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Islamic Criminal Law in Indonesia's New Criminal Code: Substantive Absorption under Constitutional Limits

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ABSTRACT

Indonesia's new Criminal Code, Law No. 1 of 2023, which entered into force on 2 January 2026, is often read either as an Islamisation of national criminal law or as a secular compromise that sidelines *fiqh jinayah*. This article examines how, and how far, Islamic criminal law is actually received in the Code. Using normative legal research with statutory, conceptual, and comparative approaches, it analyses the Code as amended by Law No. 1 of 2026, together with Law No. 20 of 2025 on Criminal Procedure, Government Regulation No. 55 of 2025, and the Aceh Qanun Jinayat, across three layers: offences, sanctions, and settlement mechanisms. The findings show that the Code absorbs Islamic criminal law substantively rather than formally. Adultery, cohabitation, and offences against religion reflect the protective aims of *hifz al-nasl* and *hifz al-din*, yet they are framed as complaint-based or incitement-based offences without *hudud* penalties. Victim forgiveness, judicial pardon, compensation, restorative settlement, and a death penalty subject to probation operate in a manner compatible with *ta'zir* and with the restorative values of *'afw*, *sulh*, and *diyat*, as early judicial practice already shows. Living law and the Aceh regime admit local Islamic norms only through constitutional and human rights filters. The article concludes that the Code is best understood as *siyasah shar'iyyah* within a constitutional state and recommends *maqasid*-based judicial guidelines for applying victim forgiveness and living law.

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INTRODUCTION

On 2 January 2026, Indonesia's new Criminal Code, Law No. 1 of 2023, replaced the *Wetboek van Strafrecht* inherited from the Dutch colonial administration. It entered into force together with Law No. 20 of 2025 on Criminal Procedure and Law No. 1 of 2026 on Criminal Adjustment, which aligns sectoral statutes and regional regulations with the general part of the Code and amends several of its provisions. The Code is presented as a project of decolonisation that grounds criminal law in Pancasila and in the values living in Indonesian society (Faisal et al., 2024), although critics question whether it fulfils that promise (Butt, 2023). For the world's most populous Muslim-majority country, one question has accompanied this project since its earliest drafts: what place should Islamic criminal law (*fiqh jinayah*) occupy in a code that must serve a plural nation?

Responses to this question remain polarised. One strand reads the provisions on adultery, cohabitation, offences against religion, and living law as signs of moral and religious conservatism that threaten privacy, minority rights, and legal certainty (Butt, 2023; Prayitno et al., 2026; Putri, 2025). Another strand, rooted in Islamic legal scholarship, observes that the Code departs from *fiqh jinayah* because it contains no *hudud* or *qisas* penalties and treats adultery as a complaint-based offence (Usman et al., 2025). Although opposed, both strands share one yardstick: Islamic criminal law is regarded as present only when its offences and fixed penalties are reproduced in positive law. This yardstick obscures other routes through which a legal tradition shapes a code, namely the values that justify prohibitions, the philosophy of sanctions, and the procedures for settling conflicts.

Prior studies have examined individual provisions from an Islamic perspective. They have analysed the expanded adultery offence (Januarsyah et al., 2023), the shift from blasphemy to incitement-based religious offences (Tobroni et al., 2025), the death penalty with probation (Jamilah, 2026; Tongat, 2024), judicial pardon and *'afw* (Ali et al., 2025), and living law in relation to *'urf* (Asmawi et al., 2025). Others have shown that Islamic criminal law contributes to the Code mainly at the level of values and general principles (Abdillah et al., 2024, 2026). Two gaps remain. Most studies treat single provisions and seldom read offences, sanctions, and settlement mechanisms as one system. Most were also written before the Code took effect, so they do not account for Law No. 1 of 2026, the new Criminal Procedure Code, Government Regulation No. 55 of 2025 on living law, or the first judgments applying judicial pardon.

This article builds on the classical division of crimes (*jarimah*) into *hudud*, whose penalties are fixed by revelation; *qisas* and *diyat*, which give victims or heirs the right to retaliation, compensation, or forgiveness; and *ta'zir*, the residual domain in which the ruler defines offences and penalties according to public interest (*maslahah*) (Royani & Park, 2023). The *maqasid al-shari'ah*, the protection of religion, life, intellect, lineage, and property, provide criteria for judging whether such legislation serves the aims of the law (Tamam et al., 2026). In Indonesia, moreover, the transformation of Islamic law into national law is a two-way process of accommodation that is not synonymous with Islamisation (Baehaqi, 2021).

Against this background, the main academic problem of this article is not whether the Code is Islamic or secular, but how a national code that rejects both *hudud* penalties

and the private enforcement of *qisas* can still receive Islamic criminal law, and how that reception should be qualified in Islamic legal theory. The problem is urgent because the Code has been in force since January 2026: judicial pardon based on victim forgiveness is already applied, Government Regulation No. 55 of 2025 regulates the recognition of living law, and the Aceh *qanun* now operates beside a national code, yet no settled yardstick exists for assessing these developments from the perspective of *fiqh jinayah*. Accordingly, this article addresses three questions: (1) in which layers of the Code (offences, sanctions, and settlement mechanisms) Islamic criminal law is received, and in what form; (2) which constitutional and human rights limits restrict that reception; and (3) how this mode of reception should be characterised in terms of *ta'zir* and *siyasah shar'iyyah*. The first question is answered layer by layer in the Results and Discussion, the second in the analysis of pluralism and its risks, and the third in the synthesis. The article argues that the Code receives Islamic criminal law through substantive absorption rather than formal enactment and that, because almost all of its provisions fall within the domain of *ta'zir*, this mode of reception can be justified as *siyasah shar'iyyah*, the legitimate policy-making of a Muslim-majority constitutional state.

METHOD

This study is normative legal research, which examines law as a system of norms, principles, and doctrines rather than as observed behaviour (Tan, 2021). It combines three approaches. The statutory approach analyses Law No. 1 of 2023, in particular Articles 2, 51, 54, 66, 98–101, 300–305, 411–412, 433, 476, 479, and 597, as amended by Law No. 1 of 2026, together with Law No. 20 of 2025, Government Regulation No. 55 of 2025, Law No. 11 of 2006 on the Governing of Aceh, and Aceh Qanun No. 6 of 2014 on Jinayat Law. The conceptual approach employs the categories of *fiqh jinayah*: *jarimah*, *hudud*, *qisas*, *diyat*, *ta'zir*, *'afw*, *sulh*, and the *maqasid al-shari'ah*. The comparative approach sets each provision against its nearest counterpart in *fiqh jinayah*. Primary legal materials consist of these instruments and Balige District Court Decision No. 171/Pid.B/2025/PN Blg, used to illustrate the early application of judicial pardon. Secondary materials consist of journal articles, mostly published between 2021 and 2026. The materials were collected through library and document study, with statutory texts current as of October 2026.

The legal materials were analysed qualitatively, through systematic and teleological interpretation, in four stages. First, in the inventory stage, the instruments

were read in full, and a provision was selected when it regulates conduct, a sanction, or a settlement mechanism with a counterpart in *fiqh jinayah*, or opens criminal law to non-state norms. Second, in the coding stage, each selected provision was assigned to one layer by its primary legal function: *offences* (provisions formulating prohibited conduct and its elements), *sanctions* (provisions determining the type, measure, or modification of punishment, including forgiveness, pardon, compensation, and the death penalty with probation), and *settlement and pluralism* (provisions determining the forum or normative source through which a case is resolved, such as living law, restorative settlement, and the Aceh *qanun*). This grouping follows the structure of *fiqh jinayah*, which distinguishes the prohibited act (*jarimah*), its punishment (*'uqubah*), and the ways a case is settled or recognised (*'afw*, *sulh*, and *'urf*), and mirrors the Code's division between offences (Book Two), punishment (Book One), and the sources and procedures of application. Provisions with a double function, such as the customary obligation in Articles 66(1)(f) and 597, were coded by their primary function and cross-referenced. Third, in the assessment stage, each provision was compared with its nearest *fiqh* counterpart on three criteria: the mode of reception, from formal enactment (as in Aceh) to substantive absorption (the protective aim is kept but the legal form changes); conformity with the *maqasid*; and the constitutional or human rights limits attached to it. Fourth, in the synthesis stage, the results were compared across layers to identify the patterns and limits of reception that answer the research questions, as summarised in Table 1.

RESULT AND DISCUSSION

Islamic Criminal Law in the Architecture of the Code

The general part of the Code departs from the retributive orientation of its colonial predecessor. Article 51 states that punishment aims to prevent crime for the protection of society, to rehabilitate offenders, to resolve conflicts and restore balance, and to foster remorse. The death penalty is no longer a principal penalty but a special penalty, always threatened alternatively as a last resort (Article 98). These choices define the space in which Islamic criminal law can operate. Table 1 maps the provisions most relevant to *fiqh jinayah*.

Table 1. Reception of Islamic Criminal Law in Law No. 1 of 2023

Fiqh category	Provision in Law No. 1 of 2023	Mode of reception	Point of divergence
Zina (*hadd*)	Art. 411: intercourse with a person who is not one's spouse; max. 1 year or	Substantive: no longer limited to married persons; protects	No *hadd* penalty; prosecution depends on a family complaint rather

Fiqh category	Provision in Law No. 1 of 2023	Mode of reception	Point of divergence
	category II fine; complaint by spouse, parent, or child	marriage and lineage (*hifz al-nasl*)	than a right of God (*haqq Allah*)
Khalwat and related immorality (*ta'zir*)	Art. 412: cohabitation as husband and wife outside marriage; max. 6 months or category II fine; complaint-based	*Ta'zir*-type moral offence	Enforcement left to the family; no public prosecution
Protection of religion (*hifz al-din*); *riddah*	Arts. 300–305: hostility, hatred, or incitement against religion; inciting abandonment of religion; coerced conversion; disrupting worship; defiling places of worship	Protects religion and religious life	Apostasy itself is not punished; coercion to convert or abandon religion is punished
Sariqah, *hirabah*, *qadhf*	Art. 476 (theft), Art. 479 (theft with violence), Art. 433 (defamation)	Functional analogues	Graded, discretionary penalties; no amputation or fixed lashes
Qisas and *diyat*	Art. 54(1)(j) victim forgiveness; Art. 66(1)(d) compensation; Arts. 98–100 death penalty as alternative, last resort, with 10-year probation	Restorative logic close to *'afw* and *diyat*	Forgiveness mitigates but does not bar punishment; compensation supplements rather than replaces the penalty
'Afw and *sulh*	Art. 54(2) judicial pardon; restorative settlement under Law No. 20 of 2025	Judicially supervised reconciliation	The state, not the victim, holds the final decision
'Urf and local Islamic norms	Arts. 2, 597, and 66(1)(f); Government Regulation No. 55 of 2025	Regulated pluralism	Filtered by Pancasila, the 1945 Constitution, human rights, and general legal principles
Aceh *jinayat* (*hudud* and *ta'zir*)	Qanun Aceh No. 6 of 2014 under Law No. 11 of 2006; national codes apply where the Qanun is silent	Territorial special regime	Confined to Aceh; corporal penalties remain contested under human rights standards

Source: Author's analysis of Law No. 1 of 2023 and related legislation.

Table 1 reveals a consistent pattern. Wherever the Code touches a classical *jarimah*, it adopts the protective aim of the prohibition but changes its legal form: it prescribes graded and discretionary penalties instead of fixed ones, makes several moral offences complaint-based, and places forgiveness and reconciliation under judicial control. The following subsections examine this pattern in each layer.

Offences: Shared Prohibitions, Different Legal Interests

The adultery offence illustrates the pattern most clearly. Article 284 of the colonial code punished only adultery committed by a married person. Article 411 of the new Code punishes any person who has sexual intercourse with someone who is not his or her spouse, so unmarried persons are now covered. This expansion brings the offence closer to the *fiqh* concept of *zina*, which covers both married (*muhsan*) and unmarried offenders, and it was justified as protection of religious and moral values tied to Pancasila

(Januarsyah et al., 2023). Yet the penalty is at most one year of imprisonment or a category II fine, far from the *hadd* of flogging or stoning, and prosecution requires a complaint from the spouse or, for unmarried persons, from a parent or child. Cohabitation under Article 412 follows the same structure with a lighter penalty and has no *hadd* counterpart; in *fiqh* it amounts to *zina* only when intercourse is proven and is otherwise a matter of *ta'zir*.

The complaint requirement is where Islamic law scholars locate the main gap, since *zina* in *fiqh* violates the right of God (*haqq Allah*) and is not left to private complaint (Usman et al., 2025). A closer reading of classical doctrine suggests a less stark contrast. Jurists made the *hadd* of *zina* almost impossible to prove: it requires four eyewitnesses or a maintained confession, and the maxim *idra'u al-hudud bi al-shubuhat* requires the penalty to be averted whenever doubt arises (Aykul & Uddin, 2025). The duty to conceal private sins (*satr*) further discourages exposure, which is why digital evidence of intimate conduct is considered unsuitable for *hudud* cases (Haq & Syatar, 2026). Classical doctrine therefore also restrained the state's power to search out private sexual conduct. The complaint requirement performs a comparable function in modern form: it keeps the moral prohibition while preventing raids, vigilantism, and prosecution without the involvement of those directly affected. This reading also answers part of the rights-based critique, although concerns about selective enforcement against women and unregistered marriages remain valid (Prayitno et al., 2026; Putri, 2025).

The offences against religion show a similar transformation. Articles 300 to 305 punish public hostility, hatred, or incitement on the basis of religion, inciting a person to abandon religion, coercing a person to abandon or change religion, disrupting worship, and defiling places of worship. These provisions correspond to *hifz al-din*, but they do not punish apostasy (*riddah*); Article 302(2) instead punishes coerced conversion, which protects the believer's freedom. Law No. 1 of 2026 confirms this direction: it restates Article 300 with an express exemption for objective, internal, and scholarly statements and repeals Article 4 of Presidential Decree No. 1/PNPS/1965, the legal source of the old blasphemy offence, redirecting references to Articles 300 and 302(1). Scholars describe this as a shift from protecting religion as such to protecting religious freedom and people targeted for their faith (Banjarani et al., 2026; Tobroni et al., 2025). In *maqasid* terms, *hifz al-din* is reinterpreted as protection of religious peace rather than enforcement of orthodoxy. Theft, violent theft, and defamation (Articles 476, 479, and 433) likewise

correspond functionally to *sariqah*, *hirabah*, and *qadhf*, but carry graded penalties rather than amputation or fixed lashes.

Sanctions: A Ta'zir-Compatible and Restorative System

The second layer is where Islamic criminal law has its strongest, though least recognised, influence. Under the *qisas* regime, victims or heirs may demand retaliation, accept *diyat*, or forgive, and the Qur'an (2:178) commends forgiveness. Studies describe *diyat* as a Qur'anic prototype of restorative justice that combines restoration with proportional retribution (Hamidah & Arif, 2026). The Code contains three mechanisms that echo this structure. Article 54(1)(j) obliges judges to consider forgiveness by the victim or the victim's family. Article 54(2) allows the judge to impose no penalty, considering the minor nature of the act, the offender's circumstances, and subsequent events, on grounds of justice and humanity. Article 66(1) lists compensation and the fulfilment of local customary obligations among additional penalties. Law No. 20 of 2025 adds restorative settlement at the investigation, prosecution, and trial stages, in forms that include forgiveness, compensation, and restitution (Articles 79–88).

Early practice shows these mechanisms at work. In Decision No. 171/Pid.B/2025/PN Blg of 24 February 2026, the Balige District Court found a defendant guilty of minor assault under Article 466(1) of the Code but imposed no penalty. Relying on Article 54(2) and Article 246 of Law No. 20 of 2025, the court noted that the parties had signed a peace agreement in which the victim forgave the defendant, who expressed remorse (MARINews, 2026a). This reasoning, built on forgiveness, reconciliation, and remorse, mirrors the logic of *'afw* and *sulh*. Comparative work confirms that the Islamic doctrine of pardon from punishment rests on similar restorative aims (Ali et al., 2025), although the open-ended wording of Article 54(2) calls for clearer parameters (Utami et al., 2026).

The death penalty follows the same logic. As amended by Law No. 1 of 2026, Article 100 attaches a ten-year probation period to death sentences, during which execution is barred; a convict who shows commendable conduct has the sentence commuted to life imprisonment by presidential decree after the Supreme Court's consideration, and Article 101 converts the sentence to life imprisonment by operation of law if execution does not occur within ten years after clemency is rejected. Islamic law likewise does not make execution in homicide mandatory, since heirs may forgive. The scheme has been read as a middle way between retention and abolition (Tongat, 2024), and a *maqasid* reading

finds it compatible with the protection of life and the possibility of spiritual rehabilitation (Jamilah, 2026). What the Code lacks is a formal role for victims' families, which has led to proposals to integrate *diyat* and *'afw* into commutation (Robo et al., 2026).

There is an important difference. In *fiqh*, forgiveness extinguishes the right to *qisas*; in the Code, it is only one factor the judge weighs, and restorative settlement under Law No. 20 of 2025 is excluded for offences against life, sexual violence, and offences against decency (Article 82). This difference is less foreign to Islamic law than it appears. Because the Code fixes neither offences nor penalties by revelation, almost all of it falls within *ta'zir*, where the legislature acting as *ulil amri* may define offences and graded sanctions according to *maslahah* (Royani & Park, 2023). The Code's preventive, rehabilitative, and conflict-resolving purposes match the classical aims of *ta'zir*, so the absence of *hudud* penalties does not by itself make the Code un-Islamic.

Legal Pluralism and Its Constitutional Filters

The third layer concerns channels through which norms outside the Code enter criminal justice. Article 2(1) provides that the principle of legality does not reduce the force of the law living in society, and Article 597 makes violations of such law punishable by the fulfilment of customary obligations, which Law No. 1 of 2026 elevates to a principal penalty for living-law offences laid down in regional regulations. Government Regulation No. 55 of 2025 sets the procedure and criteria for identifying such law. Where customary law is shaped by Islam, this channel may give local Islamic norms a place in criminal adjudication, and *'urf* offers a tool for identifying which living norms qualify (Asmawi et al., 2025). However, Article 2(2) limits living law to the place where it lives, to matters not regulated by the Code, and to norms consistent with Pancasila, the 1945 Constitution, human rights, and general principles of law. Its narrowing to written customary law in regional regulations has also been criticised as undermining legal certainty and the provision's own purpose (Fathurokhman et al., 2026).

Aceh represents a different channel. Under Law No. 11 of 2006, Aceh enforces Qanun No. 6 of 2014, which includes *hudud* and *ta'zir* offences such as *khamr*, *maisir*, *khalwat*, and *zina*, with caning as the principal penalty. The Code does not repeal this regime, which is widely regarded as a valid *lex specialis* grounded in special autonomy (Anggara et al., 2025). In July 2026, the Supreme Court's Chief Justice for Religious Affairs described the relationship as complementary, with national criminal law and procedure applying wherever the Qanun is silent (MARINews, 2026b). Judges in Aceh nonetheless

face overlaps on *zina*, *khalwat*, and *khamr*, and harmonisation demands are perceived as a threat to special autonomy (Mukhlis et al., 2026). Aceh thus shows what formal enactment of *fiqh jinayah* looks like, and its persistent tension with national human rights standards helps explain why the national legislature chose substantive absorption.

Substantive Absorption as Siyasah Shar'iyyah

Taken together, the three layers show that Islamic criminal law operates in the Code as a source of values, a philosophy of sanctions, and one of several normative orders admitted through regulated pluralism, but not as a body of rules transplanted wholesale. This finding corrects both readings outlined above. The Code is not an Islamisation of criminal law, because it contains no *hudud* penalties, makes moral offences complaint-based, and subjects every pluralist channel to constitutional limits. Nor does it exclude Islamic law, because the protective aims of *hifz al-din* and *hifz al-nasl* and the restorative ethics of *'afw*, *sulh*, and *diyat* are visible in its text and already in its application. The finding extends earlier work on the normative transformation of Islamic criminal law into the Code (Abdillah et al., 2026) by showing that this transformation is uneven: strongest in sanctions, partial in offences, and most constrained in pluralism.

Substantive absorption also carries risks. Forgiveness and judicial pardon can be abused where victims are pressured to forgive, especially women and children, a danger Islamic law itself would reject because coerced forgiveness is invalid. Living law can import discriminatory norms if verification under Government Regulation No. 55 of 2025 is weak. The *maqasid* therefore serve not only as a justification for the Code but also as a standard for applying it: forgiveness must be free, compensation must restore the victim, and local norms must protect life, dignity, and freedom.

CONCLUSION

Indonesia's new Criminal Code receives Islamic criminal law through substantive absorption rather than formal enactment. At the level of offences, it shares the protective aims of *fiqh jinayah* on adultery, cohabitation, and religion but frames them as complaint-based or incitement-based offences with discretionary penalties. At the level of sanctions, victim forgiveness, judicial pardon, compensation, restorative settlement, and the death penalty with probation reproduce the logic of *'afw*, *sulh*, and *diyat* within a process controlled by the state. At the level of pluralism, living law and the Aceh regime admit local Islamic norms only through constitutional and human rights filters. From the standpoint of Islamic legal theory, this mode of reception is best understood as *ta'zir*

legislation and *siyasah shar'iyyah* in a constitutional state. The Supreme Court should issue guidelines on victim forgiveness and judicial pardon that ensure forgiveness is voluntary and protect vulnerable victims. The government and regional governments should apply Government Regulation No. 55 of 2025 strictly so that compiled living law respects human rights. Islamic law scholars should develop a doctrine of *ta'zir* suited to a national code, and future research should examine judgments issued after 2026 to test how far the restorative potential identified here is realised.

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