conditions, the background of the perpetrator, and the potential impact of the crime on the lives of the community. In order for further study to enrich this discussion, it is recommended to further examine the differences in the application of judicial pardon at different court levels, as well as how judges balance the principles of restorative justice and strict law enforcement. Further study can also consider the views of the community and victims on the decision to pardon the judge and whether the decision actually has a positive impact on the rehabilitation of the perpetrator and restoring the victim's losses. In addition, a more in-depth study of the interaction between Indonesian positive law and *fiqh jinayah* in the context of forgiveness can pave the way for the development of a more humane and just justice system. The combination of the two will produce a legal system that not only upholds norms but also fulfills a sense of justice and guarantees the protection of human rights more completely.

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