De Jure: Jurnal Hukum dan Syar'iah
Volume 17 Issue 2, 2025, p. 624-648
ISSN (Print): 2085-1618, ISSN (Online): 2528-1658
DOI: http://dx.doi.org/10.18860/j-fsh.v17i2.32639
Available online at http://ejournal.uin-malang.ac.id/index.php/syariah

Philosophical Foundation, Application, and Controversies of Judicial Pardon in Islamic Criminal Law, Indonesian Penal Code, and the Criminal Justice System of Kuwait

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Received: 20-04-2025	Revised: 03-12-2025	Published: 28-12-2025

Abstract:

This article explores the philosophical foundation and scope of application of *al-'afwu 'anil 'uqubah* in Islamic criminal law, judicial pardon in the Indonesian Penal Code, and pardon and reconciliation under the criminal justice systems of Kuwait. Adopting philosophical, statutory, conceptual and comparative approaches, it employs the judicial-normative research method to analyse legal principles, legal concepts, and legislation relevant to the subject matter and to the topic. The findings indicate that the philosophical rationale of *al-'afwu 'anil 'uqubah* in Islamic criminal law is grounded in restorative and theological aims, limiting its application to specific offences such as *qishash*, certain *hudud*, and *ta'zir*. In contrast, the Indonesian Penal Code uses *rechterlijke* pardon to soften the rigidity of legalistic punishment, granting judges discretionary authority to withhold penalties in trivial cases, taking into account the offender's circumstances and contextual factors. Meanwhile, the Kuwaiti criminal justice system, though influenced by Sharia principles, employs pardon and reconciliation primarily to control crime, granting extensive powers to the *Amir*, victims, and investigative bodies to commute or withdraw penalties in exchange for cooperation.

Keywords: *al-'Afwu 'Anil 'Uqubah*; *Rechterlijke Pardon*; Indonesian Penal Code; Islamic Criminal Law; Indonesia; Kuwait.

Introduction

This article compares the philosophical foundations and scope of application of *al-'afwu 'anil 'uqubah* in Islamic criminal law, judicial pardon (*rechterlijke pardon*) in

the Indonesian Penal Code, and pardon and reconciliation under the criminal justice systems of Kuwait. This study addresses the pressing need to examine the evolving concept of justice within the various legal systems. Muladi argues that the concept of justice has shifted from a retributive, prosecution-focused model to a restorative, community-based approach that prioritises repairing harm and fulfilling the needs of crime victims.[1] Contemporary criminal jurisprudence has also shifted toward ensuring that the rights of victims and other parties harmed by the offender are fully upheld through mediation and reconciliation.[2] The strong influence of retributive response to crime and punishment which treats crime mainly as a violation of public order combined with limited concern for restoring victims' rights, has led to major shortcomings in the criminal justice system, particularly the neglect of victims.[3] Many studies highlight the vulnerable position of victims, noting that the system tends to prioritise perpetrators because its primary focus is prosecuting offenders rather than addressing victims' needs.[4] The shift from retributive to restorative justice is set out in Law No. 1 of 2023 concerning the Indonesian Penal Code (IPC), enacted on 2 January 2023 and effective from 2 January 2026. Among its reforms is the introduction of judicial pardon (*rechterlijke* pardon) in Article 54(2). However, the IPC still has notable shortcomings, including the absence of a requirement for prior victim consent and a regulatory framework that remains biased and open to endless debate and interpretation.[5]

Previous studies on judicial pardon have largely focused on its procedural implementation within the Indonesian criminal justice system,[6] its relationship to

[1] Muladi, *Kapita selekta sistem peradilan pidana* (Semarang: Badan Penerbit Universitas Diponegoro, 1995).

[2] Nelvitia Purba et al., "Double Track System for Child Convictions for Sexual Violence In North Sumatera: Perspective of Restorative Justice," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 2 (July 2024): 1216–38, https://doi.org/10.22373/sjhk.v8i2.23000; Mia Amiati, Taufik Rachman, and R. B. Muhammad Zainal Abidin, "Urgency of Falsum in Indonesian Criminal Justice System as Basis for Revision; An Islamic Perspective," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 19, no. 2 (October 2024): 303–28, https://doi.org/10.19105/al-lhkam.v19i2.13141.

[3] Jennifer A Brobst, "The Revelatory Nature of COVID-19 Compassionate Release in an Age of Mass Incarceration, Crime Victim Rights, and Mental Health Reform," *University of St. Thomas Journal of Law & Public Policy* 15, no. 1 (2021).

[4] Robyn L Holder and Elizabeth Englezos, "Victim Participation in Criminal Justice: A Quantitative Systematic and Critical Literature Review," *International Review of Victimology* 30, no. 1 (January 2024): 25–49, https://doi.org/10.1177/02697580231151207; Nurini Aprilianda et al., "Re-Conceptualizing Child Victim Rights: A Normative and Comparative Analysis of Victim Impact Statement in Indonesia's Juvenile Justice System," *Jambura Law Review* 7, no. 2 (July 2025): 442–67, https://doi.org/10.33756/jlr.v7i2.30132; Lies Sulistiani et al., "Urgency of Regulation of Witness and Victim Protection Agency (LPSK) in the Upcoming KUHAP," *Jurnal IUS Kajian Hukum Dan Keadilan* 13, no. 3 (December 2025): 520–44, https://doi.org/10.29303/ius.v13i3.1835.

[5] Muhammad Kharisma Bayu Aji et al., "The Potential Disparity in Judicial Pardon Decisions: Formulation Issues in The National Criminal Code," *Jurnal Hukum Dan Peradilan* 14, no. 1 (March 2025): 63–90, https://doi.org/10.25216/jhp.14.1.2025.63-90.

[6] Mufatikhatul Farikhah, "The Judicial Pardon Arrangement as a Method of Court Decision in the Reform of Indonesian Criminal Law Procedure," *PADJADJARAN JURNAL ILMU HUKUM (JOURNAL OF LAW)* 8, no. 1 (April 2021): 1–25.

restorative justice,[7] its role as an alternative sanction, particularly for minor offences,[8] and its application in homicide cases.[9] However, these studies have not explored the philosophical basis or the broader scope of judicial pardon through a comparative perspective, particularly regarding the Indonesian Penal Code, Islamic criminal law, and Kuwait's criminal law system. Such a comparative examination is essential, given the significant influence of Islamic legal principles on the formation of the Indonesian Penal Code.[10] *Sharia* pioneered the promotion of reconciliation and tolerance in criminal justice, constituting a humanitarian dimension that predates many secular legal systems and aligns with a key goal of modern criminal policy.[11] This study, by contrast, explores the philosophical rationale and application of pardon across the three jurisdictions. Specifically, it provides a detailed examination of the penal philosophy underlying judicial pardon in the three criminal law systems, while offering a comprehensive explanation of the scope and conditions for applying the concept to criminal offences.

The first part of this study identifies the root of *al-'afwu 'anil 'uqubah* in Islamic criminal law in restorative and theological aims and applies only to certain offences. The second part explains the philosophical rationale for judicial pardon under the IPC to moderate the rigidity of legalistic punishment, allowing judges to waive penalties in minor cases based on contextual factors. The last part explores how pardon and reconciliation in the Kuwaiti criminal justice system are primarily used to control crime, granting extensive powers to the *Amir*, victims, and investigative bodies to reduce or withdraw penalties in exchange for cooperation. This part also highlights the distinctive features of the three jurisdictions regarding the philosophical foundation and the scope of application of judicial pardon.

Methods

This study employed the juridical-normative method of legal research, which focuses on studying legal principles, legal concepts and relevant legislation. This research also utilised philosophical, statutory, conceptual, and comparative approaches to understand the meanings and applications of these materials. The philosophical approach is applied to examine the penal-philosophical foundations that justify judicial pardon for defendants proven to have committed a crime. The statutory approach analysed Article 54(2) of the IPC, providing the legal basis for

[7] Armansyah, "Judicial Pardon and Restorative Justice: Towards Corrective Sentencing in the Indonesian Criminal Law System," *Kosmik Hukum* 25, no. 3 (September 2025): 643–51, https://doi.org/10.30595/kosmikhukum.v25i3.28358.

[8] Sagung Putri M. E. Purwani and Putu Mery Lusyana Dewi, "Judicial Pardon in Update of the Criminal System Against Middle Crimes," *Yustisia* 10, no. 3 (September 2022): 415–30, https://doi.org/10.20961/yustisia.v10i3.55347.

[9] Muhammad Muslih Hisyam and Ufran Ufran, "Tinjauan Asas Pemaafan dalam Perspektif Hukum Islam dan Hukum Indonesia pada Perkara Tindak Pidana Pembunuhan" *Jurnal Indonesia Berdaya,* No. 4(2022)

[10] Vivi Ariyanti and Supani, "Examining Muslims' Aspirations in Drafting the New Criminal Code: Analyzing Criminal Law Policy in Indonesia from a Maslaha Perspective", *Al-Manāhij: Jurnal Kajian Hukum Islam,* 18.No. 1 (2024): 37-54

[11] Belkasem Souikat, "The Scope of Criminal Reconciliation in Islamic Jurisprudence" *Politics and Law Notebooks,* No. 2 (2020): 26.

judicial pardon, alongside Kuwaiti legislation on pardon and reconciliation. The conceptual approach explored the core ideas underpinning judicial pardon in these three legal systems. The comparative approach identified the philosophical foundations and scope of judicial pardon within criminal cases. This study adopted a micro-comparative approach, focusing on a specific component of criminal law systems: pardon in Islamic criminal law, the IPC, and the Kuwaiti criminal justice system. With respect to the IPC, which will officially come into force on 2 January 2026, the authors conducted interviews with two of its drafters to understand the rationale for the formulation of Article 54(1), which grants judges the authority to pardon defendants. To strengthen the study's findings and analysis, this study also utilised relevant literature in books and scholarly journals.

Result and Discussion

Al-'Afwu 'Anil 'Uqubah in Islamic Criminal Law

The term judicial pardon (*rechterlijke pardon*) in the context of Islamic criminal law is *al-'afwu 'anil 'uqubah,* a method of resolving criminal cases in which the victim chooses to pardon the perpetrator, either unconditionally or upon receiving compensation.[12] This concept is based on the idea of recommending pardon or forgiveness, which translates to 'forgiveness from punishment' in English. It also deals with the recommendation of *Allah SWT* expressed in *Qur'an Surah al-A'raf* (Chapter 7), verse 199: *"Be gracious, enjoin what is right, and turn away from those who act ignorantly.".* In Islamic criminal law, pardon is unconditional and applies to all types of crimes, or *jarimah*. In the Qur'an and Hadith, however, the use of pardon is inherently limited and primarily applies to cases of offence of *qishash*, such as assault or murder. However, it is also possible to apply pardon to certain offences of *hudud* and *ta'zir*.[13] Several conditions must be fulfilled to grant a pardon. First, a pardon must be granted by the people or party with the rightful authority to do so, in this case, the victims of *jarimah* or their heirs. Because only those with the right of *qishash* are entitled to offer a pardon, a pardon granted by anyone without this right is considered invalid. According to Imam Abu Hanifah, Imam Syafi'i and Imam Ahmad, the right of *qishash* belongs to all heirs, either *dzawil furudh* (fixed share heirs) or *'ashabah* (residuary heirs), regardless of gender.[14]

Second, to be entitled to a pardon, a person must be a *mukallaf* (of sound mind and of legal age). A pardon given by a minor, although they are *mumayyiz* who are able to distinguish between right and wrong, will be rejected.[15] That a pardon can be granted only by someone who has reached puberty (*baligh*) is established in *Surah an-Nur* verse 59, in which *Allah* SWT states: *"And when your children reach the age of puberty, let them seek permission to come in, as their seniors do. This is how Allah makes His revelations clear to you, for Allah is All-Knowing, All-Wise".* The above verse shows that a pardon will not be accepted if it comes from a person who is not *'aquil* (of sound

[12] Muhammad Rijaldy Alwy Alwy, "The 'afw Principle and The Indonesian Restorative Justice System," *Jurnal Hukum Islam* 19, no. 2 (December 2021): 313–28, https://doi.org/10.28918/jhi.v19i2.4726.
[13] Ahmad Agus Ramdlany, "Restorative Justice Dalam Hukum Pidana Islam Perspektif Filsafat Hukum Islam" (Doctoral Thesis, UIN Sunan Ampel Surabaya, 2021).
[14] Abu Bakr bin Mas'ud al-Kasani, *Bada'i' al-Sina'i Fii Tartib al-Syarai'* (Cairo: Dar al-Kutub al-Ilmiyah, 1997).
[15] Ibn Qudamah, *Al-Mughni*, 2nd ed. (Cairo: Hajr li aṭ-Ṭiba'ah wa an-Nasyr, 1991).

mind). Prophet Muhammad SAW stated that 'the pen has been lifted from three people: the sleeper until he wakes up, the child until he reaches puberty, and the insane until he becomes sane'. Because all such people are considered innocent, their deeds are not recorded in the Book of Deeds. The insane are also considered to have no responsibility for their actions, considering that accountability depends on one's mental capacity.[16]

Third, a pardon must be freely granted without duress or manipulation. A pardon offered under these circumstances must be rejected.[17] Allah SWT has said, *"Whoever renounces their faith in Allah – not those who are forced to do so while still firm in their faith in their hearts, but those who embrace disbelief wholeheartedly—will be condemned by Allah and suffer a tremendous punishment."* Fourth, if there is only one *mustahiq qishash* (person entitled to retribution) that grants a pardon, that pardon is valid and legally binding. Likewise, if there is more than one *mustahiq qishash* and one of them grants a pardon, the punishment will be nullified. However, according to the Maliki school of thought, the person granting the pardon must be of equal or higher rank than the other heirs (*mustaḥiq*). Forgiveness granted by a person of a lower rank is an invalid pardon, and the offender remains subject to punishment (*qishash*).

Fifth, if a pardon granted by a victim's guardian, whether from *qishash* (retribution) or *diyat* (compensation), is a valid pardon, thereby freeing the offender from both *qishash* and *diyat*, as these are considered individual rights. However, since *qishash* involves both the rights of *Allah* (society) and those of individuals, the authorities (the state) may still impose *ta'zir* (discretionary) punishment. The Hanafi and Maliki schools hold this view. According to the latter, *ta'zir* punishment includes imprisonment for one year and flogging (one hundred lashes). By contrast, the Syafi'iyyah, Hanabilah, Ishak, and Abu Tsaur schools hold that *ta'zir* punishment is unnecessary in such circumstances.[18] Sixth, a pardon must be communicated using clear (*sharih*) and explicit language. This can be expressed through spoken word or actions, such as saying 'I forgive him', 'I nullify it', 'I release him', or 'I accept'.'[19] Seventh, pardon (especially in cases of *qishash*) must be validated by a court decision to ensure its enforceability.[20]

When it comes to the discussion of philosophical principles underlying the concept of *al-'afwu 'anil 'uqubah,* this is grounded in the philosophy of punishment, or *'uqubah*. The philosophical basis of *al-'afwu 'anil 'uqubah* is rooted in the general philosophy of punishment (*'uqubah*) in Islamic criminal law. Punishment is only a method of addressing criminal offence, guided by both general objectives of *dar' al-*

[16] Nehaluddin Ahmad et al., "Challenges of the Insanity Defence: Legal Perspectives on Mental Illness and Criminality in Brunei's Dual Legal System.," *Manchester Journal of Transnational Islamic Law & Practice* 20, no. 4 (October 2024): 150.
[17] Qudamah, *Al-Mughni*.
[18] Abu Bakr bin Mas'ud al-Kasani, *Bada'i' al-Sina'i Fii Tartib al-Syarai'* (Beirut: Dar al-Kutub al-Ilmiyah, 1997), 287.
[19] Abu Bakr bin Mas'ud al-Kasani, *Bada'i' al-Sina'i fii Tartib al-Syarai'*, Cet I (Beirut: Dar al-Kutub al-Ilmiyah 1997): 285.
[20] Moin Uddin and Shad Saleem Faruqi, "Power of Pardon in the Sharī'ah and Its Applicability in Common Law," *Jurnal Syariah* 32, no. 2 (August 2024): 246–74, https://doi.org/10.22452/syariah.vol32no2.2.

mafasid wa jalb al-mashalih (preventing harm and promoting benefit) and specific objectives, such as *al-raddu wa al-jazaa'* (retribution and deterrence) and *al-ta'dibu wa al-islah* (education, reform, and the common good).[21] Saamikh Sayyid Jaad asserted that *al-'afwu* is inseparable from these purposes. In this context, punishment in Shariah serves two fundamental aims: preventing harm and achieving social benefit, and deterring crime while fostering moral improvement.[22]

Within this framework, punishment is not the sole solution to crime but one of several means of realising Islamic law's objectives. These aims are articulated in three principles: preventing wrongdoing through punishment (*radd al-mafsadah*), upholding justice (*al-'adalah*), and advancing public welfare (*al-mashlahah*).[23] The preventative function of punishment must be proportionate to the offence and contribute to the welfare of both offender and society. Under these conditions, the use of *al-'afwu* (pardon) is justified so long as punishment retains its capacity to prevent harm.[24] According to Ahmad Fathi Bahantsi, the aim of advocating forgiveness as a method of resolving crimes – a principle which is strongly emphasised in Islam – is to prevent the development of an endless cycle of hatred fuelled by revenge or hostility. Consequently, while retaliation in kind (*qishash*) is certainly justified in cases such as intentional murder, its application is directed so as to ensure that it serves as the last resort (*ultimum remedium*). Therefore, forgiveness, whether unconditional or coupled with a demand for *diyat* (compensation), is preferred and encouraged.[25] The conception of *al-'afwu* as a pardon, in which no punishment of any kind is imposed, highlights the compassionate nature of Islam. This approach reflects the belief that forgiveness provides relief and comfort, allowing the perpetrator to experience the grace of Islam as a path to mercy and societal harmony.[26]

Al-'afwu applies to various types of crimes *(jarimah),* including *qishash, hudud,* and *ta'zir*.[27] Granting pardon for criminal offences punishable by *qishash* is highly recommended, and scholars agree that doing so is preferable to imposing punishment.[28] This view is based on Allah's statement in Surah al-Baqarah, verse 178, stating: *"O believers! The law of retaliation is set for you in cases of murder—a free man for a free man, a slave for a slave, and a female for a female. But if the offender is pardoned by the victim's guardian, then blood-money should be decided fairly, and payment should be made*

[21] Nuraisyah Nuraisyah, "Philosophical Dimensions of Punishment in Islamic Criminal Law," *Al-Hurriyah: Jurnal Hukum Islam* 6, no. 1 (August 2021): 91–101, https://doi.org/10.30983/alhurriyah.v6i1.3459.

[22] Saamikh Sayyid Jaad, *Al-'Afwu 'Anil 'Uqubah Fii al-Fiqhi al-Islami Wa al-Qanuni al-Wadh'Ie* (Silsilatu al-Kuttab al-Jami'ie, 1983), 12.

[23] Mahir Amin, Marli Candra, and Helga Nurmila Sari, "Punishment in Islamic Criminal Law: Between Facts and Ideals of Punishment," *Al-Jinayah : Jurnal Hukum Pidana Islam* 10, no. 1 (June 2024): 48–71, https://doi.org/10.15642/aj.2024.10.1.48-71.

[24] Ramdlany, "Restorative Justice Dalam Hukum Pidana Islam Perspektif Filsafat Hukum Islam."

[25] Ahmad Fathi Bahantsi, *Al-Qisas Fil Fiqhi al-Lslami* (asy-Syirkah al-'Arabiyyah lit-Ṭiba'ah wan Nasyr, 1964).

[26] Ibrahim Bin Fahd Bin Ibrahim Wa'dan, *Al-'Afwu 'Anil 'Uqubah Wa Atsarihi Baina al-Syariah Wa al-Qanu* (Riyadh: Fadhlul Murad, 2002), 46.

[27] Suparno Suparno, Rusli Rusli, and Ia Hidarya, "A New Restorative Justice Paradigm in the Sociology of Islamic Law in Indonesia: Nahdlatul Ulama and Muhammadiyah's Responses to Corruption Cases," *Syariah: Jurnal Hukum Dan Pemikiran* 24, no. 2 (2024): 480–502, https://doi.org/10.18592/sjhp.v24i2.16221.

[28] Ash-Showi, *Bulghatu al-Salik*, Juz 3 (Beirut: Dar al-Ma'rifah1409 H): 383.

courteously. This is a concession and a mercy from your Lord. But whoever transgresses after that will suffer a painful punishment."

Abdul Qadir Awdah argues that because *hudud* are prescribed in the Quran as rights owed to God and cannot be forgiven or nullified, pardon does not affect perpetrators sentenced to *hudud* punishments, whoever grants it – the victim, their guardian, or the authorities – because hudud punishments are mandatory and must be enforced.[29] However, pardon can be granted for certain types of *hudud,* especially in cases involving direct victims, such as *sariqah* (theft) and *qadzaf* (false accusation of adultery).[30] Scholars agree that the authorities are fully empowered to grant pardons for *ta'zir* offences and nullify the punishments associated with them, either partially or entirely. However, scholarly opinion differs over whether this authority extends to all *ta'zir* offences or only certain types.[31] One view holds that the authorities cannot grant pardon for offences punishable by *qhisash* and *hudud*, for which *qhisash* and *hudud* punishments cannot be issued; instead, they must be addressed with *ta'zir* punishment relevant to the crime. In such cases, the authorities cannot pardon the crime or withhold punishment. However, for other types of offences punishable by *ta'zir*, the authorities can grant a pardon and reduce or nullify the corresponding punishment if they believe it is in the public interest to do so. The second view holds that the authorities have the right to pardon all offences punishable by *ta'zir* and to nullify the punishment if doing so serves the public good.[32]

Judicial Pardon (*Rechterlijke Pardon*) in the Indonesian Penal Code

In the context of positive law, "pardon" – also referred to as mercy, clemency, indemnity or amnesty – is a flexible concept. Broadly speaking, it can be interpreted as forgiveness for an unlawful act to achieve a just society.[33] The concept of *rechterlijke* pardon, or judicial pardon, also known as *dispensa de pena*, refers to a court's decision not to impose a punishment on a person found guilty.[34] Pardon is a fundamental principle of punishment.[35] However, its role has become devalued by those who perceive the modern criminal justice system as quite capable. In the context of the Indonesian Penal Code (IPC), this concept reflects a paradigm regarding the purpose and direction of punishment that was not explicitly regulated in the old Penal Code.[36] As Arief has stated: *"It is pretty much the same with the issue of objective and direction of punishment that are probably forgotten, ignored or forbidden just because there is no explicit formulation within the criminal code, whereas if we look at it from a systematic standpoint, the*

[29] Awdah (n 10) 168-169.
[30] Jaad, *Al-'Afwu 'Anil 'Uqubah Fii al-Fiqhi al-Islami Wa al-Qanuni al-Wadh'Ie*.
[31] Awdah (n 10) 390.
[32] Alwy, "The 'afw Principle and The Indonesian Restorative Justice System."
[33] David Tait, "Pardons in Perspective: The Role of Forgiveness in Criminal Justice," *Federal Sentencing Reporter* 13, nos. 3–4 (2001): 134–38, https://doi.org/10.1525/fsr.2000.13.3-4.134.
[34] Abdurrakhman Alhakim, "The Ideas of Rechterlijk Pardon as a Restorative Justice Approach: From Vengeance to Recovery?," *Ganesha Law Review* 5, no. 1 (May 2023): 1–12, https://doi.org/10.23887/glr.v5i1.1769.
[35] Dalton Kane, "Jurisdiction of Pardoned and Commuted Sentences Must Remain Within the Judicial Branch," *Liberty University Law Review* 15, no. 1 (September 2021), https://digitalcommons.liberty.edu/lu_law_review/vol15/iss1/6.
[36] Marcus Priyo Gunarto, Interview (Yogyakarta, 17 July 2024)

position of "objective" is very central and fundamental. This very objective is the spirit of the criminal system."[37]

Formulated on the principle of formal legality and oriented to the past, the old Penal Code mandated criminal sanctions for any offence that met the formal elements of a crime, including minor infractions. In the absence of an explicitly expressed purpose and direction for punishment, this rigid system focused on three key aspects of criminal law: identifying the criminal act (*strafbaarfeit*), establishing culpability (*schuld*), and imposing punishment (*straf* or *poena*).[38] Therefore, the theoretical basis of the old penal code appears to be retributive punishment, suggesting that the sole purpose of punishment is retribution under the legality principle. While the issues of culpability and the purpose of punishment were recognised in judicial practice, they were not acknowledged in the old penal code.[39]

Huda, one of the drafters of the IPC, argues that the inclusion of *rechterlijke pardon*, a concept previously formulated in the Netherlands, in the IPC reflects the spirit of democratisation in Indonesian criminal justice. This democratisation can be seen in the balanced regulation and application of both the legality principle and its exceptions, such as the recognition of customary laws and the emphasis on balancing the interests of the perpetrator with those of the victim.[40] The inclusion of *rechterlijk pardon* in the IPC, as part of criminal law reform, aims to grant judges the discretion to impose or withhold punishment when a defendant is found guilty. This allows judges to issue a judicial pardon and impose no sanctions, despite the defendant's guilt.[41]

Several key arguments inform the decision to grant a judicial pardon: First, Judicial pardon is motivated by a rejection of the rigidity and absolutism of conventional punishment. Judicial pardon addresses the shortcomings of the old penal code, whose strict adherence to the maxim 'No Mercy for You' led to an inflexible and coercive model of legal enforcement. Judicial pardon is intended to provide a more balanced and compassionate alternative to that model;[42] Second, *Rechterlijke pardon* is designed to function as a 'safety valve' (*veiligheidsklep*) that prevents the stagnation that can develop when court decisions impose criminal sanctions unnecessarily on minor offences, thereby avoiding rigid punishment absolutism.[43] When deciding whether to grant *rechterlijke pardon* in a criminal case, the judge must consider not only the defendant's culpability, the nature of the offence,

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[37] Barha Nawawi Arief, *Tujuan Dan Pedoman Pemidanaan* (Semarang: Pustaka Magister, 2011), 7.
[38] Syamsuddin Syamsuddin et al., "Criminal Liability Against Crime Defense Forced (Noodweer)," *The Indonesian Journal of Legal Thought (IJLETH)* 2, no. 1 (August 2022): 18–25, https://doi.org/10.23917/ijleth.v2i1.18884; Tia Ludiana, "Eksistensi Pidana Mati Dalam Pembaharuan Hukum Pidana (kajian Terhadap Pidana Mati Dalam Ruu Kuhp)," *LITIGASI* 21, no. 1 (July 2020): 60–79, https://doi.org/10.23969/litigasi.v21i1.2394.
[39] Musa Darwin Pane, "Potensi Ancaman Pidana Melakukan Kerumunan Di Tengah Pandemi Covid 19 Di Indonesia," *LITIGASI* 22, no. 2 (October 2021): 230–41, https://doi.org/10.23969/litigasi.v22i2.4119.
[40] Chairul Huda, Interview (Jakarta, 22 July 2024)
[41] Marcus Priyo Gunarto, "Asas Keseimbangan dalam Konsep Rancangan Undang-undang Kitab Undang-undang Hukum Pidana," *Jurnal Mimbar Hukum* 24, no. 1 (2012): 83–97, https://doi.org/10.22146/jmh.16143.
[42] Barda Nawawi Arief, *Masalah Penegakan Hukum Dan Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan* (Jakarta: Kencana, 2015).
[43] Marcus Priyo Gunarto, Interview (Yogyakarta, 17 July 2024)

and the purpose of punishment, but also the sentencing guidelines and the provisions of Article 54(2) of the IPC. If the prosecution's case proves persuasive, the judge, after considering these factors, may still grant a judicial pardon, despite the defendant being found guilty. This approach enables *rechterlijke pardon* to safeguard against the inflexibility and absolutism that characterised the old penal code.[44]

Third, *Rechterlijke pardon* primarily serves as a judicial corrective to the legality principle. By granting judges the authority to impose or withhold punishment, the inclusion of this concept in the IPC corrects the emphasis in the old national Penal Code on the retributive function of criminal law. This stems from the view that judges are merely the mouthpiece of the law (*la bouche des lois*) whose role is to punish perpetrators without regard for the impact of their decisions on societal justice.[45] The rigid configuration of punishment in the old national penal code also limited judicial discretion by requiring judges to impose punishment whenever all the elements of criminality existed. *Rechterlijke pardon*, however, allows judges to determine whether there are grounds for withholding punishment even in cases where guilt has been established.[46]

Forth, The inclusion of judicial pardon in the IPC serves to implement and integrate the purpose of punishment into Indonesia's legal framework. Today, the purpose of punishment is not explicitly or definitively defined in any regulations, suggesting that its objectives lie outside the scope of the legal system. This is unclear regarding how punishment should be enforced. This regulatory model legitimised decisions based solely on proof of criminal activity and culpability, thereby reinforcing the rigidity of the old national Penal Code. As formulated in the IPC, the objective of punishment is grounded on the idea that punishment is merely a means to an end. In that formulation, this objective balances two primary goals: protecting society, including victims of crime (i.e., the prevention of general harm), and safeguarding individual perpetrators (i.e., the prevention of specific harm). This approach reflects the simultaneously repressive and preventive functions of criminal law. By balancing these competing objectives, Indonesian policy towards criminality seeks to ensure that punishment has a positive impact not only on the perpetrator but also on the wider society.[47]

Fifth, *Rechterlijke pardon* offers a justification for punishment based not only on the fact that the crime exists (the legality principle) and the accused is responsible for it (culpability principle), but also on the punishment objectives. In the framework of the IPC, these objectives are included as a condition for punishment alongside the objective requirement of a criminal act and the subjective requirement of fault. In contrast, the concept of judicial pardon or *rechterlijke pardon* aims to balance these various objectives by addressing the rigidity of the legality principle which dominated the old Penal Code through the application of five key principles of *rechterlijke pardon*: (1) avoiding punishment absolutism; (2) providing a safety valve (*veiligheidsklep*) to

[44] Arief, *Masalah Penegakan Hukum Dan Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan*.
[45] Sahat Marisi Hasibuan, "Kebijakan Formulasi Rechterlijke Pardon Dalam Pembaharuan Hukum Pidana," *Jurnal Hukum Progresif* 9, no. 2 (October 2021): 111–22, https://doi.org/10.14710/jhp.9.2.111-122.
[46] Chairul Huda, Interview (Jakarta, 22 July 2024)
[47] Chairul Huda, Interview (Jakarta, 22 July 2024)

prevent stagnation in judicial decision making; (3) serving as a judicial corrective to the strict application of the legality principle; (4) considering the objective of punishment as one of the conditions for punishment; and (5) requiring that, to justify punishment, due consideration be given not only to the existence of the crime (the legality principle) and proof of guilt (culpability principle), but also to punishment objectives.

As it is formulated in the IPC, the scope of judicial pardon (*rechterlijke pardon*) is limited to minor offences (trivial cases).[48] Its application is based on the factors specified in Article 54, paragraph (2) of the IPC, stating: *The severity of the offence, the personal circumstances of the offender, the circumstances at the time of the offence, and subsequent events may serve as grounds for deciding whether to impose a punishment, with due consideration to justice and humanity.* In the context of the severity of the offence, Article 54, paragraph (2) of the IPC references this factor, without clearly defining the extent of the judge's discretion in assessing the severity of the offence when deciding whether to grant a pardon rather than impose a penalty or otherwise take action against the offender. In the absence of an explicit definition, "the severity of the offence" can be interpreted as a judicial pardon that applies to relatively minor or less serious crimes.[49] Arief argues that because the phrase "the severity of the offence" is not precisely defined, there is no limit to the judge's authority to grant a pardon only to certain types of crimes. Gunarto interprets "the severity of the offence" as reflecting both the dangerous nature of the act and the legal interests at stake in the crime committed by the offender. Although some experts argue that this phrase implies that pardon can be granted only for minor crimes under the IPC, Gunarto disagrees. For example, theft is considered a crime under Article 362 of the old Penal Code, as adopted from the *Wetboek van Strafrecht* (WvS). As long as the requirements of this article are met and there is no reason to exempt the defendant from punishment, a penalty should be imposed.

Likewise, Huda argues that judicial pardon is not restricted to minor offences, although such offences are among those eligible for consideration. Consequently, "the severity of the offence" referred to in Article 54, paragraph (2) of the IPC depends on various factors associated with lesser offences. It can also be assessed based on the societal impact of the offence, with an emphasis on prioritising the collective welfare over individual interests. For example, consider a teacher, in an educational context, pinching a student as a form of discipline, and then the student's parents report it as abuse. While this action may not be justifiable, teachers sometimes react impulsively when correcting their students. Under the provisions of the IPC on abuse, however, the teacher could be subject to punishment for their actions. Huda considers this case minor, suggesting they may be eligible for a judicial pardon given the context and the relatively low severity of the offence.[50]

Article 54, paragraph (2) of the IPC also introduces the offender's "personal circumstances" as a consideration in determining eligibility for pardon. While the

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

[49] Raden Roro Fara Anissa Putri, "Urgensi Keberadaan Dan Model Pengaturan Ideal Judicial Pardon Dalam Kitab Undang-Undang Hukum Pidana (KUHP) Di Indonesia" (Undergraduate Thesis, Universitas Islam Indonesia, 2024), https://dspace.uii.ac.id/handle/123456789/49612.

[50] Chairul Huda, Interview (Jakarta, 22 July 2024)

Penal Code does not define this phrase explicitly, similar language appears in the Dutch Penal Code regarding the concept of judicial pardon (*rechterlijke pardon*), which considers the offender's individual circumstances. In this context, Gunarto explains that the concept of personal circumstances is consistent with the principles of justice and humanity, which infuse the subsequent factors for assessment. Ultimately, judges have discretion to determine whether the trial revealed aspects of the offender's personal circumstances that justify a pardon.

Huda adds that relevant factors that the judge may consider when deciding a pardon. These factors include the offender's health, level of education and family responsibilities. The pardon is also granted when meeting the offender's circumstances at the time of the offence and subsequent events. Unfortunately, the IPC does not provide a clear definition for it. Therefore, careful interpretation should help avoid potential bias, particularly regarding emergency provisions (*noodtoestand*). Huda interprets "the circumstances at the time of the offence as the offender's motivation for committing the crime, while "subsequent events" can be understood as the offender's actions after committing the crime, such as whether they admit their guilt and express remorse for their actions or turn themselves in to the authorities. Huda distinguishes between conditions and events that occurred at the time of the crime, such as a natural disaster or the offender's motivation, and those that occurred subsequently. These conditions can also be assessed by considering the offender's willingness to be held accountable for their actions, including whether the act was a repeat offence or premeditated, the suffering or loss experienced by the victim, and the offender's responsibility for that loss and whether the victim's own actions or behaviour contributed to the offence.[51]

Judicial pardon in the ICP must also be linked to judicial discretion. The use of the word '*dapat*' ('may' or 'can') indicates that if the conditions outlined above are met, the judge can grant a judicial pardon (*rechterlijke pardon*). This phrasing gives the judge sufficient discretion to apply legal reasoning in determining whether to impose punishment or grant a pardon. However, because the judge is not required to pardon the offender, they retain the option to impose criminal sanctions instead. In essence, the word '*dapat'* establishes judicial independence in deciding whether or not to grant a pardon based on the factors outlined above.[52] A drawback of discretionary power, however, is the potential for legal uncertainty, which can lead to inconsistency, bias, and even disparity in sentencing decisions.

It is also important to argue that granting a pardon allows a judge to demonstrate leniency by releasing an offender who has been proven guilty from punishment, particularly if imposing the penalty might conflict with the community's perception of justice. When deciding whether to grant a pardon, both justice and humanity are key considerations. Gunarto notes that, under Article 54, paragraph (2) of the IPC, the factors discussed above – the severity of the offence, the offender's personal circumstances, the prevailing circumstances at the time of the offence and subsequent events – should be assessed in light of their implications for justice and

[51] Chairul Huda, Interview (Jakarta, 22 July 2024)
[52] Chairul Huda, Interview (Jakarta, 22 July 2024)

humanity.[53] Moreover, any punishment imposed should both benefit the offender by providing a specific deterrent to future criminal activity and protect the community's interests by serving as a general deterrent.[54] If the punishment would cause more harm than good from the standpoint of justice and humanity, Gunarto argues that the judge should pardon the offender but still acknowledge their guilt.[55] Despite the opportunities it presents, implementing judicial pardon (*rechterlijke pardon*) within the IPC is, however, as yet unfeasible and will remain so even once the IPC is enacted. This is due to its lack of alignment with the Code of Criminal Procedure (KUHAP), which distinguishes only between penal and non-penal decisions. To support the implementation of judicial pardon (*rechterlijke pardon*) in the future, Huda and Gunarto propose establishing a separate decision-making regime for judicial pardon (*rechterlijke pardon*), distinct from both penal and non-penal regimes.[56]

Pardon from the Punishment in the Criminal Justice System of Kuwait

Before discussing the role of pardon and reconciliation in the Kuwaiti criminal justice system, it is essential to examine the philosophy underlying the Kuwaiti legislature's approach to criminal justice. Although not explicitly stated or defined, this philosophy can be inferred by analysing the legal principles and texts adopted by the legislature. The constitutional framework makes it evident that the Kuwait legislature has established a set of rules that reflect its guiding philosophy. Article 2 of the Kuwaiti Constitution states that Islam is the state religion and *Sharia* is a primary source of legislation. This clearly indicates that Kuwaiti laws and legal procedures are established in the rules of Islamic *Sharia*. Moreover, when these laws and procedures are examined, it becomes evident that most are derived from and are consistent with Islamic *Sharia*. The Kuwaiti legislature reinforced this alignment with the established principles of *Sharia*, as outlined by its scholars when drafting these constitutional texts.[57] This reflects strong adherence to Islamic traditions, which encourage reconciliation. Indeed, reconciliation is a key Islamic concept, as evidenced by numerous Quranic verses and Prophetic *Sunnah* which emphasise its value as a means of resolving conflicts.

Having examined the philosophical basis for the Kuwaiti legislature's approach to criminal justice, we now turn to its stance on pardoning. Accordingly, this section begins by exploring the punitive philosophy underpinning its view on this issue and how it has evolved. We will then outline the various types of pardon and distinguish them from other similar concepts. Kuwaiti criminal law has notably incorporated the principles of pardon and reconciliation, with the Kuwaiti legislature embracing them in many instances. Their first formal adoption occurred in Kuwait's Penal Code No. 16 of 1960 and the Code of Criminal Trials and Procedures No. 18 of 1960. We will trace the development of this legislative approach through a historical review of these statutes.

[53] Marcus Priyo Gunarto, Interview (Yogyakarta, 17 July 2024)
[54] Marcus Priyo Gunarto, "Sikap Memidana Yang Berorientasi Pada Tujuan Pemidanaan," *Mimbar Hukum* 21, no. 1 (2009): 93–108, https://doi.org/10.22146/jmh.16248.
[55] Marcus Priyo Gunarto, Interview (Yogyakarta, 17 July 2024)
[56] Marcus Priyo Gunarto, Interview (Yogyakarta, 17 July 2024)
[57] Explanatory Memorandum of Law No 16 of 1960 regarding the Issuance of the Penal Code, published in Issue No 278 of *Kuwait Al-Youm* (11 June 1960).

In examining the Kuwaiti Penal Code, we find that the legislature initially implemented a range of penalties that allowed for pardons under certain circumstances. Two examples show that pardon is unconditional and absolute. The first example applies when a final judgment has imposed the death penalty. In such cases, the punishment cannot be carried out until it is ratified by the *Amir*, who has full discretionary authority to pardon the offender or commute the sentence. It indicates that the legislature has intentionally refrained from imposing conditions in such cases by giving the Amir the authority to exercise his judgment on a case-by-case basis.[58] The second example of an unconditional pardon pertains to crimes for which criminal proceedings may be initiated only upon a complaint from the victim or authorisation from the competent authority. In such cases, the legislature allows the complaint or authorisation to be withdrawn, effectively granting the accused a special pardon.[59]

Both cases show that the Kuwaiti criminal legislature grants the authority to pardon for two reasons. The first concerns the profound impact of the death penalty on the individual. Given that it ends a life, this punishment is subject to the discretionary authority of the *Amir*, which includes the right to mitigate it or withdraw it altogether. Notably, the Kuwaiti legislature's decision to grant the *Amir* the absolute right to pardon or commute a death sentence could be seen as potentially conflicting with certain provisions of Islamic *Sharia*. In cases of murder, for example, *Sharia* stipulates that specific conditions must be met before granting a pardon, as previously noted. The same rationale applies in the second case. Crimes for which a complaint initiates prosecution align with Islamic principles in that they emphasise the rights of the victim and the importance of preserving social bonds. Towards this end, the Kuwaiti legislature grants the victim the authority to withdraw their complaint, granting the accused an unconditional special pardon and respecting the victim's right to seek reconciliation.

The criminal legislature also specifies certain crimes for which pardon may be granted under certain circumstances. For example, in counterfeiting, forging or falsifying banknotes or coins, offenders may be exempted from punishment if they inform the competent authorities before the crime takes place, before the criminal investigation begins, or if they assist in the arrest of other perpetrators involved in the crime.[60] A similar approach is taken in cases of criminal conspiracy. If two or more persons agree to commit a felony or misdemeanour and take steps indicating they are unlikely to abandon their plan, each will be held accountable for their conspiracy, even if the agreed-upon crime itself does not occur. Any participant who promptly informs the authorities about a criminal conspiracy and the individuals involved in it, before any investigation or search begins, and before any crime is committed, is exempt from punishment. If this information is provided after the investigation and search have taken place, an exemption applies only if it leads to the arrest of the other conspirators.[61]

[58] Law No 16 of 1960 regarding the Issuance of the Penal Code (Law No 16), art 60.
[59] Law No 18 of 1960 regarding the Issuance of the Criminal Trials and Procedures Code (Law No 18), art 110.
[60] Law No. 16, arts 263-273.
[61] Law No. 16, art 56.

Likewise, in cases of crimes against external state security, Kuwaiti criminal law stipulates that any perpetrator who informs the administrative or judicial authorities before the crime is committed and before the investigation begins is exempt from the punishment prescribed for such crimes. The court may also grant an exemption from punishment if the information is reported after the crime has been committed but before the investigation begins. Additionally, the court may grant an exemption if, during the investigation, the offender assists the authorities in apprehending the other perpetrators of the crime or the perpetrators of another crime of a similar nature and severity.[62] The legislature adopted a similar approach to bribery, exempting the briber and the intermediary from punishment if they report the crime to public authorities, even after it has occurred. Because bribery involves the misuse of public office, with the primary offender being the public official who accepts the bribe, this exemption aims to ensure that the main offender does not escape punishment.[63]

To summarise, the Kuwaiti criminal legislature introduced the concept of pardon into the Kuwaiti Penal Code by granting the *Amir* the right to withdraw the death penalty, by giving the victim of complaint-based crimes the right to withdraw their complaint, and by granting the investigative authority the right to bestow exemption from punishment in cases involving counterfeiting, forgery, or falsification of currency, criminal conspiracy, bribery, and crimes against external State security. While the *Amir* and the victim have an unconditional right to pardon, the investigative authority's right to do so applies only when an accused individual assists in the investigation and facilitates the arrest of other offenders in these specific crimes.

By adopting the philosophy of pardon in the Criminal Trials and Procedures Code as well, the Kuwaiti criminal legislature sought to facilitate the apprehension of criminals. If a crime is punishable by imprisonment of more than seven years or is subject to a more severe penalty, and if multiple individuals took part in its commission, the Minister of Interior, at the request of the Public Prosecutor, may grant a pardon to any person believed to be involved in that crime, provided they supply information sufficient for the arrest of the other accused persons and submit all evidence to support conviction. In such cases, the accused becomes a witness, although they are not required to take an oath. The pardon becomes effective and binding if the accused fulfils these conditions in good faith and provides substantial assistance to the investigation. No criminal charges will then be brought against them, even if they themselves have been accused of committing the offence.[64]

Furthermore, it is important to note that the Kuwaiti criminal legislature's approach to exemption from punishment was not stimulated by a desire to show leniency toward the offender or to reform them. In the 1950s, Kuwaiti criminal policy focused primarily on punishment and deterrence by increasing the severity of penalties. However, analysis of the legal texts reveals that the legislature's intention in granting exemptions was to ensure that punishment was imposed on the remaining offenders. In cases where securing convictions was quite a challenge, the legislature

[62] Law No 31 of 1970 regarding the Amendment of the Penal Code (Law No 31), art 22.
[63] Law No 31, arts 39 and 40.
[64] Law No 18, art 160.

sought to encourage offenders or their accomplices to inform authorities or otherwise assist in apprehending the main perpetrator.

The types of crime for which Kuwaiti law permits exemption from punishment often occur in secret and can be difficult to prove. In these cases, the legislature's objective was to ensure that criminals are apprehended and do not evade punishment. This intent is explicit in the language of the legal texts. Phrases such as 'if they facilitate the arrest of the other perpetrators', 'anyone who promptly informs the public authorities of the existence of a criminal conspiracy and the individuals involved in it', 'if the offender enables the authorities during the investigation to arrest the other perpetrators of the crime or perpetrators of another crime of a similar nature and severity', and 'on the condition that they provide information sufficient for the arrest of the other accused persons', indicate the strategic direction and philosophy of the Kuwaiti criminal legislature in adopting this approach.

Nevertheless, it could be argued that the legislature's approach at the time was pioneering in its application of a system of exemption from punishment. These laws were enacted before the Kuwaiti Constitution was issued and were consistent with Kuwaiti society's social values at the time. Since then, the Kuwaiti legislature has continued to develop the legal framework, particularly regarding pardon and criminal reconciliation. The Kuwaiti legislative framework has also continued to evolve in the crime control approach to pardon and criminal reconciliation. When the Constitution of the State of Kuwait was issued in 1962, it set the basis for the philosophy of pardon and reconciliation, albeit indirectly. As noted earlier, Islamic *Sharia* embraces the idea of reconciliation and pardon, meaning that the Kuwaiti Constitution affirmed this philosophy by upholding several key principles that support this concept, including establishing Islam as the State religion and Islamic *Sharia* as a primary source of legislation. Additionally, the Constitution upholds justice, freedom and equality as pillars of Kuwaiti society, while emphasising that cooperation and compassion forge strong bonds between citizens. The family is regarded as the foundation of society, grounded in religion, morals, and loyalty. The law protects the family's structure, strengthens its bonds, and safeguards motherhood and childhood. The state also prioritises the well-being of young people, shielding them from exploitation and ensuring their protection.

The Kuwaiti system of governance is founded on the separation of powers, with each branch cooperating with the others in accordance with the provisions of the Constitution; no authority may relinquish any part of its constitutionally defined powers. These constitutional principles provide the legal basis for the system of pardon and criminal reconciliation to this day. The development of this framework began with the constitutional legislature's refinement of the concept of pardon. Previously, the *Amir* of the state had the authority to issue a comprehensive pardon for specific crimes at any time. Such a pardon is regarded as equivalent to an acquittal and nullifies all previous procedures and judgments related to the offence. However, a comprehensive pardon for a crime still leaves room for a civil compensation claim. Additionally, once a sentence has been issued, before or during its execution, the *Amir* has the power to issue a pardon to withdraw the sentence, reduce it, or replace

it with a lighter penalty. Although the original judgment remains intact, this form of pardon modifies the nature or status of the sentence as if it had been fully served.[65]

Thus, Articles 238 and 239 of the Criminal Trials and Procedures Code authorised the *Amir* to grant both special and comprehensive pardons. However, following the issuance of the Kuwaiti Constitution in 1962, the constitutional legislature took a different approach. While the right to grant special pardons remained with the *Amir*, the power to issue comprehensive pardons was assigned to the legislative authority, meaning that such pardons could be issued only through legislation.[66] From this perspective, it could be said that modern criminal jurisprudence, in establishing the rules of criminal legislation, aims to achieve general deterrence by imposing punishment for crimes committed. However, it can also be viewed as offering a more holistic response to the problem of crime by providing criminal protections for the state, upholding public order through reconciliation and encouraging consensual settlement between the parties, thus reducing the burden of litigation on the judicial system.

As discussed in the next section, the criminal legislature began adopting the concepts of pardon and reconciliation in various other criminal legislations. For now, the shift in the punitive philosophy of the Kuwaiti criminal legislature remains significant. Initially, pardon was intended to ensure the punishment of some criminals by exempting others who reported the crime to the authorities. In contrast, modern Kuwaiti criminal legislation has begun to apply the principle of pardon because criminal reconciliation enables criminal cases to be considered outside the scope of traditional criminal procedures. This makes reconciliation an effective tool for managing these cases and accelerating their resolution, thus alleviating the pressure caused by the ever-rising number of criminal cases coming before the courts. This strategy reflects a legislative flexibility aimed at reducing the burden on the courts and achieving justice. It is worth noting that the primary rationale for adopting pardon in recent Kuwaiti criminal legislation remains to facilitate the arrest of offenders by offering one of them exemption from punishment in exchange for providing information that facilitates the apprehension of the others. In other words, the model stays as crime control. However, some modern criminal legislation has considered the idea of pardon to expedite the judicial process. In view of this notable development, encouraging future research to assess the effectiveness of the pardon or reconciliation system in achieving these goals is essential.

We also need to clarify the distinction between the legal mechanisms of "exemption from punishment" in the form of pardon and reconciliation and "sentence mitigation" in terms of their legal implications for offenders, victims and the state. The Kuwaiti criminal legislature has adopted both pardon and reconciliation as methods of exempting offenders from punishment. While there are important differences between these concepts, which we discuss in this section, we will use the terms "pardon" and "reconciliation" interchangeably in their broad sense for this research. A more detailed analysis will be left for future studies.

Kuwaiti criminal law generally distinguishes between pardon and reconciliation. Criminal reconciliation involves both parties agreeing to waive their right to judicial recourse and instead resolve the dispute amicably. This process serves

[65] Law No 18, arts 238 and 239.
[66] Constitution of the State of Kuwait 1962, art 75.

as a non-judicial legal mechanism in which criminal proceedings are terminated in exchange for a financial settlement. Parties opt for reconciliation for various reasons, including a desire to avoid the typically high costs, duration, and potential publicity of judicial proceedings, among other considerations. The key difference between reconciliation and pardon is that the latter does not depend on the consent of the other party and does not require their approval. Whereas reconciliation is a bilateral agreement between the parties, pardon is a unilateral act granted by the individual with the authority to forgive.[67]

Reconciliation requires the mutual consent of both parties, while pardon is issued by the victim or the victim's guardian alone, needing no consent from the offender. Whereas pardon may be granted with or without compensation, including the payment of a *diya* (blood money), reconciliation always involves a financial settlement. No set amount is prescribed for this settlement, which may be equal to or less than the *diya* or even exceed it. The timing of reconciliation has implications for the criminal proceedings. If reconciliation occurs before the investigation begins, the Public Prosecution orders the case to be closed. If reconciliation takes place during an ongoing investigation, the Public Prosecution rules that criminal proceedings are no longer necessary. If reconciliation occurs once a criminal case has been referred to court, the court issues a judgment terminating the case. If reconciliation occurs during an appeal before the Court of Cassation, the court dismisses the appeal and suspends the sentence. In all cases, when the victim and the accused agree to reconcile, the court must rule to terminate the criminal case, without regard to the accused's guilt or innocence. However, criminal reconciliation does not preclude the filing of a civil lawsuit in either the criminal or the civil courts.[68]

It is essential to distinguish pardon from other forms of sentence mitigation. The Kuwaiti criminal legislature has adopted two approaches to mitigation. The first is legal mitigating excuses, under which specific legal provisions mandate reduced penalties for crimes committed under circumstances stipulated by law.[69] The second approach is judicial mitigating excuses, whereby the criminal judge is granted discretionary authority to reduce a sentence based on the personal circumstances of the accused or the context of the crime. There are three scenarios in which judicial mitigation can be applied. The first involves withholding adjudication. For crimes punishable by imprisonment, the court may decide not to impose punishment if the offender's character (e.g. their age or previous behaviour), or the circumstances in which the crime was committed, or the relative insignificance of the crime, suggests that the accused is unlikely to reoffend. In such cases, the court may withhold pronouncement of guilt and instead require the accused to provide a personal or collateral guarantee and to commit to good behaviour for up to 2 years. In some

[67] Sultan F. M. KH Alotaibi, Noor Naemah Abdul Rahman, and Ameen Ahmed Abdullah Qasem Al-Nahari, "Lapse Of Punishment By Pardon In The Kuwaiti Penal Code: A Comparative Study: سقوط العقوبة بالعفو في قانون الجزاء الكويتي: دراسة مقارنة," *Al-Qanatir: International Journal of Islamic Studies* 24, no. 1 (September 2021): 108–25.

[68] Daniel Pascoe and Michelle Miao, "Victim–Perpetrator Reconciliation Agreements:What Can Muslim-Majority Jurisdictions and the Prc Learn from Each Other?," *International & Comparative Law Quarterly* 66, no. 4 (October 2017): 963–89, https://doi.org/10.1017/S0020589317000409.

[69] Law No 16, arts 153 and 159.

cases, no guarantee at all is needed. During this period, the court may also appoint a person to supervise the accused. If the accused maintains the conditions of the undertaking for the duration of the specified period, the previous trial proceedings are rendered null and void. However, if the accused violates the terms, the court will proceed with the trial and impose the sentence for the crime.[70]

The second scenario involves suspending execution of the sentence. For crimes punishable by up to two years' imprisonment or by a fine, the court may suspend the sentence if, having considered the character of the offender or the circumstances in which they committed the crime, it is believed that they are unlikely to reoffend. The offender must sign a commitment to uphold this condition and, if the court deems it appropriate, provide a personal or collateral guarantee. Suspension orders remain in place for three years from the date the judgment becomes final. If no order to revoke the suspension is issued during this period, the conviction is considered null. However, suspension can be revoked if, during the suspension period, the convicted person receives a prison sentence for another crime committed either within or prior to the suspension period, provided the court was unaware of it when the suspension was granted. Similarly, if it emerges subsequently that a prison sentence was issued before the suspension was granted and the court was unaware of it, the suspension may also be rescinded. When a suspension order is revoked, the original sentence is then enforced. The authority to revoke a suspension order lies with the court that issued it and with the court that imposed the new prison sentence. In this case, either the prosecutors or the victim can request the revocation of a suspension order.[71]

The third scenario involves a lighter sentence as a replacement. If the court finds that the accused deserves leniency due to their background or character, or the circumstances in which the crime was committed, it may reduce the severity of the penalty. For example, the court may replace a death sentence with a term of life imprisonment or a term of at least 10 years. Similarly, the court may replace a life sentence or a sentence of seven or more years' imprisonment with a lesser sentence. However, the substituted sentence must be no less than one-third of the maximum penalty prescribed for the crime.[72] While both pardon and sentence mitigation prevent the imposition of punishment on the accused, only mitigation involves placing the accused under supervision or monitoring. In other words, pardon lacks the deterrent element and is best suited for offenders with a low likelihood of reoffending.

There is another method of mitigating sentences, in which pardons are issued by the judiciary. However, the Kuwaiti criminal legislature has not adopted this approach; instead, it has implemented a system of judicial mitigation and individual pardon, in which the victim chooses to pardon or reconcile with the accused.[73] The legal concept of criminal reconciliation is both simple and nuanced. On one hand, it provides a straightforward alternative to traditional criminal procedures, which, as is well known, are often lengthy and complex. By facilitating swift resolution, reconciliation is an effective case management tool. Indeed, the approach emerged as a response to the challenges faced by many countries whose judicial systems are

[70] Law No 16, art 81.
[71] Law No 16, art 82.
[72] Law No 16, art 83.
[73] ibid.

overwhelmed by the growing number of criminal cases brought to court, complicating the pursuit of secure, timely justice.

The state exercises its judicial authority over all its territory following the principle of the territoriality of criminal law. It fulfils this role through its judicial system, through which it seeks to protect individual rights and freedoms and safeguard individuals from potential harm. Nevertheless, as the custodian of the executive, legislative and judicial branches of power, the state can empower individuals and certain designated bodies to settle disputes through reconciliation. In line with modern criminal philosophy and its objectives, the Kuwaiti criminal legislature has embraced the concept of reconciliation. As previously discussed, the legislature has moved beyond the previous approach, which was limited to exempting certain offenders to enable punishment for others by enacting a range of laws that employ reconciliation to, among other things, preserve public funds and reduce the number of criminal cases brought to court.

More than 30 laws incorporate provisions for reconciliation between the victim and the accused for specified crimes and under specified conditions. Due to the limited scope of this paper, it is not possible to examine them all in detail here, but key examples include Decree-Law No. 67 of 1976 on Traffic, Law No. 37 of 2014 establishing the Communication and Information Technology Regulatory Authority, Law No. 20 of 2014 on Electronic Transactions, Law No. 112 of 2013 establishing the Public Authority for Food and Nutrition, Law No. 10 of 2003 issuing the Unified Customs Law of the Gulf Cooperation Council (GCC) countries, Law No. 42 of 2014 issuing the Environmental Protection Law, Law No. 33 of 2016 regarding the Kuwait Municipality, Law No. 7 of 2010 establishing the Capital Markets Authority and regulating securities activities, and Law No. 115 of 2014 establishing the Public Authority for Roads and Land Transport. Collectively, these laws demonstrate the legislature's commitment to reconciliation as a legal remedy across various sectors.

Examination of these provisions reveals a distinct philosophical alteration. As well as offering reconciliation as an alternative to traditional criminal procedures, some of these laws introduce a policy of reducing fines requiring immediate payment, underscoring the evolution in the Kuwaiti criminal legislature's approach to sentencing. While these developments are significant, it is important to note that, rather than fully embracing the modern objectives previously discussed, most provisions on pardon and reconciliation remain grounded in the traditional approach, whereby the accused can obtain a pardon by cooperating and providing information that leads to the arrest and punishment of other criminals. Moreover, as noted earlier, pardon stems from one of the core principles of Islamic *Sharia*: preventing harm and promoting good. In the Kuwaiti system, by contrast, the rationale for pardon is based primarily on the principle of crime control, which focuses on the arrest and punishment of offenders.

Despite the variety of approaches to the concept of pardon – a reflection of the ideological diversity of the schools of jurisprudence – there is consensus among Islamic legal scholars that the primary aim of the pardon system is to resolve disputes amicably. This approach helps to maintain cordial relationships and social cohesion

among individuals, minimising the need to resort to the judiciary.[74] In other words, for individuals accused of misdemeanours and lesser crimes, the principal financial burdens arise not from the fines or sentences imposed by the court, but from the costs incurred before the case reaches court. These include lost wages due to absence from work, legal fees, and time spent on the case. Consequently, for the accused, the priority is less about observing the formalities of judicial procedure and more about minimising the time and expense of navigating the legal system.[75]

The previous analysis highlights key differences in the philosophical foundation and the scope of application of *al-'afwu 'anil 'uqubah* in Islamic criminal law, judicial pardon (*rechterlijke pardon*) in IPC, as well as pardon and reconciliation in the Kuwaiti criminal justice system. Table 1 presents the distinctive features among them.

Table 1. Philosophical Foundation and Scope of Application of Judicial Pardon in Three Legal Systems

Legal System	Philosophical Foundation	Scope of Application
Islamic criminal law	- Preventing harm and promoting benefit - Retribution or crime prevention	- Certain types of crimes, such as crimes of *qishash*, including assault and murder. - Crime of *sariqah* (theft) and *qadzaf* (false accusation of adultery) - Offence of *ta'zir* for which the judge has discretion to grant a pardon.
Indonesian Penal Code	- Promoting justice and humanity - Principle of balance	- Minor offences (trivial cases): - *The severity of the offence* - *The personal circumstances of the offender* - *The circumstances at the time of the offence*
Kuwaiti Criminal Justice System	- Preventing harm and promoting benefits - The primary principle of crime control	- The *Amir* has the authority to pardon death sentences. - Granting pardons in cases involving counterfeiting, forgery, currency falsification, criminal conspiracy, offences against

[74] Ramizah Wan Muhammad, *Forgiveness and Restorative Justice in Islam and the West: A Comparative Analysis | ICR Journal*, December 30, 2020, https://icrjournal.org/index.php/icr/article/view/786?utm_source=chatgpt.com.
[75] Malcolm M. Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* (Russell Sage Foundation, 1986).

	external state security and bribery. - Offering a pardon to one offender in exchange for their cooperation with and assistance in the investigation, and facilitating the arrest of other criminals involved. - Offences of municipal affairs, traffic, and environmental protection

Source: Proceed by the Authors

Table 1 indicates that the difference between *al-'afwu 'anil 'uqubah* and *rechterlijke pardon* is that the former is given by the victim in the context of crimes of *qishash* and several types of crime of *hudud,* such as *sariqah*, whilst the latter is granted by a judge or the authority to the minor offences. Moreover, as formulated in the IPC, *rechterlijke pardon* can only be granted by a judge after considering various factors, though limited to trivial cases. The judge also has the freedom to apply legal reasoning when deciding whether to grant such a pardon. In other words, the concepts of *al-'afwu 'anil 'uqubah* in Islamic criminal law focus on rehabilitating and educating the perpetrator as well as protecting society. The IPC was founded on the principle of balance, aiming to address the rigidity of the previous penal system, which focused solely on legality with no consideration for evolving social norms and customs. *Al-'afwu* for *jarimah qishash* implies that the offender can compensate the victim in place of punishment. In contrast, under the IPC, compensation is not a condition for judicial pardon. Nevertheless, the judge may consider the offender's provision of compensation or their efforts to restore the victim's rights as supporting the decision to grant a pardon.

Meanwhile, pardon and criminal reconciliation in the Kuwaiti system are based primarily on the principle of crime control. Pardons can be applied to a wide range of crimes and penalties. The *Amir* has the authority to pardon death sentences, while victims of complaint-based crimes have the right to withdraw their complaints. Investigative authorities also have the discretion to grant pardons in cases involving counterfeiting, forgery, currency falsification, criminal conspiracy, offences against external state security and bribery. Investigative authorities may offer a pardon to one offender in exchange for their cooperation with and assistance in the investigation, and facilitating the arrest of other criminals involved. Reconciliation has been applied across various laws, including municipal affairs, traffic, and environmental protection, among others. This movement represents a new legislative approach through which reconciliation has emerged as an alternative to conventional criminal procedures.

Conclusion

Pardon functions as an essential corrective mechanism across criminal justice systems, though its scope and philosophical rationale vary. The principle of *al-'afwu 'anil 'uqubah* in Islamic criminal law reflects restorative and theological aims linked to the objectives of punishment: preventing harm, promoting social welfare, ensuring retribution and deterrence, and encouraging moral reform. It is also limited to specific offences, including *qishash*, certain *hudud* crimes such as theft and false accusation, and *ta'zir* offences. In contrast, IPC adopts *rechterlijke pardon* to temper the rigidity of a legality-based system. Embedded in the principle of balance, it authorises judges to refrain from punishment based on the offender's circumstances, the nature of the offence, and relevant contextual factors. This discretionary approach represents a broader shift toward a more humane and flexible penal philosophy, though primarily applied to minor offences.

The Kuwaiti criminal justice system, although influenced by Islamic Sharia, especially its principles of *ta'zir* and the religious emphasis on reconciliation, has developed on a distinct philosophical basis. Unlike Sharia, where pardon aims to prevent harm and promote communal welfare, the Kuwaiti system employs pardon primarily as a tool of crime control. The scope of pardon is extensive: the *Amir* may commute death sentences, victims may withdraw complaints, and investigative bodies may grant conditional pardons for cases such as bribery, forgery, and crimes against state security, often in exchange for cooperation that leads to the arrest of other offenders.

This study confines its analysis to the application of judicial pardon within substantive criminal law. Therefore, it becomes crucial to further examine the appropriate procedures and judicial criteria governing the exercise of judicial pardon, particularly the circumstances under which judges may refrain from imposing criminal sanctions under the new Criminal Procedure Code. Ensuring that these procedures and criteria adequately protect and fulfil the rights of crime victims further shows the significance of this study.

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