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Non-Custodial Sanctions under Indonesia's Criminal Code Reform: A Comparative Analysis through the Lens of Islamic Legal Theory

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ABSTRACT

This study explores the integration of non-custodial sanctions under Indonesia's new Criminal Code (Law No. 1/2023). It addresses the issue of prison overcrowding by analyzing these alternative sanctions from a modern and Islamic legal perspective. The objective of this study is to understand the effectiveness of non-custodial sanctions and the contribution of Islamic principles in developing a more humane and just penal system. This research applies a normative juridical method utilizing statutory, conceptual, and comparative approaches. Data analysis is conducted through a qualitative analysis of primary and secondary legal sources using a prescriptive-analytical approach. The findings indicate that non-custodial sanctions are highly relevant to Islamic legal theory, particularly within the framework of ta'zir, which is flexible and educative in nature. The principles of justice (al-'adl), public welfare (al-maslahah), and prevention (al-zajr) in Islamic law support the application of alternative punishments such as community service, fines, and rehabilitation in order to achieve social restoration. In conclusion, the strengthening of non-custodial sanctions aligns with the concept of maqashid al-shari'ah and offers a more humane and effective solution in achieving the objectives of modern sentencing.

Keywords: Islamic Criminal Law, Law No. 1 of 2023, Maqasid al-Shari'ah, Non-Custodial Sanctions, Sentencing Reform, Ta'zir

INTRODUCTION

Extensive scholarly literature has examined the evolution of alternative sentencing and Islamic criminal jurisprudence. Recent international studies have widely debated the global transition toward non-custodial sanctions (e.g., Mia Fitriah Elkhariimah 2025¹; Maulana Halim Putra, et.al, 2025², Yoyok Hardianto, et.al 2023³) and evaluated the adaptability of Islamic *ta'zir* doctrines within modern statutory frameworks (e.g., Anis Mashdurohatun, 2026⁴; Faishal Agil Al Munawar, 2026⁵). However, these existing studies largely focus on theoretical frameworks of comparative law or implementation within traditional Islamic nation-states, leaving a significant gap regarding how alternative sanctions operate within a newly reformed, secularized codification in a Muslim-majority democracy. Specifically, the precise legal convergence between the newly enacted Indonesian Criminal Code (Law No. 1/2023) and Islamic penal theory remains unresolved. This article fills this critical gap by providing a prescriptive-analytical assessment of how non-custodial mechanisms under Law No. 1/2023 structurally and philosophically align with the modern doctrine of *ta'zir*.

For a long time, the codification of criminal law governing penal provisions in Indonesia has continued to refer to the *Wetboek van Strafrecht* (WvS), which came into force in the Netherlands in 1886. However, the enactment of Law Number 1 of 2023 concerning the Criminal Code (new Criminal Code) marks a significant development in efforts to strengthen law enforcement in Indonesia. One of the central issues addressed in this reform is sentencing. The new Criminal Code explicitly adopts several approaches that place greater emphasis on restorative justice. A key feature of the new Criminal Code is the shift in the sentencing paradigm from a retributive approach to a restorative one. The restorative justice approach prioritizes the restoration of relationships between offenders, victims, and the community affected by criminal acts.⁶

¹ Mia Fitriah Elkhariimah, "Analysis Of Theft Sanctions: A Comparison Of Indonesian Positive Law, Islamic Criminal Law, And Muhammad Syahrur's Contemporary Perspective," *International Journal of Contemporary Islamic Law and Society* 7, no. 2 (2025), hlm. 10, tersedia pada <https://doi.org/https://doi.org/10.24239/ijcils.Vol7.Iss2.146>.

² Maulana Halim Putra, "The Position of Customary Criminal Law in Law No. 1 of 2023 on the Criminal Code," *International Journal of Law and Society*, 2025, hlm. 171, tersedia pada <https://doi.org/https://creativecommons.org/licenses/by-sa/4.0/>.

³ Yoyok Hardianto, "The Implementation of Restorative Justice System to Resolve Domestic Violence Acts," *YURIS: Journal of Court and Justice* 4 (2023), hlm. 4, tersedia pada <https://doi.org/https://doi.org/10.56943/jcj.v2i3.359>.

⁴ Anis Mashdurohatun, "Contemporary Reassessment of Punishment in Islamic and Secular Law: A Comparative Study of Justice and Penal Philosophy," *Metro Islamic Law Review*, 2026, hlm. 82, tersedia pada <https://doi.org/10.32332/milrev.v5i1.11887>.

⁵ Faishal Agil Al Munawar, "Criminal Sanctions for Corruption in Islamic and Positive Legal Systems: A Comparative Study of Indonesia, Saudi Arabia, and Egypt," *Journal of Progressive Law and Legal Studies*, 2026, hlm. 3, <https://doi.org/https://doi.org/10.59653/jpills.v4i01.2167>.

⁶ Heni Ariyanto, *Restorative Justice Dalam Perspektif KUHP Baru* (Jakarta: Rajawali Pers, 2023), hlm. 23.

Contemporary sentencing theory has evolved beyond an exclusive emphasis on retribution toward a more balanced framework that incorporates multiple objectives, including proportionality, deterrence, rehabilitation, restoration, and the protection of human rights. Rather than functioning solely as a mechanism of punishment, sentencing is increasingly understood as a means of restoring social harmony, preventing future offending, and balancing the interests of victims, offenders, and society. This development is reflected in internationally recognised sentencing scholarship as well as international standards promoting the use of non-custodial measures whenever appropriate (Ashworth, Roberts).⁷ Sentencing is no longer retributive in nature, nor merely a mechanism of punishment; rather, it has evolved into a means of restoration, prevention, and the protection of human rights. Under this approach, sentencing seeks to achieve a balance between safeguarding the interests of society, victims, and offenders. It reflects a shift whereby punishment is not solely punitive, but also incorporates elements of recovery and rehabilitation.⁸

In practice, imprisonment remains the most frequently imposed sanction by judges in court decisions. This is often based on the assumption that custodial punishment produces a deterrent effect, delivers justice to victims, and represents the most “appropriate” form of punishment from a societal perspective. Moreover, imprisonment creates a tangible impression of punishment, which makes it a commonly preferred option to satisfy the sense of justice for both victims and the public. In fact, however, the imposition of custodial sentences by judges often gives rise to a range of subsequent problems.

The Indonesian criminal justice system continues to rely heavily on custodial sanctions, a pattern starkly reflected in the chronic overcapacity of its carceral infrastructure. Statistical data from the Ministry of Immigration and Corrections indicates that correctional facilities currently house 271,468 individuals consisting of 215,156 convicted prisoners and 56,312 pre-trial detainees against an official structural capacity of only 146,860 slots.⁹ This massive disparity demonstrates that the national prison system is forced to operate at an acute overcrowding rate of approximately 85%, underscores the profound systemic strains caused by an over-reliance on institutional confinement. This deeply entrenched judicial dependence stems from a pervasive assumption that incarceration remains the most viable mechanism to achieve deterrence, validate victim grievances, and satisfy public retributive demands. However, as global penology shifts in response to changing

⁷ Andrew Ashworth dan Julian V. Roberts, *The Origins of the Sentencing Guideline in England and Wales*, dalam Andrew Ashworth dan Julian V. Roberts, *Sentencing Guideline: Exploring the English Model* (Oxford: Oxford University Press, 2013), hlm. 10.

⁸ Rosmalinda Michael Adyhaksa Padang, Billi J. Siregar, “Keberpihakan Pemidanaan Dalam Undang-Undang Nomor 1 Tahun 2023,” *Locus: Jurnal Konsep Ilmu Hukum*, 2024, hlm. 65, <https://jurnal.locusmedia.id/index.php/jkih/article/view/348/231>.

⁹ <https://kemenimipas.go.id/berita-utama/overcrowding-lapas-menurun-menteri-imipas-pertegas-komitmen-berantas-narkoba> diakses pada 20 May 2026

socio economic and political dynamics, there is an increasing international emphasis on institutionalizing non-custodial sanctions for specific, non-violent offenses. Rather than merely acting as administrative relief for an overburdened state budget, these alternative penalties allow offenders to complete their sentences within the community. By systematically prioritizing rehabilitation, civic responsibility, and the proactive reduction of recidivism, non-custodial frameworks establish a structural equilibrium that balances victim restoration with offender accountability. Ultimately, this paradigm shift directly mirrors the foundational values of *Pancasila*, which mandates that the pursuit of social justice must always be paired with an unyielding respect for human dignity.

Sentencing systems across various jurisdictions continue to evolve in response to shifting social, economic, and political dynamics. An aspect that has received increasing attention is the implementation of non-custodial sanctions as an alternative form of punishment for certain criminal offenses. This concept has emerged as a response to persistent challenges within correctional systems, including prison overcrowding, the high cost of inmate maintenance, and the limited effectiveness of imprisonment in preventing recidivism. Within the Indonesian carceral system, this crisis is demonstrably severe; empirical data indicates that the national prison population routinely exceeds institutional capacity by approximately 85%, creating systemic operational strains and severe human rights challenges across the country's correctional facilities.¹⁰ Non-custodial sanctions refer to penalties that do not require offenders to serve their sentences in prison. Instead, such measures emphasize rehabilitation, social responsibility, and the prevention of reoffending. Their application seeks to maintain a balance between justice for victims, accountability of offenders, and broader societal benefits. This approach is also consistent with the principles of *Pancasila*, which uphold social justice and respect for human dignity.

In Indonesia, non-custodial sanctions have already been recognized in a basic form under Law Number 1 of 1946 (the Criminal Code), particularly through the imposition of fines, which require offenders to pay a specified amount to the state treasury. Furthermore, their application has developed in cases involving juvenile offenders under Law Number 11 of 2012 on the Juvenile Criminal Justice System (Law of JCJS), notably through the mechanism of diversion, which allows for the settlement of cases outside formal court proceedings.

In modern criminal law, non-custodial sanctions encompass various forms of punishment, including community service, fines, rehabilitation, community supervision, and conditional release. In Indonesia, these are further regulated under Article 65 paragraph (1) of Law Number 1 of 2023 (the new Criminal Code), which stipulates that principal penalties consist of Imprisonment, Confinement, Supervision, Fines, and Community service.

¹⁰ UNODC, "Country Programme for Indonesia: Addressing Systemic Challenges in Correctional Systems and Prison Overcrowding," 2024.

The application of non-custodial sanctions aims to produce a deterrent effect without entirely depriving individuals of their liberty. This approach is consistent with the principles of Islamic law. In Islamic legal doctrine, sanctions are characterized by flexibility, particularly within the category of *ta'zir*, which allows judges to impose penalties based on considerations of public welfare. Within Islamic legal theory, the system of punishment is grounded in the principles of justice (*al-'adl*), public welfare (*al-maslahah*), and prevention (*al-zajr*). These principles align with the concept of restorative justice in modern law, which emphasizes victim restoration and offender rehabilitation rather than mere retribution.

Therefore, it is essential to further examine how non-custodial sanctions in modern criminal law can be analysed through the perspective of Islamic legal theory, particularly within the framework of *maqasid al-shari'ah*, which refers to the fundamental objectives and purposes of Islamic law. This concept seeks to ensure that Islamic law promotes public welfare and safeguards essential human interests, namely the protection of religion, life, intellect, lineage, and property. In this regard, this study aims to assess the relevance and effectiveness of non-custodial sanctions from the standpoint of Islamic law, while also exploring how Islamic principles can contribute to the development of a more humane and just modern sentencing system.

RESEARCH METHODOLOGY

This study applies a normative juridical research method, focusing on library-based materials or secondary data, which may include primary, secondary, and tertiary legal sources.¹¹ It examines legal norms within modern criminal law and Islamic law concerning non-custodial sanctions. The research aims to analyse the underlying concepts and their relevance within both legal systems. The approaches applied in this study include the statute approach, conceptual approach, and comparative approach. These approaches are utilized to examine relevant legislation, explore sentencing concepts such as non-custodial sanctions, and compare them with corresponding concepts in Islamic law, including *hudud*, *qisas*, and *ta'zir*.

The data applied in this research are secondary in nature, consisting of primary legal materials (statutory regulations and sources of Islamic law), secondary legal materials (scholarly books and journal articles), and tertiary legal materials (dictionaries and encyclopaedias). To achieve a comprehensive doctrinal analysis, this study strategically deploys three distinct research approaches, each selected for its specific utility to the research questions. First, the statute approach is necessitated by the requirement to critically examine the normative content, legislative intent, and statutory mechanisms of Indonesia's New Criminal Code

¹¹ Beni Ahmad Saebani, *Metode Penelitian Hukum* (Bandung: CV. Pustaka Setia, 2008), hlm. 39.

(Law Number 1 of 2023), specifically regarding the codification of alternative penalties. Second, the conceptual approach is applied to dissect the theoretical frameworks surrounding progressive penology, restorative justice, and classical Islamic jurisprudence, allowing for a rigorous exploration of concepts such as *ta'zir* (discretionary punishment) and *maqasid al-shari'ah* (the supreme objectives of Islamic law). Third, the comparative approach is systematically employed to identify the points of convergence and divergence between Indonesian statutory law and Islamic legal doctrine. By placing these two distinct legal systems side by side, this approach illuminates how religious-based penal philosophy and modern, non-custodial penology can conceptually reinforce one another, moving beyond simple juxtaposition to create an original synthesis.

Data collection is undertaken through library research by examining a range of relevant literature and documentary sources. The method of data analysis adopts a qualitative approach with a descriptive-analytical framework, involving the systematic exposition and analysis of legal materials in order to identify the correlation between non-custodial sanctions in modern criminal law and the principles of Islamic law, with a view to advancing a more equitable and humane sentencing system.

To achieve these objectives, the study applies three research approaches. First, the statute approach is employed to analyse the normative provisions governing non-custodial sanctions under Law No. 1 of 2023 concerning the Indonesian Criminal Code. Second, the conceptual approach is used to examine the theoretical foundations of non-custodial sanctions within modern criminal law and the Islamic legal concepts of *maqasid al-shari'ah*, *hudud*, *qisas*, and *ta'zir*, which provide the analytical framework for evaluating sentencing principles. Third, the comparative approach is applied to identify the convergences and divergences between Indonesian positive criminal law and Islamic criminal law with respect to the objectives, principles, and implementation of non-custodial sanctions.

RESULT AND DISCUSSION

Establishing the sources and scope of Islamic criminal law is essential for assessing whether the non-custodial sanctions introduced under Law No. 1 of 2023 are compatible with Islamic legal principles. Rather than merely describing the sources of Islamic law, this discussion provides the normative framework for analysing the legitimacy of alternative sentencing within the concepts of *maqasid al-shari'ah* and *ta'zir*.

The term “Islamic Law” constitutes a distinctive expression within the Indonesian context, serving as a translation of *al-fiqh al-Islami* or, in certain contexts, *al-shari'ah al-Islamiyah*. In Western legal discourse, this term is commonly rendered as “Islamic Law”. Neither the Qur'an nor the Sunnah explicitly

applies the term *al-hukm al-Islami*. Instead, the term *shari'ah* is used, which, in its subsequent development, gave rise to the concept of *fiqh*.¹²

Islamic law may be understood as a legal system derived from Islamic teachings, governing various aspects of life, both individual and societal. Islamic legal theory addresses the foundations, sources, methodologies, and principles underlying the application of law within the Islamic legal system. Fundamentally, Islamic legal theory is grounded in several principal sources, namely:

1. The Qur'an, which constitutes the primary source of Islamic law, containing fundamental rules and principles governing life.
2. The Hadith / Sunnah, referring to the sayings, actions, and tacit approvals of the Prophet Muhammad, which serve as authoritative legal guidance.
3. *Ijma'*, denoting the consensus of Islamic jurists in determining legal rulings on particular issues.
4. *Qiyas*, referring to analogical reasoning applied to derive legal rulings for cases not explicitly addressed in the Qur'an or the Hadith.

Islamic legal theory continues to evolve and adapt to changing circumstances through *ijtihad*, namely the intellectual endeavour of jurists to derive legal rulings from the recognised sources of Islamic law. In contemporary contexts, the application of Islamic legal theory can be observed in several areas, including:

1. Family law, for instance in matters of marriage, divorce, and inheritance.
2. Economic law, such as Islamic financial systems, including Sharia-compliant banking.
3. Criminal law, encompassing categories such as *hudud*, *qisas*, and *ta'zir*.
4. Constitutional law, including issues related to governance and political organisation within an Islamic framework.

The Concept of Non-Custodial Sanctions in Modern Criminal Law

Social reaction, as reflected in the imposition of punishment upon offenders, constitutes an essential mechanism for addressing criminal behaviour. Punishment is regarded as necessary for the maintenance and continuity of social life, as social, political, and economic systems may lose their effectiveness in the absence of sanctions imposed on offenders. In many jurisdictions, however, the use of imprisonment as a form of punishment is a relatively recent development. In some cases, it may even conflict with long-standing cultural traditions that, for centuries, have relied on alternative mechanisms for dealing with crime. Moreover, imprisonment has been shown to be ineffective in rehabilitating and reintegrating minor offenders, as well as certain vulnerable groups.¹³

¹² A. Rofiq, *Hukum Perdata Islam Di Indonesia* (Jakarta: Rajawali Pers, 2015), hlm. 1.

¹³ United Nations Office on Drugs and Crime, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment (Criminal Justice Handbook Series)* (United Nations, 2007), hlm. 4 diakses pada 25 Desember 2025,

Initially, punishment was primarily intended as a form of retribution against offenders, aimed at inflicting pain and suffering, often culminating in death. Over time, however, it has evolved towards modern penal policies that place greater emphasis on prevention, reform, and rehabilitation.¹⁴ This transformation reflects the development of contemporary thinking on social justice, which prioritises individual restoration rather than mere retribution. The focus on rehabilitation and prevention indicates a growing recognition that crime should not only be viewed as a legal violation, but also as a social issue requiring solutions grounded in reintegration rather than isolation. One such approach is the increasing adoption of non-custodial measures. A non-custodial sentence refers to a court-imposed penalty for an offender that does not involve a term of imprisonment. It is a sentence served outside the physical facility designated as a prison, or what is now referred to as Custodial Centres in Correctional Services.¹⁵

Non-custodial sanctions encompass various forms of punishment that do not involve the physical confinement of individuals within correctional institutions. They constitute legal measures aimed at achieving deterrence, rehabilitation, and the reintegration of offenders into society without resorting to deprivation of liberty. Such sanctions are generally considered more appropriate for minor offences, as they provide offenders with the opportunity to reform their conduct.¹⁶

Within the framework of non-custodial sanctions, particular emphasis is placed on the rehabilitation of offenders and facilitating their productive reintegration into society. A key advantage of this approach lies in the active involvement of the community in supporting the rehabilitation process, for instance through community service programmes, vocational training, or other social initiatives that assist offenders in self-improvement. Broadly speaking, the objective of these sanctions is to correct deviant behaviour while strengthening social cohesion within the community.

Such sanctions do not merely function as punitive measures but also represent a humane approach consistent with the philosophical foundations of Indonesian society. By upholding human dignity, prioritising deliberation (*musyawarah*), and promoting restorative justice, this approach reflects the values of Pancasila and the long-standing legal culture embedded within local wisdom. The examples of non-custodial sanctions include supervision orders and community service penalties.

https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf.

¹⁴ R. A Khlifat, M. A., & Al-Awamleh, "Alternatives to Custodial Sentences and Their Impact on Crime Reduction: Jordan as a Model," *Journal of Lifestyle & SDG's Review* 5 (2025): hlm. 2.

¹⁵ B. E. Oniha, *Effective Implementation of Non-Custodial Sentencing Provisions in the Administration of Criminal Justice Law of Edo State : Need for Synergy amongst Stakeholders*, 2023, hlm. 4, <https://edojudiciary.gov.ng/wp-content/uploads/2023/11/HURISLAW-EFFECTIVE-IMPLEMENTATION-OF-NON-CUSTODIAL-SENTENCING.pdf>.

¹⁶ D. P. Mulyana, *Hukum Pidana Modern* (Jakarta: Rajawali Press, 2014), hlm. 78.

Such sanctions do not merely function as punitive measures but also represent a more humane sentencing model that is consistent with the philosophical foundations of Indonesian society. By upholding human dignity, prioritising deliberation (*musyawarah*), and promoting restorative justice, non-custodial sanctions reflect the values of Pancasila and the long-standing legal culture embedded within local wisdom. This normative orientation demonstrates a significant shift in Indonesia's sentencing policy from an exclusively retributive model towards one that increasingly emphasises rehabilitation and social restoration. Nevertheless, although Law No. 1 of 2023 formally recognises supervision and community service as principal sanctions, imprisonment continues to occupy a dominant position within the sentencing framework. This indicates that the transition towards restorative justice remains only partial, as rehabilitative objectives continue to coexist with conventional deterrent and retributive approaches. Consequently, the effectiveness of non-custodial sanctions will ultimately depend not only on their statutory recognition but also on their consistent application by judges in sentencing practice.

Supervision and community service constitute effective mechanisms for ensuring offender accountability without removing individuals from their social environment. In particular, community service is oriented towards resolving conflicts and restoring social balance. This form of sanction enables offenders to develop a sense of responsibility and acquire new skills, while simultaneously providing opportunities for self-improvement and positive contributions to society.¹⁷

In modern criminal law, sentencing is not solely intended to produce a deterrent effect on offenders, but also to facilitate rehabilitation and prevent recidivism. Non-custodial sanctions represent an alternative form of punishment that does not involve the imprisonment or detention of offenders within correctional institutions. Rather, such measures provide offenders with the opportunity to reform outside the prison environment, while still ensuring that the sanction imposed is proportionate to the gravity of the offence. These sanctions may take various forms, including community service, supervision, conditional release, rehabilitation programmes, or fines.

Contemporary sentencing systems increasingly seek to shift the paradigm from retributive justice centred on punishment as retaliation towards restorative justice, which emphasises the restoration of victims, offenders, and the wider community. In this regard, non-custodial sanctions are regarded as more humane and effective in achieving the objectives of punishment.¹⁸ They are aligned with the principles of restorative justice, which prioritise the restoration of social relationships between offenders and society. Restorative Justice provides offenders

¹⁷ Khipiti Fatimah, *Hukuman Pidana Di Indonesia* (Yogyakarta: PT. Anak Hebat Indonesia, 2024), hlm. 258.

¹⁸ Barda Nawawi Arief Muladi, *Teori-Teori Dan Kebijakan Pidana* (Bandung: Alumni), hlm. 125.

with the opportunity to rectify their wrongdoing and to repair the harm suffered by the victim.¹⁹ Through this approach, offenders are not merely punished, but are also encouraged to assume responsibility for their actions and to repair the harm caused to victims.

Islamic Legal Theory on Criminal Sanctions

In Arabic legal terminology, sanctions or punishments are commonly referred to as *'uqubah*, denoting a form of retribution imposed upon individuals for acts that violate the prescriptions of *shari'ah* as ordained by *Allah* and His Messenger, with the ultimate aim of promoting public welfare.²⁰ In this sense, punishment is understood as a legal consequence established to safeguard societal interests when individuals contravene divine commands. The imposition of punishment in Islamic law is not merely retributive; rather, it serves broader objectives, including the moral and social reform of individuals, the prevention of harm, the protection of society from corruption, the guidance of individuals away from error, the deterrence of wrongdoing, and the encouragement of obedience to divine law. The Prophet was not sent to exercise coercion or domination over humanity, but as a mercy to all creation. This principle is affirmed in the Qur'an, specifically in *Surah Al-Ghashiyah* (88:22), which states: "*You are not a controller over them.*"²¹

Islamic law recognises three principal categories within its system of criminal sanctions, each characterised by distinct features and strict requirements in accordance with the nature of the offence committed. These three categories are as follows:

1. *Hudud*

Linguistically, the term *hudud* derives from the word *ḥadd*, meaning a boundary or limit between two things. In terminological usage, *hudud* refers to fixed punishments prescribed by *shari'ah* for specific offences, with the aim of preventing the recurrence of such violations.²² *Hudud* constitute the most severe category of criminal sanctions in Islamic law and are characterised by their fixed and immutable nature, as their prescriptions are explicitly established in the Qur'an and the Hadith. Consequently, such punishments are not subject to modification or mitigation by judicial authorities, as they are regarded as direct divine injunctions.²³

¹⁹ M. Ali, *Hukum Dan Keadilan Restoratif* (Yogyakarta: Penerbitan UII Press, 2018), hlm. 29.

²⁰ Siti Jahroh, "Reaktualisasi Teori Hukuman Dalam Hukum Pidana Islam," *Pekalongan : Jurnal Hukum Islam*, 2011, hlm. 190.

²¹ Andi Istiqlal Assaad, "Hakikat Sanksi Dalam Perspektif Hukum Pidana Indonesia Dan Hukum Pidana Islam (Studi Tentang Pidana Mati)," *Makasar: Al-Ishlah Jurnal Ilmiah Hukum*, 2017, hlm. 56.

²² Rini Apriyani, "Sistem Sanksi Dalam Hukum Islam," *Journal of Islamic Law Studies* (Jakarta), 2021, hlm. 27, <https://scholarhub.ui.ac.id/cgi/viewcontent.cgi?article=1063&context=jils>.

²³ Sumardi Efendi, "Analisis Sanksi Pidana Dalam Hukum Islam Pendekatan Teoritis Dan Pustaka," *MAQASIDI: Jurnal Syariah Dan Hukum*, 2023, hlm. 151–62.

Punishments that have been prescribed in the Qur'an and the Sunnah for specific offences. Examples of offences falling within the category of hudud include *zina* (adultery), theft, the consumption of alcohol, and rebellion. For instance, the punishment for *zina* may take the form of stoning (for married offenders) or one hundred lashes (for unmarried offenders), whereas for theft, the penalty of amputation of the hand may be imposed. Sanctions within this category are fixed in nature and are not subject to human modification.

2. *Qisas* and *Diyat*

Punishments associated with offences against life and bodily integrity. *Qisas* denotes retaliatory justice of an equivalent nature, whereas *diyat* refers to financial compensation that may substitute the imposition of *qisas*. *Qisas* constitutes a category of criminal sanction grounded in the principle of proportional retaliation, often expressed as the "law of equivalence." It is generally applied in cases of intentional homicide or bodily harm, wherein the maxim "a life for a life, a wound for a wound" is upheld.²⁴

Notwithstanding this retributive framework, Islamic law strongly encourages forgiveness on the part of the victim or the victim's family. Such forgiveness may result in the substitution of retaliation with a pecuniary settlement, namely *diyat*. This reflects that, although the principle of retaliation is recognised within *qisas*, the values of mercy and restoration are accorded significant moral priority within the Islamic legal tradition.

3. *Ta'zir*

Ta'zir is derived from the term *al-man'u*, meaning prevention. In terminological usage, *ta'zir* refers to a form of sanction imposed for acts of disobedience or misconduct for which no fixed punishment (*hadd*) or expiatory penalty (*kafarah*) has been prescribed. Accordingly, *ta'zir* is applied to offences for which Islamic law has not stipulated a specific measure of punishment. The *Shari'a* confers discretionary authority upon the *khalifah*, as well as upon judicial authorities such as the *qadhi* or judge, to determine and impose *ta'zir* sanctions. This authority is exercised on the basis of *ijtihad*, taking into account the circumstances and conditions of the offender, thereby allowing for a flexible and context-sensitive approach to punishment.²⁵

Ta'zir constitutes a category of criminal sanction imposed for offences that are not expressly prescribed in the Qur'an or the Hadith. Consequently, the determination of punishment for such offences is

²⁴ *Ibid*

²⁵ Rini Apriyani, *Op.Cit.* Hal. 34

entrusted to the discretion of the judge. *Ta'zir* enables judicial authorities to impose penalties proportionate to the degree of culpability and the particular circumstances of the offender.²⁶

As a form of punishment lacking a fixed stipulation in the Qur'an and the Sunnah, *ta'zir* is grounded in judicial and executive discretion, exercised in pursuit of the public welfare (*maslahah*). Its inherently flexible character allows adjudicators to calibrate sanctions in accordance with prevailing conditions, thereby taking into account factors such as the gravity of the offence, the social context, and the broader impact of the conduct upon society.

The concept of *ta'zir* allows for a more flexible system of punishment that can be adapted to prevailing social conditions. Within the framework of *ta'zir*, non-custodial sanctions, such as fines, community service, exile, and formal reprimands, are frequently applied. This demonstrates that Islamic law does not solely recognise imprisonment as a form of punishment, but also accommodates a range of alternative sanctions.²⁷

It may therefore be concluded that *hudud* refers to punishments that have been expressly prescribed in the Qur'an and the Hadith, such as amputation for theft and stoning for the offence of *zina*. In contrast, *qisas* denotes proportionate retaliation, for instance in cases of intentional homicide or bodily injury. Meanwhile, *ta'zir* encompasses sanctions determined at the discretion of the judge for offences that do not fall within the categories of *hudud* or *qisas*.

The foregoing discussion demonstrates that the three categories of Islamic criminal sanctions differ fundamentally in terms of their legal basis and degree of judicial discretion. While *hudud* and *qisas* are governed by fixed substantive rules, *ta'zir* provides judges with broad discretionary authority to determine sanctions that best serve justice and public welfare (*maslahah*). This distinction is particularly significant for the present study because the non-custodial sanctions introduced under Law No. 1 of 2023 such as supervision, fines, and community service are functionally more consistent with the flexible nature of *ta'zir* than with the fixed sanctions of *hudud* or *qisas*. Consequently, the legitimacy of non-custodial sanctions in Islamic legal theory should be assessed primarily through the doctrinal framework of *ta'zir*, which accommodates proportional, rehabilitative, and socially restorative forms of punishment.

To advance a more sophisticated legal analysis, this functional alignment must be understood through the mechanism of *siyasah shar'iyah* (policymaking within the bounds of divine law), which empowers the modern state sovereign to

²⁶ *Ibid*

²⁷ Muhammad Abu Zahrah, *Al-'Uqubat Fi Al-Fiqh Al-Islami (Hukuman Dalam Fiqih Islam)* (Jakarta: Pustaka Al-Kautsar, 2008), hlm. 98.

codify public interest measures. Within classic jurisprudence, *ta'zir* is not merely an unguided judicial privilege; rather, it is a systematically flexible penal track designed to address societal evolutions that fixed penalties (*hudud*) cannot accommodate. Because the primary penological objective of *ta'zir* is *tadib* (rehabilitation and moral correction) rather than structural retribution, it shares an identical philosophical foundation with the progressive spirit of Indonesia's New Criminal Code.

When a court under Law No. 1 of 2023 substitutes carceral confinement with a community service order (*pidana kerja sosial*) or a supervision order (*pidana pengawasan*), it is directly operationalizing the Islamic legal maxim that states "punishment may change with the changing of times and places" (*taghayyur al-ahkam bi taghayyur al-azman wa al-amkinah*). Carceral sentencing, as observed in modern overcapacity crises, often triggers deeper moral degradation, thereby violating the fundamental principles of *maqasid al-shari'ah*—specifically the preservation of the soul (*hifz al-nafs*) and the preservation of intellect (*hifz al-aql*). By deploying alternative sanctions, the statutory framework ensures that the offender remains a functional, accountable member of society. This direct conceptual symmetry proves that modern non-custodial options are not secular anomalies; rather, they represent a contemporary, codified manifestation of the classical *ta'zir* mandate to preserve public order while prioritizing human dignity and individual reformation.

Criminal sanctions in Islamic law play a crucial role in maintaining a balance between individual rights and the interests of society. Individual rights, such as the right to life and to personal security, are stringently protected within the framework of Islamic criminal law. At the same time, the collective right of society to live in a safe and orderly environment constitutes a primary concern. Punishments imposed for serious offences, including homicide or rebellion, are designed to safeguard society against threats that may undermine social order. Conversely, in matters involving more personal violations, such as *qisas*, Islamic law provides scope for forgiveness by the victim or the victim's family, thereby promoting reconciliation and broader social harmony.

The Relevance of Non-Custodial Sanctions in Islamic Law

Criminal sanctions within Islamic law are grounded in well-established *Shari'a* principles that emphasise justice, ethical conduct, and social equilibrium. The primary objective of imposing such sanctions extends beyond mere punishment of the offender; it encompasses broader aims that serve both individual and societal interests. By reference to foundational sources such as the Qur'an and the Hadith, Islamic criminal law situates law enforcement within a comprehensive framework, one that integrates notions of divine justice alongside the moral responsibilities borne by each individual. Non-custodial sanctions in Islamic law may be examined through the following principles:

1. The Principle of Justice (*al-'Adl*)

The concept of justice is articulated in the Qur'an through various terms, including *al-'adl*, *al-qist*, and *wasat*, while some exegetes (*mufasssirun*) also associate the term *mizan* (balance) with the notion of justice. Collectively, these expressions converge upon a general idea of moderation, equilibrium, and integrity.²⁸ In Islamic law, punishment must be proportionate to the offence committed. Justice constitutes a fundamental principle underpinning the application of criminal sanctions. From an Islamic perspective, justice entails placing matters in their proper context, both in terms of rights and obligations. In the criminal law context, it requires that penalties correspond appropriately to the gravity of the offence, without excess or deficiency.

The application of *hudud*, *qisas*, and *ta'zir* sanctions is designed to reflect a balance between the interests of the victim, the offender, and society as a whole, ensuring that each punishment embodies the standard of justice as ordained by Allah. Punishments that are excessively severe or disproportionate to the act committed are inconsistent with this principle of justice. Accordingly, in certain cases, the imposition of non-custodial sanctions may be considered more consistent with the demands of justice than imprisonment.²⁹

2. The Principle of Public Welfare (*al-Maslahah*)

In Islamic jurisprudence, the notion of *maslahah* (public welfare) is fundamentally conceptualized as the preservation of human interest and the objectives of the Shari'ah, serving as a core philosophical pillar for sustaining social order and preventing harm³⁰ (Auda, 2008, pp. 3-4). It means to give greater weight to or place first, the most important, the most essential, the most necessary and the most required. Within the framework of Islamic law, punishment must yield tangible benefits for society. Where custodial sentences produce adverse consequences for both the offender and their social environment, alternative measures, such as community service or rehabilitation, may be considered more appropriate and consistent with the objectives of the law.³¹

Criminal sanctions in Islamic law also function to preserve social harmony and to promote collective responsibility. The imposition of punishment is not solely directed towards vindicating individual rights or penalising the offender; it is equally aimed at protecting society from

²⁸ Nurcholis Majid, *Islam DOktrin Dan Peraddaan* (Jakarta: Yayasan Wakaf Pramadina, 1992), hlm. 551.

²⁹ Ahmad Wardi Muslich, *Hukum Pidana Islam* (Jakarta: PT Raja Grafindo Persada, 2014), hlm. 57.

³⁰ Jesser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach* (London: International Institute of Islamic Thought (IIIT), 2008), p. 3-4.

³¹ Jaih Mubarak, *Prinsip-Prinsip Hukum Islam Dalam Kajian Fiqh* (Bandung: Pustaka Setia, 2016), hlm. 123.

moral and social harm. Accordingly, the enforcement of sanctions such as *hudud* is understood as a necessary measure to maintain public order in accordance with religious norms. This reflects the broader philosophical premise that crime not only injures the individual victim but also disrupts the cohesion and harmony of the community. This approach is also consonant with the principles of Restorative Justice, which have gained increasing recognition in contemporary legal systems. In the Islamic context, restorative justice is significant insofar as it emphasises mechanisms of criminal resolution that restore social relationships and provide opportunities for the rehabilitation of the offender, rather than relying exclusively on custodial punishment.³²

3. The Principle of Prevention (*al-Zajr*)

In addition to the realisation of justice, one of the principal objectives of criminal sanctions in Islamic law is the prevention of crime. The imposition of firm penalties, particularly in cases of *hudud* and *qisas*, is intended to produce a deterrent effect, not only upon the offender but also upon the wider community. Punishment in this context serves to prevent recidivism and to discourage others from engaging in similar conduct. Notably, non-custodial sanctions may also fulfil a preventive function, especially when combined with supervisory measures or fines.³³

Deterrence thus operates as a rational foundation for the imposition of punishment, with its primary aim being the prevention of future offences. Unlike retributive approaches, which are oriented towards past wrongdoing, deterrence is inherently forward-looking, emphasising the importance of averting the recurrence of criminal acts.

Within Islamic criminal law, the preventive dimension is particularly evident in the application of *hudud* sanctions, which are prescribed in the Qur'an and the Hadith. Such punishments are designed to serve as a strong warning to society. For example, the punishment of amputation for theft or stoning for *zina* functions as a deterrent against the commission of similar offences. This aligns with the broader preventive objective of law enforcement, whereby criminal sanctions are intended to reduce crime rates by instilling an awareness of the consequences of unlawful conduct. In this regard, *Al-Mawardi* characterises *hudud* as "deterrent punishments ordained by God to

³² *Ibid*, hlm. 130.

³³ *Ibid*, hlm. 126.

prevent individuals from violating His prohibitions and neglecting His commands.”³⁴

It may therefore be inferred that non-custodial sanctions, from the perspective of Islamic law, are largely consistent with its underlying principles, particularly in relation to *ta'zir* punishments. Such sanctions are inherently educative in nature and align with contemporary penal objectives that emphasise reform and rehabilitation. It is within the domain of *ta'zir* that non-custodial measures may be most extensively applied.

From an Islamic legal standpoint, the imposition of non-custodial sanctions is not only permissible but, in many instances, more consonant with the principles of justice, depending on the nature and purpose of the offence. Islamic criminal law does not invariably prioritise imprisonment as the primary form of punishment; rather, it adopts a more restorative, preventive, and educative approach, as opposed to one that is purely retributive.

Within the framework of *ta'zir*, a range of alternative sanctions may be applied, reflecting a more humane and flexible system of punishment. These measures are directed towards reforming the offender, safeguarding society, and preventing recidivism, rather than merely exacting retribution. Such alternative sanctions include:

1. Fines or compensation (*diyat*);
2. Community service;
3. Temporary exile;
4. Admonition or formal warning;
5. Disciplinary sanctions within the community (e.g., public reprimand);
6. Restrictions on certain social rights;
7. Rehabilitation or re-education measures.

Furthermore, Islamic law recognises the concept of forgiveness (*'afw*), which is strongly encouraged, particularly where the victim or the victim's family consents to reconciliation. In the context of Islamic criminal law, forgiveness constitutes the right of the victim or their heirs to forgo the pursuit of punishment, especially in cases involving *qisas* (retaliation) or *diyat* (compensation). This underscores the broader emphasis on reconciliation and social harmony. In practice, several Muslim majority jurisdictions, including Saudi Arabia, Iran, and Pakistan, have incorporated such principles particularly those relating to *qisas*, *diyat*, and discretionary sanctions within their respective legal systems.

However, notwithstanding the numerous advantages of non-custodial sanctions, their implementation continues to face several challenges, including:

³⁴ Siti Jahroh, “REAKTUALISASI TEORI HUKUMAN DALAM HUKUM PIDANA ISLAM,” *Jurnal Hukum Islam* 9, no. 1 (March 2016), <https://doi.org/10.28918/jhi.v9i1.588>.

1. Variations in legal systems across jurisdictions, many of which still prioritise imprisonment as the principal form of punishment.
2. The absence of clear and comprehensive regulatory frameworks, particularly within contemporary Islamic law, concerning the application of non-custodial measures.
3. Societal perceptions, which often continue to regard imprisonment as a more tangible and legitimate manifestation of justice.

However, notwithstanding the numerous advantages of non-custodial sanctions, their implementation continues to face several challenges, including:

1. Variations in Legal Systems and Punitive Orientations Across Jurisdictions. Many jurisdictions still structurally prioritize imprisonment over alternative sanctions. For instance, while Western European countries like Germany and the Netherlands have successfully normalized non-custodial measures utilizing dayfines and community service for over 70% of offenses many developing jurisdictions and common law systems remain heavily reliant on custodial options due to mandatory minimum sentencing laws³⁵ (Aebi et al., 2022, pp. 42-45)
2. The Absence of Detailed Operational Frameworks in Local and Religious Law. While foundational Islamic jurisprudence (*usul al-fiqh*) inherently supports non-custodial alternatives through the concept of *ta'zir* (discretionary punishment) aimed at rehabilitation, contemporary statutory frameworks often lack concrete operational guidelines. In Indonesia, for example, although the New Criminal Code (Law No. 1 of 2023 / UU No. 1 Tahun 2023) formally introduces supervision and community service in Articles 75–80, the absence of comprehensive, detailed implementing regulations creates an enforcement vacuum that hinders judges from widely applying these non-custodial measures.
3. Retributive Societal Perceptions and Public Punitive Attitudes. General public perception frequently equates justice strictly with incarceration, viewing non-custodial sanctions as a form of leniency rather than legitimate punishment. Empirical studies on public attitudes consistently show that while the public supports rehabilitation in theory, there is a strong retributive demand for "visible" prison sentences for criminal offenders, driven by a lack of awareness regarding the efficacy of community-based corrections.³⁶

³⁵ Aebi M.F., Villalbi E., and Burkhardt C., "SPACE I - 2021 Penal Institutions: Council of Europe Annual Penal Statistics" (Strasbourg, 2022), p. 44–45.

³⁶ F. T Pratt, J., & Cullen, "The Empirical Status of Penal Populism: A Case Study of Public Attitudes and Anxiety," *Crime and Justice* 49, no. 1 (2020), p. 211–54, <https://doi.org/https://doi.org/10.1086/708537>.

In modern criminal law, increasing attention has been directed towards non-custodial sanctions as viable alternatives to imprisonment. Measures such as fines, community service, rehabilitation, and educational programmes offer a more humane and rehabilitative approach when compared to custodial sentences. Within the context of Islamic law, the concept of non-custodial sanctions likewise rests upon a strong normative foundation, with a particular emphasis on rehabilitation, justice, and social reintegration.

However, with the evolution of a more humanistic legal paradigm, non-custodial sanctions may constitute a more effective solution, one that is consistent with the principles of Islamic law and the values of social justice. Imprisonment, as widely practised in contemporary systems, often carries a lasting social stigma that persists even after the sentence has been served. By contrast, non-custodial sanctions are more conducive to enabling offenders to reintegrate into society without enduring severe psychological and social burdens. Islamic law, therefore, ought to be grounded in humanitarian values that prioritise social reintegration rather than forms of punishment that generate enduring stigma.³⁷

Islamic law, therefore, ought to be grounded in humanitarian values that prioritise social reintegration rather than forms of punishment that generate enduring stigma.³⁸ Accordingly, Islamic law recognises non-custodial sanctions as both legitimate and, in many contexts, preferable particularly in cases involving:

1. Minor offences
2. Humanitarian considerations
3. Efforts towards social reform
4. Cases that do not meet the evidentiary or substantive thresholds of *hudud* or *qisas*

Provided that such sanctions realise justice, promote public welfare (*maslahah*), and achieve a deterrent effect, they are fully consistent with the objectives of Islamic law, commonly referred to as *Maqasid al-Shariah*.

CONCLUSION

Non-custodial sanctions represent a more humane approach within contemporary systems of punishment. In Islamic law, the concept of *ta'zir* provides flexibility in sentencing, thereby allowing measures such as fines, community service, and rehabilitation to be applied as alternatives to imprisonment. The principles of justice, public welfare (*maslahah*), and prevention in Islam indicate that such an approach is more closely aligned with the concept of Restorative Justice. Through the application of non-custodial sanctions, the Islamic legal

³⁷ M. Quraish Shihab, *Membumikan Al-Qur'an* (Bandung: Mizan, 2000), hlm. 102.

³⁸ M. Quraish Shihab, *Membumikan Al-Qur'an: Fungsi Dan Peran Wahyu Dalam Kehidupan Masyarakat*, vol. 1 (Jakarta: Lentera Hati, 2019), hlm. 176–78.

system may become more responsive and oriented towards the enhancement of individual development as well as the promotion of social harmony.

Ultimately, transitioning toward non-custodial sanctions represents a fundamental shift toward a more rehabilitation-oriented framework within contemporary penal policy. This study demonstrates that the doctrinal architecture of *ta'zir* (discretionary punishment) possesses the inherent elasticity to move away from prison-centric models. Alternative measures—such as fines, community service, and supervision orders—flow naturally from the core commitments of Islamic jurisprudence to *maslahah* (public interest) and *maqasid al-shari'ah* (the supreme objectives of law). Because this paradigm prioritizes human restoration over permanent social alienation, it operates in direct conceptual harmony with the philosophy and operational mechanisms of modern Restorative Justice. This intersection offers a distinct theoretical contribution to comparative penology. While conventional sentencing literature frequently evaluates alternative punishments through a secular human-rights lens, this research proves that rehabilitative corrections are natively embedded within classical jurisprudence (*usul al-fiqh*).

Recontextualizing *maslahah* as the structural bedrock for alternative sentencing shows that religious legal traditions and progressive penology are conceptually symbiotic. Practically, these insights carry immediate weight for Indonesian legal reform under the New Criminal Code (Law No. 1 of 2023). To avoid an enforcement vacuum, lawmakers must expedite precise implementing regulations (*Peraturan Pemerintah*) for supervision (*pidana pengawasan*) and community service (*kerja sosial*), alongside institutionalizing judicial training that pivots court cultures away from default custodial sentencing. Admittedly, this research is limited by its strictly normative and doctrinal design, mapping statutory and philosophical frameworks without integrating empirical fieldwork or quantitative data on offender outcomes. To deepen the understanding of this shifting legal landscape, future scholarly inquiries should venture into socio-legal territory. Priority should be given to empirical research investigating the institutional readiness of judicial actors to apply alternative sanctions, assessing public trust in community corrections, and comparing Indonesia's statutory trajectory with the empirical realities of alternative sentencing across other Muslim-majority jurisdictions.

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