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Chapter 1

Sharia: From global to local

1.1 Introduction

Sharia has been central for Muslims since the time of the prophet to the present. Most Muslims believe that Sharia deals with all aspects of their life. However, the history of Sharia shows that categories of Sharia vary depending on time and place. Through the ages, Sharia has developed and it has also been confronted with various challenges. The most recent developments in Sharia show that it contests various values and laws, including issues surrounding its position within the legal system of a nation state.

This chapter aims to present the position of Sharia in Muslim countries; starting from a global picture and ending at the latest developments in Minangkabau, West Sumatra. To this end, the chapter begins with a brief discussion regarding the concept of Sharia. Subsequently, it presents the position of Sharia in a number of Muslim countries, which, in turn, will illustrate its position within the Indonesian legal system. This will also outline elements of Sharia that have been legalized and incorporated into the national law. Crucially, this chapter also discusses the situation since the government implemented a policy of decentralization and regional autonomy in 2000 that has resulted in the legislation of Sharia for provincial and regional/municipal laws. It also discusses the validity of provincial or regional /municipal law and the extent to which central government still has the authority to control these laws if they are in contradiction with the constitution or other, higher ranking laws. In the final subsection I

will present a brief history of Sharia within West Sumatran society. The chapter ends with conclusions on the issues presented.

1.2 The concept of Sharia

Currently, the word Sharia is widely used to refer to the rules or regulations that determine how Muslims behave and conduct their lives. Principally, these rules and regulations are derived from two main sources of Islamic teachings, the Quran and ḥadīth. The scope of these rules and regulations has been gradually extended by Muslim scholars (*faqih/fuqahā*), legal advisers (*mufti*) and judges (*qāḍī*). The Quran and ḥadīth clearly indicate that the word Sharia applies to the rules and regulations that set out how to behave and to live.

The word Sharia (*Sharā'i*, plural) originates from *sh-r-*, meaning, among other things, 'water hole, drinking place; approach to a water hole' (Wehr 1979:544). If this is interpreted as a well-trodden path for man and beast to a source of water in an arid desert environment then one can appreciate why this term became a metaphor for Muslims and a whole way of life ordained by God (Weis 1998:17). The Quran mentions a word related to Sharia in five verses and the word Sharia itself occurs in the chapter of *al-Jāthīya*/the Kneeling down (45): 18, which designates a path. The cognate *shir'a* occurs once in the chapter of *al-Mā'ida*/the Table spread (5): 48 and parallels *minhāj*, meaning the way or a path. The root *sh-r-a* appears in verb form twice in the chapter of *al-Shūrā*/Consultation (42): 13 and 21. Lastly, the word *shurra'an* appears in the chapter *al-'A'rāf*/the Heights (7): 163 in relation to rebels ('Abd al-Bāqī 1988:378). In the ḥadīth the word *Sharia* occurs once in the ḥadīth of Ibn Ḥanbal. In the plural form it appears about a dozen times, including *al-imān wa sharā'i*, *sharā'i al-islām*, *wa sharā'i wa ḥudūda* and *al-Islām wa sharā'i'ahu* (Wensinck 1955:101). Thus, Sharia is the most frequently used term in both

the Quran and the ḥadīth for expressing the rules, regulations and system of rules relating to behavior and conduct.

At the 2nd/8th century, the word Sharia was seldom applied by Muslim scholars. Indeed, the word *dīn* was used to describe Muslims' activities. This term was not only used in reference to dogma but also with regard to the law (Rahman 1979:102). For example, in *Risāla*, al-Shāfi'ī (d. 820) makes little use of the word Sharia or *Shar'*. The scholar al-Ghazālī (d. 1111) uses the word in *al-Mustaṣfā* in relation to *shar'unā* (our law) and *Shar'u man qablanā* (the law of those before us) (Celder 1997:322). In the 8th/14th century, Muslim scholars use this word widely in reference to rules or regulations relating to conduct or behavior. For instance, al-Shāṭibī (d. 1388) uses the word Sharia as a central theme in *al-Muwāfaqāt fī 'uṣūl al-sharī'a*. He defines it as rules that regulate conduct (*af'āl*), ways of speaking (*aqwāl*) and intention (*i'tiqād*) (al-Shāṭibī 2003). A more contemporary scholar, 'Abd al-Wahhāb Khallāf (d. 1956) defines Sharia as a set of rules ordained by *Shāri'* (the Law Makers, God) dealing with the conduct (*af'āl*) of *mukallaf* which are either imposed (*ṭalaban*), optional (*takhyīran*) or conditional (*waḍ'an*) (Khallāf 1992:100).

Muslim scholars categorize Muslims' conduct (*khitāb al-taklīf*) into five classifications: neutral or indifferent (*mubāḥ*), recommended (*mandūb*), disapproved (*makrūh*), obligatory (*wājib*) and forbidden (*ḥarām*). These categories deal with a Muslim's relationship with God, with other individual Muslims and with the community. Within these categories Sharia is not a uniform, fixed and unchangeable set of rules. Indeed, I found a variety of rules regarding behavior and conduct in various *fiqh* books, *kitāb al-fatāwā* and Muslim laws in different countries. Furthermore, the above three categories have not remained fixed over time. The rules that were initially seen as only relating to the relationship between a Muslim and God later developed. For instance, the purpose of *zakāt* was to maintain the relationship between a Muslim and God and it also had social purposes. Later, however,

zakāt became viewed as a matter of ritual. The development of *zakāt* over the last three decades has demonstrated its double function – its socio-economic purposes and its purpose as a ritual. The rules relating to fasting provide us with another example. Current developments show that there are new regulations in some Muslim countries, for instance Morocco, that include punishment for those who disrespect the rules of fasting in a provocative manner during Ramadan (Buskens 2010:122). Similar developments can also be seen with regard to regional laws in areas such as West Sumatra (see chapter 2).

Sharia, then, is part of a tradition of rules (which can be divided into five categories) that determine the correct forms and purpose of Muslim conduct. As a tradition of Muslim discourse, Sharia addresses the conception of the Islamic past and future and in particular to Islamic practice in the present (Asad 1984:14). Current developments in this tradition show that its scope has been widely extended. Sharia now also functions as a vocabulary for morality and justice. Indeed, it is a flexible vocabulary for a moral economy of claims and counter-claims between the masses and various factions, with regards to the obligations of ruler and ruled (Zubaida 2003:11). This development suggests that Sharia concerns all aspects of Muslim life, from birth to death; a total discourse that finds simultaneous expression within diverse institutions, be they religious, legal, moral, economic or political. However, attempts to legislate Sharia at a state level have forced to adjust it to the new circumstances of Muslim society today, so Sharia is primarily viewed in a narrow legal sense (Messick 1993:3).

1.3. Role of Sharia in Muslim countries

In the nineteenth and twentieth centuries, the majority of Muslim countries were subject to the political power of Western rulers. This domination led to the subordination of Sharia under the state legal systems imposed by these rulers. This position persisted after these Muslim countries gained their independence. The place of

Sharia in state legal systems can be classified into three categories: 1) Sharia formally dominates the state legal system and Islam is officially the religion of state; 2) Sharia is a source of state legislation but a Western-style legal system prevails; and 3) Sharia has no role in the legal system at all (*cf.* Otto 2010:635; Peters 2003:91).

Saudi Arabia and Iran fall into the first category. In the Kingdom of Saudi Arabia, Sharia is explicitly located in the state constitution and, formally, it is the sole source of political legitimacy and it is the source for the country's laws (Vogel 2011:55). This is evidenced by section 1 of the constitution, called *al-Nizām al-'asāsī*, which states that the religion (of Saudi Arabia) is Islam. Article 7 states that 'Rule in the Kingdom of Saudi Arabia draws its authority from the Book of God Most High and Sunna of His Prophet'. These two texts have sovereignty (*ḥākiman*) over all regulations (*nizām*) of the state (Vogel 2000:3). On 1 March 1992, King Fahd issued the first codified constitutional framework for his country, stating that the country will not adopt a Western-style system of democracy. He argued that the Islamic system, on which the constitution is based (*Shūrā*) is more suitable for the needs of the country (van Eijk 2010:151). In Iran, the role of Islam has been explicit since the country adopted a new constitution following the Revolution of 1979. The general principle of the constitution is illustrated by article 4, which states that 'all civil, penal, financial, economic, administrative, cultural, military, political and other laws and regulation must be based on Islamic criteria' (Mir-Hosseini 2010:348).

The majority of Muslim countries belong to the second category. However, there are nuances and variations from country to country, including Egypt, Indonesia, Malaysia, and Morocco. Article 2 of the Egyptian constitution, adopted in 1971, includes the clause: 'Islam is the religion of the state, Arabic is the official language, the principle of the Islamic Sharia shall be a chief source of legislation'. In 1980, the government of Egypt amended article 2

of the constitution and changed the wording from *mabādi' al-sharī'a al-islāmīya maṣḍar ra'īsī li al-tashrī'* (the principles of Islamic Sharia are a principle source of Legislation) to the more forceful statement, *mabādi' al-sharī'a al-islāmīya al-maṣḍar al-ra'īsī li al-tashrī'* (the principles of Islamic Sharia are *the* principle source of legislation). Henceforth, Sharia would play a more important role in Egyptian society (Lombardi 2006:1-2). The new stress on Egyptian citizenship was designed not to combat, but rather to balance the role of religion in national identity and political discussions. Similarly, the ban on parties with a religious reference was based on a claim that religion should not be used to divide the country (Brown 2011:117). While the position of Sharia is similar in many Muslim countries, different countries have different schools of law (*madhhab*); for example, Morocco has adopted the Malikite School, while Malaysia and Indonesia adhere to the Shafi'ite School.

Turkey belongs to the third category. In 1926, it adopted a totally different model in which the constitution establishes the Republic of Turkey as a democratic, secular and social state, governed by the rule of law and respecting fundamental human rights and freedom. Turkey implements the most rigorous secular project in the Muslim world and uses all available means to exclude Islamic norms from the public sphere. Codification of Turkish law is based on a number of European systems: civil and commercial law originally based on the Swiss system, administrative law founded on the French system, and criminal law based on the Italian system. Secularization of the law was largely completed in 1928 when Atatürk initiated secular reform and abolished Islam as the state's religion. Calls for increased religiosity in recent decades have had no effect on the country's law (Koçak 2010:231).

As we have seen, the position of Sharia within these three categories varies from country to country. Otto suggests that the development of Sharia in twelve Muslim countries shows two main

streams – a sense of moderation and some signs of reverse trends. Otto suggests that the moderation can be seen in: the rolling back of earlier reforms (Iran), the move towards constitutionalism (Saudi Arabia, Sudan, Afghanistan, Turkey), the continuing liberalization of marriage laws (Egypt, Morocco, Pakistan), restraint in the execution of cruel corporal punishment (Pakistan, Malaysia, Nigeria), significant progress in democracy and human rights (Indonesia) and the maintaining of the status quo (Mali). At the same time, Otto believes a second trend is emerging that is reflected in, among other things, the introduction of retribution punishment in Pakistan (1997), the rolling back of marriage law reform in Malaysia (1994) and the introduction of Sharia criminal law in Northern Nigeria (Otto 2010:620).

1.4 Position of Sharia in the Indonesian legal system

The position of Sharia in the Indonesian legal system finds its roots in the Dutch colonial administration. The colonial government attempted, not always successfully, to avoid being involved in religious matters. In 1882, it issued *staatsblad* 152/1882 which wrongly labeled Islamic courts in Java and Madura *priesterraad* or priests councils.. These courts were led by a group of judges called *penghulu*, which consisted of between three and eight non-salaried religious officials. Its jurisdiction covered family law, including marriage, divorce, inheritance and endowment (*waqf*). Crucially, however, decisions made by these courts could only be legally executed once the civil court had given its affirmation (*executoire verklaring*). For the government, elements of Sharia might be only valid if they had been absorbed by *adat* or customary law (Lev 1972:11). This position illustrates that the position of Sharia in the colonial legal system was double dependent; it relied on the civil court (*landraad*) to execute decisions taken by the priest councils on the one hand, while on the other hand its validity depended on

adat (Hooker 2008). In other words, Sharia was located on the periphery of the colonial legal administration.

There have been a number of attempts by individual Muslims or Islamic groups to make Sharia central to the Indonesian legal system. Their main objective is to gain constitutional acknowledgement of the legal standing of the implementation of Sharia for Muslims. This objective was advocated during sessions held by the BPUPK (*Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan/Investigating Committee for the Preparation of Independence*) between June and August 1945. The result was a phrase added to the preamble of the constitution, commonly called Jakarta charter, stating that Muslims have an obligation to adhere to Sharia. In fact, this phrase was commonly seen as the legal basis for further steps to implement Sharia. Ultimately, however, this phrase was removed from the final draft of the constitution and the head of the BPUPK promised to revisit this matter after independence (Anshari 1981). This issue re-emerged during the *Konstituante* debates held between 11 November and 7 December 1957; during the parliamentary sessions at the beginning of the New Order (1966-8); and in the parliamentary sessions held between 1999 and 2002 aimed at amending the constitution. But, these attempts failed to achieve their purpose (Hosen 2006).

Despite the fact that the constitution does not explicitly acknowledge Sharia, it has played a role in the development of the Indonesian legal system. There are two important factors that make it possible to apply Sharia. First, section 29 of the constitution regulates that: 1) the state shall be based upon a belief in the One and Only God; and 2) the state guarantees all citizens the freedom of worship, each according to his/her own religion or belief. This section indicates that Sharia is placed as a source for national law, not as national law itself. For that to occur, it must be transformed through the process of state legislation. This section requires that the implementation of Sharia must be based on an

individual consciousness or awareness, and not be imposed by state law. Furthermore, the state is obligated to facilitate and guarantee the implementation of Sharia; and the legislation to incorporate Sharia in national law must not be in an imperative form (Mahfud 2008:72). In fact, section 29 of the constitution is commonly used to justify Sharia legislation for state laws and regulations. Secondly, the government established the Ministry of Religious Affairs on 3 January 1946. This ministry primarily undertook tasks dealing with religious affairs that fell under the remit of the Ministry of Justice, the Ministry of Home Affairs and the Ministry of Education and Culture. It established offices at the provincial, regional/municipal and sub-regional (*kecamatan*) level and these have played a significant role in intensifying Islam across the country. Historically, the Ministry of Religious Affairs has been a bridge between the interests of the state and the Muslim communities.

Although section 29 of the constitution justifies legislation of Sharia for state law, evidence shows that the first Sharia legislation was not introduced until three decades after independence. This situation was mainly the result of three interconnected factors. Firstly, a number of Muslim groups, including the Darul Islam movement, utilized Sharia as an emblem that threatened the unity of Indonesia. They advocated replacing the unitary state with an Islamic state (Van Dijk 1981). Secondly, Sharia remained inapplicable for the state's purposes as it was unsystematic, lacked procedural rules, was often contradictory and was disconnected from the modernization project introduced by the government. This situation was also linked to a learning culture in which Sharia was primarily taught to gain piety rather than as a functioning law. Thirdly, there was a woeful lack of well-educated actors who could be proponents of Sharia for state law. The consequence of this third factor was that the power relations and political interests of the ruler had nothing to do with Sharia. Since the 1970s, these three problems have gradually

changed and the attitude of Indonesia's rulers towards Sharia has begun to shift and we are seeing Sharia being introduced in certain contexts.

1.5 Integrating Sharia with the state

Although a number of scholars label the legislation of Sharia for state law as Islamization,⁵ this study takes a different position. It sees this legislation as an attempt by the state to integrate Sharia and bring it in line with the state's interests (*cf.* Halim 2008). The word *integrate* implies that an act of adjustment is employed in three ways: to determine the means, the procedures and the methods of Sharia in order to bring it in line with *Pancasila* and the constitution. Integration also means acknowledging that there are other elements of Sharia that are not in line with these two standards. Further, the political interests of rulers, likely to gain the political support of Muslims if they permit the integration of Sharia, also play a role in this issue.

The government aims to achieve at least two objectives in legislating Sharia for the national law: first, to accommodate a living law in the society, and second, to use it for social engineering purposes (Hooker 2008; Azra 2005). This fact reveals that the state prioritizes the accommodation of elements of Sharia practiced by the majority of Muslims while at the same time also attempting to shape Sharia so that is in line with the state's interests. Consequently, the legislation of Sharia for state laws or regulations may be classified in two categories: real and symbolic. The first category contains 'real' legislation that is primarily designed to employ the law or regulation, while the latter is mostly aimed at maintaining the political interests of the rulers.

⁵Among these scholars are Mark Cammack (Cammack 1997) and Arskal Salim (Salim 2008a; 2008b).

Historically, the symbolic elements of the government's policies first appeared in the 1950s, and have apparently continued to increase from the beginning of the New Order regime to the present. For example, the president holds an annual official state commemoration of the revelation of the Quran on the 17th day of Ramadan. The state also officially recognizes and remembers the birthday of the prophet Muḥammad, and the government regularly facilitates a national competition for reciting the Quran (MTQ). The president established a private charitable institution in 1982, *Yayasan Muslim Pancasila*, which collects money from civil servants to finance the building of mosques throughout Indonesia. It was also symbolic that in 1985 President Suharto was willing to finance (with his own money) a project for the compilation of Islamic law (*Kompilasi Hukum Islam*) (Nurlaelawati 2010:82). To add to this list of symbolic events, since 2000 the government has legislated a number of laws concerning Sharia; however, it hardly ever issues the regulations required for the law to come into effect. That said, the government has also introduced Sharia legislation that can be characterized as having real purposes. In other words, the government has tried to facilitate Indonesian Muslims in implementing Sharia and to define a form of Sharia that is in line with the state interests and the Indonesian context. The Ministry of Religious Affairs, the state institution tasked with dealing with religious concerns, has been playing a central role in maintaining these two interconnected purposes. Consequently, Sharia has been incorporated into a number of laws, rules, regulations, and institutions concerned with Islamic education, Islamic courts, marriage law, *zakāt*, pilgrimage, and Islamic finance institutions. The following subsections briefly present those laws, rules, regulations, and institutions that have incorporated Sharia.

1.5.1 Islamic education

Since the early years of independence, educational institutions have been under the remit of several ministries, including the Ministry of Education and the Ministry of Religious Affairs. The

former primarily manages secular educational institutions known as *pendidikan umum*. The latter manages religious educational institutions, widely known as *pendidikan agama* (Azra 2007:261). Both ministries are responsible for organizing schools from elementary level through to higher education.⁶ The government provides teaching staff and facilities, as well as the curriculum for these institutions.

One of the most important aspects for the government is managing religious education and the form of Islam – Sharia — that is to be taught. The Ministry of Religious Affairs has designed a curriculum for all levels of education for this purpose. We need look no further than the curriculum of higher Islamic education, particularly the faculties of Sharia at STAIN, IAIN, and UIN, to see the shape and form of Indonesian Islam. Hooker concludes three points with regard to this curriculum: firstly, Sharia must be managed as part of the wider secular curriculum, but in fact, there has been successful implementation of a standard national Sharia curriculum; secondly, the innovations that are occurring in regional curricula should not be seen as a threat to *fiqh*; and lastly, the curriculum has shown that it can accommodate more than one form of legal reasoning. Indeed, two forms of legal reasoning are applied in these institutions – one drawn from classical Muslim sources and the other from the western tradition (Hooker 2008:127-8). Students at Sharia faculties are trained to gain employment in positions related to their *fiqh* knowledge, including

⁶ The Ministry of Religious Affairs supervises Islamic education from elementary to higher education: it organizes Madrasah Ibtidaiyah (MI) for elementary schools, Madrasah Tsanawiyah (MTs) for junior high schools, Madrasah Aliyah (MA) for high schools and Sekolah Tinggi Agama Islam Negeri (STAIN), Institute Agama Islam Negeri (IAIN), Universitas Islam Negeri (UIN) for higher Islamic education. According to data released by the Ministry of Religious Affairs in 2010, the total numbers are as follows: MI:1,675 (state/*negeri*) & 20,564 (private/*swasta*); MTsN:1,415 (state/*negeri*) & 12,608 (private/*swasta*); MAN:748 (state/*negeri*) & 5,149 (private/*swasta*); STAIN:32, IAIN:14, & UIN: 6, in total 52 (state/*negeri*) & 522 (private/*swasta*), www.kemenag.go.id, accessed in 24/2/12.

as civil servants at the Ministry of Religious Affairs and judges in Islamic courts. It should be noted, however, that there are judges in Islamic courts who originate from other faculties at the IAIN or UIN, and who are also law graduates from secular universities.

Current developments in the Indonesian education system reveal a gradual strengthening of Islamic education, particularly since central government issued law 22/2003 on national education that recognizes all levels of religious educational institutions to be part of national education. Presidential decree 55/2007 gives the authority to the Ministry of Religious Affairs to set up curriculums for religious education at all levels, including for those educational institutions under the remit of the Ministry of Education. This situation confirms that the government persists in attempting to shape and guide Indonesian Islam and Indonesian Sharia.

1.5.2 Islamic courts

The Islamic court is an important Islamic institution and an arena where state-defined Sharia is imposed and put into practice. The colonial government first established this institution for Java and Madura in 1882 and the Indonesian government continued to maintain it after independence. Subsequently, in 1951, the government extended similar institutions, namely *mahkamah syar'iyah*, to other regions in Indonesia. However, the government hardly provided sufficient facilities as it is a judicial institution and it also lacks authority to execute its decisions. Because of this situation, Hazairin (d.1975) who had expertise on Islamic and customary law, once suggested to abolish Islamic courts as he argued that they had no authority to execute their decision, they were poorly administrated and lacked facilities (Noer 1978:49-50).

The government finally acknowledged the authority of Islamic courts as a national judicial institution in section 7 (1) of the law 19/1964. When this amendment to the law was approved on 17 December 1970, the government decided to give Islamic

courts equal status with the other three courts regulated in law 14/1970. Section 10 (1) elucidates that there are four judicial institutions in Indonesia: civil courts, Islamic courts, military courts, and state administrative courts. However, this is the only regulation that implements equal status and this means that it is still the case that decisions made by the Islamic court cannot be executed without receiving an affirmation from the civil court. In 1980, the Ministry of Religious Affairs issued the ministry decision 6/1980 to standardize the name of Islamic courts – at the first level, *Pengadilan agama* and *Mahkamah Syar'iah* became *Pengadilan Agama* and the Islamic appeal court became the *Pengadilan Tinggi Agama*.

The government also had the equal status of Islamic courts in mind in 1989 when it tabled a draft law on Islamic courts in parliament. A nationwide controversy ensued in response to the bill. The public debate showed that the bill was not only seen as a political shift by the government towards Islam, but it was partly an attempt by those Muslims advocating that Sharia should become a state matter (Mujiburrahman 2006:194). The debate ended after President Suharto guaranteed that the bill was disconnected with the ideological matters.

Finally, members of parliament approved the draft and the president promulgated it as law 7/1989 on Islamic courts on 27 December 1989. Section 7 regulates that the Islamic court's jurisdiction is marriage, inheritance, grants (*hiba*), endowment (*waqf*) and almsgiving (*ṣadaqa*). Crucially, this law stipulates that the court was now an independent institution that can execute decisions without any affirmation from the civil court. In 2006, the jurisdiction of the Islamic court was extended when the government passed law 3/2006. Article 49 of this law states that the jurisdiction of this court is now: marriage, inheritance, *waṣiya*, *ḥiba*, *waqf*, *zakāt*, *infāq*, *ṣadaqa*, and Islamic economy.⁷ Article 52A

⁷ Article 49 further elaborates the scope of the Islamic courts to include economic disputes relating to: (a) *Bank Syariah* (Islamic banking), (b) *Lembaga*

also extends the jurisdiction of Islamic courts to include being a witness to the visibility of a crescent (*ru'yat al-hilāl*), i.e. to determine the first day of each month of the lunar calendar. In addition, the government has bestowed special autonomy on the province of Aceh, which gives the province the authority to implement Sharia regulated under law 44/1999, 18/2001 and the presidential decree 11/2003. The jurisdiction of the Islamic court in Aceh province is underpinned by *Qanun*, a local law issued by provincial and regional/municipal authorities. In relation to the jurisdiction of Islamic courts, in 2011 the Supreme Court released data that reveals that the number of disputes settled in Islamic courts, including the *Mahkamah Sharia* of Aceh, had grown to 363.041 cases (in 2010 the number was 320.788) (www.badilag.net). The majority of these cases concerned divorce.

Before 2004, the Islamic court had not been a fully independent judicial institution and its structural, administrative and financial affairs were regulated by the Ministry of Religious Affairs. The widely held belief was that this situation meant that this judicial institution could be influenced by non-judicial interests. As previously stated, this came to an end when the government amended law 14/1970 on the judicial authority with law 35/1999 and, then, in 2004 the government issued law 4/2004. Article 42 (2) of law 4/2004 directs the transfer of the structural, administrative and financial affairs of Islamic courts from the Ministry of Religious Affairs to the Supreme Court by, at the latest, 30 June 2004. In fact, the transfer occurred ten days before the deadline. On 29 October 2009, the government issued law 48/2009

Keuangan Mikro Syariah (Sharia micro finance institution), (c) *Asuransi Syariah* (Islamic Insurance), (d) *Reasuransi Syariah* (Islamic reinsurance), (e) *Reksadana Syariah* (Sharia fund), (f) *Obligasi Syariah dan Surat Berharga Berjangka Menengah Syariah* (Sharia bond and mid-term Sharia securities), (g) *Sekuritas Syariah* (Sharia securities), (h) *Pembiayaan Syariah* (Sharia financing), (i) *Pegadaian Syariah* (Sharia mortgage), (j) *Dana Pensiun Lembaga Keuangan Syariah* (retirement fund of the Sharia finance), and (k) *Bisnis Syariah* (Sharia businesses).

as a revision to laws 50/2006 and 7/1989 on Islamic courts. This new law aimed to harmonize a number of rules regarding Islamic courts with law 48/2009 on judicial authorities. For example, law 50/2009 was amended with article 12A that regulates that judges in Islamic courts are also under the control of the Supreme Court and the Judicial Commission.

1.5.3 Marriage

The government had attempted to have a unified family law since the 1950s. In October 1950, the Minister of the Ministry of Religious Affairs, Wachid Hasjim (d. 1953), established a committee, chaired by Teuku Muhamad Hasan and assisted by several members representing Muslims, Protestants, Catholics and women activists, to draft a marriage bill. In May 1953 the committee produced three bills: one for all citizens; one specifically for Muslims, Protestants and Catholics; and one for those falling outside these three religious groups. But, the Minister was dissatisfied with this legislation. In the subsequent three years, his successor Minister Mohammad Ilyas (1911-1970), also proposed a draft regarding Islamic marriage to parliament. But the members of parliament failed to reach a consensus regarding the content and form of the marriage law, because all factions in the parliament had different interests toward this issue although they realized that a unified marriage law was a priority (Martyn 2005:124-125). Despite these failed attempts, the Ministry of Religious Affairs issued the decision 1/1955 regarding the compulsory registration of marriage. Since then, there were no further developments concerning marriage law until 5 March 1958 when Soemari, member of the parliament belonging to the National Party (PNI) tabled a marriage bill aimed to apply to all citizens, regardless of religion. This bill was nicknamed 'Mrs. Soemari's bill' that was viewed as an anti-polygamy bill. The parliament members belonged to religious parties opposed the Soemari's bill and characterized the bill as secular. They mainly argued that a

marriage law should be based on religious law. Consequently, the parliament failed to reach a consensus to have a unified marriage law (Martyn 2005:138-144).

At the beginning of the New Order, there were three bills proposed by different government institutions. The Ministry of Religious Affairs proposed another draft bill on Islamic marriage (*Rancangan undang-undang pernikahan ummat Islam*) to parliament on 22 May 1967. In the following year, the Ministry of Justice also proposed a marriage bill, namely, *Rancangan undang-undang pokok perkawinan* (bill on marriage) to the parliament on 7 September 1968 aimed at regulating marriage for all citizens without considering their religious devotions. These two bills were accepted by the parliament, but, both failed to become law as they were rejected by non-Muslim members, particularly those belonging to the Catholic party (Mujiburrahman 2006:160). In July 1973, the government proposed another marriage bill. This time a majority of Muslims rejected the draft, providing three arguments: first, a number of articles of the bill were claimed to be in contradiction to Sharia; second, Muslims were anxious that Islamic interests should be defended in parliament; and third, the government did not consult with any Islamic organizations or with Muslim officials at the Ministry of Religious Affairs when preparing the bill.

With the rejection of the proposed bill, a number of Muslim leaders approached the authorities – specifically the Armed Forces (ABRI) – because they believed that the bill would endanger socio-political stability. In response to this approach, in October 1973, General Sumitro, commander of the Security and Order Operation (*Kopkamtib*) and Soetopo Joewono, head of the coordinating body of state intelligence (BAKIN), intensively lobbied with leaders of the Islamic Party (PPP) and Muslim Leaders outside parliament (Mujiburrahman 2006:164-5). Finally, a compromise was reached and the bill was revised with number of articles that were mostly viewed in line with Islamic teachings. On 22 December 1973,

parliament approved the bill and less than a month later the president passed it on 2 January 1974 as law 1/1974. On 1 April 1975, the president issued PP 9/1975 which legally implemented the law.

This law consists of 24 chapters and 67 sections concerning marriage matters, including the requirements for marriage, the cancellation of a marriage, the right and obligations of husband, wife and children, and other related issues. A number of rules regulated under law 1/1974 were new for Muslims, including the administration of marriage and also the rule that a divorce is only legitimate if conducted in front of an Islamic court. Furthermore, its contents show that these codified rules are regulated under the Shafi'ite School of law, but it also extends into other schools of laws and even adopted elements of Dutch and *adat* laws.

This unified marriage law was important for both the government and Muslims. For the government, this law was intended as a tool of social engineering, and to this end the law regulates the shape and form of the family. For example, a marriage must be administrated, rules on polygamy were tightened, and divorce must be conducted in court in order to guarantee the rights of both parties. Meanwhile, the majority of Muslims sees this law as a success in terms of achieving the codification of Sharia as state law.

1.5.4 Compilation of Islamic law

Kompilasi Hukum Islam – the Compilation of Islamic Law – commonly abbreviated as KHI, has marked a distinctive and real achievement in the Indonesian Islam project. The compilation of Islamic Law is redefinition; it is certainly not a purification of Sharia, but it is more than a selection or reworking because it imposes a new way of thinking about Sharia (Hooker 2008:18). From the process of drafting, the Compilation of Islamic Law is considered as an authoritative text, not least because many prominent Indonesian ulama were involved in the process of shaping it. That said, a

number of them acknowledged that they did not have much opportunity to articulate their views during discussions of the draft (Nurlaelawati 2010:88). This was the first (and perhaps the last) occasion that ulama were actively involved in the legal process of codifying elements of Sharia for national regulations. Thus, the authoritative position of the Compilation of Islamic Law is based on the fact that it is an *ijmā'*, i.e. the consensus of Indonesian ulama.

The idea of the Compilation of Islamic Law was originally derived from a situation where judges of the Islamic court had no standard legal references for examining disputes. Consequently, the same kinds of disputes could result in different judgments. To overcome this problem, in 1985, Bustanul Arifin (d. 2011), a member of the Supreme Court, advocated the idea of a set of standard legal references. In short, Muslim scholars, judges, and the Minister of Religious Affairs agreed. President Suharto also approved the plan and even offered a sum of his own money to fund the committee that would take the project forward. Bustanul Arifin was appointed as head of the committee that would prepare the draft. This process, which lasted six years, involved a number of activities, including examining 160 *fiqh* texts; holding seminars and discussions; consulting with 181 prominent ulama; examining Islamic court decisions; conducting comparative analysis with other Muslim laws from different countries. After more than six years, the committee finally succeeded in producing a Compilation of Islamic Law, *Kompilasi Hukum Islam*. (Nurlaelawati 2010:79-81) For the legal bases of KHI, on 10 June 1991 the president signed the presidential instruction no.1 of 1991 aiming to give the Ministry of Religion the right to disseminate the KHI. It consists of three simple divisions: book I on marriage and divorce (19 chapters and 170 sections); book II on inheritance (7 chapters and 43 sections); and book III on endowment (5 chapters and 13 sections). These books contain explanations and clarifications for a number of sections. In addition, section 229 states that the judge must pay

serious attention to the values of the community, in order for the decision to be just.

The Compilation of Islamic law is not an uncontested document. In October 2004, a working group from within the Ministry of Religious Affairs produced a counter legal draft to the Compilation of Islamic Law. This caused controversy and was withdrawn by Minister of Religious Affairs within weeks. The controversy derived from a number of issues in the draft: 1) a guardian, *wāli*, is not required in a marriage; 2) a ban on polygamy; 3) a compulsory marriage contract; 4) the mutual marriage gift, *mahr*; 5) registration would be an essential element of marriage rather than an evidentiary requirement as it is at present; 6) *‘idda* for men and women; 7) permission for an interreligious marriage; 8) *nushuz* (disobedience) could be the fault of both husband and wife; and 9) males and females would inherit equal shares of an estate and non-Muslim claimants would also be allowed to inherit (Hooker 2008; Nurlaelawati 2010). Given these issues, the counter draft was widely considered to be secular. Despite the fact that the KHI was challenged, after 15 years it has passed the efficacy test (Hooker 2008:26). It is an original attempts to legislate elements of Sharia, although, judges at the lowest level of the Islamic court have not yet fully incorporated the Compilation of Islamic Law in their decisions (Nurlaelawati 2010).

1.5.5 Endowment

The first regulation by the Indonesian government on endowment (*waqf*) occurred in 1977 when it issued the government regulation 28/1977.⁸ This regulation is directly connected to law 5/1960 on

⁸Under the administration of the colonial government, *waqf* matters were regulated under *Staatsblad* no. 6196 issued in 31 January 1905, *Staatsblad* no. 12573 issued in 4 June 1931, *Staatsblad* no. 13390 issued in 24 December 1934 and *Staatsblad* no. 1935 issued in 27 May 1935. These regulations ruled that *waqaf* was administered under the authority of *bupati* and should be focused on the public interest (Djatnika 1983; Halim 2005).

agrarian law, which could affect the legal status of endowment property. In response to the issuance of this regulation, the Ministry of Religious Affairs established a section at its offices tasked with managing issues concerning endowment.

Although rules on endowment have been regulated in the Compilation of Islamic Law, on 27 October 2004 the government upgraded the regulation to a law by introducing law 41/2004. This law consists of 11 chapters and 81 sections. This not only strengthens the legal basis of endowment, locating it in the hierarchy of the Indonesian legal system, but it also provides more standardized and comprehensive rules concerning this subject.

There are five aspects that can be characterized as new rules on endowment: First, endowment property is classified as relative ownership or public ownership and both required registration with the relevant official institutions. Second, endowment property not only covers immovable property such as land or buildings, but also extends to moveable property including money, vehicles, and intellectual property. Third, endowment is seen as not just having ritual and social purposes, but also it also meets wider public needs and has a business purpose in accordance with Sharia. Fourth; the law suggests establishing an independence organization, namely, the Indonesian Endowment Institute (*Badan Wakaf Indonesia*). Lastly, an administrator (*nāzir*) of endowment must be professionally trained.

The government passed government regulation 42/2006 to implement the endowment law. However, there has not been any significant public attention with regards to the implementation of law 41/2004, although theoretically endowment was a potential economic source. According to data released in 2010 by the Ministry of Religious Affairs, the extent of *waqf* land in Indonesia has reached more than three billion m² and it is situated in more

than 400,000 different locations. 67.6 per cent of this land has been certified and 32.5 per cent remains uncertified.⁹

1.5.6 Pilgrimage

The government plays a central role in managing the pilgrimage (*hajj*) in Indonesian history. In this respect, it deals with the matters of politics, economy, growth of population, progress of Islam in Indonesia, the government's relationship with Saudi Arabia and health as well as security (*Agenda* n.d:149-158; Vredembregt 1962:94-121). Accordingly, the government plays a central role in organizing the hajj and demonstrates regulated and systematized control of this religious duty. Three important points should be made in this regard: First, performance of pilgrimage must be religiously correct and administratively valid. Second, it is conducted overseas, in Mecca, thus its objectives must be limited and its purpose specific. Thirdly, it involves an amount of money. The Ministry of Religious Affairs determines the regulations and procedures relating to the hajj. Thus, one interpretation is that the pilgrim must not only surrender to God, but also to the state (Hooker 2008:205-6).

The government began to manage the pilgrimage in 1950. For this purpose, it issued rules and regulations including the decree of the Ministry of Religious Affairs no. A/III/1/648 (issued on 27 March 1950). This decree regulates several issues including the costs of the pilgrimage, transportation to and from Mecca, health, and passports, and it established a committee to manage the pilgrimage, its requirements, etc. (*Konperensi* 1950:354-460). These rules have been adjusted over the years. For example, in 1999 the pilgrimage was regulated under law when the

⁹ Endowment property has reached 3,181,586,921 m², is situated in 417,265 locations and 67.6 per cent of it has been certified by the government, www.kemenag.go.id accessed in 24/2/12.

government issued law 17/1999. This law is purely for administrative purposes, In addition, law 13/2008, in response to a decision by the government of Saudi Arabia, permits pilgrims to use a regular passport for the journey rather than a special passport (*paspor haji*).

There are two current and distinctive issues concerning the pilgrimage: the government's monopoly of the process, and how to manage the annual quota of pilgrims and whether people who have performed the pilgrimage have different rights to people who never do it. The way the Indonesian government manages the hajj has become a target of criticism and the state's monopoly of the process is seen as a source of corruption and inefficiency. Both political overtones and the fact that the hajj is a source of income for the government are factors for the government's involvement in the process (Noer 1978:58-64). Several NGOs expressed similar criticism to the parliament on 27 January 2004; they were critical of the lack of standard services and also stated that the monopoly actually weakens the organization of the pilgrimage. It should be noted, however, the majority of critics are involved in private companies keen to play a role in this business.

The Saudi authorities have fixed an annual quota for pilgrims at 1% of the Muslim population of a country. Consequently, the Indonesian government operates a queue system.¹⁰ Participation in the hajj requires payment of a deposit. Previously this was a minimum of 20 million rupiah; since 2010 this figure has increased to 25 million rupiah. The money is paid into a special bank account called a *tabungan haji*. This money cannot be withdrawn by the investor and no interest or shares are paid. This money provides the investor with a queue number generated by an online system. This number indicates the investor's place on the waiting list and it can take anything from three to ten years to

¹⁰The quota for Indonesia is as follows:188,900 (2006), 189,000 (2007), 193,723 (2008), 191,000 (2009), 185,669 (2010) www.kemenag.go.id accessed 23/2/12.

reach the top and have the opportunity to perform the pilgrimage. The government has a right to use this sum of money before the investor receives permission to do the pilgrimage.

Clearly, the government gains financial advantage from this system. Assuming that at any one time there are 2 million investors, this generates a huge amount of money. According to a staff member at the Ministry of Religious Affairs, when the system was first established, the government only gained 2.5% of the monthly interest, but since 2006 the money was invested in a different way, giving the government approximately 10% of the monthly interest. Besides this financial gain, the government also obtains financial advantage from the journey cost of the pilgrimage.¹¹ Thus, it is understandable that public demands for the accountability of the management of the pilgrimage gradually increases.

Besides this financial advantage, the government also shapes Sharia in relation to the hajj. The Ministry of Religious Affairs has produced a number of manuals for the pilgrimage: *Panduan perjalanan haji* (Manual for the pilgrimage journey), *Bimbingan menasik haji* (Instruction and manual for the pilgrimage), *Hikmah ibadah haji* (wisdom behind the pilgrimage), and lastly *do'a dan dhikir* (prayers and invocations). These four books are a

¹¹Costs for the journey to the *hajj* vary from year to year and depend on places of embarkation. There are now eleven points of embarkation for the *hajj*. The costs (in US dollars) are as follows: Aceh 2,753 (2007), 3,258 (2008), 3,243 (2009), 3,147 (2010); Medan 2,753 (2007), 3,292 (2008), 3,333 (2009), 3,237 (2010); Padang 2,753 (2007), 3,258 (2008), 3,329 (2009), 3,233 (2010); Palembang 2,850 (2007), 3,379 (2008), 3,377 (2009), 3,280 (2010); Batam 2,753 (2007), 3,292 (2008), 3,376 (2009), 3,325 (2010); Jakarta 2,850 (2007), 3,430 (2008), 3,444 (2009), 3,364 (2010); Solo 2,850 (2007), 3,379 (2008), 3,407 (2009), 3,327 (2010); Surabaya 2,850 (2007), 3,430 (2008), 3,512 (2009), 3,432 (2010); Banjarmasin 2,950 (2007), 3,517 (2008), 3,518 (2009), 3,440 (2010); Balikpapan 2,950 (2007), 3,517 (2008), 3,544 (2009), 3,474 (2010); Makasar 2,950 (2007), 3,575 (2008), 3,575 (2009), 3,505 (2010) www.kemenag.go.id accessed 23/2/12.

package and are meant to be read together.¹² The fourth book reflects the government's construction of Sharia. This construction clearly shows that the current pilgrimage is the orthopraxy but also demonstrates what the Ministry of Religious Affairs believes to be the true significance of the pilgrimage (Hooker 2008:233). Compared to the colonial time, aspects of the pilgrimage vary significantly and it is undeniable that the pilgrimage is an aspect of Islam that is intertwined with politics (Eisenberger 1928; Noer 1978:64; Van Dijk 1991). Current developments show that the government's definition of the hajj is limited to a ritual journey and that participation results in increased social status (van Bruinessen 1995).

1.5.7 Islamic finance

The first Islamic finance institution was established in Indonesia in 1992. The Indonesian ulama Council (MUI) endorsed the idea of establishing an Islamic bank¹³ that applied a non-interest system.

¹² The first book consists of nine chapters: (1) introduction, (2) preparation, (3) departure, (4) activities in Saudi Arabia, (5) Returning (to Indonesia), (6) Medical Counseling and Care, (7), Devotional Visit (*ziarah*), (8) Travel Prayers and Funeral Prayers, and (9), epilogue (*Panduan* 2009). The second book consists of six chapters: (1) introduction, (2) Definitions and General (3) *Hajj Tamattu'*, *Hajj Iفراد* and *Hajj Qiran*, (4) Previsions and the *Umrah* and Pilgrimage, (5) Question and answers on the pilgrimage matters, (6) epilogue (*Bimbingan* 2009). The third book only comprises three chapters: (1) Introduction, (2) Concept and General Significance of *Hikmah*, and (3) Insights into the pilgrimage (*Hikmah* 2009). The last book consists of nine parts: (1) *Do'a* of departure, (2) *Do'a* when performing *Tawaf*, (3), *Do'a* when Performing *Sa'i*, (4) Intention, *Do'a* when leaving for Arafah and *Do'a* when Performing *wukuf*, (5) *Do'a* when waiting (*mabit*) in Muzdalifa and Mina, (6) *Do'a* when Performing the Farewell Circumambulation (*tawaf wada'*) and *do'a* after Performing *Tawaf Wada'*, (7), *Do'a* when Visiting Madina, (8) *Do'a* when Arriving at Home, and (9), Simple *Do'a* (*Do'a* 2009).

¹³ In Indonesia, banks that apply an Islamic financial system are Bank Syariah or Sharia Bank rather than Islamic Bank or Bank Islam, as in Malaysia. According to Ash-Shiddiqy the name is derived from a conversation between the MUI team, the Ministry of Finance and B.J. Sumarlin, an Indonesian Christian. A member of MUI said that the aim of establishing the bank was to provide a financial

This approval emanated from a national meeting of the Indonesian ulama Council in August 1990. The idea was fully supported by the up and coming Indonesian Association of Muslim Intellectuals (*Ikatan Cendekiawan Muslim Indonesia/ICMI*) and the approval also came from President Suharto. The first Islamic bank, *Bank Muamalat*, was established on 15 May 1992 and in the first few years this financial institution received public support, as evidenced by an 84 billion rupiah pledge to purchase a share in the bank (Hefner 2003:155-156).

The justification for establishing an Islamic bank came from law 7/1992 on banking systems, which provides the possibility to establish a new dual banking system. Furthermore, the government issued law 10/1998 as an amendment to law 7/1992. This new law explicitly refers to an Islamic banking system and provides further legal grounds for the secular banking system to create an Islamic branch. Besides these two laws, the Islamic banking system is also justified through law 23/1999, which was later amended by law 3/2004, stating rules on the authority of the Central Bank to regulate banking system, including an Islamic system. Furthermore, the government issued law 21/2008 on Islamic banking on 16 June 2008. Hence, the position of Islamic banking system has been fully acknowledged within the legal system.

In support of the growth of an Islamic banking system, the Indonesian ulama Council issued a legal opinion (*fatwa*) concerning the interest on loans on 24 January 2004. The *fatwa* classifies interest, which has been widely practiced by several financial institutions, including banks, insurance and mortgage institutions, as prohibited. Nevertheless, this *fatwa* is only valid in areas where

institution for Muslims who believe that *ribā* or interest is not allowed. Consequently, the minister hastily named the bank Bank Syariah. Ash-shiddiqy mentioned this story when he was presenting a paper at the conference organized by the IAIN Padang in July 2010.

an Islamic banking system is operating. It is clear that the *fatwa* aims to stimulate Muslims to engage with the Islamic banking or other institutions. The increase in Islamic financial institutions proves that this intention has been partly achieved.

The growth of the Islamic economic system continued with the establishment of Islamic insurance and Islamic mortgage and other financial institutions. This development has also been reflected in educational institutions, which now have faculties of Islamic economy and teach other related subjects on this theme. This development has not only occurred at Islamic higher education institutions such as STAIN, IAIN or UIN, but also within secular higher educational institutions like the University of Indonesia (Azra 2007:263).

It is important to note that the emergence of the Islamic banking system and other Islamic financial institutions has occurred within less than twenty years. This can be accounted for by the fact that the aim of Islamic financial institutions is to stimulate economic growth. In addition, article 49 of law 3/2006 extended the jurisdiction of Islamic courts to include disputes related to Islamic finance. In this regard, the Supreme Court issued decree no. 20 of 2008 on 10 September 2008 providing a legal basis for Islamic courts to implement the Compilation of Law on Islamic Economy (*Kompilasi Hukum Ekonomi Syariah/KHES*). This compilation consists of four books: the first book regulates the subject of law and the scope of properties; the second book deals with contracts; the third books deals with regulations on *zakāt* and grant (*hiba*); and the fourth book regulates Sharia accountancy.

1.5.8 Penal code

The government has issued a number of laws, rules and regulations concerning penal codes, none of which give an explicit indication that they are derived from religious texts. That said, several substantive laws are derived from religious teachings, including

Sharia. This subsection is confined to the matters of blasphemy and pornography.

The criminal offences of hatred, heresy and blasphemy are dealt with in the Penal Code (*KUHP*), article 156a. This article, which is derived from article 4 of the presidential decree 1/PNPS/1965, was issued on 27 January 1965. The decree determines that hatred, heresy and blasphemy are offences and it obligates the government to record this in article 156a of the Penal Code. This article has been often used to justify a number of events. For example, in 1990 judges sentenced a famous journalist, Arswendo Atmowiloto, to five years in jail for committing blasphemy. This followed Atmowiloto publishing a list of figures most admired by readers in his weekly tabloid 'Monitor' on 15 October 1990. The Prophet Muḥammad was placed at number eleven in the list and this was seen as humiliation of the prophet.

A case currently going through the courts involves a number of Muslim groups who are demanding that the government abolishes the Ahmadiyah Organization which they accuse of breaching the rules of article 156a of the Penal Code rules. On 23 February 2009, six NGOs, together with four leading Indonesian scholars¹⁴ proposed that the Constitutional Court cancel the presidential decree No.1/PNPS/1965 because it is in contradiction with the 1945 constitution. They argued that this law was issued in an emergency situation and thus it has become irrelevant in the current social realities and that it contravenes the constitution and its regulations. After hearing the case, the Constitutional Court rejected the proposal on 19 April 2010, declaring the decree still valid.

The law on pornography can also be included in the category of laws that have been adapted to include elements of

¹⁴ The NGOs are Imparsial, ELSAM, PBHI, DEMOS, Yayasan Desantra and YLBHI, and the scholars are KH.Abdurrahman Wahid, Prof. DR. Musdah Mulia, Prof. M. Dawam rahardjo and KH. Maman Imanul Haq.

Sharia. The government issued law 44/2008 on pornography on 26 November 2008. It consists of eight chapters and 45 sections. All the regulations on this are concerned with immorality. When the draft was still being discussed in parliament, this issue provoked wide public debate and discussion because cultural diversity meant that immorality varied from region to region. Despite several public rejections of this draft, immorality can now be punished.

1.6 Bringing Sharia to the regions

The provincial and regional/municipal governments possess the authority to issue laws. This is regulated in the constitution and laws 22/199 and 32/2004. Article 18 (6) of the constitution elucidates: 'regional authorities shall possess the authority to issue local laws and other regulations to implement the local autonomy and the duty of assistance'. The provincial and regional/municipal laws, and other regulations, must fit into legal frameworks with regard to substance, procedure and structure. Firstly, the substance of local laws must fulfill certain requirements: not contradict with public interests (*kepentingan umum*) or higher ranking laws; it may impose punishment; it should consider the principles of guardianship, humanity, nationality, justice and equality before the law.

Second, local laws should follow procedures set out by the legal authority belonging to the governor, *bupati*/mayor and the parliament. The governor and the provincial parliament possess the authority to table a draft law and these institutions are required to approve any bill. Subsequently, the jointly approved draft will be discussed by members of the provincial parliament. After the provincial parliament approves the bill, it requires approval from the governor in order to become provincial law. If the governor does not approve the bill within thirty days, it automatically becomes a provincial law; however, for it to become legally applicable, the governor must issue a governor's regulation

(*Peraturan gubernur*). If this is not forthcoming, the provincial law remains window dressing. This legal mechanism is also applied to region/municipal laws.

Third, local laws are the lowest ranking laws in the hierarchy of the national legal system. Law 10/2004 regulates that the law may be issued at the province, regional and village levels.¹⁵ But, law 12/2011 revises this, removing village law from the hierarchy¹⁶, reclassifying it as a regulation.¹⁷

Provincial and regional law have an equal validity compared to those laws issued by higher ranking state institutions such as the People's Consultative Assembly, the national parliament or the president. However, these laws are only valid in the province or region/municipality where they are issued. The validity of the law is justified by two factors: firstly, section 18A of the constitution authorizes these institutions to issue the law; and secondly, the provincial or regional/municipal authorities are representatives of the people and members of the provincial or regional/municipal parliament or the *bupati* or the mayor are elected through general election. Thus, the authority of these

¹⁵ The hierarchy of national law according to article 7 of the law 10/2004 is:1) the constitution of 1945 (*UUD 1945*); 2) the national law/*perpu* (*Undang-Undang/Peraturan Pemerintah Pengganti undang-undang*); 3) the government regulation (*Peraturan Pemerintah*); 4) President Regulation (*Peraturan President*); 5) local law (*Peraturan Daerah*).

¹⁶ The hierarchy of national law according to article 7 of law 12/2011 is:1) Constitution of 1945 (*UUD 1945*); 2) decisions of the People's Consultative Assembly (*TAP MPR*); 3) National law/*perpu* (*Undang-Undang/Peraturan Pemerintah Pengganti undang-undang*); 4) Government regulations (*Peraturan Pemerintah*); 5) Presidential regulations (*Peraturan President*); 6) Provincial law (*Peraturan daerah provinsi*); 7) Regional law (*Peraturan Daerah Kabupaten/kota*)

¹⁷Regulations that are issued by the People's Consultative Assembly (MPR), Council of Representative of the region (DPD), Parliament, Supreme Court, Constitutional Court, Supreme Audit Board, Judicial Commission, Indonesian Bank, Ministers, states institutions that are established according to the law, provincial parliament, governor, regional/municipal parliament, *bupati*/major, head of village or equivalent.

institutions is equal to the authority possessed by the president, members of the People's Consultative Assembly and the national parliament that are authorized to issue laws.

However, as the unitary state (*eenheidstaat*) the central government has the power to control provincial and regional authorities, because decentralization and local autonomy means transfer or delegation of the legal and political authority. This control is commonly known as the general norm control mechanism (Asshiddieqy 2006:107). Two types of control mechanism are regulated under the constitution that stipulates the possibility to conduct judicial or constitutional review. Judicial review is mentioned in section 24A (1), which rules that the Supreme Court is authorized to review the ordinance and regulations made, while constitutional review is mentioned in section 24C (1), which rules that the Constitutional Court is authorized to review the law against the constitution.

Laws 22/1999 and 32/2004 introduce the norm control mechanism – executive preview and review. Executive preview is conducted by central government and provides for the review of a draft of any provincial law before the draft is discussed by provincial authorities. As the representative of central government, the governor may also review the drafts of regional laws before they are discussed in the provincial or regional/municipal parliament. The second type of review is also conducted by central government and involves the review of provincial laws or decisions made by the governor. As the representative of central government, the governor has the authority to review regional/municipal laws or regulations issued by a *bupati* or mayor.¹⁸ In addition, the judicial review conducted by the Supreme Court is also applied to provincial, regional/municipal law.

¹⁸ The review mechanism regarding provincial and regional law may be seen in the appendices 1, 2 and 3.

In relation to this issue, the question of whether provincial or regional/municipal government has the authority to legalize Sharia legislation remains a matter of dispute. Laws 44/1999 and 18/2006 explicitly regulate that this authority only belongs to the province of Aceh. There are no explicit regulations regarding other provinces. This dispute is rooted in the fact that the laws relating to regional government mention that religious matters are outside the authority of regional government. In fact, the same laws also suggest that local government shall have the authority to issue regulations to maintain regional governance. Despite this dispute, Sharia legislation has been introduced in a number of provinces and regions/municipalities. The following subsections briefly present the Sharia legislation introduced in the province of Aceh and in other provinces.

1.6.1 Sharia in Aceh

The government of Aceh possesses a special autonomy to implement Sharia. This privilege is regulated under laws 44/1999, 18/2001 and 11/2006. The first two laws concern the special autonomy for the province of Aceh and the third law deals with detailed regulations issued after the Helsinki Memorandum of Understanding, signed between representatives of the Indonesian government and the Aceh Freedom movement (*Gerakan Aceh Merdeka, GAM*) on 15 August 2005. Law 44/1999 elucidates that Sharia has been an important element of Aceh society. Section 1 (1) specifies that Sharia is Islamic teaching regarding all aspects of life, and article 4 (1) authorizes the province to implement Sharia through local legislation at the provincial and regional/municipal levels. This legislation is called *Qanun*.

Although section 7 (1) of law 11/2006 determines that foreign affairs, national military and security, judicial, monetary and fiscal as well as religious affairs are excluded from the authority of the province of Aceh, section 125 (1) authorizes this province to codify Sharia regarding to: 1) theology (*‘aqīda*), 2)

Sharia, and 3) moral (*akhlāq*).¹⁹ Subsequently, the *Qanun* have been added to the jurisdiction of the *Maḥkāma Sharīya*, the special name for the Islamic court in Aceh, where the substantive law of the *Qanun* deals with the jurisdiction of the Islamic court. *Qanun* have also been added to the jurisdiction of the secular court, *pengadilan negeri*, if the substantive law of the *Qanun* concerns the jurisdiction of this court.

The government of Aceh has issued a number of *Qanun* concerning, among other things, the establishment of the Consultative Council of Ulama (Majelis Permusyawaratan Ulama, MPU), implementation of Sharia relating to theology, ritual, public expression of Sharia, religious education, prohibition of drinking alcohol, gambling and *khalwat*, management of *zakāt* institutions, and Islamic education.²⁰ There is current public debate in Aceh regarding the extent to which *Qanun* will be codified in Islamic criminal law.

1.6.2 Sharia in other provinces

Although the authority of governments in other provinces to legalize Sharia is not explicitly regulated, a number of authorities

¹⁹ Furthermore, article 125 (2) mentions that the fields of Sharia regarding ritual (*ibāda*), family law (*āḥwal al-shakhṣīya*), private matters (*mu‘āmala*), public law (*jināya*), court (*qaḍā*), education (*tarbīya*), (*da‘wa*), preaching (*Syiar Islam*) and defending Islam (*pembelaan Islam*).

²⁰ The *Qanun* issued included: 1) *Qanun* 3/2000 on the establishment of MPU, 2) *Qanun* 5/2000 on the implementation of Sharia in Aceh, 3) *Qanun* 7/2000 on customary law and Sharia, 4) *Qanun* 43/2001 on the administration of MPU and the establishment of the plenary council, 5) *Qanun* 10/2002 on the establishment of a Sharia court, 6) *Qanun* 11/2002 on the implementation of Sharia in the area of theology (*aqīda*), ritual (*ibāda*) and public expression of Sharia (*syi‘ar*), 7) *Qanun* 32/2002 on the religious educational system based on the Quran and Ḥadīth, 8) *Qanun* 11/2003 on the prohibition of drinking alcohol and similar types of beverages, 9) *Qanun* 13/2002 on the prohibition of gambling, 10) *Qanun* 14/2003 on the prohibition of the *khalwat*, 11) *Qanun* 7/2004 on the management of *zakat*, and 12) *Qanun* 11/2004 on the tasks and duties of the Sharia police.

have exercised their power to legislate Sharia for provincial, regional/municipal laws known as *Perda Sharia*, i.e. Sharia by-laws. They have sought to revitalize and enshrine Sharia in relation to beliefs and practices and other social problems such as prostitution, gambling, alcohol and drugs. This legislation occurred in a number of provinces, including South Sulawesi, South Kalimantan, East Java, South Sumatra and West Sumatra.

There is no precise information about how many provincial, regional/municipal governments across Indonesia have issued *Perda Sharia*. However, a study conducted by Crouch on this subject shows 160 *Perda Sharia* issued between 1999 and 2000 in 26 provinces. Crouch suggests that local governments in the province of West Sumatra have generated the most *Perda Sharia*, with over forty. This is followed by local governments in South Sulawesi and West Java, both of which have produced over 20 *Perda Sharia* (Crouch 2009:54-58). This number has gradually increased because the dynamics of local politics have intensified this issue. The majority of *Perda Sharia* concern issues relating to Muslim dress code, prohibition of prostitution, alcohol consumption, drugs and other addictive substances, several offences on immorality, rituals, *zakāt* institutions, Quranic education and other governance issues. In May 2006, Sharia legislation in several provinces and regions/municipalities evoked public and parliamentary debate. The debate was initially provoked by two major news magazines, *Gatra* and *Tempo*, printing articles concerning this issue. *Gatra* wrote the headline '*Negeri Syariah tinggal selangkah lagi*' (Islamic State: only one step away) on 6 May 2006.²¹ This was followed on 14

²¹ *Gatra* carried a series of eight reports and four interviews. The reports were entitled: *Gelora Syariah Menggepung Kota*, *Peta Terapan Syariah Islam*, *Jalan Panjang Syariah Islam dan Negara*, *Belajar Damai dari Bulukumba*, *Menguji Niat Perda*, *Syariat Islam di Berbagai Daerah*, and *Sengketa Pandangan Porno*. The interviews were with: Hasyim Muzadi (chair of the NU), Tifatul Sembiring (the President of PKS), Muhammad Ismail Yusanto (Public speaker of the Hisbuttahrir Indonesia), Dewi Djakse (politician of PDI-P), and Adnan Buyung Nasution (Lawyer).

May 2006, by the *Tempo* headline ‘*Syariat Islam di daerah*’ (Sharia in the regional areas).²² These magazines triggered public fears about the emergence of Sharia in a number of regions. On 16 May 2006, this issue reached the heart of government when Konstang Panggawa (member of a Christian political party, PDS) interrupted a session of the parliament. He quoted the reports of *Gatra* and *Tempo* and suggested that members of parliament should carry out political steps to prevent the growth of Sharia in the regions. He said that *Perda Sharia* were in contradiction with higher laws and also contravened the constitution of 1945. Panggawa’s interruption inflamed the debate on this issue among members of parliament and was widely covered by the media. The first reaction to Panggawa’s views came from the Zulkifliemansyah (members of PKS political party) who said that Panggawa’s views were totally wrong and it was a mistake to interpret *Perda Sharia* as contradicting higher laws and being against the constitution. They argued that *Perda Sharia* is justified (*Republika*, 17/5/2006).

Arguments for and against the issue increased among members of parliament. Those against the issuance of *Perda Sharia* were members of the Protestant and Catholic and nationalist parties, such as PDS and PDI; meanwhile, those pro Sharia were from the Islamic parties, such as, PKS, PAN, PBB. On 17 May 2006, 56 members of DPR signed a petition asking their leaders to write a letter to the president asking for the withdrawal of *Perda Sharia*. The petition was delivered to the vice chair of the parliament, Soetarjo Soerjogoernitro. A counter-petition was signed by 134 members of parliament, mainly from Islamic parties.²³ This

²²*Tempo* carried seven reports in the 14 May 2006 edition; namely, *Syariat Islam di Jalur Lambat, Dari Aceh Sampai Mataram, Jika Malam selalu Mencemaskan, Membawa Kontroversi ke MA, Akibat Menyontek Tetangga, Pecut Banbu dari Bulukumba, and Goyangan Tak Kunjung Reda*.

²³ A breakdown of these 134 members of parliament shows that: 22 are from the PPP, 30 from the PKS, 30 from the PAN, 20 from the BPD, 6 from the Golkar, 8 from the PBR, 5 from the Demokrasi and 3 from the PKB.

petition was delivered to the chair of parliament, Agung Laksono, on 27 June 2006. Finally, the two sides reached an agreement to reconcile the debate by suggesting that *Perda Sharia* should be examined according to the legal mechanisms of executive review, judicial review or constitutional review.

The central government, under the Ministry of Home Affairs, has conducted the executive review of provincial, regional/municipal laws, including *Perda Sharia*. This examination aimed to scrutinize whether the laws are in contravention of state laws and regulations. The examination revealed that between 2002 and 2006, 554 provincial and regional/municipal laws have been withdrawn. These laws dealt mostly with the issues of local tax and retribution (Huda 2010:156-7). None of the legislation withdrawn was *Perda Sharia*. However, the Supreme Court had only examined one *Perda Sharia* – 5/2006 – on the prohibition of prostitution, issued by the authorities of Tangerang. The case was put to the Supreme Court by a number of individuals and NGOs who characterized the provincial law as being in contravention with national laws. In March 2007, the Supreme Court ruled that law 5/2005 from Tangerang does not contravene any national law.²⁴

1.7 Sharia in West Sumatra

The province of West Sumatra is mostly associated with being Minangkabau land. Minangkabau land covers an area that is larger than the provincial area. Indeed, the Bangkinang region in the

²⁴The individuals who proposed judicial review by the Supreme Court were Lilis Mahmuda, Tuti Rachmawati and Hesti Prabowo who were from Tangerang, and they were supported by several NGOs, including the Jakarta Law Aid Institute (LBH Jakarta) the Apik Law Aid Institute, the Indonesian Lawyer Association (PBHI), and the Wahid Institute. They argued it contradicted with higher laws such as the Penal Law, Regulation no.7/1984 on the rectification of the CEDAW, NO.39/1999 on human rights and No.10/2004 on the legal procedure of promulgating the law.

province of Riau and the Kerinci area in the province of Jambi are also part of the Minangkabau culture. However, West Sumatra is also home to the Mentawai, who do not belong to Minangkabau culture. The following discussion deals with the Minangkabau culture, the majority of which comes under the administration of West Sumatra province.

West Sumatra now has twelve regions and seven municipalities, consisting of 176 sub-districts and 627 villages, called *nagari*. The population projection in 2009 was 4.83 million, comprising 2.37 million men and 2.46 million women. The population includes: 97.57% Muslims, 1.21% Protestant, 0.96% catholic, 0.04% Hindu, 0.19% Buddhist and 0.02% others. In 2009, there were 4,532 mosques, 11,868 *mushalla/surau* (prayer sites), 72 protestant churches, 49 catholic churches, and 6 *viharas* (West Sumatra 2010).

Minangkabau culture is defined by a handful of customs and rough linguistic commonalities, spreading out from a heartland of highland villages called the *darek* and into the expanding *rantau* (Hadler 2008:4). Before the arrival of Islam, the people of Minangkabau had obeyed the *adat* rules of this matrilineal society founded by Datuk Katumanggungan and Perpatih Nan Sabatang. It is widely believed that ulama who belonged to a Sufi order introduced Islam to the Minangkabau people in the 13th century, and in the next three centuries they succeeded in converting the Minangkabau people to Islam. They successfully shifted the role of *surau* to be the center of Islamic teachings for the Minangkabau people.

At the end of 18th century and at the beginning of the 19th century, some ulama who returned from Mecca, where they had gone to study Islam as well as to perform pilgrimage, applied a more legalistic approach to the Islamization of the society, and they began to devote attention to examining what was Islamic and what was un-Islamic. Haji Miskin, for example, preached against certain external abuses in Minangkabau society, in particular

gambling, opium-smoking, cock-fighting, the drinking of *tuak* (alcohol) and the chewing of betel (*sirih*). Another Padri leader, Tuanku Nan Renceh, introduced a new order that was based on four tenets: faith, circumcision, fasting and prayer five times a day. As symbol of the new order, tobacco, opium, betel, cock-fighting, gambling and strong drinks would be banned, men were to wear beards and dress completely in white, women had to cover their faces and the two sexes were not to bathe together (Dobbin 1974:336). The *adat* leaders were opposed to the new approach and this led to fierce tensions that resulted in a civil war. After a couple of years of war, a number of *adat* leaders requested help from the Dutch authorities to fight the ulama groups, namely the Padri. The involvement of the Dutch resulted in what is commonly called the Padri War. The conflict ended in 1937 when Tuanku Imam Bonjol was arrested and passed away in exile in Manado in 1864.

It is important to briefly mention the relationship between Sharia and Minangkabau *adat*. Initially, Padri leaders expected people to fully convert to Islam and disobey the *adat* that was claimed to be in contradiction with Sharia. In the memoirs he wrote in exile, Tuanku Imam Bonjol revealed an interesting notion concerning the relationship of Sharia and *adat* rules. In 1832, he was told by pilgrims who had returned from Mecca that the Wahhabi had fallen in Mecca and the version of Sharia promulgated by Haji Miskin (the first leader of the Padri in 1803) were no longer valid. This story influenced Tuanku Imam Bonjol's thought. In his memoirs, he recalls saying to one of his advisors, 'there are many laws in the Quran that we have overlooked. What do you think about this?' His advisor replied: 'We have overlooked many of the laws in the Quran'. (*Naskah* 2004:39). The memoir also reveals that in a meeting held among Islamic as well as *adat* authorities, they agreed that:

This was the request of all the *adat* leaders to the Tuanku Imam. They applied the law according to the teaching of the Quran. And

so they applied the law according to the teaching of the Quran. And the adat leaders used Sharia as the basis for adat (*adat basandi syarak*). If there was a problem with adat it would be brought to the adat leaders. If there was a problem with Sharia. If there was a problem with adat it would be brought to the Islamic authorities. (*Naskah* 2004:40-1).

This is the first text that mentions that Minangkabau people agreed to a maxim of *adat* based on Sharia (*adat basandi Syarak*). However, in the second half of the 19th century, Verkerk Pistorius pointed to a different maxim that is *adat* based on Sharia and Sharia based on adat (*adat basandi syarak, syarak basandi adat*) (Pistorius 1871).

At the end of the 19th century, Minangkabau *adat* was again under attack. This time from Aḥmad Khatib al-Minangkabawi (1860-1916) who left for Mecca as a teenager to study Islam. In Mecca, he married a daughter of Ṣalih al-Kurdi, from a rich Arab family, and he did not return to his homeland until his death in 1916. He wrote three books regarding the *adat* rules of inheritance and claimed that the *adat* practices of inheritance contradicted Sharia and, thus, he characterized it as *jāhiliya* tradition. He further suggested that *adat* rules should be replaced with Sharia. If they were not able to do this, he suggested that people should perform *hijra* and move to another place where Sharia was applied. His views were followed by ulama who had studied Islam with him in Mecca, including Khatib Muhammad Ali (1861-1836), a leading figure of *Kaum Tua*, and Abdul Karim Amrullah (1879-1945), well known as Haji Rasul, a leading figure of *Kaum Muda*. However, after observing actual practices of how property was treated according to *adat* rules, they concluded that Sharia could not be applied. They argued that property ruled under *adat* law did not fulfill the requirements necessary for the application of Sharia (Huda 2003).

At the beginning of the 20th century, Minangkabau ulama polarized into two groups: traditionalists, called the Old Group

(*Kaum Tua*) and modernists, called the New Group (*Kaum Muda*) (Abdullah 1971). They were involved in public debates on trivial doctrinal (*khilāfiya*) matters, comprising eighteen problems, such as: *berdiri mawlid* (standing while reciting the history of Prophet), permissibility of *Ṭarīqa Naqshbandiyya* and *Saṭṭarīya*, vocalizing the vow at the beginning of prayers and visiting graves (Abdulmutalib 1981). The impact of this polarization still continues today and ulama associated with the modernist group are mostly attached to organizations such as Muhammadiyah; while the traditionalist group tends to be part of organizations such as Tarbiyah Islamiyah or other Sufi orders.

Since independence, the relationship between Sharia and Minangkabau *adat* has, on the whole, been harmonious. Concerning inheritance, for example, in 1952 Minangkabau ulama and *adat* functionaries reached an agreement that Sharia can be applied to self-earned property and *adat* rules are applied to *adat* property. However, it was suggested that people should write a *waṣīya* that gives one third of the self-earned property to a nephew or niece (*kemanakan*). This agreement was re-emphasized by the ulama at a meeting in Padangpanjang between 21-25 July 1969 (Huda 2003:113).

However, the actual practices show that most Minangkabau people are reluctant to apply Sharia to self-earned property. This property tends to be collectively owned by family members. As long as all family members agree to this practice, according to Syarifuddin, it does not contradict Sharia (Syarifuddin 1984:333). Subsequently, this collective ownership tends to be regulated under *adat* rules (von Benda-Beckmann 1979). This practice suggests that the foundation of Minangkabau society is still ruled under *adat* law, although the maxim *adat basandi syarak, syarak basandi kitabullah*, has been widely accepted by the people. According to Hadler, 'the Minangkabau matriarchate is hard to kill' and the Minangkabau *adat* is still a strong basis of Minangkabau society (Hadler 2008:177).

Adat and Sharia have become two important themes of public discourse in West Sumatra since the implementation of decentralization and regional autonomy in 2000. There are strong views that local government should be based on public policies in accordance with local identity. This local identity refers specifically to the maxim of *adat*. Besides the possibility to issue laws created by the national decision to devolve power, provincial law 9/2000 also created more obvious chances to issue local legislation relating to village administration. This provincial law states that decentralization and local autonomy allow for the adjustment of government structure in accordance with Minangkabau culture, in which the lowest government structure is *nagari*. It also provides for the governance of society in accordance with the philosophy of *adat*: *adat* is based on Sharia, Sharia is based on the Quran; Sharia commands, *adat* implements; the nature is being a teacher (*adat basandi syarak, syarak basandi kitabullah. Syarak mangato, adat mamakai. Alam takambang jadi guru*). This philosophy authorizes the position of Sharia and *adat* as two central entities for the society.

1.8 Conclusions

The use of the term Sharia has grown in line with the development of Muslim history. Currently, it is primarily understood in a legal sense, particularly in the sense of positive law. Although early Muslim scholars did not use this term in discussing rules for Muslims, the Quran and ḥadīth clearly designate that this word means life rules for Muslims; a discursive tradition or a total discourse on Muslim life. As a set of rules, Sharia deals with different situations at different times and from place to place.

The position of Sharia in the era of nation states among the Muslim countries varies from country to country. Most of the legal systems of these countries employ European models, maintaining the systems applied by colonial governments. Current

developments, however, suggest that Sharia has been gradually adopted into the legal system of these countries. Thus, Sharia faces new challenges to adjust, particularly in relation to the nation state that also possesses its own meanings, structures and rules. The dynamic relation between the two varies from country to country.

In Indonesia, the government has legalized a number of aspects of Sharia for national law. The legislation is strongly intended to define an Indonesian Islam or an Indonesian *madhhab*. This term is commonly defined as Sharia in accordance with the state's purposes. The political parties and state institutions play an important role in determining to what extent the elements of Sharia should be legalized. Thus, the state is actively involved in shaping Sharia through education, family, endowment, pilgrimage, Islamic charity forms, economic activities and judicial institutions. In addition, with regard to public law, Sharia is mostly placed on the periphery, outside the legal sphere.

In Minangkabau, West Sumatra, the position of Sharia, juxtaposed with the *adat*, has been playing an important role in society. Most people obey Sharia in relation to rituals such as performing prayers, fasting during Ramadan, paying Islamic forms of charities, and performing pilgrimage. Besides ritual activities, several institutions relating to Sharia have been established including mosques, Islamic education centers (both state and private institutions), and a number of Sufi orders. In addition, the role of the Ministry of Religious Affairs, which established a sub-regional office (*kecamatan*) in the area, has played a key role in implementing Sharia legislation relating to state laws, rules and regulations. There have also been attempts to legislate other aspects of Sharia, which are not currently of the state's concern, in the provincial or regional/municipal law. This legislation will be examined in the subsequent chapters.