

Alternatives to Criminal Conviction in a Comparative Analysis of Positive Law and Islamic Criminal Law

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Abstract

This paper aims to comprehensively analyze the concept of alternative punishment in a comparative study of positive law and Islamic criminal law. Currently, imprisonment is still the main choice, causing overcrowding in prisons in Indonesia. Sharp criticism and dissatisfaction with imprisonment have prompted the development of alternative punishments other than imprisonment that are in accordance with the purpose of punishment. This study is a type of qualitative research using data collection techniques through literature studies. The data used in this study was taken from secondary data from various literatures consisting of books, journals, mass media, news, social media related to alternative sentencing. The conclusion of this paper shows that in positive law, alternative provisions for punishment other than imprisonment have been regulated in the Criminal Code (KUHP) and other laws and regulations, including in the form of fines (compensation), rehabilitation sanctions for narcotics abuse cases, and settlement of criminal cases outside the court (APS) by prioritizing the principle of restorative justice, namely peace and forgiveness, for the perpetrators, victims and the community. In positive law, alternative punishment has an ideal concept with the aim of sentencing that leads to recovery, not retaliation. This paper also concludes that in the concept of Islamic criminal law, the provision of alternative punishments contains the principles in *maqashid* sharia, namely in maintaining religion (*al-dîn*), soul (*al-nafs*), offspring (*al-nasl*), property (*al-mâl*) and reason (*al-aql*).

Keywords: Prison overcrowding; prison; alternative punishment; positive law; Islamic criminal law

Abstrak

Tulisan ini bertujuan untuk menganalisis secara komprehensif mengenai konsep alternatif pemidanaan dalam kajian komparatif hukum positif dan hukum pidana Islam. Saat ini penjatuhannya hukuman penjara masih menjadi pilihan utama sehingga menyebabkan kepadatan Lapas di Indonesia. Kritik tajam dan ketidakpuasan pidana penjara telah mendorong untuk mengembangkan alternatif pemidanaan selain penjara yang sesuai dengan tujuan pemidanaan. Kajian ini merupakan jenis penelitian kualitatif dengan teknik pengumpulan data melalui studi kepustakaan. Adapun data yang digunakan dalam penelitian ini diambil dari data sekunder dari berbagai literatur yang terdiri dari buku-buku, jurnal-jurnal, media massa, berita, media sosial yang berhubungan dengan alternatif pemidanaan. Kesimpulan dari tulisan ini menunjukkan bahwa dalam hukum positif, ketentuan alternatif pemidanaan selain penjara telah diatur dalam KUHP dan peraturan perundang-undangan lainnya, antara lain berupa sanksi denda (ganti rugi), sanksi rehabilitasi terhadap kasus penyalahgunaan narkoba, dan penyelesaian perkara pidana di luar pengadilan (APS) dengan mengedepankan prinsip restorative justice, yaitu dengan perdamaian dan pemaafan, baik pelaku, korban dan masyarakat. Dalam hukum positif, alternatif pemidanaan memiliki konsep yang ideal dengan tujuan pemidanaan yang mengarah pada pemulihan, bukan pembalasan. Tulisan ini juga menyimpulkan bahwa dalam konsep hukum pidana Islam, pemberian alternatif pemidanaan mengandung prinsip-prinsip dalam *maqâṣid al-syarî'ah*, yaitu dalam menjaga agama (*al-dîn*), jiwa (*al-nafs*), keturunan (*al-nasl*), harta (*al-mâl*) dan akal (*al-aql*).

Kata Kunci: Kepadatan lapas; penjara; alternatif pemidanaan; hukum positif; hukum pidana Islam

Introduction

The phenomenon of overcrowding in prisons is a classic problem that occurs in almost every prison in Indonesia. Based on data from the Institute for Criminal Justice Reform (ICJR), it was stated that there was a significant increase in 2022 as of January reaching 223 percent.¹ Even the occupancy rate in

¹ ICJR: Beban rutan dan lapas per Januari 2022 capai 223 persen, "https://www.antarane.ws.com/berita/2687101/icjr-beban-rutan-dan-lapas-per-januari-2022-capai-223-persen," n.d.

prisons in 2025 is estimated to reach 136 percent, or 311,534 inmates.² This high number will almost certainly continue to trigger new problems in correctional institutions. Although various policy steps have been taken, until now the problem of overcrowding in prisons has yet to be resolved.

The condition of chronic overcrowding in prisons has to be acknowledged as having given serious problems related to the impact it has. The issue of prisonization, which is negative in nature, includes extortion between inmates, theft in cells, hazing of new inmates, homosexuality, spread of disease, and so on, is a bad portrait due to overcrowding in prisons.³ These problems have practically attracted the attention of the government, which firmly asks for the maximum implementation of prison policies. In this case, the Directorate General of Corrections at the Ministry of Law and Human Rights (Dirjen Paskumham) has taken several steps to reduce the density of prisons and detention centers, namely by providing conditional leave (CB), parole (PB), and leave before being released (CMB), including remission. However, the inflow of inmates is greater than the outflow with the limited number of detention room facilities, resulting in these efforts being considered ineffective in solving the problem of overcrowding in prisons comprehensively.⁴

Observing the dynamics of overcoming prison overcrowding, one of the crucial issues lies in the question of the purpose of punishment⁵. The current phenomenon shows the dominance of the orientation of punishment in law enforcement, which still focuses on the notion of retribution, by placing prison as the main choice in imposing crimes⁶. When prisons are still perceived as places where people are guilty, such as in mild cases, or in cases of drug abuse, prisons are still crowded. This is where in order to overcome the overcrowding of prisons, one solution is to re-effectively re-implement alternative punishments in the Criminal Code and other laws and regulations that are oriented towards prevention and rehabilitation.

So far, there are at least two studies that still have a correlation with this study, one of which comes from Ismail Rumadan. In his writings, although he

² "Kelebihan Kapasitas Lapas Di Indonesia Bisa Mencapai 136 Persen Pada 2025," accessed March 28, 2022, <https://www.infoindonesia.id/read/2022/03/17/13640/kelebihan-kapasitas-lapas-di-indonesia-bisa-mencapai-136-persen-pada-2025>.

³ Padmono Wibowo, "Pentingnya Mitigasi Risiko Dampak Kepenuhsesakan Pada Lapas Dan Rutan Di Indonesia," *Jurnal Ilmiah Kebijakan Hukum* 14, no. 2 (2020): 263–83

⁴ Aan Riana Angkasa Aji Putra and Ningrum Puspita Sari, "Kendala Pemberian Pembebasan Bersyarat Di Lembaga Pemasyarakatan Kelas Ila Sragen," *Jurnal Hukum Pidana Dan Penanggulangan Kejahatan* 2, no. 3 (2013).

⁵ Aan Riana Angkasa Aji Putra and Ningrum Puspita Sari, "Kendala Pemberian Pembebasan Bersyarat Di Lembaga Pemasyarakatan Kelas Ila Sragen," *Jurnal Hukum Pidana Dan Penanggulangan Kejahatan* 2, no. 3 (2013).

⁶ Dede Kania, "Pidana Penjara Dalam Pembaharuan Hukum Pidana Indonesia," *Yustisia* 3 (2014): 19–28.

does not focus on examining alternatives to non-imprisonment criminal sanctions in positive law, on many occasions Rumadi discusses alternative models of punishment with a restorative justice approach. According to him, in the midst of the problem of overcrowding that creates a lot of crime in it, the restorative justice model is a step that can be resolved by the community, not only in criminal law issues but also in civil law. This is because the principle of restorative justice was born from customary law which does not recognize the difference between customary law and criminal law. Thus, it can reduce the number of inmates who are incarcerated.⁷ Furthermore, according to Usman, in his writings, he views that criminal alternatives such as fines and conditional punishment are a middle way in suppressing the density of prison residents, but needs to be supported by integrating policies through legislative reform, such as the Narcotics Law which has a very high number of criminal acts.⁸

Meanwhile, in the study of Islamic criminal law, related to the purpose of punishment, it cannot be separated from the revelation of universal Islamic law. The Islamic criminal law contains values that live in a society (living law) can be used as one of the mainstay sources that can fulfill the community's sense of justice. It can also be a filter for western law, which is incompatible with Indonesian morals and culture. Likewise, Islamic law can become a partner of customary law which has been a local habit of the community (*al-'adab al-muhakkamah*), as long as the customs and culture are in accordance with Islamic law.⁹

Based on this framework, this paper has a specific objective of examining alternatives to punishment in positive law as a solution to minimize prison overcrowding by synergizing it with the concept of sentencing objectives in Islamic criminal law which is oriented to peace and benefit.¹⁰ Because the position of Islamic criminal law is very important as a living law that has been tested in solving problems in society.

⁷ Ismail Rumadan, "Problem Lembaga Pemasyarakatan Di Indonesia Dan Reorientasi Tujuan Pemidanaan," *Jurnal Hukum Dan Peradilan* 2, no. 2 (2013): 263, <https://doi.org/10.25216/jhp.2.2.2013.263-276>.

⁸ Ismail Rumadan, "Problem Lembaga Pemasyarakatan Di Indonesia Dan Reorientasi Tujuan Pemidanaan," *Jurnal Hukum Dan Peradilan* 2, no. 2 (2013): 263, <https://doi.org/10.25216/jhp.2.2.2013.263-276>.

⁹ Ismail Rumadan, "Problem Lembaga Pemasyarakatan Di Indonesia Dan Reorientasi Tujuan Pemidanaan," *Jurnal Hukum Dan Peradilan* 2, no. 2 (2013): 263, <https://doi.org/10.25216/jhp.2.2.2013.263-276>.

¹⁰ Efa Rodiah Nur, "Alternatif Penyelesaian Perkara Pidana Dalam Perspektif Hukum Islam Sebagai Media Menuju Keadilan," *Masalah-Masalah Hukum* 45, no. 2 (2016): 115–22.

Discussion

Criminal Conviction in Positive Law and Islamic Criminal Law

1. Criminal Conviction in Positive Law

The punishment system based on positive law in Indonesia includes several theories of punishment. Experts have different views on the classification of the theory of punishment. Algra divides the theory of the purpose of punishment into three types, namely, absolute theory (revenge theory), relative theory or objective theory (doeltheorie), and combined theory/gemengdetheorie.¹¹ L. J. Van Apeldoorn divides the theory of punishment into three groups, namely, absolute theory (absolute theory), relative theory (doeltheorieen), and unity theory (vereenegingstheorie). Meanwhile, Muladi divides theories regarding the purpose of sentencing into three, namely: absolute (retributive) theory, teleological theory, and teleological retributive theory.¹²

The synthesis of the three opinions gave birth to 5 (five) groups of sentencing theories, namely:

a. Absolute Theory or theory of retaliation (absolte theorieen)

The absolute theory or the theory of retaliation emphasizes that the state must punish the perpetrators because people have sinned (*quia peccatum*).¹³ In other terms, retaliation is the legitimacy of punishment in which the State has the right to impose a sentence because the criminal has assaulted and raped the rights and interests of the protected law.¹⁴

b. Relative Theory (doeltheorieen)

In principle, this theory teaches that the imposition of a crime and its implementation must at least be oriented towards preventing the convict (special prevention) from repeating the crime again in the future, as well as preventing the wider community in general (general prevention) from the possibility of committing crimes such as crimes that have been committed previously and other crimes. All punishment orientations are in the context of creating and maintaining legal order in people's lives.

c. Unity/Combination Theory (vereenegingstheorie)

This theory is a combination of absolute theory and relative theory. In addition to emphasizing retaliation, the combined theory is aimed at protecting the rule of law out of respect for law and authority. Algra and Apeldoorn argue

¹¹N E Algra, "Van Duyvendijk, Mula Hukum, Transl," *Simorangkir*, (Bandung: Bina Cipta, 1983).

¹²Eddy O S Hiarij, *Prinsip-Prinsip Hukum Pidana* (Cahaya Atma Pustaka, 2016)

¹³Van Apeldoorn, "Pengantar Ilmu Hukum, (Jakarta: Pradnya Paramita" 2001).

¹⁴Adami Chazawi, "Pelajaran Hukum Pidana Bagian I, (Jakarta: PT. RajaGrafindo Persaada, 2007), p. 15.

that “usually punishment requires a double justification. The government has the right to punish, when people commit crimes (if someone commits behavior that deserves punishment) and when it seems that they will be able to achieve a useful goal”.¹⁵

d. Teleological Theory

This theory emphasizes punishment as a moral critique in response to wrong actions. The purpose of the moral criticism is a reform or change in the behavior of the convict in the future.¹⁶

e. Teleological Retributive Theory

This theory was put forward by Muladi, with the view that "the purpose of punishment is plural because it combines the principles (objective) and retributive as a unit". This theoretical view suggests the possibility of articulating punishment theories that integrate several functions as well as utilitarian retribution, where prevention and rehabilitation are all seen as targets to be achieved by a criminal plan. Because the objectives are integrative, the goals of punishment are: prevention, general and specific, community protection, maintaining community solidarity, and compensation.

Of the various theories that exist, all of them are based on three elements, namely¹⁷:

- a. Deterrence, by imposing a sentence, it is hoped that the perpetrator will become a deterrent and will not repeat the crimes that have been committed (special preventive) and the general public will know that if they commit an act committed by the convict, they will experience a similar punishment (generale preventive).
- b. Improving the convict's personality, with the treatment and education provided during his sentence in order to the convict feels sorry and will not repeat his actions and return to society as a good and useful person;
- c. Familiarize or make the convict helpless, meaning is to impose the death penalty, or to impose a life sentence.

Finally, it should also be stated that the imposition of a criminal (punishment) is essentially an imposition of suffering or misery or other unpleasant consequences. It is given intentionally by a person or institution who has power (by the authorities) to someone who has committed a criminal act according to the law.

¹⁵ Muladi, *Lembaga Pidana Bersyarat*, “Bandung” (Alumni, 2008), p. .29.

¹⁶ H Salim Hs, “Perkembangan Teori Dalam Ilmu Hukum, (Jakarta, PT,” *Raja Grafindo Persada*, 2010).

¹⁷ John Kenedi, *Kebijakan Hukum Pidana (Penal Policy) Dalam Sistem Penegakan Hukum Di Indonesia* (Pustaka Pelajar, 2017), p. 130.

2. Criminal Conviction according to Islamic Law

In Islamic criminal law, related to the theory of punishment, it focuses more on the benefit. The general purpose of the law is to uphold justice based on the will of the human creator so that order and peace can be realized in society. A society that obeys the law means loving justice, as in Surah An-Nisaa' [4]: 65:

“But no, by your Lord, they will not [truly] believe until they make you, [O Muhammad], judge concerning that over which they dispute among themselves and then find within themselves no discomfort from what you have judged and submit in [full, willing] submission.”

The purpose of law in the Islamic perspective is known as *maqashid* sharia, namely the purpose or objective of Islamic law in other terms called wisdom and *illat* the establishment of a law. At the application level in the field, Abu Ishaq al-Syatibi divides the field of *maqashid* sharia into five parts, namely:

- a. *Hifdz al-Din* (keeping religion);
- b. *Hifdz al-Nafs* (keeping life);
- c. *Hifdz al-'Aql* (guarding reason);
- d. *Hifdz al-Nasl* (keeping offspring);
- e. *Hifdz al-Mal* (keeping property)¹⁸;

Based on the several fields above, it is clear that the purpose of Islamic law includes criminal law which not only protects individual interests, but also the interests of society and the state, even further that Islamic law protects interests related to religious beliefs, both concerning the soul, mind and spirit or the potential for thought, lineage, or wealth. So the area that is the goal of protection from Islamic criminal law covers a wide area because it involves all aspects of human life, its relation to fellow humans and to the creator.¹⁹ In addition to giving punishment to the perpetrators of criminal acts, the application of Islamic criminal law (*jinayah*) also aims as a means of teaching people about the prohibition of an act being carried out.

Ibn Taymiyya explained that Allah SWT prescribes punishment as a mercy and a reflection of Allah's desire to do good to His servants. Thus, it is appropriate for people to punish others for their mistakes, do good and give mercy to them, like a father who teaches his son and a doctor who treats his patients.²⁰

There are two basic aspects of the formulation of punishment in the Islamic criminal law, namely:

¹⁸ Asep Saepudin Jahar, *Hukum Keluarga, Pidana & Bisnis* (Prenada Media, 2013), p. 119

¹⁹ H M Nurul Irfan, “Fiqh Jinayah” (Amzah, 2013).

²⁰ Ahmad Syafiq, “Rekonstruksi Pemidanaan Dalam Hukum Pidana Islam (Perspektif Filsafat Hukum),” *Jurnal Pembaharuan Hukum* 1, no. 2 (2014): 178–90.

- a. Aspect of Compensation/Retribution (Retribution). The retributive function of a punishment is the subject that is most discussed by Islamic criminal law experts, in addition to its deterrent function. This seems to be influenced by the existence of the verses of the Qur'an, which discuss a lot about this aspect of retribution. For example, the following Quranic verse:

"Indeed, the recompense for those who fight against Allah and His Messenger and cause mischief in the land is only that they are killed or crucified, or their hands and feet are cut off in exchange for reciprocity, or are banished from the land (where they live). That is (as) an insult to them in this world, and in the Hereafter they will have a great torment [Qs. 5:33]"

- b. Aspect of Deterrence. Sentencing Imprisonment is a legal reasoning for a sentence to be imposed. The main objective is to prevent the recurrence of these crimes in the future. In contrast to retribution, which tends to look back from the point in time of the crime, this deterrence is projected forward, namely the importance of having a preventive measure so that the violation does not happen again. One thing that should be noted is that Islamic criminal law is the legal system that has the strongest adoption of this deterrence aspect when compared to other criminal systems. Islam views the nature of deterrence as the most important thing in giving punishment.²¹

Based on the explanation above, both positive criminal law and Islamic criminal law, if narrowed down, there are two main functions of criminal law, namely: Primary function, as a rational crime prevention tool (as part of criminal policy or criminal politics). The secondary function is as a means of regulating social control which is carried out spontaneously and made by the state with its completeness. In its second function, the task of criminal law is more focused on policing the police, in order to protect citizens from interference by authorities who are not likely to use crime as a means incorrectly, in other terms, crimes with certain motives.

Criminal Sanctions in Positive Law and Islamic Criminal Law

1. Criminal Sanctions according to Positive Law

Criminal sanctions imposed on perpetrators of crimes as stated in Article 10 of the Criminal Code (KUHP) can be classified into two types, namely principal punishment and additional penalties.²² The principal

²¹ Siti Jahroh, "Reaktualisasi Teori Hukuman Dalam Hukum Pidana Islam," *Jurnal Hukum Islam*, 2016.

²² There are several differences in the RUU-KUHP, in which the Basic Penalties contained in Article 58 are classified into four parts, namely: imprisonment, criminal closure, criminal supervision (control), criminal fines, and criminal social work (community service), while the death penalty regulated in Article 59. Additional penalties include revocation of certain

punishment is the most important punishment imposed on the perpetrator, consisting of: death penalty, imprisonment, confinement, fines, and imprisonment. For more details can be explained as follows:

- a. Death penalty; The death penalty is the most severe punishment and can be applied to certain crimes that are intolerant from the point of view of state law. The two main arguments for the death penalty are that apart from being a retaliation, it can also play a role in causing a deterrent effect on the community. Furthermore, the implementation of the death penalty was changed to be more humane, namely by being shot. This change was made through a legal instrument in the form of Law Number 2/PNPS/1964, namely Presidential Decree Number 2 of 1964 which was stipulated as Law Number 5 of 1969 concerning Procedures for Implementing Death Penalty Sentenced by Courts in General and Military Courts. The death penalty is actually still needed because it can provide a stronger deterrent effect than other types of punishment. The threat of criminal punishment is only aimed at extraordinary crimes such as terrorism and narcotics.
- b. Imprisonment; Imprisonment that is widely applicable in various countries is a form of criminal substitute for punishments that are considered inhumane as the death penalty. The concept of imprisonment was originally intended for low-class people who were characterized by hard work or forced labor. Imprisonment is carried out in the form of placing a convict in prison for a time determined by the court according to his guilt.
- c. Confinement Punishment; The confinement punishment is lighter than imprisonment, namely in terms of carrying out mandatory work and the ability to carry the convicted person's daily equipment. Confinement can be carried out with a minimum limit of 1 (one) day and a maximum of 1 (one) year as stipulated in Article 18 of the Criminal Code. Confinement sentences are served in cells, generally the prison convicts are separated from the convicts who are serving confinement.²³
- d. Criminal fines; Fines are the oldest criminals, older than imprisonment, perhaps as old as the death penalty. In modern times, fines are imposed for minor offenses, in the form of violations or minor crimes.²⁴ Therefore, a fine is the only crime that can be borne by someone other than the convict. Although the fine is imposed on the convicted person, there is no prohibition if the fine is voluntarily paid by another person on behalf of the

rights, confiscation of certain goods with invoices, announcement of judge's decisions, payment of compensation, and fulfillment of customary obligations.

²³ Leden Marpaung, "Asas-Teori-Praktik Hukum Pidana, Sinar Grafika" (Jakarta, 2005), p. 109.

²⁴ Fauzan Fauzan and Nasaruddin Umar, "Norma Pengecualian Dalam Pasal 8 Rancangan Undang-Undang Larangan Minuman Beralkohol (Analisis Fikih Jinayah Dan Ilmu Perundang-Undangan)," *Madania: Jurnal Kajian Keislaman* 22, no. 1 (2018): 131-44.

convict.²⁵ Fines have a civil nature, similar to the payments required in civil cases against people who commit acts that harm others, only that in criminal law, fines are paid to the state.

- e. Criminal Closure; The criminal closure became the principal crime based on Law Number 20 of 1946 concerning the Criminal closure. It is reserved for politicians who commit crimes because of their ideology, but in modern judicial practice this provision is never applied. The confinement penalty is one of the crimes that eliminate independence, is heavier than a fine, but lighter than confinement, in accordance with Article 10 of the law in question. In the context of alternative punishments, it can be described hierarchically, in this case a light punishment becomes an alternative to a heavier punishment. It means that imprisonment is an alternative to the death penalty, and a fine is an alternative to imprisonment and confinement. This shows that the Criminal Code actually provides an alternative to imprisonment, as well as criminal law outside the Criminal Code.

2. Sanctions according to Islamic criminal law

In contrast to Indonesian criminal law which divides punishment into main and additional penalties, Islamic criminal law (*fiqh jinayah*) generally stipulates a single rule for each crime (*jarimah*). However, *fiqh jinayah* is open to additional penalties in accordance with the *ijtihad* of the judge who handed down the sentence. Here are some forms of *jarimah* and their punishments.

When viewed in Islamic criminal law, the types of sanctions and criminal acts are as follows:

a. *Jarimah Hudud*

Crimes that fall into this category are the most serious crimes in Islamic criminal law. It is a crime against the public, but does not affect private interests, but relates to God's rights. *Jarimah hudud* includes *jarimah zina*, *jarimah qadzaf*, *jarimah syurb al-ksamr*, *jarimah al-baghyu*, *jarimah al-riddah*, *jarimah al-sariqah*, *jarimah al-hirabah*, and *al-baghyu* (rebellion).²⁶

b. *Jarimah Qishash*

This crime is also known as *qishash* and *diyat*, which consists of murder and torture. This *jarimah* is located in the middle position between *hudud* and *ta'zir*. Apart from protecting against crimes against the integrity of the body intentionally, this *jarimah* also makes unintentional crimes its domain, whether it is intentional murder, murder by negligence, maltreatment that causes injury or

²⁵ Hamzah Andi, "Asas-Asas Hukum Pidana," (*Rineka Cipta, Jakarta*, 2008), p. 207.

²⁶ Topo Santoso, *Membumikan Hukum Pidana Islam: Penegakan Syariat Dalam Wacana Dan Agenda* (Gema Insani, 2003), p. 6

illness, violence with physical disabilities, and others²⁷. Meanwhile, in *al-Mu'jam al-Wasith*, *qishash* is defined by imposing legal sanctions on the perpetrators of the crime exactly the same as the crime committed life for life and limbs are repaid with body parts.²⁸ It can be concluded that *qishash* is doing the same or similar revenge, the life of the murderer can be removed because he has killed the victim or the perpetrator of the persecution may be persecuted because he has wronged the victim.

c. *Jarimah Ta'zir*

All kinds of crimes that are not regulated in the Qur'an and Hadith. Technical rules, types and implementation are determined by local authorities based on *ijma'* (consensus). The form of this finger is very varied and unlimited, according to the bad action that is done because of the devil's temptation to humans. Among other things, the death penalty, flogging, imprisonment, exile, cross, excommunication, reprimand and fines of *jarimah ta'zir* is an enforcement of the Islamic state's right to punish all forms of criminalization and inappropriate actions both for actions that cause physical, social, and social harm/damage. and social, political, financial, or moral values for individuals and society at large.²⁹

In Islamic criminal law (*jinayah*), it can be illustrated that the imposition of sanctions focuses more on corporal punishment, rather than imprisonment. Although in the study of *fiqh*, the discussion of prison becomes an inseparable part of *ta'zir*, but *fiqh* does not formulate prison institutions. On the contrary, the existence of prisons is an effort to adjust *fiqh* to the context in which *fiqh* develops.

Overcrowding of Prisoners in Indonesia

The problem of overcrowding in prison occupants poses a risk of not succeeding in the concept and purpose of correctional facilities, due to the logical consequence of the dense conditions of prison occupants, resulting in the goal of fostering inmates not being achieved. The criminal justice system which still tends to imprison every form of criminal action has an impact on the high crime rate which ends in legal proceedings with imprisonment as the final place for legal sanctions. It will automatically have an impact on the density of prison inmates in Indonesia. Of course, the problem of prison overcrowding is a separate problem that invites the potential for internal and external conflicts.

²⁷ Santoso.

²⁸ Ibrahim Mustafa, "Dkk., Al-Mu'jam Al-Wasith," (*Tabran: Al-Maktabah Al-Ilmiyyah, t. Th*) 1973. : 740

²⁹ Santoso, *Membumikan Hukum Pidana Islam: Penegakan Syariat Dalam Wacana Dan Agenda*.

Correctional institutions at first were not a complicated problem. However, a number of problems arise because its role has changed to become a center for gathering people who have been sentenced to criminal sanctions. These problems require more detailed and thorough thinking. The number of the problems and demands of thoughts are caused by the implementation of the punishment which takes a long time, some even last a lifetime, according to the philosophy of imprisonment, namely: it must be long, it must show suffering, and it must take the form of a burden as a substitute for the losses suffered by the victim. Imprisonment or correctional punishment must last for a long time, with the aim of general prevention, so that the public gets empirical evidence so that no one repeats similar acts in the future.

The use of prisons or detention centers (Rutan) as a means of accommodating criminals causes many problems in its implementation. Especially on the issue of the length of confinement carried out, the physical condition of the building, and the availability of other facilities and infrastructure that are part of the convict's rights while in prison.³⁰ Another problem is the limitation of the maximum length of imprisonment whose effectiveness can be accounted for in order to achieve the rule of law. It is common knowledge that long-term punishment can actually be a criminogenic factor,³¹ where temporary prisoners who are deposited in Correctional Institutions acquire negative knowledge from criminogenic convicts who have received verdicts that have the permanent legal force. This situation can allow a negative learning process because there is no separation of rooms contained in the Correctional Institution.

Giving remissions, PB, CB, and CMB are good steps to reduce the density of prisons and detention centers, but the provision of facilities for community members only focuses on how to reduce the density of prisons and detention centers but does not aim to prevent similar actions from happening again in the future. The emergence of new recidivists as well as the recurrence of similar crimes in the future is a reflection of the failure of modern punishment patterns that put forward a pseudo-humanist side. In fact, there are several patterns of punishment that seem modern but do not solve problems that keep repeating themselves so that it has implications for the overcrowding of prisons and detention centers and the swelling of state spending.

This is also exacerbated by the weakness in coordination between prisons, the police and the attorney general's office. So that for cases that are classified as narcotics crimes, minor crimes (tipiring) as optimally as possible

³⁰ Regarding the rights of prisoners, it can be seen in Article 14 of Law no. 12 of 1995 concerning Corrections.

³¹ Criminogenesis consists of the words "crime" and "gene" which means "carrier of evil". Criminogenic factors are factors that trigger crime.

find solutions through non-imprisonment alternatives, such as fines, rehabilitation or restorative justice steps, namely settlement of cases outside the court.

Alternative Punishment besides Imprisonment in Various Countries

Several countries have implemented the concept of alternative sanctions as a substitute for imprisonment. France, for example, this country has implemented the concept of "semi liberte" in the form of half-day release for the prison community. Prisoners who receive the benefits of this regulation are free to leave their prisons during the day to participate in a series of activities such as taking courses, training, or studying other sciences. Prisoners can also be employed without pay or become medical volunteers. They will remain in prison if there are no special needs that are oriented to social work as part of their schedule. Uniquely, the days outside the prison are still counted as detention days.³²

Another concept that is also applied in developed countries is the concept of alternative criminal custodial. This concept applies in Greece, where a prison sentences of less than 6 (six) months can be converted into a fine of money.³³ Even the courts are given the flexibility to grant permission to convert prison punishment into fines to correctional officers who are punished to a maximum imprisonment of 18 (eighteen) months.³⁴ In addition, social work penalties also applied to correctional residents who are punished with more than 6 (six) months. The social work is carried out in a place in the form of plantations or agricultural land, the results of which are intended for the needs of the wider community. Uniquely, the punishment that is passed by working will reduce two days of the punishment. However, the reduction in the punishment period will be canceled if the correctional officer behaves badly, is disciplinary, or does not carry out the work (which is imposed as a punishment) in an appropriate manner.

Apart from the two countries above, there are also other alternative forms of punishment that are applied. Portugal has a criminal supervision concept in which prison residents are not imprisoned, but are required to do social work for one to three years with supervision in rehabilitation efforts. Another sanction is a reprimand plus compensation for the loss carried out as

³² Karl-Ludwig Kunz, "Non-Custodial Sanctions in Europe: An Overview," *Acta Criminologica: African Journal of Criminology & Victimology* 7, no. 1 (1994): 33–39.

³³ Michael Leo Owens and Hannah L Walker, "The Civic Voluntarism of 'Custodial Citizens': Involuntary Criminal Justice Contact, Associational Life, and Political Participation," *Perspectives on Politics* 16, no. 4 (2018): 990–1013.

³⁴ Emmilia Rusdiana, "Pengenaan Pidana Denda Yang Dapat Dikonversi Dengan Pidana Kurungan Pada Pelaku Kriminogenis terdiri dari kata "crime" dan "gen" yang berarti "pembawa kejahatan". Faktor kriminogenis ialah faktor yang memicu terjadinya tindak kejahatan. Anak," *Jurnal Yudisial Vol* 12, no. 3 (2019): 363–80.

applicable in Finland, Serbia, Armenia, Romania, Macedonia, Tajikistan, China, and Vietnam. Even the Council of Europe gives judges the prerogative not to impose any punishment on offenses that are deemed light.

That the punishment of social workers, half-day imprisonment, and other alternative custodial punishments will be effectively applied to countries that have a proportional demographic to topographic ratio. Europe, which is currently the center of modern punishment in the world, does not have the landscape and population density found on the Asian continent, especially in Indonesia. Strong safeguards are needed in terms of quality and quantity to carry out supervision for the above alternative punishments, and such a concept will certainly be difficult to apply in Indonesia.

The Urgency of Alternative Criminal Law in the Study of Positive Law and Islamic Criminal Law

The current phenomenon in various countries has abandoned the punishment of imprisonment by replacing alternative punishments other than imprisonment, including social work crimes, supervision crimes, and fines and so on. Likewise, Indonesia should implement alternative punishments other than prison, which is already available in the Criminal Code (KUHP) and other laws and regulations. This alternative punishment is an alternative solution for law enforcement officers who have been using imprisonment with a retributive justice approach (revenge) rather than restorative justice (recovery). So that the problem of overcrowding in prisons with the many problems in it can be minimized. On the other hand, the values of the purpose of punishment in Islamic criminal law should be used as an approach in positive law in Indonesia, especially in the context of implementing alternative punishments. The restorative justice approach, for example, is actually a reflection that has existed in Islamic criminal law for a long time, the law that lives in society (living law) that brings good, both perpetrators, victims and society.

This type of criminal fine is an alternative punishment other than imprisonment that can be applied. Fines or compensation is one of the main types of crime in Article 10 of the Criminal Code (KUHP), in addition to the death penalty, imprisonment, confinement, and criminal closure. Even fines are the oldest form of crime and are older than imprisonment and as old as the death penalty. In practice, the imposition of fines is relatively easy, but requires some support for transparent administrative procedures, with the calculation of appropriate fines.³⁵ This can be done by recording and keeping a record of the types and forms of criminal acts that have been found in police offices in each sector, known as the Police B1 Book. In its application in the field, penalties for paying fines (*diyyat*) can be imposed on perpetrators of minor crimes (*tipiring*),

³⁵ Reymond Kalianget, "Eksistensi Pidana Denda Dalam Konteks Kitab Undang-Undang Hukum Pidana," *Lex Crimen* 4, no. 7 (2015).

such as theft, pickpocketing, extortion, vandalism, diversion, and other crimes that are not part of a serious crime. The perpetrator of the offense can be forced to return the stolen goods and compensate for the losses caused by the theft he did. In addition, the perpetrator is also given a sanction in the form of a warning so as not to repeat a similar crime in the future.³⁶

In the study of Islamic criminal law, the logic of transferring prison sentences by prioritizing fines is a method to respond to criminal acts by involving conflicting parties in order to repair the damage caused by the crime. This is done through dialogue and negotiation between the two parties, and fines can be used as ransom for a crime so that the perpetrator does not have to be in prison. In Islam, the fine in question belongs to the type of fine whose perfection is not certain, namely the fine that is determined through the judge's *ijtihad* and adjusted to the violation and/or crime that has been committed. Thus, in the study of Islamic criminal law the existence of a fine (compensation) is essentially a manifestation of the concept of restorative justice (restorative justice), namely the concept of justice that improves all parties.³⁷

Furthermore, another alternative punishment is in the form of providing rehabilitation, especially for narcotics crimes. It is undeniable that the biggest contributor is inmates, so that currently the prison is mostly drug-related. Provisions regarding rehabilitation for narcotics abuse have been regulated in Article 54 of Law Number 35 of 2009. Which states, Narcotics addicts and victims of narcotics abuse are required to undergo medical rehabilitation and social rehabilitation. The basis for considering the provision of rehabilitation actually lies in the long-term goal, in order to support individual recovery and reintegration into society, so as to end chronic recidivism that often characterizes the behavior of offenders with drug dependence. Narcotics abusers, including self-victimizing, are individuals who become victims of the consequences of their own actions. In the sense of crime without causing victims (crime without victims). This means that there is an act that is categorized as a crime, but does not cause a victim to others, and then the act is not categorized as a crime, so that narcotics abusers are considered victims and not the perpetrators of crime, and then the right action is rehabilitation, not imprisonment.³⁸

³⁶ Santoso, *Membumikan Hukum Pidana Islam: Penegakan Syariat Dalam Wacana Dan Agenda*.

³⁷ Yusi Amdani, "Konsep Restorative Justice Dalam Penyelesaian Perkara Tindak Pidana Pencurian Oleh Anak Berbasis Hukum Islam Dan Adat Aceh," *AL-'ADALAH* 13, no. 1 (2016): 76–81.

³⁸ Andi Najemi, Kabib Nawawi, and Lilik Purwastuti, "Rehabilitasi Sebagai Alternatif Pemidanaan Terhadap Anak Korban Penyalahgunaan Narkotika Dalam Upaya Perlindungan Terhadap Anak," *Jurnal Sains Sosio Humaniora* 4, no. 2 (2020): 440–54.

In Islamic criminal law, a drug abuser (user), even though the crime is classified as a crime without a victim, the perpetrator must still be whipped and shown in public before undergoing rehabilitation. This includes drug dealers (dealers), no matter how much drugs are sold, if the impact is large, the dealer deserves the death penalty and does not receive any facilities from the state except during the waiting period for execution. This is done in order to present a deterrent effect in the future. Meanwhile, users or addicts can be categorized as drunkards based on qiyas, so that drug users can be punished 40-80 (forty to eighty) lashes in accordance with the judge's *ijtihad* by considering the form and type of criminal act that he committed, as well as the conditions concerned. On the other hand, in the perspective of Islamic criminal law, sanctions for drug abuse can be transferred to rehabilitation, based on the judge's consideration and there is an element of *syubbat*, namely the existence of elements of ambiguity, uncertainty and doubt in proving drug use, as well as confusion in certain articles. In accordance with *maqashid sharia*, rehabilitation aims to restore physical health in accordance with *hifz al-nafs*, restore mental health in accordance with *hifz al-aql*. Rehabilitation can also use a religious approach so as to carry out *hifz al-din*. After the rehabilitation process is complete and the perpetrator has returned to his proper life, there have been efforts by *hifz al-mal* and *hifz al-nasl*.

The next alternative is to use a restorative justice approach, namely the out-of-court settlement model or alternative dispute resolution (APS).³⁹ The strategy of eradicating criminal acts in Indonesia, entering the modern era, must undergo a paradigm shift. The paradigm that was previously only oriented to prison sentences should change with a new stage, namely the stage of strengthening the prevention system (preventive measures) by prioritizing restorative justice in resolving cases. The restorative justice approach, in principle, has the aim of recovering the impact of crime for all parties through peace or forgiveness, both perpetrators, victims and the community.⁴⁰ More than 80 countries, including Indonesia have used this type of restorative approaches to dealing with crime. Restorative justice programs can be used at any stage of the criminal justice system, in accordance with national law. Restorative justice processes can be adapted to different cultural contexts and community needs.⁴¹

³⁹ Ilyas Sarbini and Aman Ma'arij, "Restorative Justice Sebagai Alternatif Penyelesaian Perkara Pidana," *Fundamental: Jurnal Ilmiah Hukum* 9, no. 1 (2020): 31–42.

⁴⁰ Kristian Kristian and Christine Tanuwijaya, "Penyelesaian Perkara Pidana Dengan Konsep Keadilan Restoratif (Restorative Justice) Dalam Sistem Peradilan Pidana Terpadu Di Indonesia," *Jurnal Hukum Mimbar Justitia* 1, no. 2 (2017): 592–607.

⁴¹ Dewi Setyowati, "Memahami Konsep Restorative Justice Sebagai Upaya Sistem Peradilan Pidana Menggapai Keadilan," *Pandecta Research Law Journal* 15, no. 1 (2020): 121–41.

In Islamic criminal law, the restorative justice approach is carried out through peace and forgiveness by realizing the creation of justice and balance for the perpetrators of crimes and the victims themselves. The concept of restorative justice in Islamic criminal law is explicitly regulated in Q.S. Al-Hujurat [49]: 10 and Q.S. Ash-Syura [42]: 40 who ordered peace and forgiveness in the settlement of criminal acts. The existence of peace and forgiveness in the context of realizing the integrity and sustainability of shared life is essentially in line with the value of the principle of *maqashid* sharia towards the creation of justice and the benefit of all parties, both perpetrators, victims, and the community.

Seeing the benefit that is the goal of human life, alternative punishment can be a solution in enforcing the law. If it is related to the spirit of practicing Islamic law, namely the public benefit, the alternative concept of punishment is in line with the substance of *maqashid* sharia as stated by as-Syatibi. According to this prominent *usul fiqh* scholar who is based on the Maliki school of thought, this benefit can be realized if the five main elements (*al-uşûl al-kebamsah*) can be realized and maintained. The five main elements in question are maintaining (1) religion, (2) soul, (3) descendants, (4) will, and (5) wealth. To maintain these five main elements, three sharia objectives are included which are *wasilah* and complement each other, namely (a) *maqâşid ad-darûriyyât*, (b) *maqâşid al-hâjjiyyât*, and (c) *maqâşid at-tahsîniyyât*.⁴² From this, it comes to the conclusion that anything that guarantees the maintenance of the five main elements is called *maslahah*, while anything that eliminates them is called *mafsadah*.

Maqâşid ad-darûriyyât is something that requires preserving and maintaining the five main elements in human life. Its application is by upholding the pillars, establishing the rules, and rejecting the *mafsadah* that has arisen and will occur. *Maqâşid al-hâjjiyyât* is intended to eliminate narrowness or difficulties while preserve the maintenance of the five main elements so that they are even better. Meanwhile, *maqâşid at-tahsîniyyât* is intended so that humans can do their best to maintain the five main elements. In this case, alternative punishment is a form of *hâjjiyyât*, which is a much needed solution in protecting the souls of prisoners due to overcrowding in prisons. Prisoners are also human beings whose souls must be guarded even though they are criminals who are currently serving a sentence.

Conclusion

There are several important points that conclude this study; in positive law, provisions for alternative punishment other than imprisonment are

⁴² Abu Ishâq As-Shâhibî, "Al-Muwâfaqât Fî Uşûl as-Syarî'ah," (*Beirut: Dar Al-Fîkir*, 2005).

available in the Criminal Code and other legislation. There are several alternative forms of punishment that can be used, including models of criminal sanctions, fines, and rehabilitation sanctions. Including the model of settlement of criminal acts outside the court (APS) with a restorative justice approach, namely in the form of peace and forgiveness of the perpetrators, victims and the community. Conceptually, alternative punishment in positive law has an ideal concept with the aim of punishment that leads to recovery not retaliation. Then in the concept of Islamic criminal law, the provision of alternative punishment is in accordance with the principles contained in *maqashid al-syariah*, namely protecting religion (*al-dīn*), soul (*al-nafs*), offspring (*al-nasl*), property (*al-māl*) and reason (*al-aql*).

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