Regulating Crimes under Muslim Law and European Civil Law Framework in Indonesia: Lottery Gambling as a Case Study

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Abstract

Indonesia's penal code, derived from Dutch colonial law, defines gambling as speculative betting on luck—a vague formulation that leaves room for ambiguity. Because Indonesia incorporates Islamic law into its legal system, clarifying the definition of gambling becomes especially crucial. However, divergent and often contradictory interpretations among Islamic jurists, particularly regarding whether gambling falls within the scope of punitive criminal law, complicate this task within Indonesia's framework of legal pluralism. This study traces the evolving interaction among Islamic law, customary law (adat), and state laws in Indonesia, using the controversy over the Porkas/SDSB lotteries of the 1980s and 1990s as a case study. The central argument is that, although fiqh *remains largely marginalized in the Indonesian Penal Code, adjudicators occasionally draw on Muslim legal sources—particularly adat laws—to define criminal offenses. Even in the SDSB case, however, European civil law exerted more influence over the criminalization of gambling than Islamic law. While muftis continue to play a limited role in penal legislation, despite having lesser political influence, their views often influence public opinion or institutionalized norms, further sidelining fiqh in defining the legal contours of gambling.*

Introduction*

In 1991, the Indonesian *Ulama* Council (*Majelis Ulama Indonesia*, or MUI), issued a *fatwā* (juristic opinion) prohibiting the government-run national lottery, *SDSB*[1] (*Sumbangan Dana Sosial Berhadiah)*.[2] The *fatwā* was the product of years of public debate and mounting pressure from conservative-populist Muslim constituencies, including factions within the MUI itself. While a majority of MUI members regarded *SDSB* as *maysir*—the Arabic legal term for gambling—Ibrahim Hosen (d. 2001), the head of the *fatwā* commission, initially disagreed. He did not consider SDSB to fall within the concept of *maysir*,[3] and thus resisted issuing a ban until it was unambiguously categorized as gambling under *sharīʿa*.[4] Hosen's reasoning rested on two legal principles: first, the "the original legal status of all things is permissible, until a relevant *dalīl* [evidence][5] prohibits them," which he applied to the permissibility of lotteries under *fiqh*;[6] and second, that "the rule of the *ḥakīm*[7] repeals disagreement," a maxim that allowed the *fatwā* to override prior claims that the lottery was a public good and thus permissible.

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1 SDSB is a national program run by Soeharto's government, which preceded by similar failed program *Porkas*. The further description of this program is delivered in the section three of this article, but concisely speaking, this program is government-run lottery for increasing public revenue.

2 *Hari-hari akhir SDSB akhir mimpi indah*, Tempo (1993), https://www.tempo.co/politik/hari-hari-akhir-sdsb-akhir-mimpi-indah-1032690 (last visited Mar. 14, 2024).

3 Ibrahim Hosen, Apakah Judi Itu? 30 (1987).

4 Moch. Nur Ichwan, *ʿUlamāʾ, State and Politics: Majelis Ulama Indonesia After Suharto*, 12 Islamic L. & Soc'y 45, 60 (2005).

5 In Islamic jurisprudence, *dalīl* serves as the basis for all legal opinion. A *dalīl* mainly comes from the Qurʾān and *ḥadīth*, but can also be derived from analogy (*qiyās*), consensus (*ijmāʿ*), custom (*ʿurf*), and notions of public benefit (*maṣlaḥa*).

6 *Fiqh* is the term for Islamic jurisprudence and legal sciences. This term should not be mistaken as *sharīʿa*, as *fiqh* mainly deals with jurists' interpretation of *sharīʿa*, thus more specific and not necessarily sacred.

7 The word *ḥakīm* here may imply both the chief judge and the government.

Gambling is a contested issue in the *fiqh* tradition, particularly in the Shāfiʿī school of law– the dominant *madhhab* in Indonesia. The Qurʾān explicitly prohibits gambling, describing it as among the devil's favored acts. As a result, there is very limited scope for legalizing *maysir*—or its more frequently used synonym, *qimār*—under Qurʾānic injunctions.[8] Nonetheless, Shāfiʿī jurists have never reached a consensus on the permissibility of games involving gambling or gambling-like mechanisms.[9] For example, some jurists permitted wagers between players in horse or camel racing. Classical scholars categorized such betting under *munāḍala* (reward for competitions),which allowed for its permissibility. In support, some *fuqahāʾ* (jurists) cited specific *ḥadīth*s that exempted archery, horse racing, and camel racing from the general prohibition, thereby justifying these practices.[10]

Labelling this permissive view as *gharīb* (uncommon) is far from warranted. Yaḥyā b. Sharaf al-Nawawī, a prominent medieval Shāfiʿī jurist (d. 676/1277) renowned for reconciling divergent opinions in the Shāfiʿī tradition through works such as *Rawḍat al-ṭālibīn* and *Minhāj al-ṭālibīn*, acknowledged with permissibility of betting in horse racing.[11] Indeed, many classical[12] Shāfiʿī jurists addressed *qimār* not under criminal prohibitions, but within the context of *sabaq* or *munāḍala*, as well as *shahāda* (the rights to give witness testimony).[13] Unlike adultery or theft, gambling does not carry a divinely prescribed punishment (*ḥadd*). In the formative and classical periods of Islamic

8 Qurʾān 5:90.

9 Franz Rosenthal, Gambling in Islam 1–3 (1975).

10 Abū ʿĪsā al-Tirmidhī, 3 al-Jāmiʿ al-kabīr (Sunan al-Tirmidhī) 318 (Bashār Maʿrūf ed., 1996); Abū al-Hasan al-Māwardī, 15 al-Ḥāwī al-kabīr fī fiqh fadhhab al-Imām al-Shāfiʿī 183 (1994); Ibn Ḥajar al-Haytamī, 9 Tuḥfat al-muḥtāj fī sharḥ al-Minhāj wa-ḥawāshī al-sharwānī wa-l-ʿabbādī 398 (1984).

11 *See* Yaḥyā b. Sharaf al-Nawawī, Minhāj al-ṭālibīn 328 (2005); Yaḥyā b. Sharaf al-Nawawī, 10 Rawḍat al-ṭālibīn wa-ʿumda al-muftīn (1990). Al-Nawawī does not seem to problematize the issue of rewarding on those particular games.

12 Classical here constitutes a range of jurists before al-Nawawī. This limitation stands on the fact that al-Nawawī is considered as the compilator of Shāfiʿī diversity, before the glossal (*ḥashiya*) tradition began.

13 Al-Nawawī, Rawḍat al-ṭālibīn, *supra* note 11, at 351–54; al-Māwardī, *supra* note 10, at 182–83.

law, *jināyāt* (crimes) typically referred to serious offenses with prescribed punishments in the Qurʾān or *ḥadīth*—including homicide, adultery, theft, robbery, slander, public intoxication, and *ridda* (apostasy, though the punishment for this remains contested). Moreover, enforcement of a *ḥadd* punishment requires satisfaction of specific preconditions. For instance, cutting off a thief's hand is conditioned on the stolen property's value meeting a threshold of at least two dinars.[14]

All violations outside the major offenses listed above also fall under discretionary punishment, which depends either on the judge's assessment or, in civil law systems, on the application of codified statutes. Even when a judge deems gambling a criminal offense, its penalty remains discretionary. The classification of *qimār* as a secondary issue within the *fiqh* subjects of *sabaq*, *munāḍala*, and *shahāda* suggests that gambling may be prohibited and punished through judicial discretion rather than fixed legal mandate. This treatment arguably reflects an understanding of gambling more as a moral transgression than as a punishable criminal violation.

Ibrahim Hosen arguably adopted a traditional religious-legal approach, shaped by his education in a classical *madrasa* and his intensive engagement with *fiqh* literature.[15] He appears to have permitted SDSB's operations prior to the issuance of the *fatwā* because, based on his reading of Shāfiʿī texts, he believed that certain conditions had to be met for an activity to constitute prohibited *qimār*, and SDSB did not, in his view, meet those conditions. Nevertheless, conservative Muslims rejected this interpretation, prompting the MUI *fatwā* commission—then still under Hosen's leadership—to ultimately declare the national lottery unlawful in response to growing public opposition. Importantly, the *fatwā* addressed only the specific case of SDSB and did not establish a precedent for contemporary lottery schemes or online gambling. The tension between Hosen's position and conservative critiques reflects the indeterminacy within *fiqh* regarding the definition of gambling. Thus, applying *qiyās*

14 Rudolph Peters, Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century 7 (2006).

15 Bakri Hasbullah & Tim Pengarang, Prof. K.H. Ibrahim Hosen Dan Pembaharuan Hukum Islam Di Indonesia 24 (1990).

(analogical reasoning) to emerging gambling models is complicated by the ambiguity surrounding the relevant *ʿilla* (legal rationale). Moreover, as a civil law jurisdiction, Indonesia requires that all crimes be codified by statute. Criminalizing gambling thus demands consensus across Islamic law, *adat*, and civil legal codes, which must then be legislated. In this way, elements of *sharīʿa* may become codified into positive law.[16]

Indonesia's legal system is rooted in Dutch colonial law, specifically the *Wetboek van Srafwet Nederlandsch Indie*, which was based on the Napoleonic Code.[17] Since its incorporation into the modern Indonesian legal system, the criminal code has undergone relatively few substantive changes,[18] aside from limited updates—such as revisions relating to rape and sexual harassment. Gambling is criminalized under Article 303 of the *Kitab Undang-Undang Hukum Pidana* (KUHP), but this provision is located within the chapter on "immorality/decency" (*pelanggaran asusila*).[19] Its definition—"betting on chance-based games"—is also vague and requires judicial interpretation, particularly when evaluating whether modern forms of gambling fall within its scope.[20] The rise of online gambling has further complicated enforcement. Such platforms may more easily evade criminalization because their games are not purely chance-based; outcomes can be influenced by manipulable algorithms, thereby obscuring whether they qualify as prohibited under existing legal definitions.[21]

Formulating a comprehensive law that criminalizes all forms of gambling in modern Indonesia is challenging due to the country's system of legal pluralism. Indonesia formally recognizes Islamic law—categorically limited to the Shāfiʿī tradition—as a source of law alongside the Dutch legal code and *adat*

16 Rudolph Peters, *From Jurists' Law to Statute Law or What Happens When the Shari'a is Codified*, 7 Mediterranean Pol. 82, 88 (2002).

17 Simon Butt & Timothy Lindsey, Indonesian Law 185 (2018).

18 Daniel S. Lev, *Colonial Law and the Genesis of the Indonesian State*, 40 Indonesia 57, 70–72 (1985).

19 KUHP [Kitab Undang-Undang Hukum Pidana], art. 303.

20 *Id.*

21 Michael Auer & Mark D. Griffiths, *Using Artificial Intelligence Algorithms to Predict Self-Reported Problem Gambling with Account-Based Player Data in an Online Casino Setting*, 39 J Gambl. Stud. 1273, 1273–94 (2022).

(customary) law. However, Islamic law plays a limited role in the development of Indonesian criminal law.[22] Even if granted greater authority, Islamic law would likely have little impact on the criminalization of contemporary gambling, as *fiqh* literature lacks a clear, operative definition of *qimār* sufficient to classify modern gambling models.

These premises give rise to two central questions explored in this article. First, to what extent do Islamic law and civil law traditions interact in the formation of criminal law, both generally and in the Indonesian context? Second, if neither Islamic nor European legal traditions clearly define gambling as a punishable offense, why—and how—does Indonesian law treat it as such? This article argues that although *fiqh* remains marginalized in the Indonesian Penal Code, judges and legislators occasionally invoke Muslim legal concepts when defining criminal offenses. This influence is evident in the evolving regulation of gambling in Indonesia, which has shifted from a colonial-era focus on unlicensed betting houses to a broader prohibition driven by the dominant Muslim public sentiment shaped by *adat* and *fiqh*-based reasoning.[23]

For clarification, the term "Muslim law" is not entirely synonymous with Islamic law. Muslim law refers to the hybrid legal norms that emerge from the integration of Islamic legal principles, *adat* practices, and the public and political interests of the Muslim majority. The concept of Muslim law is not novel; it resonates with the classical notion of *taṣarruf bi-l-imāma* (acts of state), which encompasses matters unaddressed by *sharīʿa* but governed by the ruler's discretionary actions grounded in public policy and social welfare—often reflected in custom and public opinion.[24] Because the locus of regulatory authority shifts from scriptural sources to human decision-making, this integrated framework is more aptly termed Muslim law rather than Islamic law.

22 Robert Cribb, *Legal Pluralism and Criminal Law in the Dutch Colonial Order*, 90 Indonesia 47, 65–66 (2010).

23 Iza R. Hussin, The Politics of Islamic Law: Local Elites, Colonial Authority, and the Making of the Muslim State 70 (2016).

24 Mohammad Fadel, *Islamic Politics and Secular Politics: Can They Co-exist?*, 25 J. L. & Relig., 187–204, 114 (2009).

This study re-examines criminal law in Indonesia through a pluralistic legal lens that incorporates both secular and religious elements, focusing on the criminalization of gambling. It challenges two opposing assumptions: first, that Islamic law could fully supplant the civil code; and second, that Islamic law is entirely marginalized within Indonesia's penal framework. In doing so, the article contributes to broader debates on punishment in legal systems that accommodate both religious and secular sources, and explores how Islamic law operates within a secular context through what might be called a Muslim law channel. The Shāfiʿī scholarly debate over gambling highlights the need for a comprehensive reassessment of the classical legal tradition beyond the Shāfiʿī school, offering insights into how Islamic criminal law, particularly *ḥudūd* and *taʿzīr*, might be reintroduced and adapted within a secular legal setting. Notably, *taʿzīr* provides judges with flexibility to impose minimal penalties for certain violations, refer to secular statutes, or even waive punishment altogether. This discretionary space is especially salient for gambling models that do not clearly fall within the classical definition of *qimār*.

This discussion begins with an examination of Shāfiʿī jurisprudential sources—given its status as the predominant *madhhab* in Indonesia—on gambling and on cases that have historically escaped criminalization in both the Shāfiʿī tradition and post-independence Indonesian law, namely the SDSB lottery. The regulation of gambling in this context reveals that public and political interests, eventually codified as *adat* norms, often outweigh *fiqh*-based prohibitions, particularly where doctrinal ambiguities exist. In practice, the criminalization of gambling has proceeded primarily through the civil law framework rather than through Islamic or customary legal sources, underscoring the dominant role of civil law in this area.

To be sure, the SDSB represents only one form of lottery among many types of gambling in Indonesia. Nevertheless, this article focuses on SDSB due to the controversy it provoked among state authorities, the public, and Islamic jurists—a controversy that illustrates the dynamic interplay among these actors. This interplay suggests that where gaps exist in both secular

and Islamic legal frameworks, and where state interests do not mandate intervention, criminalization may nonetheless emerge from *adat* or broader social pressure.

A Challenge: Marginalization of Islamic Law Theory

The arrival of Islam in the ancient Indonesian archipelago did not displace the existing *Srivijaya*[25] and Hindic legal systems. Early Muslim rulers did not introduce *fiqh* as an independent legal system; rather, they integrated it with prevailing local customs and Sanskrit-based legal traditions.[26] Popular proverbs in most Sumatran civilizations, such as the Acehnese proverb—*Adat dan Syariʿat lagee sifeut ngon dzat* (custom and *sharīʿa* are like contingent and essence)—reflects this deep integration of Islamic law with local custom.[27] The Dutch scholar Christiaan Snouck Hurgronje's[28] later efforts to distinguish between *adat* and Islamic law suggest that the intertwined nature of these systems was not perceived as problematic until the late nineteenth century.[29]

The Dutch East India Company (*Vereenigde Oostindische Compagnie*, or VOC) recognized this integration of *fiqh* and *adat*, and accordingly incorporated local Islamic-customary

25 Srivijaya or Sriwijaya was a Buddhist Kingdom that ruled most of Sumatra Island and Malay Peninsula from the seventh until the eleventh century.

26 Tom Hoogervorst, *Legal Diglossia, Lexical Borrowing and Mixed Juridical Systems in Early Islamic Java and Sumatra*, *in* Islamic Law in the Indian Ocean World: Texts, Ideas and Practices 39, 45 (Mahmood Kooria & Sanne Ravensbergen eds., 2021).

27 Arfiansyah Arfnor, *The Interplay of Two Sharīʿa Penal Codes: A Case from Gayo Society, Indonesia*, *in* Islamic Law in the Indian Ocean World, *supra* note 26, at 151.

28 Christiaan Snouck Hurgronje (d. 1936) was a prominent early anthropologist and Dutch Islamicist renowned for his studies of Indonesian Muslim societies, particularly in Aceh. Notably, he gained unique insights by spending time in Mecca (1884–1885), where he cultivated the impression of being an Islamic scholar under the name "Haji Abdul Ghaffar," an identity that made him integrated with Acehnese religious society easily.

29 *See* Stijn Cornelis van Huis, *Debates About the Place of Islamic Law in Society: Snouck Hurgronje and Van Den Berg Revisited*, Business Law (Aug. 2019), https://business-law.binus.ac.id/2019/08/23/debates-about-the-place-of-islamic-law-in-society-snouck-hurgronje-and-van-den-berg-revisited/ (last visited June 12, 2025).

law into their activities with locals. Likewise, the subsequent Dutch colonial administration continued this approach of accommodating local laws in their own regulations, appointing *penghulu* (a judge for Islamic affairs) to arbitrate matters in accordance with Islamic principles.[30] Over time, however, the colonial government codified a legal system modelled on European civil law, which Indonesia formally inherited upon gaining independence in 1945. While this legal system recognizes plural sources—European, *adat*, and Islamic law—the roles of *adat* and Islamic law have been largely confined to commercial and private law domains, with European law serving as the principal foundation for criminal law.[31]

Since the introduction of the civil law system by the Dutch in the eighteenth century, Indonesian law has operated through five core legal codes: the *Kitab Undang-Undang Hukum Pidana* (KUHP), governing criminal law; the *Kitab Undang-Undang Hukum Perdata* (KUHPerdata), governing commercial law; the *Undang-Undang Peradilan Agama,* regulating matters of private and family law; the *Undang-Undang Peradilan Tata Usaha Negara,* governing administrative law; and the *Undang-Undang Mahkamah Konstitusi*, governing constitutional law.[32] Some modern Muslim legal scholars—particularly those from conservative-populist circles—argue that the marginalization of Islamic law is a colonial legacy intended to detach Muslims from their divinely revealed legal tradition. However, as previously noted, even under Islamic dynasties between the thirteenth and mid-twentieth centuries, Islamic law did not stand as an independent legal system unless integrated with local law. For example, the Ottoman Empire developed *yasaq* (secular legal codes) to support the implementation of Islamic law, beginning with the reign of Sulaymān al-Qanūnī.[33]

At first glance, Islamic law appears marginalized in Indonesia's Dutch colonial legal framework, particularly in the

30 Hoogervorst, *supra* note 26, at 46.

31 Lev, *supra* note 18, at 72.

32 Butt & Lindsey, *supra* note 17, at 185–87.

33 Leonard Wood, *Legislation as an Instrument of Islamic Law*, *in* The Oxford Handbook of Islamic Law 550, 554 (Anver M. Emon & Rumee Ahmed eds., 2018).

area of criminal law. Yet, as David Powers has argued, the Dutch colonial government—likely unfamiliar with the structure of criminal offenses in *fiqh*—may not have been the principal agent of its exclusion from penal codification.[34] Instead, colonial authorities may have prioritized the marginalization of Islamic commercial law, which regulates contracts, companies, labor, and taxation, because it directly affected core colonial economic interests.[35]

Nevertheless, the conclusion may change if Islamic law is approached through a different conceptual lens. Broadly speaking, there are two primary understandings of what constitutes Islamic law. The first one centers on divine enunciation, and the other on human interpretation of God's message. The first posits that Islamic law is directly prescribed—either wholly or in part—by the *shāriʿa*,[36] and thus can be delineated with clear boundaries. The second views Islamic law as the product of human efforts to understand divine revelation, implying that it is inherently interpretive and therefore subject to contextual factors such as relativism and public interest.[37] From this latter perspective, anything that Muslims broadly perceive as Islamic, regardless of its textual origin or prevalence in classical practice, may be treated as part of Islamic law. This line of reasoning aligns with the concept of Muslim law previously discussed: a new, more relevant term for *fiqh*.

If Islamic law is equated with Muslim law in this sense, then it could be argued that Islamic law has never been truly marginalized in Indonesia. Under this view, Islamic law here is expressed through societal norms that often resemble *adat*, and is thus represented by the notion of "living law."[38] The recently revised *Kitab Undang-Undang Hukum Pidana* (KUHP)

34 David S. Powers, *Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India*, 31 Comp. Stud. in Soc'y & Hist. 535 (1989).

35 *Id.*

36 *Shāriʿ* is mostly used for God in *fiqh* and *kalām* literatures. Its literal meaning is road maker, but the metaphorical meaning is "the ruler" or one who makes the *sharīʿa*.

37 Routledge Handbook of Islamic Law 29–30 (Khaled Abou El Fadl, Ahmad Atif Ahmad & Said Fares Hassan eds., 2019).

38 Butt & Lindsey, *supra* note 17, at 201.

reflects this by allowing offenses to be prosecuted under "living law" when not explicitly covered by statutory provisions. For instance, Islamic law may justify prosecution for public alcohol consumption, even though such conduct is not directly regulated under the KUHP. This framework takes on a different salience in the context of the Aceh region, where *sharīʿa* is formally incorporated into the regional criminal penal code under a constitutionally recognized system of legal dualism.[39] Nonetheless, this interpretive, society-centered conception of Islamic law finds less precedent in classical *fiqh* literature.

Indonesian criminal law encompasses most offenses that are also recognized as crimes under *sharīʿa*. Of the seven crimes prescribed by *sharīʿa*, the KUHP excludes only *ridda* (apostasy), primarily due to the secular nature of the civil law system. Homicide is addressed in Article 338, theft in Article 362, adultery in Article 411, robbery in Article 365, and the sale of alcohol in Article 424. Although slander under Islamic law is tied specifically to false accusations of adultery, a broader former of defamation is regulated under Article 311 of the KUHP. The exclusion of *ridda* is consistent with Indonesia's status as a secular state that constitutionally guarantees protects freedom of religion, and is further justified by the fact that the criminalization of *ridda* is itself contested within the Islamic legal tradition.[40] Beyond these offenses, the KUHP also criminalizes gambling, public humiliation, counterfeiting, and the unauthorized disclosure of secrets—offenses that, within Shāfiʿī jurisprudence, are subject to debate as to whether they constitute criminal acts or merely moral violations.

Gambling in Classical Shāfiʿī Literature

This study is limited to the legal literature of the Shāfiʿī *madhhab*, as Indonesian Muslims have historically adhered predominantly to the Shāfiʿī school.[41] Accordingly, references to "Islamic law" in this section should be understood primarily as referring

39 *Id.* at 205.
40 Peters, *supra* note 14, at 7.
41 C. Snouck Hurgronje, The Achehnese: Volume 1, at 80 (1906).

to Shāfiʿī *fiqh*, unless otherwise specified. While contemporary *fatwā* rulings in Indonesia increasingly draw upon inter-*madhhab* approaches,[42] Shāfiʿī *fiqh* continues to hold a dominant and influential position relative to other schools.

The internal diversity of the Shāfiʿī school forms the focus of this analysis. The classification of gambling has long been a contested issue within Shāfiʿī legal thought—particularly in cases involving indirect or non-player betting, such as wagers on sword-fighting matches.[43] This study examines how the definitional boundaries of *maysir* and *qimār*—the Arabic terms for gambling—evolved during the formative and classical periods, with particular attention to the shifting legal treatment of such activities. This analysis proceeds through a historical-chronological method, beginning with early juristic treatments and culminating in the authoritative views of al-Nawawī, the most prominent commentator on medieval Shāfiʿī debates.[44] Select post-Nawawī perspectives are also considered, including those of Ibn Ḥajar al-Haytamī (d. 909/1503), a leading fifteenth-century Shāfiʿī scholar.

Although gambling is referred to as *maysir* in the Qur'ān, Shāfiʿī *fiqh* literature rarely employs this term, for two primary reasons. First, early juristic texts seldom treat *maysir* as an independent topic of discussion. Second, these texts generally address gambling under secondary topics such as *musābaqa*, *munāḍala*, and *shahāda*. The framing of *maysir* as a standalone issue in substantive criminal law appears primarily in modern *fiqh* literature, likely in response to the influence of the modern state on Islamic legal thought. As Wael Hallaq argues, the modern state has significantly reshaped how Muslims conceptualize *sharīʿa*, transforming it from a non-political moral-legal system into a tool of state governance.[45] Following the codifi-

42 Siti Hanna et al., *Woman and Fatwa: An Analytical study of MUI's Fatwa on Women's Health and Beauty*, 24 Ahkam: Jurnal Ilmu Syariah, 171–84 (2024).

43 Ibn Ḥajar al-Haytamī, 4 al-Fatāwā al-kubrā al-fiqhiyya 262 (n.d.).

44 Akram Yūsuf al-Qawāsimī, al-Madkhal ilā al-madhhab al-Shāfiʿī 238 (2003).

45 Wael B. Hallaq, Sharīʿa: Theory, Practice, Transformations 308 (2009).

cation movement that began in the sixteenth century—marked by Sulaymān al-Qānūnī's (d. 974/1566) promulgation of the *Qānūnnāme*,[46] Muslim scholars increasingly treated moral infractions, including gambling, as matters of formal legal regulation. Guy Burak characterizes this shift as part of the second formation of Islamic law.[47]

Arguably, classical scholars' reluctance to treat gambling as a primary legal topic reflects its non-penal character. Gambling was understood as a moral-ethical issue that was secondary to greater concerns such as witness testimony or financial contracts.[48] Even within the *fiqh* tradition, the preferred term for "gambling" is *qimār*, not *maysir*, which is thought to be more precise. Both terms were in circulation before the Qurʾānic revelation, and thus the *ṣaḥāba* (companions of the Prophet Muḥammad) would have been familiar with their meanings. *Maysir* appears in a pre-Islamic poem by ʿUbayd b. ʿAbd ʿUzzā al-Sālimī al-ʿAzādī, where it denotes "betting on games."[49] This aligns with its Qurʾānic usage, in which *maysir* is condemned alongside satanic acts such as intoxicants, divinatory arrows, and idol worship (Qurʾān 5:90). Likewise, *qimār* appears in a pre-Islamic poem by al-Aʿshā al-Kabīr (d. 7/629), bearing the meaning of "betting."[50] Although *qimār* does not appear in the Qurʾān, several *ḥadīth*s employ the term, making it central to later juristic debates on gambling.[51]

Early Shāfiʿī and Irāqī-Khurāsānī Views on Gambling

Early Shāfiʿī jurists treated *qimār* and *maysir* as secondary issues, typically addressed under broader legal topics such as *sabaq* (racing), *shahāda* (witness testimony), and *shataranj*

46 *Qānūnnāme Misr* is a codified regulation, edicted by Sulaymān al-Qānūnī for Ottoman Egypt.

47 Guy Burak, The Second Formation of Islamic Law: The Ḥanafī School in the Early Modern Ottoman Empire 17 (2015).

48 Hallaq, *supra* note 45, at 309–10.

49 Ibn Maymūn al-Baghdādī, 8 Muntahā al-ṭalab min ashʿār al-ʿarab 293 (1999).

50 Maymūn b. Qays, 1 Dīwān al-Aʾshā al-Kabīr 186 (2010).

51 *See, e.g.*, Abū Dāwūd al-Sijistānī, 3 Sunan Abī Dāwūd 30 (Muḥammad Muḥyī al-Dīn ʿAbd al-Ḥamīd ed., 1951) (*ḥadīth* no. 2579).

(chess). In his *Mukhtaṣar*, Abū Ibrāhīm al-Muzanī (d. 264/878) reports that Imām Muḥammad b. Idrīs al-Shāfiʿī reluctantly permitted the playing of chess, provided it did not involve gambling (*qimār*).[52] If a man engaged in gambling through chess, his eligibility to testify as a witness would be denied due to the resulting loss of trust and moral credibility.[53] Beyond this account, neither *qimār* nor *maysir* feature prominently in al-Muzanī's work. This omission may be attributed either to the absence of significant gambling-related disputes in his time, or to the possibility that *qimār* was treated as *ʿumūm al-balwā* (axiomatic knowledge). As such, neither al-Shāfiʿī (d. 214/820) nor al-Muzanī appear to have considered it necessary to provide a formal legal definition of gambling.

The legal significance of betting becomes more pronounced in the context of *sabaq*, which concerns rewards in competitive games, whether those rewards are contributed by the competitors themselves or by third parties. Because Shāfiʿī jurisprudence is grounded in textual evidence (*dalīl naṣṣī*) before analogical reasoning, al-Shāfiʿī occasionally invoked a *ḥadīth* permitting financial prizes for only three forms of competition: horse racing, camel racing, and archery.[54] He reasoned that these exceptions[55] were justified by their military utility.[56] Based on this, al-Shāfiʿī held[57] betting between competitors in other forms of games was impermissible—unless a third party, known as a *muḥallil*, was involved.[58] In later Shāfiʿī jurisprudence, the role of the *muḥallil* became a point of doctrinal controversy, especially as scholars sought to apply this concept to modern forms of gambling.

The prominent eleventh-century Shāfiʿī scholar Abū al-Isḥāq al-Shīrāzī (d. 476/1083) expressed views on *qimār* that closely followed those of earlier authorities. The approximately

52 Abū Ibrāhīm al-Muzanī, 8 Mukhtaṣar al-Muzanī maʿa al-Umm 420 (1983).

53 *Id.*

54 Muhammad b. Idrīs al-Shāfiʿī, 4 al-Umm 243 (1983).

55 *See, e.g.*, al-Tirmidhī, *supra* note 10, at 318.

56 Al-Shāfiʿī, *supra* note 54, at 244.

57 *Id.*

58 *Muḥallil* literally means "one who makes it permissible."

two-hundred-year gap between al-Shīrāzī and al-Muzanī (d. 264/878) merits attention, as Shāfiʿī jurists during this intervening period did not produce legal writings with the same structural organization found in the works of al-Shīrāzī and his successors. Jurists of this era were often more concerned with the authentication of existing *fiqh* discourses than with their rationalization. Additionally, legal thought at the time was shaped by a casuistic rather than codified approach: jurists typically issued opinions only when questioned or appearing in public.[59] This feature was common across all *madhāhib*, with the exception of the Ḥanafī school, which permitted *fatwā* on hypothetical or foreseeable cases (*iftirāḍī*).[60]

Accordingly, the lack of sustained public concern over the definition of *qimār*—likely due to the absence of novel gambling practices—meant that most jurists saw no need to define it. By the time of al-Shirāzī, however, gambling had become more common, prompting a shift in legal treatment. In his *al-Muhaddhab*,[61] al-Shirāzī retained the general position of al-Shāfiʿī but went further by offering a concrete definition of *qimār.*[62] He identified three essential elements: (1) the winner takes all, and the loser forfeits everything; (2) both parties are physically present in the same session; and (3) the stakes are paid from the participants' own funds.[63] If a bet failed to meet these criteria, it was not considered *qimār*, and thus also not *maysir*.[64] For instance, if two individuals competed in a race, and only one wagered money—keeping it upon winning, but forfeiting it if he lost[65]—this scenario involved betting but did not constitute *qimār*.[66] In this case, the second condition (same-session occurrence) appears

59 Hallaq, *supra* note 45, at 177–78.

60 Abdullāh Mabrūk Al-Najjār, *The Jurisprudential Assumption of Imam Abū Ḥanīfa*, 30 Majallat Al-Buḥūth al-Fiqhiyya al-Muʿāṣira 13, 15 (2019).

61 Abū Ishāq al-Shīrāzī, 3 al-Muhadhdhab fī fiqh al-Imām al-Shāfiʿī 438 (1955).

62 *Id.*

63 *Id.* at 439.

64 *Id.*

65 *Id.*

66 *Id.*

less central, yet this aspect may have influenced Ibrahim Hosen's opinion on SDSB, as discussed in the following section.

The first notable challenge to the prevailing conception of gambling came from Abū al-Ḥasan al-Māwardī (d. 448/1058), who served as the chief judge of the Shāfiʿī school during the Abbasid period. In his *al-Ḥāwī al-Kabīr*, al-Māwardī problematized the dominant juristic understanding of *qimār* among *fuqahāʾ*, arguing that it is not present in all forms of racing (*sabaq*), since races are not necessarily limited to two competitors.[67] The inclusion of a third, non-betting participant who serves as *muḥallil*—as also recognized by al-Shāfiʿī—renders the contest outside legally permissible, removing it from the category of unlawful *qimār*.[68] Al-Māwardī conceded that betting without a *muḥallil* still constitutes prohibited *qimār*,[69] but he departed from earlier jurists, particularly Mālik b. Anas (d. 179/795), founder of the Mālikī school,[70] in rejecting the wholesale prohibition of all forms of betting. Al-Māwardī even contended that *qimār* and *sabaq* should be treated as distinct legal categories with independent *sharʿī* (textual) justifications.[71] In his view, it is logically inconsistent to declare *sabaq*—a permissible activity—unlawful merely because it may resemble *qimār*, a prohibited one; if such analogical reasoning were accepted, he argued, it would be equally plausible to render *qimār* permissible by aligning it with *sabaq*—a conclusion he rejected as fallacious.[72] Al-Māwardī's position not only identified a legal loophole whereby certain gambling practices may escape classification as unlawful *qimār*, but also cast doubt on the rational basis for prohibiting non-*qimār* betting altogether.

Nawawī and Post-Nawawī Views on Gambling

In the later classical period, Yaḥyā b. Sharaf al-Nawawī (d. 676/1277), in his *Rawḍat al- Ṭalibīn,* offers concrete

67 Al-Māwardī, *supra* note 10, at 183–84.
68 *Id.* at 183.
69 *Id.*
70 *Id.* at 183–84.
71 *Id.* at 183–84.
72 *Id.* at 184.

illustrations of how the *muḥallil* functions within the context of competition.[73] He presents the example of a race involving one hundred participants, with only one designated person serving as a *muḥallil*—a non-betting participant: if one of the 99 bettors wins the race, thereby claiming the pooled reward, the arrangement is considered legally permissible due to the inclusion of the *muḥallil*.[74] Al-Nawawī notes that only Ibn Khairān (d. 320/932) opposed this ruling, while al-Shāfiʿī endorsed it—indicating that dissenting from its permissibility represents a *gharīb* (uncommon) view.[75]

Nonetheless, al-Nawawī adds an important condition: the *muḥallil* must possess a skill level comparable to the other competitors; if the *muḥallil* is so weak that their loss is virtually assured, the arrangement would no longer be valid.[76] Al-Nawawī also cites Abū al-Maʿālī al-Jūwaynī (d. 478/1085) in affirming the importance of two elements previously emphasized by al-Shirāzi:[77] "*Al-Imām* [al-Jūwaynī] said if one of them [two competitors] put some fund, then the opponent wins, he gains the fund and otherwise returns it to the owner of that fund [meaning that the opponent owes nothing]. . . . This interaction has two views; the strongest one is its permissibility."[78] Among the later Shāfiʿīs, however, only Abū Ḥāmid al-Ghazālī (d. 505/1111) maintained that all forms of rewards derived from betting are impermissible, asserting that only the *Sulṭān* is entitled to issue prizes for competitions.[79] Yet even al-Ghazālī did not reject the role of the *muḥallil* in legitimating betting arrangements in contests.[80]

The foregoing discussion reveals a shared framework among Shāfiʿī scholars on *qimār*, while also illustrating a gradual evolution toward more concrete and systematic definitions. Yet beneath this convergence lie significant differences, particularly

73 Al-Nawawī, Rawḍat al-ṭālibīn, *supra* note 11, at 355–56 (1991).
74 *Id.* at 355–56.
75 *Id.* at 354.
76 *Id.*
77 Al-Shīrāzī, *supra* note 61, at 438–39.
78 Al-Nawawī, Rawḍat al-ṭālibīn, *supra* note 11, at 356.
79 Abū Ḥāmid al-Ghazālī, 7 al-Wasīṭ fī al-madhhab 178–79 (1996).
80 *Id.* at 179.

in how these jurists approached *qimār* within their broader legal and intellectual contexts. As noted earlier, references to *qimār* in Shāfiʿī texts commonly appear under the topics of *musabaqa*, *munāḍala*, or *shahāda*. However, this is not the case for al-Ghazālī, who treated *qimār* and *sabaq* under the law of contracts (*ʿuqūd*),[81] suggesting that he viewed gambling as primarily a contractual issue rather than a criminal one. Al-Māwardī's perspective, by contract, may have been shaped by his role as *qāḍi al-quḍāt* (chief judge), prompting him to soften the connection between *maysir* and competition, perhaps to accommodate the interests of the political elite. Such accommodation is not unprecedented: Abū Yūsuf al-Ḥanafī (d. 182/798), a predecessor in the office of chief judge, similarly tempered legal positions to align with state priorities.[82]

Moreover, internal divisions within the Shāfiʿī school help explain the divergence in methodological emphasis. Prior to the synthesis efforts of ʿAbd al-Karīm al-Rāfiʿī (d. 623/1226) and al-Nawawī, the school was broadly divided between the Irāqī group, led by Abū Ḥāmid al-Isfraʿyīnī al-Shāfiʿī (d. 384/1027), and the Khurāsānī group, led by al-Qaffāl al-Ṣaghīr al-Shāfiʿī (d. 383/1026).[83] Al-Nawawī observed that the Irāqīs were more committed to preserving the verbatim views of al-Shāfiʿī, while the Khurāsānīs prioritized systematic legal reasoning.[84] Al-Māwardī himself, a direct disciple of Abū Ḥāmid al-Isfraʿyīnī, belonged to the Irāqī group and criticized al-Muzanī's *Mukhtaṣar* for erasing (*ḥadhf*) key aspects of al-Shāfiʿī's rulings on chess and *qimār*.[85] By contrast, al-Shirāzī, al-Juwaynī, and al-Ghazālī—all affiliated with the Khurāsānī group—tended toward rationalizing *fiqh*, which likely explains al-Shirāzī's pioneering attempt to define *qimār* in detail.

Al-Māwardī further made possible the permissibility of prizes for chess competitions, citing a lack of juristic consensus among Shāfiʿī scholars, though he maintained that prizes for races were unequivocally lawful. In his view, the permissibility

81 *Id.* at 177–80 (condition for a contract validity).
82 Hallaq, *supra* note 45, at 160–61.
83 Al-Qawāsimī, *supra* note 44, at 244–46.
84 *Id.* at 243.
85 Al-Māwardī, *supra* note 10, at 185.

of a prize (ʿ*iwaḍ*) did not depend on whether it came from a third party or the competitors themselves—provided a *muḥallil* was present.[86] This view, however, was not adopted by most Khurāsānī or post-Nawawī jurists, who generally held that *qimār* occur in competitions unless the prize is funded solely by a non-participant.

In sum, the contributions of al-Shirāzī and al-Māwardī were critical to shaping later juristic discourse on *qimār*. Three elements emerged as defining features of prohibited *qimār* or *maysir*: (1) the risk of total loss due to the wager; (2) the participants' presence in the same session; and (3) the absence of a *muḥallil*. Betting was generally deemed impermissible in games other than those allowed by *ḥadīth*—horse racing, camel racing, and archery—when the winner was determined by reaching a clear milestone. Thus, if two fighters wagered on the outcome of a match without a *muḥallil*, and one party lost the full amount of the stake while both were present in the same session, this constituted unlawful *qimār*. By contrast, the presence a *muḥallil* or a unilateral wager (where only one party risks funds) would remove the arrangement from the definition of *qimār*, and therefore from the category of prohibited gambling.

One issue that remains to be clarified, however, is whether classical Shāfiʿī jurists treated *qimār* or *maysir* as criminal offenses or merely as ethical violations. While there is broad consensus among these scholars on the prohibition of gambling, none—from the early period through the time of al-Nawawī, or even in the generations that followed—classified *qimār* or *maysir* under *jināyāt* (criminal offense) or *ḥudūd* (prescribed punishments). This suggests that gambling was understood primarily as a moral transgression, albeit one potentially subject to judicial sanction under *taʿzīr* (discretionary punishment).[87] Nonetheless, evidence of actual punishment for gambling in Shāfiʿī sources is rare—if not altogether absent. Moreover, under *taʿzīr*, a *qāḍī* retains broad discretion and may choose not to impose any penalty at all. This further underscores the marginal punitive status of gambling within the Shāfiʿī tradition.

86 *Id.* at 183.

87 Peters, *supra* note 14, at 65–66.

Post-Nawawī jurists continued to grapple with the boundaries of *qimār*, most notably Ibn Ḥajar al-Haytamī (d. 909/1566). In response to a question concerning sword-fighting competitions in Malabar, which often involved gambling to intensify the contest, al-Haytamī issued a permissive ruling.[88] He reasoned that such fights were beneficial for military conscription and, accordingly, that prizes—even if funded through gambling—were permissible as motivational tools.[89] This opinion diverges sharply from the earlier consensus, which limited prizing to only three types of contests: horse racing, camel racing, and archery. Rather than criminalize the practice of sword-fighting, al-Haytamī legitimized it, marking a significant doctrinal departure.

As will be discussed further in relation to Ibrahim Hosen, al-Haytamī's leniency reflects an interpretive stance that departs from classical restrictions, but somehow aligns with Hosen's. While al-Haytamī was not a judge, his role as a mufti is nonetheless significant.[90] In practice, *qāḍī*s often rely on the legal opinions of muftis in reaching their rulings. Thus, if a jurist of al-Haytamī's statute permitted gambling-like practices in a context well outside the traditionally accepted *sabaq*, a judge might reasonably decline to criminalize such conduct or prohibit its associated rewards.

To clarify the progression of the debate, Table 1 (overleaf) summarizes how key Shāfiʿī jurists have conceptualized *qimār* across different periods and how each contributed to or departed from earlier views.

As previously discussed, the criminalization of gambling emerged relatively late, largely coinciding with the codification of law under the modern state. Notably, the formal prohibition of gambling has occurred primarily in countries with strong Islamic religiosity such as Malaysia, Brunei, and Saudi Arabia. By contrast, many secular states uphold the moral disapproval of gambling without imposing full criminal sanctions. Some, like

88 Al-Haytamī, *supra* note 43, at 262.
89 *Id.* at 262–63.
90 Hallaq, *supra* note 45, at 161–63.

Table 1

Scholar	***Kitāb* (Major Work)**	**Core view on *Qimār*/*Maysir***	**What Changes from Predecessors**
Imām Muḥammad b. Idrīs al-Shāfiʿī (d. 214/820)	*al-Umm*	– Limits permissibility of prize-based competitions to horse racing, camel racing, and archery (based on *ḥadīth*). – Introduces the *muḥallil* to distinguish permissible rewards from unlawful gambling.	–First to ground scope of gambling in explicit *ḥadīth*. – Introduces *muḥallil* as technical mechanism.
Abū Ibrāhīm al-Muzanī (d. 264/878)	*Mukhtaṣar*	– Permits chess until it involves gambling; loss of credibility affects witness eligibility. – Offers no standalone definition of *qimār*.	– Rare, casuistic mention of *qimār* under *ʿumūm al-balwā* (axiomatic). – Mirrors al-Shāfiʿī's stance without formal definition.
Abū al-Isḥāq al-Shīrāzī (d. 476/1083)	*al-Muhaddhab*	– Defines *qimār* by three conditions: (1) winner takes all; (2) same session; (3) self-funded stakes. Absence of any disqualifies it as *qimār*.	– First systematic definition of gambling in Shāfiʿī tradition. – Codifies conditions for what constitutes gambling.
Abū al-Ḥasan al-Māwardī (d. 448/1058)	*al-Ḥāwī al-kabīr*	– Argues races (*sabaq*) are not inherently *qimār* (even without *muḥallil*) – Keeps *qimār*/pursuit of prize separate from racing. – Allows third-party prizes regardless of betting.	– Challenges al-Shīrāzī's and predecessors' conflation of *qimār* and *sabaq*. – Insists on analytical separation: prizing is not necessarily gambling. – Softens prohibition, opening door to more permissive rulings.

Scholar	*Kitāb* (Major Work)	Core view on *Qimār*/*Maysir*	What Changes from Predecessors
Yaḥyā b. Sharaf al-Nawawī (d. 676/1277)	*Rawḍat al-ṭālibīn*	– Elaborates *muḥallil* function (e.g., 1:99 race example). – Adds requirement that *muḥallil* be of equal skill (not predictable defeat). – Endorses al-Shīrāzī's two-condition model (stakes, meeting).	– Tightens *muḥallil* conditions by adding skill-parity. – Codifies al-Juwaynī's two-aspect model into applied doctrine. – Moves discussion further into practical casuistry.
Abū al-Maʿālī al-Juwaynī (d. 478/1085)	*Nihāyat al-maṭlab*	– Identifies two conditions for *qimār*: mutual stakes and same-session betting. Absence of either invalidates *qimār*.	– Moves toward partial rationalization, but stops short of al-Shīrāzī's full three-part definition.
Abū Ḥāmid al-Ghazālī (d. 505/1111)	*Iḥyāʾ ʿulūm al-dīn*	– Prohibits all betting-based rewards; prizes only valid if awarded by the sultan. – Keeps *muḥallil* device, but relocates discussion to contract law (*ʿaqd* section).	– Shifts focus from moral/criminal sphere to contractual framework. – Frames gambling as invalid contract rather than simply an ethical lapse.
Ibn Ḥajar al-Haytamī (d. 909/1566)	*al-Fatāwā al-fiqhiyya al-kubrā*	– Permits prizing in sword fights (with gambling) as military-training incentive. – Extends permissible gambling beyond traditional "three game" limit to include martial contests.	– Breaks traditional strict "three-game" limit. – Aligns with utilitarian conscription rationale. – Illustrates how post-codification muftis could further relax earlier restrictions.

Singapore[91] and Indonesia, implement partial restrictions while permitting certain forms of regulated gambling. The following section explores how specific gambling practices evade criminalization in such jurisdictions, highlighting the tension between moral norms, legal pluralism, and state enforcement.

Escaping Criminalization: Revisiting the SDSB Controversy

Chapter XIV, Article 303 of KUHP sets forth the principal provision criminalizing gambling in Indonesia, outlining its definition, conditions, and applicable penalties. The article defines gambling as follows:

> So-called gambling is any game based on speculation, which mostly relies on luck, and where the possibility to win increases due to the adeptness and expertise of a player. Gambling also encompasses any betting on the result of a competition or other games, which is conducted by the non-players of that game, as well as other types of betting.[92]

This definition captures all forms of betting by non-players on a competition and identifies two key elements: speculation and reliance on luck. However, the definition becomes problematic where it concedes that skill and proficiency may increase a player's chances of winning, even as it emphasizes luck as the primary criterion. As a result, many games that combine both skill and chance—but remain largely unpredictable—may still fall within the scope of "gambling" under this definition.

Yet this ambiguity also creates a loophole: games that are technically predictable, even if practically uncertain, may evade the statute's application. For example, sports competitions such as football, basketball, or motor racing inherently

91 Joan C. Henderson, *Developing and Regulating Casinos: The Case of Singapore*, 12 Tourism & Hospitality Rsch. 139 (2012).

92 The original text is in Bahasa Indonesian, no official translation can be referred, and this quotation is the author's own translation.

involve speculation and elements of luck, yet are also deeply dependent on strategic skill. Similarly, many modern digital arcade games and gambling platforms are designed with algorithmic predictability—allowing them to appear as skill-based competitions, even when they functionally operate as gambling.[93] Under Article 303's formulation, such games might fall outside the legal definition, despite clearly embodying the practical characteristics of gambling.

The definitional ambiguity of gambling also extends to tournaments and competitions in which the winner receives a prize funded by the participants themselves—a widespread practice in Indonesia, particularly at the grassroots level.[94] As previously discussed, Shāfiʿī *fiqh*—the dominant *madhhab* in Indonesia—permits certain forms of betting provided that specific conditions are met, such as the presence of a *muḥallil* (a third party non-bettor) and the requirement that the betting occurs in a single session. Some Shāfiʿī scholars even encouraged betting in specific competitions, such as sword fighting.[95] This position creates a clear tension between Islamic law and the Indonesian Criminal Code (KUHP) with respect to the scope and treatment of gambling. For instance, the KUHP arguably criminalizes betting between participants in a sword fight, while Shāfiʿī *fiqh* permits it under the concept of *munāḍala* (competitive games). The KUHP adopts a broad, inclusive definition of gambling, though it contains interpretive loopholes, whereas the Shāfiʿī tradition applies a more narrow, doctrinally constrained conception. Moreover, Shāfiʿī *fiqh* generally treats gambling not as a grave criminal offense but rather as a moral infraction, punishable at most through *taʿzīr* (discretionary sanction), rather than as a *ḥadd* offense.

This divergence helps explain Ibrahim Hosen's initial reluctance to issue a *fatwā* against SDSB. His position drew upon Shāfiʿī jurisprudence, particularly the reasoning of al-Haytamī, and reflected a view that SDSB resembled a one-sided bet rather

93 Auer & Griffiths, *supra* note 21, at 1275.

94 *Taruhan untuk Seru-seruan dengan Teman, Bagaimana Islam Memandangnya?*, Republika Online (Aug. 4, 2023), https://republika.co.id/share/ryv2oo425.

95 Al-Haytamī, *supra* note 43, at 262.

than a bilateral, face-to-face gambling scenario.[96] In SDSB and similar state-run lottery programs, individuals purchased coupons with the hope of winning a prize funded in part by the collective pool of coupon sales: in the 1990s, one coupon cost 1000 rupiah—roughly the price of two kilograms of rice at the time.[97] From a jurisprudential perspective, the bettor was wagering against the state, which did not risk any financial loss and thus functioned as a de facto *muḥallil*. Furthermore, the outcome was not determined at the time of purchase, violating the condition that the betting occur within a single session. And finally, SDSB's design diverted a substantial portion of the proceeds to public infrastructure, which further complicated its classification as impermissible gambling. The program's official name—*Sumbangan Dana Sosial Berhadiah* (social donation fund with prize)—underscored this dual purpose.

When examined through the conditional criteria of the Shāfiʿī school, the structure of SDSB likely places it outside the legal definition of *maysir*. Although Ibrahim Hosen did not explicitly frame his reasoning in this way, his emphasis on the absence of face-to-face betting aligns with al-Shirāzī's definition—referenced indirectly through Hosen's citation of al-Shawkānī (d. 1250/1854) in *Naylul Awtar*.[98] Hosen further argued that even if SDSB were impermissible (*ḥarām*), its prohibition would be a matter of compliance with state authority, rather than an instead essential or intrinsic prohibition (*ḥarām li-dhātihi*).[99] Indeed, this distinction proved difficult for many Indonesian Muslims—particularly those without legal training—to accept. As noted, Hosen faced significant public criticism, ridicule, and resistance for his position. Yet his interpretive approach was grounded not in reformist ideology or in efforts to decriminalize gambling, but in engagement with *turāth* (Islamic legal heritage). His reliance on traditional sources underscores his commitment to a jurisprudential rather than political or utilitarian analysis. Moreover, the fact that SDSB generated revenue for the state further complicated any move to prohibit it. Just

96 Hosen, *supra* note 3, at 20–21.
97 *Hari-hari akhir SDSB akhir mimpi indah*, *supra* note 2.
98 Hosen, *supra* note 3, at 35–36.
99 *Id.* at 30.

as al-Haytamī permitted betting in sword-fighting competitions for their military utility, Hosen's reasoning implicitly extended *qiyās* (analogical reasoning) to SDSB on the basis of its fiscal benefit to national development.

While Article 303 of the KUHP could potentially support the criminalization of SDSB, in practice the program was shielded by another crucial provision: the article's opening clause distinguishes between lawful and unlawful gambling based on state authorization. Thus, if a gambling program is permitted by the state, it is not considered a criminal offense or a violation of the Code. In the case of SDSB, the program was not only authorized but actively sponsored by the Indonesian government.[100] It formed part of a broader national strategy to raise public funds beyond the tax base—particularly under President Soeharto's (1967–1998) *Repelita* (*Rencana Pembangunan Lima Tahun*, or Five-Year Development Plan), which required substantial public expenditure for large-scale development.[101] As such, the state had little incentive to criminalize SDSB, given its dual status as a government-backed initiative and a macroeconomic revenue stream.

A historical review of gambling legislation in Indonesia further contextualizes SDSB's legal standing. It was not until 1974 that an amendment to the KUHP repealed the original Dutch colonial law on gambling.[102] Prior to that, gambling had a bifurcated legal status: it could be either a punishable offense or a non-punishable violation, depending on whether the activity was licensed.[103] The revised Article 303 replaced the earlier Article 542 and formally consolidated unlicensed gambling as a punishable crime.[104] The repealed colonial-era statute, *Staatsblad* 1912 no. 230, had regulated *Hazardspellen* (games of

100 *Hari-hari akhir SDSB akhir mimpi indah*, *supra* note 2.

101 Thee Kian Wie, *Policies Affecting Indonesia's Industrial Technology Development*, 23 Asean Economic Bulletin 341 (2006).

102 This amendment revoked Staatsblad 1912 No. 230 and Staatsblad 1935 No. 526, which regulated punishment for unlicensed gambling houses. By this amendment, gambling became a criminal act instead of merely a violation.

103 Wahyu Lumaksono & Anik Andayani, *Legaslisasi Porkas Dan Dampaknya Terhadap Masyarakat Pada Tahun 1985–1987*, 2 Avatar: Journal Pendidikan Sejarah 540, 544 (2014).

104 Butt & Lindsey, *supra* note 17, at 186.

chance),[105] which were popular in Java at the time, and viewed by the colonial authorities as legitimate economic enterprises. From this context, we can infer that gambling was not regarded as inherently criminal under Indonesian law until the 1974 amendment—and even then, legality hinged on state licensing. Programs such as SDSB, which operated with official sanction, remained legally permissible under the new framework.

The Role of *Adat* Law in the Criminalization of Gambling

The position of *adat*—customary law and social norms—on games of chance and gambling is similarly complex. Both Malay elites and grassroots communities have historically engaged in various gambling practices, including cockfighting, card and dice games, and animal racing; these activities where often encouraged under colonial rule, as they generated economic revenue.[106] Even within more formalized conceptions of *adat* as regulated customary norms, there is little evidence that such practices were historically treated as criminal offenses. As noted by Snouck Hurgronje, opposition to these practices came almost exclusively from religious authorities; only after the post-war period did their views gain broader traction, likely due to the increasing social influence of the *ʿulamāʾ* (Islamic scholars) over the aristocracy.[107] That opposition appears to have stemmed from two concerns: first, that such games constituted gambling; and second, that they lacked military or utilitarian value and should therefore be prohibited.

Notably, two foundational Malay legal texts from the seventeenth and eighteenth centuries—*Mirʾāt al-Ṭullāb* by ʿAbd

105 This law was written in Dutch and entitled "Nadere Wijziging En Aanvulling Van De Bepalingen Betreffende Het Varleenen Van Licentien Tot Het Houden Of Doen Houden Van Hazrdspelen In Voor Het Publiek Opengestelde Lokalen (Staatsblad 1912 No. 230)," which roughly translates as "Further Amendment and Supplement to the Provisions Concerning the Granting of Licenses for Holding or Causing to be Held Games of Chance in Premises Open to the Public (Staatsblad 1912 No. 230)."

106 C. Snouck Hurgronje, The Achehnese: Volume 2, at 208 (1906); M C. Ricklefs, A History of Modern Indonesia since c. 1300, at 183 (2d ed. 1993).

107 Hurgronje, *supra* note 106, at 210.

al-Raʾūf al-Sinkīlī (d. 1105/1693) and *Safīnat al-Ḥukkām* by Jalāl al-Dīn al-Tārūsānī (d. ca. 1194/1780)—acknowledge the sinful nature of gambling (*betaruh* or *berjudi*), yet impose no legal punishment.[108] For these *ʿulamāʾ*, gambling was viewed primarily as a moral failing rather than as a justiciable offense. It was not until the mid-nineteenth century that calls for regulating gambling as a criminal matter became more pronounced. Abdullāh al-Munshī (d. 1271/1854), writing in Temasek (present-day Singapore), was among the first to question the absence of legal mechanisms for addressing gambling.[109] Taken together, the plural legal traditions that inform Indonesian law—Shāfiʿī Islamic law, customary law, and European law—did not historically criminalize all forms of gambling, especially when such practices did not involve games of chance. This raises a key question: what led Indonesian legislators in 1974 to redefine gambling as a criminal offense and later expand its scope to include "all types of betting by non-players on game outcomes"?

The most plausible explanation is the rising influence of Muslim law—a composite normative framework shaped by *fiqh* (Islamic jurisprudence), *adat* (local customs and norms), and public-political interests (*maṣlaḥa wa-taṣarruf bi-l-imāma*). The latter category encompasses state actions grounded in perceived public interest or necessity. In the case of the SDSB, although Ibrahim Hosen argued that the lottery program did not qualify as *maysir* under Shāfiʿī doctrine, the majority of Indonesian Muslims viewed SDSB as religiously impermissible, regardless of its economic utility. This reflects the dynamic role of Muslim law, which can elevate social perception and political interest to the level of enforceable legal norms—even where traditional jurisprudence may not support such a conclusion.

108 *Safīnat al-Ḥukkām* mentions *berjudi* and *sabung* (two terms close in meaning to traditional gambling) under the subject of *Dausa Besar* (major sins) and *Dausa Kecil* (minor sins), and gambling is absent from the *Jinayat* section. The same situation also applies to *Mirʾāt al-Ṭullāb*. *See* Jalāluddīn At-Tārūsānī, Safīnat Al-Ḥukkām Fī Talkhīṣ Ahl al-Khaṣṣām (Muliadi Kurdi & Jamaluddin Thaib eds., 2015) and Abd al-Raʾuf al-Sinkilī, Mirʾāt al-Ṭullāb fī Taʾṣīl Maʿrifat al-Aḥkām al-Sharʿiyya li-l-Mālik al-Wahhāb (2d ed. 2015).

109 Noor Aisha Abdul Rahman, Colonial Image of Malay Adat Laws: A Critical Appraisal of Studies on Adat Laws in the Malay Peninsula during the Colonial Era and Some Continuities 132 (2006).

Importantly, SDSB became controversial in the 1980s and 1990s, more than a decade after the 1974 amendment to the KUHP that consolidated the criminalization of unlicensed gambling. This suggests that the eventual prohibition of SDSB was not simply a result of legal reform, but also a response to shifting political dynamics. During the final decade of Soeharto's rule, the regime increasingly sought to accommodate conservative Muslim constituencies. These efforts included policy changes—such as permitting the wearing of the *jilbāb* (outer garment) in public schools—that symbolized a broader political strategy to appease Islamic factions both among political elites and at the grassroots level.[110] In this context, the move against SDSB can be understood as part of a larger realignment in the state's approach to Islamic norms, as the regime worked to preserve its legitimacy amid growing religious pressures.

As Merle Ricklefs has noted, President Soeharto's decision to permit the formation of *Ikatan Cendekiawan Muslim Indonesia* (ICMI, Indonesian Association of Muslim Intellectuals) marked a turning point in the relationship between the state and modern Muslim populists.[111] Although Abdurrahman Wahid, a *Nahdhatul Ulama* scholar who later became the fourth president, criticized ICMI as an elitist institution, its establishment symbolized a broader shift in state sympathies toward devout Muslim communities.[112] In this context, opposition to the SDSB lottery—already dominant in public discourse—emerged as the prevailing view. Mohammad Nur Ichwan further emphasizes that Ibram Hosen's eventual disapproval of SDSB was influenced by the evolving alignment between Muslim populists and the state.[113] Some may question why a trained jurist like Hosen initially adopted a neutral, if not cautiously favorable, stance toward SDSB, while lay Muslims without formal legal education led the opposition. This dynamic suggests that political and public sentiment, rather than scholarly legal engagement and reconsideration, ultimately drove the lottery's prohibition.

110 Ricklefs, *supra* note 106, at 400.
111 *Id.* at 393.
112 *Id.*
113 Ichwan, *supra* note 4, at 60–61.

Beyond jurisprudential debates, SDSB gave rise to tangible social problems at the grassroots level. During the 1990s, Indonesia was undergoing significant economic stain, culminating in the 1997 financial crisis.[114] Amid growing desperation, many turned to the lottery as a perceived path to quick wealth. Cultural factors, particularly Indonesia's enduring ties to mysticism and occult belief systems, also shaped popular engagement with SDSB.[115] Participants often brought lottery tickets to shamans or sacred graves in search of supernatural intervention; in more extreme cases, individuals gathered at the scenes of traffic accidents to record license plate numbers, believing these might contain "magical" winning combinations.[116] This kind of "wild behavior" reinforced perceptions—among both religious leaders (*ʿulamāʾ*) and secular observers—that SDSB was socially harmful. Historically, classical Malay jurists had cited precisely this kind of conduct among gamblers as a justification for prohibiting all games of chance, even when such activities did not clearly violate the formal requirements for *qimār*.[117]

Public interest is not conceptually distinct from the framework of *adat*; indeed, one may argue that *adat* functions as a vehicle through which Islamic law shapes the modern Indonesian Penal Code. In this way, *adat* serves as a conduit for the legislative and judicial invocation of "living law" when the codified civil law does not address a specific case. Theoretically, *al-ʿādah*—often translated as customary practice—does not require formal institutionalization within a society's normative order to attain legal recognition in Islamic jurisprudence. Rather, as long as a practice is widely observed or a viewpoint is broadly accepted, it constitutes *ʿādah* or *ʿurf* in and may be legally operative as an expression of public interest.[118] The role of political interest in Islamic legal discourse, however, is undeniable.

114 Reiny Iriana & Fredrik Sjöholm, *Indonesia's Economic Crisis: Contagion and Fundamentals*, 40 The Developing Economies 135 (2002).

115 Lumaksono & Andayani, *supra* note 103, at 546.

116 Bima Bagaskara, *Nostalgia SDSB, Judi Legal Era Soeharto yang Bikin Warga Tergila-gila*, Detikjabar (Apr. 9, 2023), https://www.detik.com/jabar/berita/d-6663297/nostalgia-sdsb-judi-legal-era-soeharto-yang-bikin-warga-tergila-gila.

117 Hurgronje, *supra* note 106, at 210.

118 Ayman Shabana, Custom in Islamic Law and Legal theory 50 (2010).

Al-Māwardī's more permissive stance on gambling, for instance, illustrates how juristic opinion can be shaped by the imperatives of royal authority. In this regard, *adat* mediates between Islamic legal norms and state criminal law, undermining claims that Islamic law is wholly marginalized from Indonesia's penal code. Still, it is more accurate to speak here of Muslim law—a term that captures the interplay of *fiqh*, *adat*, and public-political considerations—than to rely exclusively on the frameworks of either "Islamic law" or "customary law."

That said, Indonesia's post-independence adoption of a secular civil law system means that Muslim law alone could not technically prohibit all forms of gambling without formal legislative action—specifically, the 1974 amendment to the KUHP. In fact, Muslim law may itself be framed as a form of secular law in a broader sense: a normative structure that draws on Islamic sources but functions within a legal system responsive to public interest rather than strictly theological doctrine. This orientation sometimes leads to interpretations that diverge from classical *fiqh* stipulations. In the case of gambling, for example, traditional Shāfiʿī *fiqh* may permit certain forms of betting when a *muḥallil* is present. Yet under Indonesian Muslim law, such distinctions are collapsed, and gambling is broadly prohibited. This explains why gambling criminalization in Indonesia could not have emerged solely through Islamic legal reasoning; it required a secular legislative mechanism. Yet, as the SDSB controversy illustrates, the substantive justification for criminalization was deeply informed by Islamic and *adat*-based moral reasoning. In that case, opposing the Muslim majority's demand to prohibit SDSB would have risked provoking widespread unrest—an outcome undesirable for Soeharto's already precarious regime.

In Indonesia's contemporary context, current efforts toward legal decolonialization may benefit from embracing the framework of Muslim law. Such an approach allows for the creation of legislation that is simultaneously Islamic and secular—rooted in the cultural and moral values of the population without requiring direct reliance on contested points of *fiqh*. In contrast to a strict jurisprudential approach, which may lead to

doctrinal fragmentation or legal dead ends, as the gambling debate demonstrates, the lens of Muslim law offers a more flexible, socially responsive foundation. This framework also holds particular promise in addressing emerging legal issues such as online gambling, which might otherwise evade regulation under narrow interpretations of classical Islamic law.

Conclusion

The prohibition of the SDSB (national lottery) in Indonesian law reflects an intersection of Islamic and secular legal considerations. It illustrates a shift in Shāfiʿī legal interpretation, where juristic understanding has come to take precedence over strict textual literalism. Advocacy for prohibiting the SDSB thus represents a form of Muslim law interpretation, informed by historical practice and culture, rather than direct scriptural mandates from sacred texts or early jurists.

This study has shown that the Shāfiʿī legal tradition offers no definitive guidance on what constitutes *qimār* (gambling or betting), resulting in significant debates among jurists over its scope and meaning. Terms such as gambling, competition rewards, and non-prohibited betting (in the presence of a *muḥallil*) complicate these discussions, especially since the punishment for gambling traditionally falls under *taʿzīr* (discretionary punishment). While this interpretive vagueness has permitted certain forms of wagering to be deemed legitimate, the 1974 amendment to Indonesia's Criminal Code (KUHP) adopted a broader and more rigid definition of gambling. The KUHP frames gambling primarily as games of speculation and chance, criminalizing all forms of betting by non-players regardless of the moral or contextual justifications provided in *fiqh*, and despite Shāfiʿī jurisprudence allowing for certain exceptions. Nonetheless, the KUHP's definition is not without ambiguity, particularly in distinguishing between games of chance and those competitions that involve a significance element of skill, creating potential legal loopholes. Meanwhile, Shāfiʿī *fiqh*, as the dominant Islamic legal tradition in Indonesia, adopts a more conditional and

context-sensitive approach, often treating gambling as a moral violation rather than a criminal offense.

It is within this convergence of Muslim law (based on *adat* and *fiqh*) and public-political interests that Indonesia's modern gambling regulations have taken shape, leading to the 1974 criminalization of unlicensed gambling, including lotteries like SDSB. While *adat* itself does not explicitly criminalize gambling, its alignment with public interest has enabled it to serve as a channel for the incorporations of Islamic norms into the Indonesian criminal code. Its responsive and flexible nature, grounded in common practices accepted by the majority, allow it to guide legal reasoning in a way that is less restrictive than direct reliance on *fiqh* scriptures. This dynamic interaction between *adat* and Islamic law, which has existed since the arrival of Islam to the Southeast Asian archipelago, has been further shaped by evolving political conditions. In this way, Muslim law has become a conceptual bridge, facilitating the integration of Islamic and customary norms into the Indonesian secular legal system—particularly within the realm of criminal law.

Ultimately, this interaction undermines the notion that Islamic law is wholly marginalized within Indonesia's legal framework. Instead, Muslim law—as an adaptive, pluralistic legal concept—enables Islamic principles and *adat* values to influence national legislation. Its role may be especially significant in redefining the understanding of *ḥudūd* in modern pluralist states, where religious and secular laws coexist.