THE PUNISHMENT OF ISLAMIC SEX CRIMES IN A MODERN LEGAL SYSTEM

THE ISLAMIC QANUN OF ACEH, INDONESIA

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The role of Islamic law as state law was significantly reduced over the course of the nineteenth and twentieth centuries. This decline in the importance of Islamic doctrine has been attributed primarily to the spread of European colonialism. The western powers that ruled Muslim lands replaced much of the existing law in colonized territories with laws modeled after those applied in the home country.

The trend toward a narrower role for Islamic law reversed itself in the latter part of the twentieth century. Since the 1970s, a number of majority Muslim states have passed laws prescribing the application of a form of Islamic law on matters that had long been governed exclusively by laws derived from the western legal tradition. A central objective of many of these Islamization programs has been to implement Islamic criminal law, and a large share of the new Islamic crimes that have been passed relate to sex offenses.

This paper looks at the enactment and enforcement of recent criminal legislation involving sexual morality in the Indonesian province of Aceh. In the early 2000s, the provincial legislature for Aceh passed a series of laws prescribing punishments for Islamic crimes, the first such legislation in the country's history. The first piece of legislation, enacted in 2002, authorizes punishment in the form of imprisonment, fine, or caning for acts defined as violating Islamic orthodoxy or religious practice.[1] The 2002 statute also established an Islamic police force called the Wilayatul Hisbah charged

1. Qanun on the Observance of Islamic Law in the Fields of Doctrine, Ritual Practice, and Markers of Identity, Qanun No. 11 of 2002.

with enforcing the law.[2] This was followed in 2003 with the passage of three more Islamic criminal statutes. These enactments prescribe punishments for consumption of alcohol,[3] gambling,[4] and a sexual morals offense called khalwat.[5] Finally, in 2014, a comprehensive Islamic crimes law was passed that replaced the earlier legislation and defined a number of new crimes.[6] In addition to the three crimes contained in the 2003 laws, the 2014 statute prescribed punishments for seven more crimes related to sexual misconduct.[7]

The purpose of this paper is to examine recent Islamic criminal legislation in Indonesian Aceh as an example of Islamic criminal law in the modern world. Twenty-first century American culture commonly represents Islamic law as a definite, fixed, and immutable essence that operates completely outside of history. An examination of contemporary Islamic law as it is actually applied shows that these stereotypical representations are mistaken. As with other religious and legal traditions, contemporary Islam is a contested and highly diverse phenomenon. The character, content, and application of the law are all shaped by a variety of influences that include both ideas received from the past, and the social and political realities of the contemporary world.

An empirical examination of the nature of contemporary Islamic criminal law is of importance to Americans because a meaningful appraisal of Islamic law and the threat it purportedly poses requires that we understand what it is. This paper does not purport to answer to that question. The objective, rather, is to urge the use of an empirical approach to the study of contemporary Islamic criminal law. An empirical examination of contemporary Islamic law demonstrates that modern expressions of the law cannot be understood by reference to the classical legal literature alone. To understand the nature of contemporary Islam, we must examine its existence and operation in the real world.

The paper begins in the next section with an account of the historical circumstances leading up to the enactment of Islamic criminal laws in Aceh. Part II presents a brief survey of the classical Islamic doctrine relating to crimes. The summary of the classical era doctrine serves as background to an examination in Part III of recently enacted statutes defining Islamic sex crimes in Aceh. The discussion here focuses on the definition and judicial

2. *See id.*
3. Qanun on Consumption of Alcohol, Qanun No. 12 of 2003.
4. Qanun on Gambling, Qanun No. 13 of 2003.
5. Qanun on Khalwat [Improper Covert Association], Qanun No. 14 of 2003.
6. Qanun on Criminal Law, Qanun No. 6 of 2014.
7. *See id.*

application of an offense called khalwat that was enacted in 2003 that punishes conduct leading toward the commission of fornication. Part IV then briefly summarizes the contents of a new and more comprehensive Islamic criminal statute that was passed in 2014.

I. ISLAM AND ISLAMIC LAW IN INDONESIA

As elsewhere in the Muslim world, the implementation of laws punishing Islamic crimes in Indonesian Aceh is in part a response to circumstances and ideas present across the Muslim world. But the development of a system of Islamic criminal law in Aceh is also shaped by social and political circumstances in Aceh that are rooted in the history of the region, and the form, content, and implementation of the laws are heavily shaped by local ideas and interests.

Aceh is one of thirty-four provinces that make up the Republic of Indonesia, a sprawling archipelagic state consisting of some 800 inhabited islands that stretch more than 3000 miles along the equator from Sumatra in the west to Indonesian New Guinea in the East.[8] The development of a system of Islamic crimes in Aceh is rooted in the memory of the region's proud history of political independence and cultural exceptionalism.[9] Situated on the north coast of Sumatra along the lucrative trade routes between China and the Middle East, Aceh was among the first regions in Southeast Asia to convert to Islam and was home to some of the earliest Muslim states in island Southeast Asia. [10] The most powerful and enduring Islamic state in Aceh was the Sultanate of Aceh centered at the far north of

8. M.C. RICKLEFS, A HISTORY OF MODERN INDONESIA SINCE C. 1200, at 18 (4th ed. 2008).

9. Anthony Reid has argued that Aceh is one of a small number of Southeast Asian societies to develop a form of ethnic nationalism. The humid tropical climate found in most parts of Southeast Asia was inimical to the development of dense agricultural populations that could support centralized bureaucratic polities conducive to the creation of an ethnic nationalism. ANTHONY REID, IMPERIAL ALCHEMY: NATIONALISM AND POLITICAL IDENTITY IN SOUTHEAST ASIA 19-20 (2010). Aceh is an exception to this general pattern, and the region's long history of sovereign autonomy lasting some three centuries, from the sixteenth to the nineteenth centuries, resulted in the identification of Acehnese ethnic identity with the state. *Id.*

10. The first supra-local states in Southeast Asia were based on South Asian religions. *See* JOHN F. CADY, SOUTHEAST ASIA: ITS HISTORICAL DEVELOPMENT 62-70 (1964) (describing the rise of Buddhist Srivijaya on the southern coast of Sumatra in the sixth century). A succession of Hindu and Buddhist kingdoms ruled parts of the region from the seventh to the sixteenth centuries. RICKLEFS, *supra* note 8, at 6, 21-22. Islam began to gain a foothold in the archipelago in the thirteenth century. *See id.* at 7. The first Muslim states were located on the coasts of Sumatra, the Malay Peninsula, and the north coast of Java. *See id.* at 6-7. The first Muslim polity in Aceh dates from the latter part of the thirteenth century and was located near the present city of Lhokseumawe. *See id.* at 4.

Sumatra near the present-day provincial capital of Banda Aceh.[11] Founded in the early part of the sixteenth century, the Sultanate of Aceh maintained a sovereign existence for some 300 years until subdued by the Dutch at the turn of the twentieth century.[12]

The Dutch presence in the Indonesian archipelago dates from the early seventeenth century, but it was not until the early decades of the twentieth century that the Dutch were able to extend their control over the whole of the territory that comprises contemporary Indonesia.[13] One of the last pieces of what is now Indonesia to be brought under Dutch control was Aceh.[14] A force of 3000 Dutch troops attacked Banda Aceh in 1873, but was defeated.[15] A second Dutch offensive with a much larger force resulted in the capture of the palace and the main mosque, but did not put an end to Acehnese resistance to Dutch rule.[16] The Acehnese abandoned the capital, but continued to fight, and the Dutch military campaign in Aceh continued for more than three decades until the region was finally brought under Dutch control in the early years of the twentieth century.[17]

The Japanese invaded the Dutch colony in 1942 during World War II and occupied the region until their defeat by the United States in 1945.[18] Indonesian nationalist forces mounted a four year war of independence to resist a Dutch return, and it was not until 1949 that the Dutch formally ceded control of the state to the nationalist government.[19]

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11. RICKLEFS, *supra* note 8, at 6, 36-38. Under the leadership of its greatest Sultan, Iskandar Muda, the Sultanate of Aceh united the Muslim states of northern Sumatra and successfully wrested control of the trade routes from Portuguese Malacca on the Malay Peninsula. *Id.*

12. *Id.* at 36-38.

13. The Dutch presence in the archipelago dates from the founding of Batavia on the north coast of Java in 1610, but the Dutch conquest of the region proceeded gradually and some regions experienced colonial rule for only a few decades. Robert Cribb, *Nation: Making Indonesia*, *in* INDONESIA BEYOND SUHARTO: POLITY, ECONOMY, SOCIETY, TRANSITION 3, 8-10 (1999).

14. *Id.* at 8.

15. Anthony Reid, *Colonial Transformation: A Bitter Legacy*, *in* VERANDAH OF VIOLENCE: THE BACKGROUND TO THE ACEH PROBLEM 96, 97 (Anthony Reid ed., 2006).

16. *Id.* at 98.

17. There is no clearly marked end date to the Dutch war in Aceh. Although the two main leaders of the Acehnese opposition submitted to Dutch authority in 1903, Acehnese fighters continued to carry out a guerrilla war in the interior for another ten years. *Id.* By the time it ended, the "Aceh War" was the most costly military operation in the colony's history. *See* Teuku Ibrahim Alfian, *Aceh and the Holy War (Perang Sabil)*, *in* VERANDAH OF VIOLENCE: THE BACKGROUND TO THE ACEH PROBLEM 96, 111. By the time it was over the conflict had cost no less than 17,500 lives on the Dutch side and some 70,000 Acehnese. *Id.*

18. RICKLEFS, *supra* note 8, at 230-32.

19. *See* MCTURNAN KAHIN, NATIONALISM AND REVOLUTION IN INDONESIA 445 (1952).

The relations between Aceh and the Indonesian government in Jakarta were troubled from the outset. During the first five years following the declaration of Indonesian independence, Aceh remained largely autonomous from central government control.[20] In 1950, the region's de facto autonomy came to an end with the incorporation of Aceh into the province of North Sumatera.[21] But the change in the territory's formal legal status failed to bring about its integration into the Indonesian state, and in 1953, Acehnese forces launched an armed rebellion against central government authority.[22] In an attempt to end the rebellion, in 1959, the Indonesian government granted special region status to Aceh that gave local authorities broad powers in the field of religion, education, and custom.[23] This concession was considered insufficient by the leadership of the rebellion because it failed to guarantee Aceh's right to implement Islamic sharia.[24] The armed revolt continued until 1962, when the right of the Acehnese to implement Islamic law was recognized in a military decree.[25] Relations between Aceh and Jakarta remained unsettled, however, especially after General Suharto assumed control of the country in 1966. In the early 1970s, after it had consolidated its control over the apparatus of the state, the Suharto government launched an aggressive and often ruthless policy of suppressing all political expression of local and religious identity.[26] This policy of homogenization was applied throughout the country to all of its many religious and ethnic groups, but because of its long tradition of independence and resistance to outside domination, the policy had a sharper edge in Aceh.[27]

The already problematic relations between Aceh and Jakarta became worse following the discovery of large natural gas reserves in Aceh in the 1970s.[28] Under the highly centralized structure of the Indonesian state, almost all of the profits from Aceh's natural resources were syphoned off to Jakarta, and the Acehnese reaped little benefit from the exploitation of the

20. REID, *supra* note 9, at 128, 131.

21. RICKLEFS, *supra* note 8, at 283-84; REID, *supra* note 9, at 131.

22. RICKLEFS, *supra* note 8, at 284; REID, *supra* note 9, at 131-32.

23. RICKLEFS, *supra* note 8, at 284; REID, *supra* note 9, at 303; Michelle Anne Miller, *What's Special about Special Autonomy in Aceh?*, in VERANDAH OF VIOLENCE: THE BACKGROUND TO THE ACEH PROBLEM 292, 294-95.

24. *See* Miller, *supra* note 23, at 294-95.

25. *Id.*

26. *Id.* at 295-96.

27. *See* Geoffrey Robinson, *Rawan is as Rawan Does: The Origins of Disorder in New Order Aceh*, INDON., Oct. 1998, at 127 (discussing state sponsored violence in Aceh under Suhharto).

28. Miller, *supra* note 23, at 295.

gas reserves.[29] The establishment of a natural gas facility in Aceh also resulted in a significantly larger military presence in the region.[30] While the deployment of troops to Aceh was ostensibly for the purpose of making Aceh peaceful and secure, the effect was the exact opposite.[31] Rather than promoting peace and security, the Indonesian military presence in Aceh during the Suharto era increased the level of violence.[32]

It was in this context that a new organized resistance emerged in 1976 with the creation of the Free Aceh Movement (Gerakan Aceh Merdeka, GAM).[33] The Acehnese resistance movements that preceded GAM invoked Islam as the basis for organizing against Indonesian rule and called for the establishment of an Islamic government run according to God's law.[34] GAM eschewed religious rhetoric and articulated its grievances against Jakarta in secular terms.[35] The movement garnered enough popular support to be able to wage a guerilla war of independence against the Indonesian armed forces throughout the 1980s and 1990s.[36] The Indonesian military's forceful efforts to quash GAM resulted in widespread suffering and further alienated the Acehnese from Jakarta.[37]

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29. Robinson, *supra* note 27, at 135-36.

30. *See id.* at 137.

31. *Id.*; Damien Kingsbury & Lesley McCulloch, *Military Business in Aceh*, *in* VERANDAH OF VIOLENCE: THE BACKGROUND TO THE ACEH PROBLEM 199, 206-07.

32. Robinson, *supra* note 27, at 137. The destabilizing influence of the military presence in Aceh is in large part a consequence of the Indonesian military's business activities in the region. *Id.* Only about one-fourth of the operational expenses of the Indonesian military is supplied by the state. *See* Kingsbury & McCulloch, *supra* note 31, at 199. The remaining three-quarters comes from the military's legal and illegal business ventures. *See id.*

33. *See generally* KIRSTEN E. SCHULZE, THE FREE ACEH MOVEMENT (GAM): ANATOMY OF A SEPARATIST ORGANIZATION (2004) (discussing the origins, structure, goals, and ideology of GAM).

34. Edward Aspinall, *Violence and Identity Formation in Aceh under Indonesian Rule*, *in* VERANDAH OF VIOLENCE: THE BACKGROUND TO THE ACEH PROBLEM 149, 153-54.

35. R. MICHAEL FEENER, SHARIA AND SOCIAL ENGINEERING: THE IMPLEMENTATION OF ISLAMIC LAW IN CONTEMPORARY ACEH, INDONESIA 48 (2013). Edward Aspinall has argued that there is greater continuity than is generally recognized between the religiously-based Acehnese resistance movements of the 1950s and 60s and the nationalist-oriented movement that emerged in the 1970s. Aspinall, *supra* note 34, at 149. The Darul Islam movement used religion as the basis for demanding the creation of an autonomous Aceh governed according to Islamic principles, while GAM articulated Acehnese separatist aspirations in ethnic nationalist terms. *See id.* at 151. A common thread running through both movements, however, is the experience of state violence directed against the Acehnese people and a sense of victimization at the hands of the Indonesian state. *See id.* at 151-52.

36. The GAM military capacity was never great. It has been estimated that at its height GAM had no more than between 3000 and 8000 fighters. Kirsten E. Schulze, *Insurgency and Counterinsurgency: Strategy and the Aceh Conflict, October 1976-May 2004*, *in* VERANDAH OF VIOLENCE: THE BACKGROUND TO THE ACEH PROBLEM 225, 227.

37. *Id.* at 226.

In May of 1998, Indonesian President Suharto resigned after more than three decades in power in response to violent demonstrations and growing social unrest brought on by the Southeast Asian financial crisis.[38] Suharto was succeeded by his vice-president, B.J. Habibie, who declared a new era of Reform (Reformasi) and initiated a program of fundamental transformation of the Indonesian state.[39] One of the most significant changes was the implementation of a massive program of decentralization that resulted in the transfer of significant governmental powers from the central government to the country's more than 450 districts.[40] The Law on Regional Autonomy passed in 1999 granted district-level governments in Indonesia broad powers to legislate on matters not specifically reserved to the national government.[41] One notable reservation to local legislative authority was religion.[42] The decision to retain federal national authority over matters of religion is indicative of the continued concern over the potentially disintegrative power of primordial attachments.[43]

Another action in the immediate aftermath of Suharto's resignation that was important for Aceh was the announcement in January of 1999 that the province of East Timor would be offered the choice between remaining a

38. KEES VAN DIJK, A COUNTRY IN DESPAIR: INDONESIA BETWEEN 1997 AND 2000, at 208 (2002).

39. For an overview of the post-Suhharto political reforms see Tim Lindsey, *Constitutional Reform in Indonesia: Muddling Toward Democracy*, *in* INDONESIA: LAW AND SOCIETY 23, 23-45 (Tim Lindsey ed., 2d ed. 2008).

40. *See* Leo Schmit, *Decentralization and Legal Reform in Indonesia: The Pendulum Effect*, *in* INDONESIA: LAW AND SOCIETY 146, 146-90 (providing a broad overview of the decentralization program and its legal and political complexities). Indonesia had a brief experience of federal government in the 1940s, but for most of its history Indonesia was one of the most centralized countries in the world. For more on the 1940s' attempt to establish a federal governmental structure see KAHIN, *supra* note 19, at 386-433.

41. Act on Local Governance, Act No. 22 of 1999 (Indon.). The list of central government powers includes foreign affairs, national defense, security, the administration of justice, monetary and fiscal policy, and religion. *Id.* art. 7(1).

42. *Id.*

43. The denial of authority over the regulation of religion to district level officials has not entirely prevented them from implementing and enforcing religious norms. In the years since the Regional Autonomy was passed, dozens of local governments have passed regulations prescribing compliance restrictions on drinking alcohol, ability to read the Quran, proper dress, and other matters. Robin Bush, *Regional Sharia Regulations in Indonesia: Anomaly or Symptom?*, *in* EXPRESSING ISLAM: RELIGIOUS LIFE AND POLITICS IN INDONESIA 174 (Greg Fealy & Sally White eds., 2008). Because the regulation of religion is a central government power and thus not subject to local control, these local laws are justified in terms of the power of local governments to combat social problems and preserve public order. Arskal Salim, *Muslim in Indonesia's Democratization: The Religious Majority and the Rights of Minorities in the Post-New Order Era*, *in* INDONESIA: DEMOCRACY AND THE PROMISE OF GOOD GOVERNANCE 115, 127 (Ross McLeod & Andrew MacIntyre eds., 2007).

part of Indonesia and becoming independent.[44] In a United Nations administered referendum in September 1999, the people of East Timor voted overwhelmingly for independence.[45] The decision to offer independence to East Timor was opposed by the Indonesian military and powerful elements in the state,[46] and the loss of the province intensified concerns about Acehnese aspirations for independence. Anxious to avoid further defections from the Indonesian nation and to finally put an end to the conflict with GAM, the Indonesian legislature passed a "Special Status" law for Aceh granting the province legislative powers in the fields of religion, education, and customary law (Adat).[47] Two years later, the law on Special Status was superseded with the passage of another autonomy law for Aceh that conferred, at least in theory, even broader powers of self-governance.[48] In addition to other matters, the 2001 statute gave the provincial legislature for Aceh (Dewan Perwakilan Rakyat Daerah or "DPRD") the authority to pass laws implementing Islamic Sharia and to create the institutional machinery required to apply those laws.[49]

The decision to include authority to implement Islamic law as a part of the special autonomy legislation was designed to undermine the authority of GAM.[50] The strategy did not succeed as hoped, and GAM continued its armed campaign for independence after the passage of special autonomy law.

Circumstances in Aceh changed dramatically on December 26, 2004 when a powerful earthquake struck off the coast of Aceh in the Indian

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44. East Timor (now officially Timor Leste) comprises the eastern half of the island of Timor. *See* GEOFFREY ROBINSON, "IF YOU LEAVE US HERE WE WILL DIE": HOW GENOCIDE WAS STOPPED IN EAST TIMOR 5 (2010). The western half of the island was colonized by the Dutch and became part of Indonesia after World War II. The eastern half of the island was colonized by Portugal, who remained in the territory until 1974 when it announced plans to allow East Timor to become independent. *See id.* at 6. Indonesia invaded East Timor in 1975 and remained until in the territory until 1999 when the East Timorese voted for independence in a United Nations run referendum. *See id.* at 7-8.

45. On the independence referendum and its violent aftermath see *id.*

46. On the circumstances leading to the abrupt change in policy regarding Indonesia see Don Greenlees & Robert Garran, DELIVERANCE: THE INSIDE STORY OF EAST TIMOR'S FIGHT FOR FREEDOM 74-101 (2002).

47. Act on the Special Status of the Province of Aceh Special Region, Act No. 44 of 1999, art. 3(2) (Indon.).

48. Act on the Special Autonomy for the Province of the Special Region of Aceh as the Province of Nanggroe Aceh Darussalam, Act No. 18 of 2001 (General Elucidation).

49. *Id.*; *see also* Moch. Nur Ichwan, *The Politics of Shari'atization: Central Governmental and Regional Discourses of Sharia Implementation in Aceh*, *in* ISLAMIC LAW IN CONTEMPORARY INDONESIA: IDEAS AND INSTITUTIONS 193, 203-08 (R. Michael Feener & Mark E. Cammack eds., 2007).

50. FEENER, *supra* note 35, at 138.

Ocean. The quake and the resulting tsunami killed more than 160,000 people in Aceh and caused a profound disruption of Acehnese society.[51] It also created the impetus for finally resolving the long-running conflict between GAM and the Indonesian military.[52] On December 28, two days after the tsunami, GAM declared a cessation of hostilities.[53] In February of 2005, representatives of GAM met with Indonesian officials in Finland to seek to negotiate a resolution to the conflict, and on August 15, 2005, the two sides signed a Memorandum of Understanding that finally put an end to the long-running conflict.[54]

As in the rest of Indonesia, the law in Aceh is pluralistic.[55] This means that the legal system recognizes the existence of multiple bodies of rules or doctrine governing the same question, and that the law that applies to a particular dispute or transaction may differ from one case to the next. Most civil and criminal matters in Indonesia are governed by uniform national laws that are derived from either European law or indigenous customary law.[56] The law that governs marriage, divorce, and inheritance, however, depends on the religion of the parties.[57] Matrimonial issues are governed by the religious law of the parties.[58] There are six recognized religions in Indonesia, and at least in theory each of the country's six religions has its own law of marriage and divorce.[59] For purposes of inheritance, the other principal subject governed by Islamic law in Indonesia, a distinction is

51. *See* RICKLEFS, *supra* note 8, at 406-07; REID, *supra* note 9, at 141-42.

52. *See* RICKLEFS, *supra* note 8, at 408; REID, *supra* note 9, at 141-42.

53. *See* RICKLEFS, *supra* note 8, at 408.

54. *See* EDWARD ASPINALL, THE HELSINKI AGREEMENT: A MORE PROMISING BASIS FOR PEACE IN ACEH? 25, 84 (2005).

55. The plural character of Indonesian law is rooted in the colonial system of ethnic and religious "law groups." *See* Mark Cammack, *Legal Aspects of Muslim-Non-Muslim Marriage in Indonesia*, *in* MUSLIM-NON-MUSLIM MARRIAGE: POLITICAL AND CULTURAL CONTESTATIONS IN SOUTHEAST ASIA 102, 103-04 (Gavin W. Jones et al. eds., 2008).

56. The Indonesian Constitution of 1945, promulgated the day after Indonesian leaders declared the country's independence, formally recognized the accumulated body of colonial era legislation. *See* Undang-Undang Dasar Negara Republik Indonesia [CONSTITUTION] Aug. 18, 1945, art. 2 (Indon.) (stating that "[a]ll State Institutions and Laws shall continue in effect until new institutions and laws are created by statute"). Much of this colonial era legislation remains in effect, including the Dutch Civil Code and the Dutch Penal Code.

57. This is primarily a result of a single article in the 1974 National Marriage Act specifying the requirements for a valid marriage. Article 2 of the 1974 Marriage Act states simply that a marriage is valid (sah) when performed according to the law of the religion or belief of the parties. Marriage Act, Act No. 1 of 1974.

58. *See id.* art. 2 (stating that marriage is valid when carried out in accordance with the religious law of the parties).

59. The six recognized religions are, in addition to Islam, Buddhism, Catholicism, Confucianism, Hinduism, and Protestant Christianity.

made between Muslims and all others. Muslim inheritance is based on a version of Islamic inheritance law,[60] while the inheritance of non-Muslims is based on either the Indonesian Civil Code or Indonesian customary law.

The pluralistic character of the Indonesian legal system is also reflected in the structure of the Indonesian judiciary. There are two nation-wide court systems in Indonesia—a system of civil courts (Pengadilan Negri) and a system of "Religious" or Islamic courts (Pengadilan Agama).[61] The allocation of subject matter jurisdiction between the two systems is based on the governing law; the Islamic courts exercise jurisdiction over matters that are governed by Islamic rules, while the civil courts have jurisdiction in cases governed by non-Islamic laws.[62] Each system includes a first instance court that has a district-wide jurisdiction and an appeals court that operates at the provincial level.[63] Both systems are under a single Supreme Court that has principal responsibility for administration of both branches of the judiciary and exercises cassation review over the decisions of courts from both systems.[64]

II. PUNISHMENT IN CLASSICAL ISLAMIC LAW[65]

What is today referred to as "criminal law" did not exist in classical Islamic law or in any other pre-modern legal system. While the classical-era law included rules that prescribed punishments for actions that are now classified as crimes,[66] the set of rules and procedures that are today commonly identified as "Islamic criminal law" were not understood as

60. *See* Mark Cammack, *The Influence of Hazairin's Theory of Bilateral Inheritance*, *in* INDONESIA: LAW AND SOCIETY 329 (discussing reforms to Islamic inheritance law introduced in Indonesia).

61. R. SUBEKTI, LAW IN INDONESIA 19-21 (3d ed. 1982).

62. *See* Mark E. Cammack & R. Michael Feener, *The Islamic Legal System, in Indonesia* 21 PAC. RIM L. & POL'Y J. 13, 28-30 (2012) (discussing the subject matter jurisdiction of the Islamic Courts).

63. Act on the Civil Courts, Act No. 2 of 1986, art. 6 (Indon.); Act on the Religious Courts, Act No. 7 of 1989, arts. 3-4 (Indon.).

64. On the role of the Supreme Court in reviewing and supervising the Islamic courts, see Mark Cammack, *The Indonesian Islamic Judiciary*, *in* ISLAMIC LAW IN MODERN INDONESIA: IDEAS AND INSTITUTIONS 146, 154-57 (R. Michael Feener & Mark E. Cammack eds., 2007).

65. This section draws heavily on Mark Cammack, *Islamic Law and Crime in Contemporary Courts*, 4 BERKELEY J. MIDDLE E. & ISLAMIC L. 1 (2011).

66. RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY 7 (2005).

comprising a unified area of law in the pre-modern era,[67] and not all of those classical era rules fit the modern definition of crime.

The set of legal doctrines and principles now identified as Islamic criminal law are taken from three distinct bodies of classical era doctrine. Unlike the word crime, which denotes the act that is subject to punishment, the Islamic labels for the three categories of rules refer to the punishment imposed for engaging in the prohibited conduct.

The body of doctrine that most closely resembles modern criminal law is called hadd (pl. hudud), a word that means "the limits prescribed by God."[68] As is characteristic of classical Islamic law generally, there is significant diversity of opinion among authoritative jurists on the question of precisely what actions are subject to hadd punishment.[69] The majority of jurists recognize just five offenses punishable as hadd.[70] These include (1) illicit sexual relations (zina), (2) false accusation of illicit relations (qadhf), (3) drinking alcohol (shurb al-khamr), (4) theft (sariqa), and (5) highway robbery (qat al-tariq).[71] In addition to these five offenses, one minority viewpoint includes homicide and bodily harm in the category of hadd, while another minority view considers insurrection (baghy) and apostasy (ridda) as hadd.[72]

The defining feature of offenses categorized as hadd is that they carry a fixed penalty.[73] The punishments for hadd are extremely harsh by today's standards. Illicit sexual relations, for example, is punished with death by stoning according to some jurists while another group of jurists consider the correct punishment for zina to be flogging with 100 lashes.[74] A first offense of theft is punished by amputating the right hand.[75]

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67. WAEL B. HALLAQ, SHARI'A: THEORY, PRACTICE, TRANSFORMATIONS 309 (2009). Works of classical Islamic jurisprudence typically divided the subject matter into "four quarters"—rituals, sales, marriage, and injuries. *Id.* app. at 551-52. The topics that comprise what is today regarded as Islamic criminal law are included in three or four "books" (kitab) of the quarter on injuries. *See id.* at 551-55. But other topics are also treated in quarter four; in one Shafi'i text widely studied in Indonesia, for example, the topic immediately following discretionary punishments is circumcision. *See id.*

68. *See generally* PETERS, *supra* note 66, at 53-65.

69. *See* HALLAQ, *supra* note 67, at 310-11.

70. *See id.*

71. *Id.* at 310.

72. *See id.* at 310-11.

73. *See id.* at 310.

74. PETERS, *supra* note 66, at 60.

75. *Id.* at 55-56.

The conduct that is subject to the hadd penalties is defined in very narrow terms. The hadd offense of theft is committed by taking the property of another by stealth from a place of custody.[76] A thief who enters through an unlocked door is not punished with the hadd penalty because the unlocked door means the property was not in a place of custody.[77] The property must be of a minimum value, and theft of property that is forbidden for a Muslim to own does not qualify.[78] Nor is a poor person who steals food out of need punishable with the hadd penalty,[79] and the hadd penalty does not apply if there is any doubt as to whether the thief had any ownership interest in the property.[80]

There are specific and highly technical proof requirements for imposition of hadd punishments. In general, the commission of the offense may be established only with the confession of the accused or direct eyewitness testimony from persons who satisfy the law's standards of religion and probity.[81] Circumstantial evidence is not permitted.[82] The requirement of direct evidence of the commission of the prohibited act by the testimony of eyewitnesses poses a particular obstacle to the imposition of the hadd penalty for zina. For an act of illicit sexual intercourse to be punishable as zina, the witnesses must testify based on first-hand knowledge to the actual act of penetration, "like a pencil going into the kohl container . . . or a bucket into a well."[83]

The second source of contemporary Islamic criminal law is the set of rules governing homicide and infliction of bodily injury.[84] The punishment for homicide and wounding is governed by "lex talionis" (qisas) and takes the form of either retaliation or compensation through payment of blood money.[85] The principle of equivalence limits the law of retaliation; the guilty party suffers the same harm suffered by the victim and carried out in the same manner.[86] Compensation is sometimes an alternative to retaliation at the election of the victim and, in some cases, is the only authorized

76. *See id.* at 56.
77. *Id.*
78. *Id.*
79. HALLAQ, *supra* note 67, at 317.
80. PETERS, *supra* note 66, at 56.
81. *Id.* at 12.
82. *Id.*
83. *Id.* at 15.
84. *See generally id.* at 38-53.
85. *Id. at 39, 44.*
86. *See generally id.* at 39.

punishment.[87] The amount of compensation owed for wounding is measured against the full blood price for the killing of a free Muslim man.[88] In cases of homicide, the perpetrator pays compensation to the victim's relatives,[89] and for wounding pays it to the victim.[90]

Unlike the hadd punishments, which are in vindication of the "claims of God" and prosecuted by the state, the penalties for homicide and bodily injury are in satisfaction of the rights of the victim or the victim's family, and are private actions prosecuted by the victim or the victim's relatives.[91] The role of the state in qisas is limited to ensuring the proper implementation of retaliation by requiring a formal determination of guilt based on established standards of proof.[92]

The third classical era rubric comprising Islamic criminal law is tazir.[93] Tazir is not a body of legal doctrine defining the elements of crimes and fixing punishments, but signifies a discretionary power belonging to the ruler to punish actions considered sinful or destructive of public order, but not punishable as hadd or qisas.[94] Because tazir is understood as the means of achieving practical objectives of upholding good morals and public order, the strict proof rules that encumber the implementation of other forms of punishment do not apply.[95] The ruler also enjoys considerable leeway in deciding an appropriate form of punishment.[96] Some jurists regard the hadd punishments as establishing absolute limits on tazir punishments, though there is a difference of opinion as to how this limitation is interpreted.[97] For some jurists the punishment for tazir may not

87. Whether retaliation is available for homicide depends on the mental state of the perpetrator at the time of the killing, and the relative status of the perpetrator and the victim as measured by blood price. *Id.* at 39, 47.

88. *Id.* at 50-51.

89. *Id.* at 49.

90. *Id.* at 52-53.

91. *Id.* at 39.

92. BERNARD G. WEISS, THE SPIRIT OF ISLAMIC LAW 152-53 (1998).

93. *See generally* PETERS, *supra* note 66, at 65-67.

94. *Id.* at 65-66.

95. The prominent Islamic jurist Ibn Taimiyya explains that the "[t]azir is not a definite punishment; it is generally an infliction of some pain on a man by word or action or by avoiding saying a good word to him or doing a good deed for him. It may be by harsh admonition or reproach; it may be by forsaking him and neglecting to salute him until he repents . . . . Tazir also may be by imprisonment, by beating, by daubing the face black or making the guilty ride, backwards, on a donkey." IBN TAIMIYYA ON PUBLIC AND PRIVATE LAW IN ISLAM OR PUBLIC POLICY IN ISLAMIC JURISPRUDENCE 128-29 (Omar A. Farrukh trans., 1966).

96. *See id.* at 127-28.

97. *Id.* at 129.

exceed the least severe punishment authorized for any hadd offense.[98] Other jurists are of the opinion that the tazir punishment for a particular type of offense—theft, for example—may not be greater than the hadd punishment for that type of offense.[99]

Tazir punishments may be imposed on those who commit hadd or qisas offenses when hadd or qisas penalties cannot be imposed because of their strict procedural requirements.[100] Additionally, tazir includes acts which, though similar to offenses punishable as hadd or homicide, do not meet all of their requirements.[101] This would include, for example, the theft of property that does not meet the minimum value necessary to impose the hadd punishment.

III. THE 2003 QANUN AND THE JUDICIAL ENFORCEMENT OF KHALWAT

As discussed earlier, the first piece of legislation mandating compliance with Islamic norms in Aceh was passed in 2002.[102] Like all provincial legislation, this statute does not bear the usual Indonesian-Malay label for legislative enactments (Undang-undang), but is termed a "Qanun," a word drawn from the Islamic legal tradition.[103] The adoption of a recognizably Islamic label for the law is designed to establish its Islamic bona fides but, like many of the Islamization initiatives in Aceh, the label serves primarily to give an Islamic flavor to legislation that more closely resembles the law of contemporary Indonesia than the classical law of Islam. There is little in either the language, style, or format of the Acehnese Qanun that distinguishes them from other Indonesian laws or the statutes of many other countries around the world.

The title of the 2002 Qanun describes the content of the law as regulating the implementation of "Islamic Sharia in the Fields of Doctrine (Aqidah),[104] Ritual Practice (Ibadah), [105] and Markers of Identity

98. *Id.*

99. *See id.*

100. PETERS, *supra* note 66, at 66.

101. *Id.* at 66.

102. Qanun on the Observance of Islamic Law in the Fields of Doctrine, Ritual Practice, and Markers of Identity, Qanun No. 11 of 2002.

103. The Arabic word "qanun" was borrowed from Greek and has the same origin as "canon," the term that came to be used to refer to Catholic ecclesiastical law. *See* KNUT S. VIKOR, BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW 207 (2005). The Islamic legal tradition appropriated the word to refer to laws or regulations promulgated under the ruler's power to issue laws not inconsistent with Islamic law to maintain public order. *See id.* at 207-08.

104. The statutory definition of Aqidah states simply that what is meant is the teachings of "Ahlussunnah wal Jama'ah," which means Sunni Islam. Qanun on the Observance of Islamic Law in the Fields of Doctrine, Ritual Practice, and Markers of Identity, Qanun No. 11 of 2002, art. 7.

(Syi'ar)."[106] The purpose of the Qanun is described as "to guide and cultivate faith and devotion in individuals and society,"[107] "to inculcate understanding and sincere implementation of religious practice"[108] and "to promote and glorify actions that engender an Islamic environment and character."[109] The statute then defines both prohibitions and affirmative obligations on both governments and individuals with respect to these objectives.[110] Not all of these injunctions and prohibitions are enforceable by the state, but the Qanun also includes a section titled "Criminal Stipulations" that defines punishments for certain actions that conflict with its goals.[111] The penal provisions make punishable the acts of disseminating deviant understandings of Islam,[112] repeated and unexcused failure to observe the Friday prayer,[113] eating or drinking in a public place during the Ramadan fast,[114] and failure to conform to Islamic norms regarding proper attire.[115]

The form and language of these criminal provisions closely resemble the form and language of Indonesian national criminal law. Apart from the types of conduct made punishable, the most notable difference between the Qanun and Indonesian criminal law generally is in the type and characterization of the authorized punishments. The punishments prescribed by the 2002 Qanun are all classified as tazir, the term used in the classical doctrine for discretionary punishments imposed for actions not punishable as hudud or qisas, or in circumstances when the proof requirements for those crimes are not satisfied.[116] Violators of the penal provisions of the Qanun are subject to punishment by either imprisonment or caning.[117] The clarification to the 2002 Qanun explains the use of corporal punishment for

105. The Qanun defines Ibadah as [obligatory daily] prayer and the Ramadhan fast. *Id.* art. 8.

106. *Id.* art. 1(5). Unlike the Arabic terms used for belief (Aqidah) and ritual practice (Ibadah), the word Syi'ar is not a label associated with a particular body of Islamic doctrine or practice and does not have a standard meaning within the Islamic legal tradition. The Qanun defines the word to mean "all activities relating to the values of religious practice that glorify and exalt the implementation of Sharia." *See id.*

107. *Id.* art. 2(a).

108. *Id.* art. 2(b).

109. *Id.* art. 2(c).

110. *Id.* arts. 4-13.

111. *Id.* arts. 20-23.

112. *Id.* art. 20.

113. *Id.* art. 21(1).

114. *Id.* art. 22(2).

115. *Id.* art. 23.

116. PETERS, *supra* note 66, at 7.

117. Qanun on the Observance of Islamic Law in the Fields of Doctrine, Ritual Practice, and Markers of Identity, Qanun No. 11 of 2002, arts. 20-23.

violation of Islamic norms in terms of a combination of practical considerations and pedagogic benefits.[118] Punishment by caning is authorized for Islamic crimes in neighboring Malaysia, and Singapore punishes some non-Islamic offenses by caning.[119] Caning is not, however, used in Indonesia outside of Aceh.[120]

Both the term tazir and the use of caning as a form of punishment have their source in the Islamic legal tradition.[121] Caning, however, represents a blending of Islamic and indigenous Southeast Asian practices. As stated above, classical era Islamic doctrine specified flogging as one of the punishments for the hadd offense of zina. Corporal punishment with the use of a rattan cane was common in various parts of Southeast Asia prior to the arrival of Islam.[122]

Another criminal statute passed the following year prescribes rules for carrying out of the punishment of caning.[123] That Qanun stipulates that punishment by caning is to be carried out in a place where it can be witnessed by the general public and requires that the public prosecutor and a medical doctor be in attendance at the caning.[124] The law also contains precise requirements for the implement to be used in carrying out the punishment and the manner in which it is to be done. It specifies that caning is to be carried out with a one-meter length of rattan with a diameter of between .7 and 1 centimeter with an intact, undivided tip.[125] Caning is to be applied to a part of the body other than the head, face, neck, chest or genitals,[126] and must be done so as not to cause a wound.[127] Men are to be caned while standing and wearing thin clothing that covers their bodies from the naval to the knees. Women are to be seated and fully covered

118. *Id.* (General Elucidation). The Elucidation states,

> The threat of caning for those who commit [Islamic] crimes serves the goals of making perpetrators aware of their wrongdoing and at the same warning society at large against doing the same. It is hoped that punishment by caning will be more effective in accomplishing both objectives because persons punished in this way will fell shamed without bringing hardship to their families. Caning penalties also impose less financial burden on the government in comparison the punishments prescribed by the Penal Code. *Id*.

119. FEENER, *supra* note 35, at 233.

120. *Id.*

121. On the use of flogging in Islamic law see PETERS, *supra* note 66, at 35-36.

122. FEENER, *supra* note 35, at 233. *See also* ANTHONY REID, SOUTHEAST ASIA IN THE AGE OF COMMERCE, 1450-1680: THE LANDS BELOW THE WINDS 141 (1988) (offender sentenced to caning permitted to pay fine).

123. Qanun on Khalwat [Improper Covert Association], Qanun No. 14 of 2003, Part VIII.

124. *Id.* art. 28(1).

125. *Id.* art. 28(2).

126. *Id.* art. 28(3).

127. *Id.* art. 28(4).

when being caned.[128] An executive regulation promulgated by the Governor of Aceh in 2005 adds the further limitation that in applying the strokes the person carrying out the caning may not extend his hand above his shoulder or behind his back.[129] The evident purpose of these rules is to limit the pain and injury associated with the punishment. There are reports, however, that those who carry out the punishments do not always abide by these requirements.[130]

The 2002 Qanun also authorized the creation of an enforcement body, a kind of morals police called the Wiyatul Hisbah (WH).[131] The law defines the role of the WH as that of addressing infractions of Islamic Sharia by means of "reprimand" and "advice."[132] If after having received a reprimand the offender fails to repent or change his ways, the WH may turn the matter over to the police or a civil investigator. These officials may either prepare a case for submission to the court or dismiss the matter.[133]

To my knowledge there have never been any formal prosecutions for violations of the penal provisions of the 2002 Qanun, though the WH regularly takes action against women who violate the rules regarding proper Islamic attire. The first and so far the only laws that have served as the basis for formal criminal prosecutions in Aceh are three Qanun passed in 2003. These three laws define crimes involving the consumption, production, importation or sale of alcohol,[134] gambling and all activities that promote or facilitate gambling,[135] and an offense related to sexual morals called Khalwat.[136] As with the 2002 Qanun, the penalties for these crimes are assimilated to the categories of punishments in the classical doctrine.

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128. *Id.* art. 28(5).

129. FEENER, *supra* note 35, at 233.

130. A media report of the caning of five persons in Banda Aceh in December of 2015 includes a photograph in which the person wielding the cane appears to have extended his hand both above his shoulder and behind his back. Pelaku 'Mesum' dan Penjudi Dihukum Cambuk di Aceh [Khalwat and Gambling Perpetrators Punished by Caning in Aceh] (Dec. 28, 2015), http://www.bbc.com/indonesia/majalah/2015/12/151228_trensosial_aceh_cambuk. The same story also reports that one of the offenders, a female university student, fainted and was rushed from the scene in an ambulance. *See id.*; *see also* FEENER, *supra* note 35, at 233.

131. Qanun on the Observance of Islamic Law in the Fields of Doctrine, Ritual Practice, and Markers of Identity, Qanun No. 11 of 2002, Part VI:14.

132. *Id.* The general elucidation to the Qanun further explains that:

> The Wilayutal Hisbah as a supervisory institution is granted the role of warning, guiding, and advising, so that cases of contravention of this Qanun that are submitted to investigators to be followed up and forwarded to the courts are cases that have been through a process of warning and guidance toward the offender. *Id.*

133. FEENER, *supra* note 35, at 222-23.

134. Qanun on Consumption of Alcohol, Qanun No. 12 of 2003.

135. Qanun on Gambling, Qanun No. 13 of 2003.

136. Qanun on Khalwat [Improper Covert Association], Qanun No. 14 of 2003.

Drinking alcohol is punishable as a hudud offense, while those who facilitate the consumption of alcohol through production or distribution are subject to discretionary tazir punishments.[137] Neither gambling nor Khalwat was punishable as a hadd offense in the classical era, and the Qanun authorize only discretionary tazir punishments for these offenses.[138]

The word khalwat derives from an Arabic root meaning "hidden" or "isolated."[139] Qanun No. 14 of 2003 defines the offense of khalwat as follows:

> Khalwat is proximity in a secluded place of two or more legally responsible adults of the opposite sex who are not prohibited because of kinship from marrying and are not married to each other.[140]

This language is contained in Article 1 of the Qanun setting out definitions of statutory terms. Article 2 explains that the scope of the prohibition against khalwat includes "all actions, activities, and circumstances that could lead to the commission of zina."[141] The clarification accompanying the Qanun confirms that the prohibition is intended as a prophylactic measure. Zina, according to the clarification, is condemned in the harshest terms by Islam, and khalwat "constitutes a

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137. The hudud penalty for the consumption of alcohol is a maximum of forty strokes with a cane. Qanun on Consumption of Alcohol, Qanun No. 12 of 2003, art. 26(1). Those in the form of either imprisonment for a term of no less than three months and no more than one year or a fine of between Rp.25,000,000 and Rp.75,000,000. *Id.* art. 26(2).

138. The tazir punishment stipulated for individuals who engage in gambling is between six and twelve strokes with a cane. Qanun on Gambling, Qanun No. 13 of 2003, art. 23(1). Those who promote or facilitate gambling are punishable with imprisonment for a term of three months to one year or a fine of between Rp.15,000,000 to Rp.35,000,000. *Id.* art. 23(2).

The definition of khalwat is contained in Articles 1(20) and 2 of Qanun No. 14, but the operative criminal prohibitions are contained in three Articles, 4-6. Article 4, states simply that khalwat is "forbidden" (haram). Qanun on Khalwat [Improper Covert Association], Qanun No. 14 of 2003.

A violation of Article 4 is declared to be punishable by a tazir punishment of no less than three and no more than nine strokes with a cane and/or a fine of between Rp. 2,500,000 and Rp.10,000,000. *Id.* art. 22(1). Article 5 of the Qanun states that "every person is forbidden to commit khalwat," and Article 6 states that every person, group, government apparatus, and business is prohibited from facilitating the commission or khalwat or providing protection to those who commit khalwat. The penalties applicable to a violation of Articles 5 and 6 differ from those applicable to Article 4. A violation of Articles 5 or 6 is punishable by discretionary punishment of either imprisonment for a term of no less than two and no more than six months or a fine in the amount of between Rp.5,000,000 and Rp.15,000,000. *Id.* art. 22(1).

139. *Khalwat*, *in* ENSIKLOPEDI HUKUM ISLAM 898, 898 (1996).

140. Qanun on Khalwat [Improper Covert Association], Qanun No. 14 of 2003, art. 1(20).

141. *Id.* art. 2.

pathway or opening to the commission of zina."[142] Khalwat is therefore punishable as a "preventative" or "preemptive" measure based on the Islamic legal maxim that "a command to perform or refrain from some act includes a prohibition against actions leading to commission of that act."[143]

The prohibition against khalwat is based on language contained in the primary sources of Islamic—the Quran and the exemplary words and acts of the Prophet Muhammad or Hadith. The Quranic text that is cited in support of khalwat is Quran 17:32. That verse states, "Do not approach zina. Indeed, it is ever an immorality and evil as a way." According to one commonly quoted Hadith attributed to Ibnu Abbas, the Prophet Muhammad stated that a woman should not travel with a man unless she is accompanied by her husband or a non-marriageable male relation, and a man is prohibited from visiting a woman without accompaniment. The Prophet was then asked, "O Messenger of God, I intend to go to battle but my wife is planning to make the haj." The Prophet responded, Go and accompany your wife on the haj."[144] Another Hadith from Amir bin Rabi'ah states, "A man and woman are not permitted to be alone together, and this is not allowed because unless accompanied by a non-marriageable relative the third among them is Satan."[145]

The avowed purpose of the prohibition against khalwat is to prevent commission of zina. The statute does not, however, require proof of an intent to commit zina or of any other facts beyond simple physical proximity that are indicative of an intent to commit zina.[146] It need not be shown that the couple had a previous acquaintance or were together by pre-arrangement. Nor must it be shown that the couple were in a place conducive to the commission of zina.[147] On the face of it, a man and a woman who had no previous acquaintance but happened to find themselves together on an otherwise deserted street in the middle of the afternoon could be punished for khalwat.

The number of prosecutions for Islamic crimes in Aceh has always been small. The largest number of criminal cases brought to the Islamic

142. *Id.* para. 4 (General Elucidation).

143. *Id.* para. 8 (General Elucidation).

144. 3 THE TRANSLATION OF THE MEANINGS OF SAHIH AL-BUKHARI 65 (Muhammad Muhsin Khan trans., 1997). I have revised the wording of the translation.

145. *Khalwat*, *supra* note 139, at 899.

146. Qanun on Khalwat [Improper Covert Association], Qanun No. 14 of 2003, art. 1(20).

147. The Elucidation states that the occurrence of khalwat is not restricted "to places that are isolated and out of public view, but also can occur in the midst of a crowd, on the street or other places." *Id.* para. 5 (General Elucidation).

courts are prosecutions for gambling. [148] Though precise statistics are not available, the total number of khalwat prosecutions over the twelve years the law has been in existence is probably fewer than 100.[149] Most of those prosecutions, moreover, were in the first few years after the Qanun was passed.[150]

Based on my review of the relatively small number of publically available decisions in prosecutions for khalwat,[151] a large percentage of those charged under the statute were not simply alone together in a place where the commission of zina was possible but engaged in sexual intercourse.[152] One such case is a prosecution in 2009 in the Mahkamah Syar'iah for Tapatkuan.[153] The parties in the case were a man by the name of Didi Junaidi bin Ilhasmi and a woman named Hanisah binti Hasyimi.[154] The two were acquainted because they worked together; Hanisah was Didi's boss or supervisor.[155] The public prosecutor's graphic and seemingly unduly salacious statement of the facts contained in the indictment was as follows:

> On Monday, March 16, 2009 at about 5:00 p.m. Didi was at the home of Hasniah when Hasniah told Didi to call a repairman to fix Hasniah's broken television. Didi called a repairman and waited at Hasniah's house until 9:30 but he never arrived. While awaiting the repairman Hasniah

148. FEENER, *supra* note 35, at 175.

149. *Id*. at 174-75.

150. Cammack & Feener, *supra* note 62, at 42. As Michael Feener has pointed out, the relatively small number of cases formally presented to the court is not necessarily unusual when seen in the context of the deeper historical patterns in the implementation of Islamic law. FEENER, *supra* note 35, at 174-75. Moreover, the relative infrequency of formal prosecutions is in part a result of a considered decision by the Acehnese authorities to enhance the symbolic impact of prosecutions when they do occur. *See id.* at 176-77. The low number of prosecutions, according to Feener, is a reflection of the intent to use state enforcement of religious law as an instrument of public education directed toward official projects of social reform. *Id*. at 177.

151. The decisions of Indonesian courts are not systematically published. However, in recent years there has been an effort to make judicial proceedings more transparent, and some, though by no means all, court decisions are now available on either or both the website of the court that decided the case or the website of the Indonesian Supreme Court.

152. Mahkamah Syar'iyah Idi 02/JN/2008/MSy. IDI [7/1/2008] (Indon.) (zina); Mahkamah Syar'iyah Tapaktuan 03/JN/2009/MSyTtn [8/26/2009] (Indon.); Mahkamah Syar'iyah Takengon 03/JN/2010/MS-TKN [7/14/2010] (Indon.); Mahkamah Syar'iah Banda Aceh 04/JN/2008/MSy-BNA [8/21/2008] (Indon.) (indictment for zina dismissed because the prosecutor unable to produce the accused).

153. Mahkamah Syar'iyah Tapaktuan 03/JN/2009/MSyTtn [8/26/2009].

154. The facts of the case are taken from the decision of the appeals court which includes a thorough recitation of the proceedings of the lower court. Mahkamah Syar'iyah Aceh 03/JN/2010/MS-Ace [5/10/2010].

155. *Id.* at 3.

> took her children to their bedroom while Didi continued to wait for the repairman in the sitting room. Not long afterwards, Didi went into an adjoining bedroom that was unoccupied, removed his shirt, and lay down while still wearing his trousers. At about 10:00 p.m. Hasniah entered the bedroom where Didi was resting bringing a bottle of massage oil with her and lay down beside Didi on the bed. Hasniah then told Didi that her body ached and her head hurt and asked him to massage her. Didi sat up in the bed, Hasniah gave him the massage oil and lay on her stomach, and, using the massage oil, Didi proceeded to massage her from the bottoms of her feet to the top of her head which had the effect of sexually arousing Hasniah. On Hasniah's instructions, Didi removed his clothes and put on a sarong, and Hasniah did the same. They then engaged in intimate relations befitting husband and wife until Didi experienced an orgasm and ejaculated. The two then lay back and rested on the bed, but about ten minutes later a knock was heard at the door to the house. Hasniah told Didi to hide, but the crowd that had come to the house knew that they were together inside. The couple was then taken to the police station to be dealt with according to law.[156]

Both of the accused were found guilty.[157] Didi was sentenced to seven strokes with a cane while Hanisah received a sentence of nine strokes.[158] The convictions were upheld on appeal to the provincial court in Banda Aceh.[159] According to media reports that included a photograph of one of the accused and the person who performed the caning, the sentence was carried out on a stage set up outside the Istiqamah Mosque in Tapatkuan on November 21, 2014.[160] Nine other persons were caned at the same time, one for khalwat, three for drinking, and five for gambling.[161] The Deputy District Chief, members of the District Council, and hundreds of onlookers were reportedly present to witness the execution of the sentence.[162]

Adultery can be prosecuted as a crime under the Indonesian Penal Code.[163] Although the facts that were the basis for the khalwat prosecution

156. *Id.*

157. *Id.* at 2.

158. *Id.*

159. Mahkamah Syar'iyah Aceh 03/JN/2010/MS-Aceh [5/10/2010].

160. Heru Dwi S, 11 Pelanggar Syariat Islam Dicambu [11 Violators of Islamic Sharia Caned], ANTARA NEWS (Nov. 21, 2014), http://www.antaranews.com/berita/465523/11-pelanggar-syariat-islam-dicambuk.

161. *Id.*

162. 11 Pelanggar Syariat Islam Dihukum Cambuk [11 Violators of Islamic Sharia Caned], MEDANBISNIS (Nov. 22, 2014), http://www.medanbisnisdaily.com/news/read/2014/11/22/131169/11-pelanggar-syariat-islam-dihukum-cambuk/#.VoO9tZMrKRs.

163. INDON. PENAL CODE, art. 284(1).

of Didi and Hanisah would not support a prosecution for adultery under the Penal Code it is probable that some of the prosecutions for khalwat could have. Indonesian Penal Code Article 284(1) makes it a crime punishable by a maximum of nine months in prison for either a man or a woman to engage in sexual intercourse with a person of the opposite sex if he/she knows that the other party is married. Adultery under the Penal Code is what is called a "delik aduan" (crime on complaint), a crime that may be charged only if the aggrieved party requests that the prosecutor take action.[164]

The overlap between the National Penal Code provision on adultery and the Acehnese Qanun on khalwat is illustrated by a case that came before the Indonesian Supreme Court in 2012. The case arose out of the prosecution of a man named Dedi Saputra bin Edi Susanto for adultery in violation of Penal Code §284(1)2.a in the Civil Court for Banda Aceh, the court of general jurisdiction for most civil and criminal matters in Indonesia.[165] The charges were based on an act of sexual intercourse with the defendant's former girlfriend that occurred in the back room of an internet café where they had met to talk about the girlfriend's marital problems.[166] The defendant was convicted and sentenced to five months in jail, which was later increased to seven months on the prosecution's appeal to the Provincial High Court.[167] The defendant sought appeal in cassation in the Indonesian Supreme Court arguing, among other things, that his conviction under the Penal Code had to be overturned because he should have been prosecuted under the Qanun which, as a "special law," has priority over the Penal Code.[168] The Supreme Court denied the appeal but not on the ground that the defendant's actions were not in violation of the Qanun against khalwat. The Court did not dispute that the defendant could have been charged with khalwat rather than adultery; it ruled only that the prosecutor was not required to charge khalwat.[169]

The use of the khalwat statute to prosecute acts of adultery is entirely consistent with the goals of the statute. Proof of an act of sexual intercourse necessarily entails proof that the parties to the act were together under

164. The currently applicable Indonesian Penal Code dates from the colonial era when the Dutch Penal Code of 1886 was made applicable to certain segments of the population of the Indies. A new Penal Code has been in the works for more than a decade but passage of the law is not yet foreseeable.

165. Pengadilan Negri Banda Aceh 182/Pid.B/2011 [6/9/2011]. The facts of this case are taken from the summary of the proceedings contained in the decision of the Indonesian Supreme Court reviewing the case in cassation. Mahkamah Agung Republik Indonesia 68K/Pid/2012 [7/30/2012].

166. Mahkamah Agung Republik Indonesia 68K/Pid/2012 [7/30/2012] 1, 1-2.

167. *Id.* at 2-3.

168. *Id.* at 4-6.

169. *Id.* at 8.

circumstances that could lead to sexual intercourse. As stated above, however, the definition of khalwat would also seem to permit prosecution and punishment in circumstances where the realistic possibility of zina is very low. Though there is very little judicial interpretation of the khalwat law, available evidence indicates the courts are not prepared to give the statute that broad interpretation. That the statute does not mean all that it says is apparent from a decision by the Mahkamah Syar'iah for Kutacane in 2010 in a case involving the prosecution of a man and a woman for khalwat.[170] In order to convey a sense of the character and style of the decisions rendered by Aceh's Islamic courts in criminal cases I include here translations of significant parts of the decision. The indictment filed by the prosecutor and incorporated into the decision alleged,

> That on or about Wednesday, 28 April 2010, at about 21:30, Kasnuddin[171] together with Nurhayati, or at another time in the month of April 2010 in the Sub-district of Bambel, District of Aceh Tenggara, or at another place within the territorial jurisdiction of the Islamic Court for Kutacane, committed khalwat in the following manner:
>
> At the time and place stated above, Nurhayati left her house, without the permission of her husband, for the supposed purpose of buying noodles, and was met by Yusmani who accompanied her to where Kasnuddin was waiting for her, having parked his motorcycle on the right side of the Medan-Kutacane Highway, whereupon Nurhayati told Yusmani to leave in the direction of Kutacane, and when they felt themselves to be safe, Kasnuddin and Nurhayati, both legally responsible persons of the opposite sex who were not prohibited marriage partners but not married to each other, left the main road about five meters in the direction of the entrance to a lumber mill, then entered a dark place in the forest where a passerby would never suspect anyone to be in order to commit hidden acts, then about fifteen minutes later, the husband of Nurhayati, namely, Jakfaruddin, who had been searching for Nurhayati, came upon Kasnuddin in the dark hiding place, and then found Nurhayati after Kasnuddin had left the scene.[172]

170. Mahkamah Syar'iyah Kutacane 27/JN.B/2010/MS-KC [12/20/2010].

171. To protect the privacy of the parties and witnesses, names are often, though not invariably, blacked out in the copies of decisions that have been uploaded to court websites. The names of the parties in the decision under discussion have been removed from copy of the decision that I obtained, so the names used here are pseudonyms.

172. *Id.* at 3-4.

The case came to trial in late 2010. The two accused appeared at the hearing and were represented by an attorney.[173] The prosecution presented the testimony of two witnesses—Jakfaruddin, the husband of Nurhayati, and Yusmani, a female friend of Nurhayati who had accompanied her on the evening of the alleged crime in an outing purportedly for the purpose of buying noodles.[174] The only other evidence presented at the hearing was the statements of the two accused.[175] As is typical of criminal trials in Indonesian courts, the statements of the accused were not under oath. In its decision in the case the court presented the following statement of its findings of fact.

> Considering, that Jakfaruddin stated that he discovered Kasnuddin and Nurhayati at the entrance to the lumber mill at about 21:30 on 28 April 2010, but Jakfaruddin first met Kasnuddin with whom he exchanged sharp words after which Kasnuddin left the scene, at which point Nurhayati appeared from a spot about two meters from where Kasnuddin had been discovered, and when he searched the person of Nurhayati he found a blouse in a plastic bag inside the clothing of Nurhayati, but Jakfaruddin did not know what they had done beforehand;[176]
>
> Considering, that Yusmani stated that at about 21:30 on 28 April 2010 she accompanied Nurhayati to buy noodles, but when they arrived at the entrance to the lumber mill, Nurhayati told Yusmani to stop the motorcycle, and Kasnuddin was already there; after Kasnuddin and Nurhayati spoke to each other Yusmani was told by Nurhayati to take the motorcycle and buy noodles from the noodle stand at the bridge about 100 to 120 meters away, and when the witness left to buy the noodles she saw Kasnuddin and Nurhayati walking toward the entrance to the lumber mill;[177]
>
> Considering, that according to the testimony of Yusmani approximately two or three minutes passed from the time she left Kasnuddin and Nurhayati until she returned to the location of the incident, and on this matter the testimony of the witness was supported by the fact that the

173. *Id.* at 3.
174. *Id.* at 5-11.
175. *Id.* at 12-15.
176. *Id.* at 20.
177. *Id.* at 20-21.

> distance to the noodle stand was about 100 to 120 meters and Yusmani was on a motorcycle;[178]
>
> Considering, that based on the testimony of Yusmani it can be determined that the meeting between Kasnuddin and Nurhayati was very short lasting about two or three minutes;[179]
>
> Considering, that Kasnuddin stated that all that occurred when he and Nurhayati met was an ordinary conversation, in which Nurhayati complained to Kasnuddin about the problems at home and that the conversation lasted no longer than three minutes because at that point Jakfaruddin and Yusmani came looking for Nurhayati;[180]
>
> Considering, that according to the statement of Nurhayati, the only thing that happened between Kasnuddin and Nurhayati was they had an ordinary conversation for two or three minutes at which point Jakfaruddin and Yusmani showed up and because she was afraid Nurhayati hid in the dark.[181]

In its analysis of whether the facts established at the hearing proved the defendants' guilt, the court wrote:

> Considering, that with respect to the second element [of the crime of khalwat] "is forbidden to commit khalwat," in line 20 of Article 1 Qanun No. 14, 2003 Concerning Khalwat (Mesum) it is stated that Khalwat is "the association in a secluded place of two or more legally responsible adults (mukallaf) of the opposite sex who are marriageable but unmarried," and this understanding of khalwat is limited by the scope of the prohibition stated in Article 2 Qanun No. 14, 2003 Concerning Khalwat/Mesum, namely, "all activities, actions, and circumstances tending toward the commission of zina";[182]
>
> Considering, that the understanding of khalwat contained in Article 1(20) of Qanun No. 14, 2003 is inseparable from the scope of the prohibition against khalwat as described in Article 2, and for that reason the Court

178. *Id.* at 21.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 19.

> concludes that Qanun No. 14, 2003 concerning Khalwat/Mesum only punishes actions that tend to lead to the commission of zina;[183]
>
> * * *
>
> Considering, that based on the statements of the witnesses, as well as those of the accused, the Court concludes that it has not been proven that the act of concealment, khalwat by Kasnuddin and Nurhayati, was directed toward the commission of zina, because they talked for no more than two or three minutes before they were accosted by Jakfaruddin, husband of Nurhayati, and Yusmani so that the defendants never had a chance to engage in conduct tending toward the commission of zina. This means that the act of khalwat charged against the defendants was no more than an attempted crime and not a crime that had been completed.[184]

It is not entirely clear from the decision just what the court found lacking in the prosecution's evidence. The court does not explicitly require that the evidence prove an intent to commit zina in order for the defendants to be found guilty. The court's statement that the evidence proved only an attempt rather than a completed crime based on the fact that "the defendants never had a chance to engage in conduct tending toward the commission of zina" seems contrary to the language and purpose of the khalwat prohibition. The premise of the law is that being together in an isolated place is punishable conduct tending toward the commission of zina. Although the court does not expressly require intent and suggests that further conduct is necessary for the crime to be completed, the court's decision to acquit is probably best understood as based on a finding that the prosecution's evidence failed to establish that the couple had gone to the location with the intent of engaging in sex.

The complete lack of certainty with respect to so fundamental a matter as what, if any, intent is required for conviction is an indication of the extent to which Aceh's system of criminal justice is being shaped by the Indonesian national legal system. The treatment of mens rea in Indonesian criminal law is in a state of utter disorder.[185] Analysis of the mental elements of crimes or of how the required mental state relates to conduct,

183. *Id*. at 19-20.

184. *Id*. at 21-22.

185. For a discussion of the debased condition of Indonesian criminal law in a different context, see Mark Cammack, *Crimes Against Humanity in East Timor: The Indonesian Ad Hoc Human Rights Court Hearings*, *in* TRIALS FOR INTERNATIONAL CRIMES IN ASIA 191, 209-18 (Kirsten Sellars ed., 2015).

result, and circumstance elements is entirely lacking in most criminal court decisions. Courts typically treat intent as if it were an independent, free-standing fact that exists and must be proven without reference to some action or other object.

The absence of certainty and consistency within Indonesian criminal law is reflective of the corrupt and degraded state of Indonesian law generally. The country's legal system began to decline during the period of Sukarno's "Guided Democracy" from 1957-1965, and continued to deteriorate over the course of the dictatorial Suharto regime from 1965-1998.[186] Over the course of four decades of executive branch domination of the judiciary, law as such was rendered almost entirely irrelevant. When the long period of judicial subservience finally ended in 1998, the judiciary was both thoroughly corrupt and profoundly incompetent, a condition from which it has yet to recover. For the first three decades after independence, Indonesia's Islamic courts functioned independently of the parallel civil system, and the Islamic judiciary was largely isolated from the forces that compromised and corrupted the country's secular legal system.[187] Another difference between the Islamic and secular legal systems is that the work of the Islamic courts, which focuses almost entirely on matrimonial matters, relies on a different set of judicial competencies from what is required of judges in the secular system. Judges on Indonesia's Islamic courts perform important and often challenging tasks, but the day-to-day operation of the courts does not typically involve the reasoned application of general legal rules to a variable set of facts, and rarely requires judges to resolve issues through the analysis of legal authorities. While the resolution of family law matters emphasizes the discovery of individualized solutions to particular circumstances, law and legality are central to criminal law. Unfortunately, Indonesia's Islamic court judges are no more capable of engaging in basic legal reasoning than their secular counterparts. The problem is made worse by the fact that in adjudicating criminal law matters, Islamic court judges often seek to mimic the approach of the generally higher status civil judiciary.

The record of formal prosecutions under the khalwat statute is not necessarily indicative of the impact of the law on Acehnese society.[188] Far

186. The decline of the Indonesian judiciary is detailed in SEBASTIAAN POMPE, THE INDONESIAN SUPREME COURT: A STUDY OF INSTITUTIONAL COLLAPSE (2008).

187. *See* Cammack, *supra* note 64, at 154.

188. FEENER, *supra* note 35, at 175. Of the 104 cases handled by the WH of Banda Aceh in 2010, only one resulted in a formal prosecution. *Id.* Additionally, some of those who have been formally charged with khalwat escape prosecution because the prosecutor fails to produce the

more cases of khalwat are dealt with informally than are prosecuted in court. A report prepared by Human Rights Watch in 2010 reports that Wilayatul Hisbah has focused its enforcement efforts on two of the four Qanun authorizing criminal penalties: Qanun No. 11/2002 that deals with proper Islamic dress and other matters relating to orthodoxy and ritual practice, and Qanun No. 14/2003 on Khalwat.[189] The overwhelming majority of khalwat cases are never formally charged. Michael Feener reports, for example, that in 2010 the WH responded to a total of 104 incidents involving potential violations of Islamic criminal statutes.[190] Approximately half were taken to the WH office for moral instruction and/or a reprimand, and about one half were turned over to community leaders to be dealt with in accordance with local custom (adat).[191]

The penalties imposed informally by local authorities can in some cases be harsher than those authorized following conviction in court.[192] While some offenders are simply admonished for their misdeeds, there are reports that some couples found to have committed khalwat have been forced to marry.[193] Local officials also sometimes impose their own punishments.[194] This could include physical punishments, payment of a penalty to the village, being forced to walk around the village in a type of shaming ritual, or being doused with sewer water.[195]

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accused at the court hearing. That is not, of course unique to Aceh; persons accused of crimes in the U.S. often escape prosecution by absconding. But the number of decisions in which it is reported that the case failed to go forward because the accused were not present suggests that the frequency of failed prosecutions resulting from the absence of the accused is especially high. In at least one case, a defendant who was convicted of khalwat and sentenced to be caned avoided punishment because the authorities failed to deliver him to the place in which the punishment was to be meted out. While not present on the platform erected to punish him, there were reports that the accused was seen mingling with the crowd that had gathered to witness his caning. *Id.* at 181.

189. *Policing Morality: Abuses in the Application of Sharia in Aceh, Indonesia*, HUMAN RIGHTS WATCH (Nov. 30, 2010), https://www.hrw.org/report/2010/11/30/policing-morality/abuses-application-sharia-aceh-indonesia. The report cites data showing that in 2009 there were 3701 Sharia violations. *See id.* The largest number of cases (2689) involved violations of Qanun No. 11/2002, but the second largest category (836) was for violations of khalwat. *See id.* The emphasis placed on violations of the khalwat law is confirmed by Michael Feener, who reports that the media contains reports of violations of the khalwat statute on about two out of every three days. FEENER, *supra* note 35, at 175.

190. FEENER, *supra* note 35, at 175.

191. *Id.*

192. *Id.* at 176.

193. *Id.*

194. *See id.*

195. *Policing Morality: Abuses in the Application of Sharia in Aceh, Indonesia*, *supra* note 189; FEENER, *supra* note 35, at 175-76.

IV. THE 2014 ISLAMIC CRIMES LAW

In 2014 the legislature for Aceh passed a more comprehensive criminal law Qanun that includes the three offenses contained in the 2003 Qanuns and adds seven new Islamic crimes.[196] All seven of the new crimes defined in the 2014 Qanun relate to matters of sexual morality.[197]

For analytical purposes, the eight sex offenses contained in the 2014 Qanun can be grouped into three general categories. The first category consists of crimes that are punishable as hudud in the classical doctrine. Consistently with the traditional doctrine, two of the newly codified offenses—zina and qadzaf—are punishable as hudud under the Qanun.[198] The Qanun defines zina as "consensual sexual intercourse by one or more males with one or more females who are not married to each other."[199] Qadzaf is not a sex offense per se, but a crime involving a violation of sexual honor.[200] The crime is committed by making an accusation that another person has committed zina when the accusation cannot be supported with the testimony of four witnesses.[201]

The statute authorizes a hudud punishment for these crimes in the form of 100 strokes for zina[202] and eighty strokes for qadzaf.[203] The statute also authorizes the infliction of additional discretionary punishments when there are other aggravating factors. A person who commits zina with a child, for example, is subject to a fixed punishment of 100 strokes plus discretionary punishments of an additional 100 strokes, a fine equal to the value of 100 grams of gold, or imprisonment for a period of ten months.[204]

The crime of zina is subject to proof requirements not applicable to the other crimes in the Qanun. As discussed above, the classical era doctrine requires that hudud offenses be proven by direct eyewitness testimony or the confession of the accused. The standard of proof for zina is particularly onerous. Rather than the usual two eyewitnesses, conviction for zina

196. Qanun on Criminal Law, Qanun No. 6 of 2014.

197. *See id.*

198. *Id.*

199. *Id.* art. 1(26).

200. The crime of qadzaf is based on Quran 24:23. That verse was revealed after the Prophet's wife Aisha was accused of committing zina. N.J. COULSON, A HISTORY OF ISLAMIC LAW 13 (1964). The verse states:

> "Lo, as for those who traduce virtuous, believing women who are careless, cursed are they in the world and the Hereafter; Theirs will be an awful doom."

201. Qanun on Criminal Law, Qanun No. 6 of 2014, art. 1(31).

202. *Id.* art. 33(1).

203. *Id.* art. 57(1).

204. *Id.* art. 34.

requires the testimony of four witnesses to having observed the act of criminal conversation. The Qanun on criminal procedure enacted in 2013 extends the strict requirements for proof of hudud offenses to prosecutions under the Qanun for zina.[205]

The second category includes the crime of khalwat[206] and a new offense called ikhtilath. Like khalwat, ikhtilath is in essence (though not in name) an attempted or inchoate act of zina. The statute defines ikhtilath as, "consensual necking, petting, hugging, and kissing in private or in public between a man and a woman who are not husband and wife."[207]

Both khalwat and ikhtilath are subject to tazir punishments only. The punishment for khalwat in the 2014 Qanun is slightly greater than that prescribed in the 2003 law—a maximum of ten strokes with a cane, a maximum fine of 100 grams of gold, or imprisonment for a maximum of ten months.[208] Ikhtilath is punishable by a maximum of thirty strokes, a fine of no more than 300 grams of gold, or imprisonment for a maximum of thirty months.[209] The more severe punishment for ikhtilath is presumably based on the fact that the parties have engaged in physical touching and have therefore proceeded further along the path leading to zina than parties who are simply found alone together.

The other four sex offenses contained in the 2014 Qanun are not as clearly rooted in classical era rules. Two of the new sex crimes involve consensual relations between persons of the same sex. A crime called liwath punishes consensual sexual relations between men[210] and a crime called

205. Qanun on Criminal Procedure, Qanun No. 13 of 2013, art. 182(5).

206. Khalwat is defined in Article 1(23) of the Qanun as, "two persons of the opposite sex who are not prohibited because of kinship from marrying but are not married to each other being together in a non-public or secluded place leading toward the commission of illicit sexual relations (zina)."

This definition is more artfully worded and more complete than the definition contained in the 2003 Qanun, but does not appear to alter the definition of the offense. The most significant difference in the two definitions is the inclusion in the 2014 law of the requirement that to be punishable the conduct must "lead toward the commission of zina." Although this language was not included in the definition of the crime in the 2003 enactment, it is unlikely that the reference to zina was intended to alter the definition of the conduct that constitutes the offense. As noted above, the 2003 Qanun on khalwat included a provision specifying the scope of the prohibition against zina as including all conduct leading toward the commission of zina. The wording of the 2014 law simply consolidates the requirements in the definition of the offense.

207. Qanun on Criminal Law, Qanun No. 6 of 2014, art. 1(24).

208. *Id.* art. 23(1).

209. *Id.* art. 25(1).

210. Liwath is defined in Article 1(28) as "consensual penetration of the anus of a man with the penis of another man." *Id.* art. 1(28).

musahakah punishes consensual sexual relations between women.[211] Liwath and mushakah are subject to tazir punishments only, but the tazir punishment by caning for these crimes is the same as the hudud punishment for zina. Both crimes are punishable by a maximum of 100 strokes, a fine of no more than 1000 grams of gold, or incarceration for a term of no more than 100 months.[212]

The inclusion of liwath and musahakah in the 2014 Qanun is a reflection of the growing influence in Indonesia of literalist and puritanical interpretations of Islam in shaping public debates about religion and morality. The two remaining Islamic crimes added in the 2014 Qanun—rape and sexual harassment—suggest the influence of ideas from the West. Unlike the other eight crimes defined in the statute, which all have Arabic language labels, the words used as labels for these offenses are derived from either Malay or English. The label for the crime of rape is "pemerkosaan,"[213] the Malay word commonly used for rape in Indonesian. The label for sexual harassment—"pelecehan seksual"[214]—is a direct translation of the English term.

The crime of rape is included in the Indonesian Penal Code and was therefore punishable prior to the passage of the 2014 Qanun. However, the definition of rape in the Qanun is broader than the Penal Code and encompasses conduct not punishable under the language of the Penal Code provision.[215] Rape is punished more harshly than any other crime under the Acehnese Qanun. Rape of a child is punishable by at least 150 but no more than 200 strokes, a fine of at least 1500 but no more than 2000 grams of gold, or a prison term of from 150 to 200 months.[216]

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211. Musahakah is defined in Article 1(29) as the act of "consensual touching between two or more women of the vagina or another body part for the purpose of sexual arousal or pleasure." *Id.* art. 1(29).

212. *Id.* art. 63(1-3) (liwath); *id.* art. 64(1-3) (musahakah). Additional punishments are authorized for second offenses (Article 63(2) (liwath) and Article 64(2) (musahakah)) and when the other party is a child (Article 63(3) (liwath) and Article (64(3) (musahakah)).

213. *Id.* art. 1(30).

214. *Id.* art. 1(27).

215. The Indonesian Penal Code defines rape as "the use of force or threat of force to compel a woman who is not the perpetrator's wife to engage in sexual intercourse." PENAL CODE, art. 285. The Qanun defines rape as,

> Sexual contact between either the penis of the offender or another object and the vagina or anus of the victim or between the vagina or anus of the victim and the mouth of the offender or between the mouth of the victim and the penis of the offender accomplished by force or threat.

Qanun on Criminal Law, Qanun No. 6 of 2014, art. 1(30).

216. *Id.* art. 50.

The term sexual harassment was not used as the label for a criminal act under Indonesian law prior to the enactment of the 2014 Qanun. The Indonesian phrase "pelecehan seksual" is a direct translation from the English, but the conduct proscribed as sexual harassment in the Qanun does not involve harassment as that word is commonly used in U.S. law. The Qanun defines sexual harassment as "crude or immoral acts intentionally done in a public place or in the presence of another person without that person's consent."[217] The crime is punishable with a tazir penalty of up to forty-five strokes with a cane, a fine not exceeding 450 grams of gold, or a maximum prison term of forty-five months.[218] The punishments authorized for sexually harassing a child are double the punishments for harassing an adult.[219]

In addition to prescribing punishments for the ten core crimes defined in the Qanun, the 2014 law provides for more severe punishments when there are aggravating circumstances present. A second offense is punished more harshly than a first offense. The law also imposes more severe punishments for crimes committed against certain categories of victims.

The Qanun also authorizes punishment for aiding and abetting, promoting, or compelling the commission of the crimes defined in the statute.[220] The law states that the penalty for aiding and abetting shall be the same as the base penalty for that crime,[221] the penalty for promotion is one and one-half times the base penalty,[222] and the penalty for compelling the commission of one of the defined offenses is twice the base penalty for that offense.[223]

The 2014 statute recognizes a number of defenses that are differentiated on the basis of whether they provide a justification (alasan pembenar) or excuse (alasan pemaaf) for committing the proscribed act. There is just one defense in justification. An employee cannot be punished for crimes committed in the performance of the employee's duties if commission of the crime was ordered by a superior.[224]

The statute recognizes a number of excuse defenses. The commission of a crime under the statute is excused if the crime was committed under

217. *Id.* art. 1(27).
218. *Id.* art. 46.
219. *Id.* art. 47.
220. *Id.* art. 6.
221. *Id.* art. 6(1).
222. *Id.* art. 6(2).
223. *Id.* art. 6(3).
224. *Id.* art. 9.

duress,[225] if the perpetrator suffers from mental illness,[226] and if the crime was committed in a good faith but mistaken belief that its commission was pursuant to the valid order of a superior.[227] The statute also contains one defense that applies exclusively to khalwat and another defense that applies to the crimes of khalwat and ikhtilath. A person cannot be punished for khalwat based on his or her presence together with a fellow employee at the workplace or for being together in a residence with another resident,[228] and one who commits khalwat or ikhtilath while giving assistance to someone in danger cannot be punished for those crimes.[229] This last defense would apply, for example, in a situation where a drowning woman is pulled from the water by an unrelated man.

The drafters of the 2014 Qanun gave a great deal effort to the creation of an elaborate penalty scheme for the crimes defined in the law. The drafters' particular concern with respect to punishment has its source in features of the classical era literature. As noted, the classical era doctrine categorizes crimes or wrongs based on the type of punishment associated with that crime. The defining feature of the crimes categorized as hudud is that they carry fixed and invariable punishments that are stated in the primary sources. Because the hudud penalties are contained in divinely revealed texts, they are not subject to change or reinterpretation. The hudud punishments contained in the revealed sources also affect the severity of tazir punishments. This is based on the general principle that hudud punishments define the maximum permissible penalty for all actions subject to hudud.

The penalty structure prescribed in the 2014 Qanun is based on an elaborate set of calculations used to convert classical era punishments into their modern equivalents. Classical era doctrine recognized three forms of punishment—death, flogging, and the payment of blood money. The Acehnese criminal Qanun also recognize three types of punishment—caning, imprisonment, and payment of a fine. In specifying penalties the drafters of the 2014 Qanun sought to fix the severity of these contemporary penalties so as to be commensurate with the punishment prescribed in the classical doctrine. Based on the penalties prescribed in the classical law for violation of hudud offenses and the principle that tazir punishments may not exceed the hudud punishment for the same offense, the drafters devised a

225. *Id.* art. 10(a).
226. *Id.* art. 10(b).
227. *Id.* art. 11.
228. *Id.* art. 12.
229. *Id.* art. 13.

method for converting the punishments prescribed in the classical doctrine to their contemporary equivalents—caning, incarceration, or a monetary fine.

The methodology used to calculate these equivalents is explained in the elucidation accompanying the Qanun. The drafters first developed a method for calculating equivalences among the three classical era punishments.[230] This means, for example, determining what amount of blood money is equivalent to flogging with 100 lashes or the death penalty. To do this the drafters used the maximum permissible sentence for each type of punishment as a point of comparison. Punishment by execution, the penalty for intentional murder, and blood money in the amount of 100 adult male camels are both considered to be the maximum for each of those types of punishment.[231] The most severe flogging penalty recognized in the classical legal literature is 100 lashes, the hudud punishment for zina. Although this is the maximum number of lashes prescribed in the classical law, it is not regarded as establishing an outer limit for punishment by flogging. This conclusion is based on the drafters' judgment that zina is not the most serious criminal act involving a violation of sexual morality. The most serious sex crime, according to the Qanun, is rape.[232] The maximum punishment by flogging, therefore, is the penalty for rape. Although the classical authorities do not speak to that issue, the drafters conclude that the maximum punishment by flogging is 200 lashes.[233] This is based on the assumption that zina is exactly one-half as serious as rape, and the punishment for rape should therefore be double the punishment for zina.

Having determined the maximum penalty for the three types of classical era punishments, the next step is to translate these maximum punishments into their equivalents in modern forms of punishment. Being struck with a cane is considered the same as flogging with a whip. Since the maximum allowable flogging punishment is 200 stripes, the maximum number of strokes that may be imposed is also 200.

The modern equivalent of payment of blood money is payment of a fine. The maximum amount that can be assessed by fine is calculated by reference to the maximum blood money of 100 adult male camels. According to Hadith, at the time of the Prophet the value of 100 camels was equal to approximately 1000 gold dinars which, based on the current value

230. *Id.* para. 22 (General Elucidation).
231. *Id.*
232. *Id.*
233. *Id.* para. 21.

of gold, is equal to approximately 4200 grams of pure gold.[234] For ease of calculation, this figure is rounded down to 4000.[235] An adjustment in the amount of fine that may be imposed is also made to take account of economic circumstances in Aceh. In light of the economic difficulties faced by many Acehnese, the drafters conclude that a fine of 4000 grams of gold is unduly harsh. The maximum fine is reduced by half to equal the value of 2000 grams of pure gold.[236]

The drafters calculate the maximum allowable prison term by reference to the maximum sentence authorized in the Indonesian Penal Code.[237] The maximum prison term permitted by Indonesian law is fifteen years, which is equal to 180 months. For ease of calculation, once again, this figure is rounded up to 200.[238]

It is assumed that the maximums for each of the three forms of classical era punishments are equivalent with each other, and that the maximum for classical era punishments are equivalent to the maximum for the three modern forms of punishment. Thus, punishment by death is equal to payment of full blood money which is equal to flogging with 200 strokes, and 200 strokes with the cane is equal to a fine in the amount of 2000 grams of gold or incarceration for a term of 200 months. The equivalence across categories applies not only to the maximum punishments but also to fractional increments of those maximums. Thus, punishment with 100 strokes is equal to a fine of 1000 grams of gold or incarceration for a term of 100 months, and ten strokes equals a fine of 100 grams of gold or 10 months incarceration. The result is an elegant structure of penalties in which the maximum punishment for a particular crime is defined as a fractional portion of the maximum permissible punishment, and each of the three authorized forms of punishment has a precise equivalent in the other two punishments, calculated based on a ratio of one stroke equals a fine of ten grams, which is equal to imprisonment for one month.

CONCLUSION

The implementation of Islamic criminal law in Aceh is largely, though not entirely, an effort to define and mark a distinctive Acehnese identity. The use of Islam as the anchor for Acehnese identity is rooted in a memory of the region's past glory and the role that Islam played in framing its

234. *Id.* para. 23.
235. *Id.*
236. *Id.* para. 24.
237. *Id.* para. 21.
238. *Id.*

relationship with the rest of the world. The criminal law can be a potent tool for the construction of social identities.[239] That may be especially true of Islamic criminal law. As Brinkley Messick has written, the enforcement of hadd penalties serves as "a key summarizing symbol, shari'a shorthand for the existence of legitimate government."[240] The spectacle of inflicting corporal punishments in the name of Islam provides a dramatic and forceful manifestation of the power of the ruler and the truth of the principle that supports his rule.[241]

Public discussions of Islamic law relating to crimes focus almost exclusively on the question *whether* Islamic criminal law shall be enforced and give little, if any, attention to the question *what* Islamic criminal law is. This focus on whether rather than what, which is characteristic of discussions of the subject within the Muslim world as well as among non-Muslims, reflects widely held assumptions about the nature of Islamic law. Little attention is given to questions about the content or procedures of Islamic criminal law because it is assumed that the law is a fixed and definite essence, and that programs for the implementation of Islamic criminal law simply activate the machinery for the enforcement of the law.

An examination of Islamic criminal law in Aceh makes clear that these assumptions are mistaken. The criminal Qanun in Aceh reflect the influence of a variety of contemporary and historical factors. The drafters of the Qanun were plainly concerned to maintain continuity with the historical tradition of Islamic law. But the Acehnese Qanun also show the imprint of contemporary influences. The drafters were clearly sensitive to the conditions and concerns of contemporary Aceh and the relevance of modern ideas and institutions to Acehnese society.

239. *See generally* DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 23-46 (1990) (discussing the role of punishment in promoting social solidarity).

240. BRINKLEY MESSICK, THE CALLIGRAPHIC STATE: TEXTUAL DOMINATION AND HISTORY IN A MUSLIM SOCIETY 51 (1993).

241. Iskandar Muda, the seventeenth century ruler revered as the greatest of Aceh's sultans, had two drunken Acehnese executed by pouring molten lead down their throats. REID, *supra* note 122, at 143.