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Contesting sharia : state law, decentralization and Minangkabau custom

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Chapter 2

Maintaining 'public morality': Prevention and elimination of unlawful acts

2.1 Introduction

In the early stages of decentralization it was a widely held view that the government had been less than successful in maintaining public morality despite its monopoly over policing the efficient administration of positive law (Hooker 2008:281). This lack of success was demonstrated by the widespread occurrence of prostitution, gambling, and drug and alcohol abuse. Here, I will suggest that public morality problems occur not only as a consequence of a discrepancy between the state penal law and the Islamic penal code, but also because of a lack of effective implementation of the penal code due to a culture of corruption among government officers.²⁵

There is a significant distinction between the state's penal law and Islamic criminal law located within the issue of morality, which has been defined as the need to 'suppress practices condemned as immoral though they involve nothing that would ordinarily be thought of as harmful to other persons' (Hart 1963:25). However, this issue is not unknown in the Islamic criminal code, which deals with offences relating to committing prohibited acts or disobeying obligations set out in the Quran or

²⁵ The word corruption broadly means the misuse of office for personal gain (Klitgaard 2000:2).

ḥadīth. The discrepancy between the rules within the Indonesian penal codes and Islamic criminal law has become a challenge for many Indonesian Muslims who adhere to Islamic teachings, as well as obey the national penal codes enforced by the government.

The issue of maintaining public morality became a priority for local authorities with affiliations to Islamic political parties such as PAN, PPP, PK, and PBB. They orchestrated attempts to table a draft law on this subject aimed at preventing and eliminating public immorality. This chapter focuses on public morality and addresses three main questions: 1) To what extent are there attempts to introduce Sharia legislation relating to public immorality? 2) How has this issue been debated in public? 3) To what extent were the laws on this matter implemented in terms of actual practice? This chapter presents a number of discussions and practices on the following topics: 1) Islamic rules on public law; 2) Islamic public law in the Muslim world; 3) immorality within Indonesian public law; 4) public morality in West Sumatra; 5) local legislation on public morality that covers provincial and regional laws; 6) actual practice implemented by the municipality of Padang in terms of maintaining public morality; and 7) conclusions.

2.2. Islamic rules on public law

According to Islamic rules on public law, unlawful acts are mostly related to disobeying obligations or committing prohibited acts. Muslim jurists have classified unlawful acts into three groups: firstly, *ḥadd* or *ḥudūd*. These are offences that are mentioned in the Quran and consist of violations of the claims of God (*ḥuqūq Allāh*). They have a mandatory fixed punishment (*ḥadd* or *ḥudūd*). According to a majority of Muslim jurists in the Sunnī school, these offences fall into six categories: 1) theft (*sariqa*); 2) banditry (*qaṭ' al-ṭarīq, ḥirāba*); 3) unlawful sexual intercourse (*zina*, Arabic: *zinā*); 4) unfounded accusations of unlawful sexual intercourse (*qadhf*); 5) drinking alcohol (*shurb al-khamr*); and 6) apostasy (*ridda*). The

second group of unlawful acts is *qiṣāṣ* and *diyya*. These are offences against the personal integrity, including homicide and wounding. These offences are widely regarded in terms of retaliation (*qiṣāṣ*) and financial compensation (*diyya*). The third group of unlawful acts is *taʿzīr* and *siyāsa*. This relates to the discretionary punishment of sinful or forbidden behavior or acts endangering public order or state security (Bahnasiy 1965; al-Jazīrī 1990; al-Zuhaily 1997). The above classification is solely based on whether criminal offences and punishment have been elucidated in the Quran and ḥadīth. It is not based on whether the aim of the act is to inflict harm or evil on others.

The following paragraphs briefly discuss a number of offences that may be categorized as acts of public immorality. They relate to unlawful sexual intercourse; drinking alcoholic beverages and taking psychotropic substances, gambling, distributing pornographic prints and committing prohibited acts during the fasting month (*Ramadan*).

According to Sharia, sexual intercourse is only permitted within a marriage or between a slave woman and her master. Sexual intercourse that does not fall within bounds of these categories is considered to be unlawful sexual intercourse (*zina*). It is committed by a man and woman who are not married to each other, whether or not it takes place voluntarily, and whether or not payment is made. A man who engages in unlawful sexual intercourse commits a tortious act, regardless of whether or not the woman consented. The essential element that determines whether there should be punishment for unlawful sexual intercourse or not is actual penetration by the man into the vagina (Bahnasiy 1965:11-12; al-Jazīrī 1990:49; Ibn Rushd 1994:362-3). However, a strict standard of evidence is required to prove this offence; instead of the usual testimony of two witnesses, testimony by four witnesses in four different court sessions is required.

The Quran states that the punishment for those who commit unlawful sexual intercourse is flogging and the ḥadīth

states that the penalty is stoning. If the woman is not married, the man is liable for a proper bride price (*mahr al-mithl*)²⁶ in return for having enjoyed her sexual service. If she is a slave, the man has to pay damages to her owner. Furthermore, the person who commits unlawful sexual intercourse can be punished with the fixed penalties of either 100 lashes or death by stones, depending on their own legal status (Bahnasiy 1965:17-18; al-Jazīrī 1990:45-64).

This rule extends to other sexually immoral acts, including prostitution and homosexuality, although there are different opinions about the punishment for these offences. In addition to this type of sexual immorality, the Quran also prohibits *khalwa* (close proximity between unmarried persons of the opposite sex) and any acts that facilitate others to commit these acts are also prohibited.²⁷

The Quran prohibits the drinking of alcoholic beverages (*al-khamr*) and gambling (*al-maysr*).²⁸ Muslim jurists have extended this to prohibiting the consumption of any food and drink that can affect or damage the human psyche. These new extensions are derived from the texts of the Quran and ḥadīths. However, there are different opinions on the punishment for drinking alcohol. Shafi'ite follow the practice of the prophet, which says that the punishment is forty lashes. Other jurists follow 'Umar who increases the punishment to eighty lashes. However, there is some controversy among the Islamic Jurists concerning drinking

²⁶*Mahr mithl* is the average bride price that a woman of the same age and social status would receive upon marriage in that region.

²⁷The Quran states the prohibition of committing unlawful sexual intercourse and its consequences in various verses: al-Furqān/the Criterion (25):68; al-Mumtaḥana/the Examined One (60):12; al-Isrā'/the Night Journey (17):32; and al-Nūr/the Light (24):2, 3. Several ḥadīth add more detailed rules relating to punishment and practice in the time of the prophet. In *Fiqh* books, the offences come under the heading of Islamic public law (*bāb al-jināya*).

²⁸The Quran mentions the prohibition of alcoholic beverage and gambling in various: al-Baqara/the Heifer (2):219; al-Mā'ida/the Table Spread (5):90 & 91.

beverages other than *khamr*. Most jurists put the consumption of such beverages on a par with *khamr* and therefore believe the punishment should be the same, regardless of the quantities involved. In contrast, the Hanafites hold that someone will only be punished if he actually becomes intoxicated (Bahnasiy 1965:18-22; al-Jazīrī 1990:10-15; Ibn Rushd 1994:370-2).

Other public moralities are regulated by discretionary rules (*ta'zīr*). *Ta'zīr* deals with any unlawful and sinful acts that are not constituted as *ḥudud* offences, homicide, or bodily harm. Executive officials and judges may impose corrective punishment on those who have committed such unlawful and sinful acts (Bahnasiy 1965:192-193). The function of these discretionary rules is not only to determine punishment of those who commit *ḥudd* and crimes against the person, but also those who cannot be sentenced to the appropriate punishment for procedural reasons, or are pardoned by the victim's next of kin, or because there is a lack of legally required evidence. It also determines punishment for those who have committed acts that resemble crime but do not fall under its legal definition; this includes illegal sexual acts that are not intercourse.

Current evidence suggests that the category of discretionary acts is increasing in different Muslim countries. For example, it is now seen as an immoral act in some Muslim countries not to fast during the Ramadan, or for a person to publish or distribute nude photographs. Islamic discretionary rules accommodate attempts to maintain public morality.

2.3 Islamic public law in Muslim countries

Current developments in the Muslim world show that Islamic public law varies from country to country. The application of public law can be classified into three categories: a country that officially disconnects with Islamic criminal law; a country that uses Islamic public law as the primary basis for its public code; and a

country that uses another source, and not Islamic public law, as the primary basis of its public codes. Turkey is the only Muslim country that belongs to the category of countries that is disconnected from the Islamic penal code. This disconnection began when the government adopted German public law in 1929 (Koçak 2010:264).

The second category of countries that have a public code based primarily on Islamic principles – albeit obeying different Islamic schools of law – includes Saudi Arabia, Iran, Pakistan, Sudan, Libya and Nigeria. The position of Islamic penal codes in these countries can be described as follows: Saudi Arabia applies substantive public law concerning *ḥudūd*, *qiṣāṣ* and *ta'zīr*, largely according to the Hanbalite doctrine though it has remained uncodified. This includes offences of unlawful sexual intercourse and abuse of alcohol. In 2001, the Saudi government enacted a code of criminal procedure that elucidates that punishment can only be inflicted on those who commit crimes prohibited by Sharia (Vogel 2000; Peters 2005:152; Van Eijk 2010:166).

Iran applies Islamic public law according to Shiite doctrines. In early 1981, the government applied a public code in accordance with Islamic criminal law, which included of unlawful sexual intercourse, homosexuality and abuse of alcohol. In the following two years the government enacted state laws relating to *ḥudūd* and *qiṣāṣ* and determined that the penalty for committing such offences would be flogging. In 1991, the Iranian parliament approved a new criminal law containing five books that cover a range of offences including *ḥudūd*, homicide, blood money and discretionary punishment (Mir-Husseini 2010:358-60).

Pakistan also applies Islamic public law. Under the Zia ul-Haq regime, in 1979, the government turned away from the legal code introduced by the British and adopted Islamic public law. A number of offences concerning *ḥudūd*, *qiṣāṣ*, and *ta'zīr*, largely determined by Hanafite doctrine, are now punishable (Lau 2010:218; Wasti 2009:7-8). Rules regarding unlawful sexual

intercourse, such as homosexuality, adultery and fornication, are identical to those set out in classical *fiqh*, which states that the penalty for the offender is not only flogging but also imprisonment. Punishment for a fornicator is flogging, not lapidation (stoning), and for the abuse of alcohol it is forty lashes (Peters 2005:156-7).

Sudan is another country that applies an Islamic public code. This is regulated under section 9 of the 1973 constitution that stipulates that Sharia is the principle source of Sudanese legislation. In subsequent years a number of offences were incorporated under Islamic criminal law. For example, in 1977 abuse of an alcoholic substance became an offence, and in 1984 it was decided that unlawful sexual intercourse is punishable with eighty lashes and one year of imprisonment.

In Libya, the implementation of an Islamic criminal code began when Qaddafi came to power. In 1973 and 1974, the government enacted state laws concerning offences regulated under Islamic public law, largely according to the Malikite doctrine. Unlawful sexual intercourse and abuse of alcohol are punishable offences. Similar developments occurred in Nigeria where Islamic criminal law is applied. The offence of *zina* is punishable by death by stoning if the offender is currently married or has been married; otherwise, the punishment is one hundred lashes. *Qadhf* or false accusation of *zina* is punishable with eighty lashes and abuse of alcohol is punished with eighty lashes. Since 2000, twelve northern Nigeria states have introduced new punishments for violation of Islamic criminal law. This development includes a number of offences of unlawful sexual intercourse, sodomy, and alcohol abuse (Weimann 2010:22-29).

There has also been development of Islamic criminal law in other Muslim countries that had experienced different colonial powers. Although most of these countries continue to apply public law implemented by their colonial administrations, they have attempted to adopt traces of Islamic criminal law. A number of

countries belong to this category, including Morocco, Egypt, Mali, Malaysia and Indonesia. In Morocco, the most recent developments show that in 2003 a number of offences derived from Sharia were absorbed into Moroccan public law, including punishing Muslims who provocatively disrespect the rules of fasting during Ramadan, obstruction of religious practices, and other offences that corrupt Islamic values concerning family life and honor (Buskens 2010:122-4). Indonesia's experience regarding this issue is presented in the following sections.

2.4 Immorality within Indonesian public law

The Indonesian government still applies a penal code that was first implemented by the colonial government, although a number of sections have been abolished or added. The colonial government issued *Koninklijk staatsblad* no. 732 on *Wetboek van strafrecht voor Nederlandsch Indië* (WvSN) in 15 October 1915 and this penal code was came into force on June 1918. In 1946, the government issued law 1/1946 on this subject and changed its name into *Kitab Undang-Undang Hukum Pidana* (KUHP). Since the initial penal code was introduced and enforced by colonial power, the Indonesian government has drafted a number of versions of this law, including a bill put before parliament in 2005. However, a new penal code has never been passed. This failure may be because the government and parliament failed to reach a consensus concerning the variety of norm and code of conducts concerning public law.

KUHP and other state laws include a number of public immoralities as crimes. KUHP elucidates this matter in the chapter on public decency and public order. Sections 281 to 283 of KUHP highlight the prohibition of providing, performing, showing, distributing, and publication of any obscene material, such as nude photographs, in public; and the prohibition of earning a living from such material. Sections 284 to 288 prohibit adultery between

two parties, one of whom, or both of whom, is or are married. Section 284 specifies that this offence may only be punished if his or her spouse objects to the act; otherwise, it is not a crime. However, fornication is not included as a crime in KUHP. Sections 289 to 296 prohibit other illicit sexual acts, such as homosexuality, and providing facilities for and earning a living from these illicit sexual acts. It also classifies sexual intercourse with an underage person as a crime. Section 300 prohibits the selling or giving of alcoholic drinks to an underage person (below sixteen years old). In addition, section 484 elucidates that being drunk is only a crime if it disturbs public order. Section 303 elucidates the prohibition of gambling, including offering and providing facilities for gambling and living on the earnings from gambling. But, this offence is not considered a crime if the government permits it. At section 303, gambling is defined as any game in which there is a possibility to gain profit or that requires a player to rely on fortune rather than tactics or skillfulness. In 1974, the government decided to completely prohibit any form of gambling when it issued law 7/1974. This law came into effect when the government issued regulation 9/1981 aimed at qualifying any form of gambling as a crime.

The government has also issued a number of other laws that qualify immoral acts as crimes. This includes law 5/1997 on psychotropic and other substances, law 22/1997 on narcotics, 24/1997 on broadcasting, and 44/2008 on pornography. The first two laws rule that psychotropic substances and narcotics are strictly restricted to health and knowledge purposes. Any form of abuse of these substances is strictly prohibited and the offender may be punished with a minimum of four and a maximum of fifteen years in jail, or with a fine of a minimum of 150 and a maximum of 750 million rupiah. Various forms of indecent materials, including pornography and material related to gambling are also prohibited from publication or broadcast in any form of media. Law 24/1997 rules that offenders will be punished with

seven years in jail or a fine of 700 million rupiah. Law 44/2008 threatens the offender of a pornographic offence with punishment of a minimum of six months and a maximum of one year in jail or a fine of 250 million rupiah.

2.4.1 In the province of Aceh

Aside from the current developments in terms of issuing state laws concerning public immorality, a number of provinces and regions have codified public immorality in local law since 2000. The authorities in Aceh have issued *qanun* aimed at regulating public morality offences concerning the prohibition of drinking alcohol, gambling and *khalwat*. *Qanun* 12 of 2003 makes it an offence to consume *khamr* and psychotropic substance. *Khamr* is broadly defined as an alcoholic drink that may cause health and consciousness problems including brain damage. *Qanun* 12 elucidates that consuming alcohol and other psychotropic substances is prohibited (*ḥarām*). Thus, any parties – individual, organization or business, government and community – are prohibited from becoming involved with these substances. Every person is forbidden from consuming alcoholic and other psychotropic substances. Offenders will be punished with forty lashes. The punishment for habitual consumers adds a third more lashes to the basic punishment. This *qanun* prohibits an organization or business from producing, providing and selling alcoholic and psychotropic substances. Punishment for doing so is a minimum of three months and a maximum of one year prison or be fined with a minimum 25 billion and a maximum 75 billion rupiah. A government officer who issues such a permit will be punished with a minimum of three months and a maximum of one year in jail or be fined with a minimum 25 billion and a maximum 75 billion rupiah.

The offence of gambling is regulated under *qanun* 13 of 2003 and it defines gambling as an activity that involves a bet between two or more parties in which the winner makes a profit. This *qanun*

elucidates that gambling is prohibited (*ḥarām*). Consequently, every person is prohibited from committing any form of gambling. Offenders will be punished with a minimum of six and a maximum of twelve lashes in public. Habitual gamblers will be punished with one third extra lashes. *Qanun* 13 goes on to prohibit any organization or business from organizing, facilitating and protecting any form of gambling. Punishment for doing so is a fine of a minimum 5 million and a maximum 15 million rupiah. This *qanun* rules that no government institution has the authority to issue a license to legalize gambling. Any officer doing so will be fined with minimum 5 million and maximum 15 million rupiah. People should actively prevent any forms of gambling, for example by reporting it to the local authorities.

Qanun 14/2003 concerns *khalwat*. This is defined as close proximity between unmarried people of the opposite sex. The above *qanun* prohibits *khalwat*, facilitating *khalwat* and the protection of an offender. Punishment for committing *khalwat* is a minimum of three and a maximum of nine lashes or a fine of minimum 2.5 million rupiah and maximum 10 million rupiah. *Qanun* 14 also prohibits any private or government institution from providing facilities or protection for offenders. Anyone caught doing so will be punished with a minimum of two months and a maximum of six months in jail or be fine with minimum 5 million and maximum 15 million rupiah.

The three Aceh *qanun* outlined above reveal that the nature of these offences is decided by rules that are regulated under the Islamic penal code. They also reveal that those offences have shifted away from what KUHP has already ruled. This shift occurred as a result of legal and social factors: legally, the government of Aceh has the authority to codify Sharia and socially, most people of Aceh adhere to the rules of public morality in accordance with Sharia.

2.4.2 In other provinces

In other provinces and regions a number of local public morality laws have been issued mainly relating to the prohibition of prostitution, gambling, and alcoholic beverages. Here, I will provide an example by outlining two regional laws, one from Bulukumba in South Sulawesi and one from Sambas in West Kalimantan. The authorities in Bulukumba issued regional law 03/2002 prohibiting the abuse of alcoholic beverages. The law defines alcoholic beverages as any drinks containing elements of ethanol substances mixed with other substances. This definition emphasizes the technical methods required to produce alcohol, rather than focusing on the health problems caused by this substance. It does not, however, totally prohibit the consumption, sale or distribution of alcoholic beverages in this region. Sections 2 to 6 rule that the head of the region may issue a license to legalize the consumption or sale of alcohol; however, section 7 limits the places where alcoholic beverages may be sold to tourist destinations, hotels, restaurants and bars. Section 8 also restricts students and public officers from buying and consuming alcoholic beverages. Offenders will be punished with a maximum of six months in jail or fined a maximum of 5 million rupiah. Thus, this regional law follows the rules set out in KUHP rather than Sharia.

The authorities in Sambas issued regional law 3/2004 on the prohibition of prostitution and pornography. The prohibition of *zina* is also included in this local law, which defines prostitution and *zina* as two separate acts, despite them both involving sexual intercourse (whether consensual or by force) between a man and a woman who are not married to each other. Pornography is defined as any act that stimulates sexual desire or lust, whether it be as a result of a way of dressing or of behavior. Offenders may be punished with a minimum of four months and a maximum of six months in jail or with a fine of minimum 3 million and maximum 5 million rupiah.

Similar local regulations can be found in other regions throughout the archipelago, such as in West Java, South Sulawesi, South Sumatra and other provinces. This development suggests that local authorities are challenged with problems of public morality and are attempting to solve these problems by issuing local laws. A number of regions still issue local laws aimed at prohibiting gambling, even though it has already been prohibited under national law.²⁹ Perhaps, the purpose of this is to put the matter firmly under the authority of the regional government, rather than national law who enforce it using the police.

2.5 Public morality in West Sumatra

In West Sumatra public immorality is formed by several sets of rules, including *adat* law and Sharia. These two rules are located at the periphery of state law; however, both are very much 'living' laws within society. Actual practice varies and requires an awareness of whether an immoral act is governed by *adat* or Sharia. It should be noted that *adat* rules regarding public immorality are more varied and more specific than Sharia. The history of this society reveals that the first conflict between groups of Muslims and *adat* functionaries occurred in the 19th century and was triggered in part as a result of public immorality issues, including gambling and smoking opium (Dobbin 1974:328). Current questions of public immorality largely deal with unlawful sexual intercourse, abuse of alcohol and other psychotropic substances, gambling, the spread of pornographic materials and other immoral conduct between men and women.

In recent decades, the provincial authorities have attempted to tackle the problems of prostitution. In 1978, the government took the political decision to establish a rehabilitation center located in Sukarami at Solok, aimed at offering prostitutes

²⁹The regional law of Sambas 4/2004 on the prohibition of gambling.

an alternative and to provide them with the skills to support themselves without resorting to prostitution. However, it has little impact in terms of reducing the number of prostitutes. On the contrary, current evidence shows that number of prostitutes is gradually increasing. According to a government report, there were approximately 200 prostitutes in West Sumatra in 2000 (*Singgalang*, 22/7/2001). This actual figure is likely to be higher as not all prostitutes are willing to be recorded in this official data. Though prostitution is condemned, it is widely available in a number of cities in West Sumatra. For example, in Padang prostitutes can be easily observed on several main streets during nights, or they stay at cheap hostels or hotels located in the city. It has been widely rumored that corrupt government officers are involved in the prostitution, securing places for prostitutes to work or protecting the places where they reside. A number of other people also benefit from the earnings of prostitution, including taxi drivers and landlords.

The spread of other public immoralities such as gambling and the abuse of alcohol and other psychotropic substances, as well as the distribution of pornographic materials has been widespread. In the early 2000s, it was common to observe people freely selling and offering lottery cards, alcoholic drinks, and pornographic pictures in several public places in Padang, even next door to the police headquarters or the mayor's office in the city. These public immoralities have resulted in the increase of both crime and social problems, including a rise in the number of people who have contracted HIV/AIDS (Profile 2011:39).³⁰ Most people have become skeptical that the government is able to deal with such social problems effectively (*interview* with ulama, 27/7/2010).

³⁰ According to the statistical data of West Sumatra the total crimes and offences registered at the court between 2005 and 2009 as follow. Crimes; 2005:2,184, 2006:2,447, 2007:2,875, 2008:2,872 and 2009:3.119 Offences; 2005:198,082, 2006:91,426, 2007:89,991, 2008:87,435 and 2009:82,569 (*West Sumatra* 2010:195).

For most people, the issue of public immorality is rooted in two main factors. First, there is a discrepancy between the rules regarding immoral acts and the state's law and the norms of *adat* and Sharia which the majority of people adhere to. Law enforcement is only possible according to the state's rules. Secondly, though state law has clearly classified a number of public immoralities as crimes, there is a lack of implementation. Police officers often justify this failure by saying that public immorality is hard to defeat because it has long been a part of human culture. Another argument used by the police to justify the failure to enforce state laws on public immorality is the lack of police numbers. This is may be justified by the fact that the ratio of police and population in Indonesia is still far from ideal, that is 1:400. The data shows that between 1995 and 2000 the ratio is 1:1.000 and this rate increased to 1:750 between 2000 and 2004. This number increased to 1:500 in 2009 (News.detik.com, 01/07/2010). In West Sumatra, the ratio rate reaches 1:504 in 2009 there were 9,568 police personnel for a population of approximately 4.83 million (West Sumatra 2010:53:57). The general population tends to take the opposite view to the police and it is frequently argued that the lack of enforcement is a result of corrupt police officers who are deeply involved in immoral acts such as gambling, prostitution, abuse of alcohol and drugs.

The issue of public immorality has become a prime concern among politicians, specifically those belonging to Islamic political parties such as PPP, PAN, PKS and PBB. These politicians advocate Sharia legislation as well as *adat* rules to regulate public immorality at the provincial and regional/municipal levels.

2.5.1 Provincial Law

Members of the provincial parliament marked a new achievement when they advocated a draft provincial law concerning public immorality. The parliament has the authority to table a draft provincial law according to the regional autonomy law of 1999 and

the amended constitution. Prior to this legislation, this institution lacked the authority to draft bills. This development attracted wide public attention. In addition, legislation concerning immorality is a relatively sensitive issue for the public, because many see it as an attempt to legalize Sharia rather than *adat* rules. Consequently, there has been a varied response to this development. As Indonesian legal history shows, public discussion and debate has been the usual response to any attempts to legalize Sharia. These responses tend to become emotional and polarized. The proponents of Sharia are accused of going against *Pancasila* and the constitution; meanwhile opponents of Sharia are accused of islamophobia.

The following section presents two subsections of the draft and provincial law 11/2001. This aims to examine the contents of both, and the extent to which the provincial law differed from the draft and why such a difference occurred.

2.5.1.1 The draft

The E commission of the provincial parliament is tasked to deal with social welfare (*kesejahteraan rakyat*) and this means it is also concerned with the issue of public immorality. Though some people have voiced the opinion that public immorality problems cannot be solved by a legal approach, this commission believed that these matters required legal solutions. Thus, members of the commission took the initiative to prepare a draft for provincial law. According to the chair of this ad hoc commission, the members of the parliament had conducted several public assessments before taking a decision to draft a bill on the matter. As he mentioned to me:

We had been talking to people during several official visits to villages and other official public gatherings. People were mostly complaining about a gradual diminishing of public morality.

According to them, the adat maxim *adat basandi Sharia, Sharia basandi kitabullah*, was nothing more than lip service and disconnected from people's attitudes and behaviors. However, I acknowledge that not all people felt the same about this, but most of them do. They suggested we should issue a provincial law to maintain public morality. This suggestion motivated members of the E commission of DPRD to draft and subsequently table a bill in parliament (Interview, the former chair of the commission, 07/06/2009).

In early of 2001 the E commission began the process of drafting a provincial law concerning the prohibition and elimination of public immorality (*Pelarangan dan pemberantasan maksiat*). The draft consisted of seven chapters and seventeen sections.³¹ Below three parts of the draft are examined: the motives behind its issuance, the rules included in the draft and the penalties.

The draft mentions three main reasons for introducing the law. First, the province of West Sumatra is a region that has a distinctive character, not least that the society is ruled by both *adat* and Sharia. This is justified by the maxim: *adat* is based on Sharia; Sharia is based on the Quran; Sharia commands; *adat* implements; the messages are taken from nature (*adat basandi syara', syara' basandi kitabullah, syara' mangato, adat mamakai, alam takambang jadi guru*). Second, several immoral acts, including prostitution, unlawful sexual intercourse, homosexuality, gambling, pornographic acts, and the abuse of alcohol have affected, disturbed and disharmonized the foundation of society. These immoralities clearly contravene not only a number of state laws and regulations, but also religious and *adat* rules. Third, the purpose of issuing the provincial law is generally to maintain social harmony and specifically to protect new generations from the negative impact of immoral acts.

³¹ The draft can be seen in appendix 5.

Furthermore, this draft defines a number of key terms related to this issue. Public immorality (*maksiat*) is defined as conduct by any person that disturbs the foundations of social life and that is considered contrary to state regulations, and religious and traditional rules. This immorality includes male and female prostitution, unlawful sexual intercourse (*zina*), abortion, homosexuality, pornographic acts, gambling, and abuse of narcotics and alcoholic beverages. These immoralities may be classified into four main categories: 1) unlawful sexual intercourse; 2) gambling; 3) abuse of alcohol and other psychotropic substances; and 4) pornographic acts.

The drafter appears to be attempting to change the meaning of immoralities as defined in the national public laws. Though definitions of alcohol and other psychotropic substances are, on the whole, simply restated from what is written in the national public laws, unlawful sexual intercourse (*zina*) is defined as unlawful sexual intercourse committed by a man and women who are not married to each other, including consensual intercourse. Prostitution is defined as unlawful intercourse with financial benefits committed by a man and woman who are not married to each other. Homosexuality is defined as unlawful sexual intercourse by two people of the same sex. Nevertheless, the draft remains vague and imprecise about a number of immoral acts; for example, pornographic acts are defined as any acts and/or conduct that may stimulate sexual desire.

The draft rules that any person who is involved in, facilitates, provides, or permits public immorality shall be guilty of an offence. Section 10, entitled prohibition, states the following:

- (1) Any person who commits public immorality (*maksiat*) shall be guilty of an offence;
- (2) Any person whose conduct can stimulate or trigger another person to commit immoralities shall be guilty of an offence;
- (3) Any female person who leaves their house between 10pm and 4am, without being accompanied by family members (*muḥrim*),

and/or she is not on duty obligated by law, and/or she is not doing any work justified by other legal norms, shall be guilty of an offence;

- (4) Any owner of hotel/motel/inn/guest house who allows any guest to visit outside of visiting time or outside of the visiting room (guest room/lobby), or allows anyone to commit immoralities, or provides massage services, or allows males and females who are not married to each other to stay in the same room, shall be guilty of an offence.

The draft specifies a code of conduct for owners of hotels, entertainment venues, tourist destinations, educational institutions, state and private institutions, business groups, and mass media. For example, the owner of a hotel should record the identity of guests who are staying and send this data to an appointed local authority. The hotel owner must provide transportation to take their female staff home if their shift ends after 10pm; the owner is also obligated to prevent any form of public morality offence. This draft implies that public immoralities commonly occur in these public places.

The penalties for offenders are regulated in section 14. Subsection 1 elucidates that offenders who commit the offences that have been regulated under national public laws will be punished according to the penalties set out in the national legislation and that details of the offence will be published in three local media sources. Subsection 2 rules that the penalty for offenders who commit offences stipulated under the draft will be imprisoned for a maximum of six months or fined a maximum of 5 million rupiah. Details of the offences will be published in three local media. Subsection 3 further rules that offenders who own hotels, entertainment venues, tourist destinations, educational institutions, state and private institutions, business groups, and mass media will be punished with a maximum of six months in jail or fined a maximum of 5 million rupiah. There will also be

administrative sanctions such as the withdrawing of a business licence. Subsections 4 to 6 elucidate that if an offender is a public officer the penalty will be doubled. The draft mentions legal institutions that should enforce this provincial law, including the police, the civil servants investigation bureau and the civil service police unit. The implementation of provincial law is approved by the governor of West Sumatra.

This draft shows that codes of conduct concerning public immorality are derived from state regulations, Minangkabau *adat* and Sharia. The standard rules regarding immorality are derived from Sharia and, to some extent, also from *adat*, while the penalties for these offences are adopted from state law. This evidence reveals that Sharia does play a central role in this issue. Hooker suggests that this development can be characterized by the attempts to adopt elements of Sharia into state values (Hooker 2008:291-2).

The provincial parliament established an ad hoc commission to produce and get joint approval of the draft with the provincial government. The commission subsequently planned a number of hearings with broader audiences, including academics, NGO activists, ulama, *adat* functionaries and public figures from civil society groups as well as other elements of society. These meetings were scheduled between 26 and 29 June 2001. The ad hoc commission intentionally decided not to circulate the draft to wider public audiences; nevertheless, it fell into the hands of journalists who published it. A local daily newspaper, *Haluan*, printed the draft between 24 and 26 June 2001. There was a swift reaction from the public to the draft that was keen to share its views with members of parliament.

The public response to the draft was varied. Some people were happy and fully supported the bill; others were shocked and rejected it completely; there were a number of skeptics who proposed a different idea, and there were those who were critical and asked for a revision. Opponents and proponents alike not only

came from West Sumatra, but also outside of the province. The draft triggered nationwide public debate and discussions centered on two main issues. First, whether or not a provincial law on public immorality was necessary; and second, the rules stipulated in the draft were seen to be in contradiction to national law and human rights. Opponents and proponents to the draft reacted emotionally rather than rationally to the proposed legislation.

Many of the proponents were local ulama, *adat* functionaries and activists from Muslim organizations, including Muhammadiyah, Aisiyah Muhammadiyah and Nahdlatul Ulama. Their support was publicly articulated whenever possible. In addition, proponents attempted to counter criticism of the draft. However, they tended to do this in an emotional way, attacking opponents with value judgments, rather than with rational arguments. For example, during a meeting of the ad hoc DPRD commission on 25 June 2001, the Chair of Muhammadiyah expressed his support by saying 'I acknowledge that this draft is still in the form of a draft, therefore it still requires enriching and revising. However, we should not be hasty and say that this draft contravenes [national laws] and thus must be fully rejected. This denial is a reflection of narrow-mindedness and inaccuracy' (*Singgalang*, 27/06/2001). This statement reveals that the Chair did not focus on countering the arguments of opponents; rather he judged them accusing them of being narrow-minded and inaccurate.

A similar approach was adopted by the leader of Aisiyah Muhammadiyah who delivered the following views on this issue: 'According to Aisiyah the draft is more respected than the [declaration of human rights], because it is based on *adat* and *syara*' [Islamic Law]'. She went on to accuse opponents of the draft of having been contaminated by Western values that are not in accordance with Islamic teachings (*Singgalang*, 27/06/2001). Classifying the draft as more respected than international human

rights legislation and judging opponents for their 'Western values' is an emotional reaction.

The Vice Director of the legal aid organization (PHBI) said: 'it is strange that some of us are promoting western values that are obviously not in line with our tradition and culture. It is time to implement the richness of Islamic values' (*Singgalang*, 27/06/2001). An outstanding local *'ālim* (Islamic religious scholar), rather suspiciously supported the draft by saying, 'this draft aims to protect *akhlāq* of *ummat* [muslim communities] from disorder. Thus, all of us must support [the draft] and we should not be provoked by others whose agenda is to cancel the draft'. An *adat* functionary also supported the draft. He said, 'Muslims are the dominant population in Minangkabau; thus, it is logical that Islamic law influenced our tradition. Consequently Islamic law that is adopted in the draft must be obeyed in this region' (*Singgalang*, 27/06/2001). Similar voices were also heard from other individuals or Muslim and *adat* organizations, including the West Sumatra Ulama Council, a number of Muslim academics and *adat* functionaries. In addition, there were equally emotional responses among opponents of the draft. For example, an accusation was made that the members of parliament lacked intellectual capacities (*Haluan*, 03/06/2001).

Despite the emotion on both sides, there were some constructive arguments put forward, mostly by opponents who disagreed with the draft or certain sections of it. The governor of West Sumatra, NGO activists, and scholars belonged to this category. Their arguments can be summarized into three main points: First, substantive laws in the draft have already been regulated under national public laws. Thus, there was no point in issuing the same substantive laws, particularly ones that contravene the national laws. The suggestion was put forward to maintain public morality by reinforcing the national laws, rather than issuing local regulations on the matter. Second, it was argued that a legalistic approach, such as issuing a provincial law

concerning public immorality (*maksiat*), was not the best solution. 'To prohibit a woman from leaving her home between 10pm and 4am is not the best solution for prostitution practices, it will create more difficulties for good women', wrote AA Navis in the daily newspaper *Singgalang* (*Singgalang*, 21/07/2001). The next day, he wrote again and saying that the provincial government had already tried a similar approach to this issue but the result was unsuccessful and, in fact, the number of prostitutes in West Sumatra was on the increase. According to Navis, public immorality was rooted in a number of factors, such as economic, social, religious and *adat* problems. These factors must be taken into consideration when formulating solutions, rather than merely relying on a legal approach (*Singgalang*, 22/07/2001).

Third, the parliament should not issue any provincial law that is largely based on *adat* and Islamic teachings and with the purpose of implementing Islamic law in West Sumatra. West Sumatra is not only home to Muslims and the Minangkabau people, but also to the Mentawai region. It could be seen as a matter of discrimination to issue a provincial law that only applies to Muslims and Minangkabau people. Thus, Navis suggested issuing a similar regulation at the regional rather than at the provincial level (*Singgalang*, 24/07/2001).

The most controversial point in the draft is section 10 (3) that states that 'any female person who leaves their house between 10pm and 4am, without being accompanied by family members (*muhrim*), and/or she is not on duty obligated by law, and/or she is not doing any work justified by other legal norms, shall be guilty of an offence'. Several NGO activists argued that this section not only violated national public law, but also human rights as well. Further, it would create problems for women who, for example, must work during the night, such as in the traditional market, hospitals, hotels and other places. Thus, it was proposed to withdraw this section from the draft. However, there were a number of ulama and *adat* functionaries who supported the restrictions on women leaving their home during

the night. They argued that not only was the restriction inspired by Sharia, but also that such actions were ruled as *cando* – indecency – under *adat*.

Although there were a number of calls to withdraw the draft, during a speech by the governor to members of parliament on 10 September 2001, he suggested that parliament adjust the draft to fit in with the requirements of the national laws. To this end, the parliament might revise the draft by focusing merely on prevention (*pencegahan*) matters and excluding those sections of the draft dealing with the issue of elimination (*pemberantasan*).

In response to criticism of the draft, most members of parliament were reluctant to involve the wider public in a debate and tended to agree to revise major parts of the draft. Of the 55 members of parliament, only five had experience as members of provincial parliaments, and four had been regional parliament members.³² The remainder had no such experience. It is commonly said that being a member of the parliament happens ‘by accident’. This is as a result of a growth in political parties and the fact that there are few qualified figures for the role. In fact, many members of parliament began their careers as civil servants. However, a new law provided opportunities for them to join political parties. Consequently, this created the possibility for anyone who was interested to take on a political position (Asnan 2006:245-6). However, many of these new members underestimated the work involved. There were other factors that contributed to this situation. Political institutions like the parliament are not yet well equipped with comprehensive rules and regulations to facilitate the performance of their tasks. For example, the rules regarding the issuance of a provincial law were still, in general, regulated

³² Figures for members of parliament in 1999 were as follows: KAMMI 1 person, PUI 1 person, PPP 10 people, PDI 5 people, PAN 11 people, PBB 3 people, PK 2 people, Golkar 12 people, PP 1 person, PKB 1 person, PPIM 1 person, and representatives of Military and Police 6 people (Asnan 2006:243-5).

under the presidential decision 44/1999 and a comprehensive rule on this issue is regulated under law 10/2004.

2.5.1.2 Provincial law 11/2001

After six revisions of the first draft, the parliament finally approved a final draft and the governor subsequently approved provincial law 11/2001 on the prevention and elimination of public immoralities (*pencegahan dan pemberantasan maksiat*) on 14 November 2001. It consists of seven chapters and 24 sections. It is not surprising that its contents are considerably different from the first draft.

A brief summary of its contents follows. The provincial law aims to adopt the notion of *adat* as well as Sharia in maintaining public morality. It specifies that a number of immoral acts violate the norms of religion, *adat* and national public laws. Specific public offences are defined in section 2 (2): unlawful sexual intercourse and other conduct that may result in unlawful sexual intercourse, gambling, abuse of alcohol, narcotics and psychotropic substances, and offences relating to pornographic materials.

Though the national public laws regulate public immorality, the provincial law is concerned with four main issues: unlawful sexual intercourse; gambling; abuse of alcohol, narcotics and other psychotropic substances; and pornographic material issues. Of these four classifications, only the definition of *zina* is different from what has been defined in national public laws. The definitions for other immoral acts, including gambling, abuse of alcohol, narcotics and other psychotropic substances and pornographic materials are largely copied from the national public laws. For instance, section 1 (e) defines *zina* as intercourse between a man and woman who are not married to each other, or between to people of the same sex, whether it takes place voluntarily or by force, and whether or not payment is made.

These four offences are regulated in sections 5 to 15 which are summarized as follows: Sections 5 and 6 elucidate that any

person who commits and facilitates unlawful sexual intercourse, or may trigger sexual desire through physical movement and/or not covering part(s) of the body that they are obligated to cover by religious and *adat* rules, produces any kind of writings, pictures, and entertainment that triggers sexual desire shall be guilty of an offence. Sections 7 to 10 rule that any person who commits gambling, facilitates gambling or provides a place or protection for such activities, earns a living from gambling, or licenses gambling shall be guilty of an offence. Sections 11 to 14 rule on the abuse of alcohol, narcotics and psychotropic substances. Section 12 specifies that any person who blends, produces, stores, sells, distributes, presents, protects and consumes alcohol, narcotics or psychotropic substances shall be guilty of an offence. These substances are strictly restricted to medical purposes. With regards to publishing and producing materials that may trigger immoral acts, section 14 elucidates that any person who is in charge of a state or private institution, or any person who has business relating to publishing, producing, and distributing mass media, including printing, electronics stores, and pictures and posters, that contravenes religious and *adat* values shall be guilty of an offence. This provincial law stipulates the importance of public participation. People are encouraged to report (suspected) offences and immoral acts to the local authorities. Furthermore, the general public is also obligated to warn people against committing public immoralities.

However, there are two significant weaknesses of provincial law 11/2001 – the lack of penalty and the lack of legal enforcement. Section 22 (1) only indicates that the offender will be punished according national public law. It only regulates an administrative penalty for any local officer who does not take any legal action following the report of a suspected offence. In addition, it does not explicitly indicate specific legal enforcement, although it mentions that the police have a role in enforcing this law. That said, the police are excluded from the subject of regional

autonomy. Enforcement is prescribed in the form of the civil service police unit (*Satuan Polisi Pamong Praja/Satpol PP*); however, as yet there are no legal enforcement institutions for regional governance.

According to law 22/1999, the governor is required to issue a decree in order to implement the provincial law. Without this, the legislation remains legally inapplicable. There is no specific regulation stating when the governor should issue this decree. Implicit in this rule is that implementation of the provincial law relies on the political will of the governor. The governor established a committee to prepare the draft for the governor decree; however, it failed to fulfill its task. To date, the governor has yet to issue a decree to implement provincial law 11/2001.

Although the provincial law legally cannot come into force, the evidence has shown that it has been widely used to justify certain acts as public immorality offences. Despite this disadvantageous situation, the presence of provincial law 11/2001 has resulted in the issue of public immorality becoming the concern of the regional authorities. However, it also causes a complex relationship between two legal enforcement bodies: the police department and the regional authorities, including *Satpol PP*. This issue is discussed further in the last section of this chapter.

2.5.2 Regional/municipal law

There are four municipalities and three regions that have issued a law concerning public immorality. They are the municipalities of Bukittinggi, Padangpanjang, Payakumbuh and Padang, and the regions of Padangpariman, Sawahlunto/Sijunjung and Pesisir Selatan. This raises the question, why is this issue only of concern in these areas? One explanation may be that these issues had become a priority for most politicians belonging to Islamic political parties, including PK(S), PAN, and PBB. They mostly considered public immorality to have become widespread in these places and has caused social problems, for instance the abuse of alcohol and

other psychotropic substance and criminality (Interview with a member of the provincial parliament, 07/06/2009).

The following paragraphs briefly present the contents of each regional and municipal law. Attention is mainly focused on two issues: the category of public immoralities and the penalty for the offences.

2.5.2.1 The municipality of Bukittinggi

The municipality of Bukittinggi was the first region to issue a municipal law on public morality in West Sumatra. The parliament and the mayor issued municipal law 9/2000 on the prevention and elimination of public immorality on 28 September 2000. It consists of six chapters and eight sections. This law was revised in 2003 with the municipal law 20/2003.

Section two classifies public immoralities in three categories. Firstly, personal offences, including: 1) prostitution; 2) abuse of alcohol in public; 3) disrespecting the rules of fasting in a provocative manner during Ramadan; and 4) distributing pornographic material in public. The second category relates to the misuse of business premises for public immorality offences; and the third category refers to offences of protecting or facilitating immoral acts. The rules relating to unlawful sexual intercourse (*zina*) are excluded from this law and section 4 (2 & 3) specifies that drinking alcohol is only prohibited in public. This allows the authorities to grant licenses to businesses dealing with alcohol. However, this law adopts new elements of Sharia, i.e. disrespecting the rules of the fasting month. The penalty for offenders is a maximum of four months in jail or a fine of 4 million rupiah. The municipal law 20/2003 revised this penalty with a maximum of three months in jail or a fine of 1.5 million rupiah.

2.5.2.2 The municipality of Padangpanjang

The authorities of this municipality issued the municipal law 3/2004 on the prevention and elimination of public immorality on 3 February 2004. It consists of ten chapters and 23 sections. This law classifies public immoralities into eight categories: 1) Unlawful sexual intercourse (*zina*). Section 5 specifies that any person who commits sexual intercourse, conducts homosexual or lesbian relations, provides facilities or protects places for these offences, and lives on the earnings from unlawful sexual intercourse shall be guilty of these offences. 2) Indecent behavior. Sections 6 and 7 rule that any person who wears clothes that are not in accordance with Muslim dress code, behaves in a way that provokes sexual desire, lives on the earnings from harming people and protects any activities relating to harming people shall be guilty of an offence. 3) Publishing and distributing pornographic materials. Section 7 rules that any person who produces, distributes, stores, supplies or sells any pornographic materials shall be guilty of an offence. 4) Prohibits the abuse of alcohol. Section 10 elucidates that any person who sells alcohol without authorization, consumes it in public place, or facilitates and protects the abuse of alcohol shall be guilty an offence. 5) Disrespecting the rules of Ramadan. Article 8 rules that any person who shows disrespect for the rules of fasting during Ramadan, including smoking, drinking or eating in public shall be guilty an offence. 6) Playing games. Article 13 rules that students are prohibited from playing games, such as Playstation and billiards while wearing school uniform. 7) Abuse of narcotics and other psychotropic substances. Section 11 rules that any person who facilitates other people in the abuse of narcotics and other psychotropic substance shall be guilty an offence. 8) The prohibition of gambling. Section 12 elucidates that any person who facilitates gambling shall be guilty an offence.

Section 18 rules on the penalties for the above offences. Offenders involved in unlawful sexual intercourse, prostitutes and homosexuality will be punished with a maximum of six months in

jail or a fine of 5 million rupiah. The offence of indecent behavior is punished with a maximum one month in jail or a fine of 1 million rupiah. The offence of publishing or distributing pornographic pictures is punished with a maximum six months in jail or a fine of a maximum of 5 million rupiah. Offenders who disrespect the rules of fasting will be punished with a maximum three months in jail or a fine of 2.5 million rupiah. The offence of gambling, abuse of drugs and other psychotropic substance is punishable with a maximum six months in jail or a fine of 5 million rupiah.

The enforcement of this municipal law is conducted by the police department and also by the civil service investigator. However, these offences are not included in the tasks of *Satpol PP*.

2.5.2.3 Kabupaten of Pesisir Selatan, Padangpariman, Sawahlunto and Payakumbuh

The regional laws in these four areas are mainly duplications of provincial law 11/2001. The classifications regarding public immorality and its punishment repeat what is laid down in the provincial legislation. That is to say, there are four categories: 1) unlawful sexual intercourse and other acts that include intention to commit unlawful sexual intercourse; 2) gambling; 3) abuse of alcohol, narcotics and other psychotropic substance; and 4) publishing or distributing any form of pornographic materials. The evidence suggests that the regional law on this issue is largely motivated by a need to provide the legal grounds for the regional government to maintain public morality.

2.5.2.4 The municipality of Padang

The municipal parliament and the mayor issued municipal law 11/2005 on public order and peaceful society (*Ketertiban umum dan ketentraman masyarakat*) on 12 September 2005. Compared to similar laws from other regions, this law uses a different title – public order and peaceful society – to other regions that generally use the phrase ‘public immorality’. This difference implies that this

municipal law has a specific aim. Before the municipal government proposed the draft of the law to the parliament in 2005, the parliament had received a different draft on this issue, entitled the control, prohibition and prevention of public immorality (*Penertiban, pelarangan, dan penindakan penyakit masyarakat*). This bill had been tabled by members of parliament belonging to Islamic political parties in October 2000.

In 2000, the municipal parliament established a commission to prepare a new draft. The commission comprised of 23 members, 14 of whom were from Islamic political parties and the remainder were from nationalist parties.³³ Interestingly, it was led by a member from *Golkar*, who opposed to the draft. However, on 22 March 2001, the committee successfully prepared the draft entitled the control, prohibition and prevention of public immorality. It was subsequently tabled for further plenary sessions in the parliament. The draft consisted of six chapters and nine sections.

The draft elucidates a number of public immoralities that are not in line with religious rules and *adat*, but it does not include offences regulated under the national laws. Thus, the municipal law is required to control, prohibit and prevent these immoral acts. The draft defines public immoralities in a broad sense; that is, any acts that contravene Islamic teachings, *adat*, and other rules. Sections 2 and 4 specify the categories of public immoralities: 1) prostitution and related conduct such as *khalwa* (close proximity between unmarried persons of the opposite sex); 2) abuse of alcohol, drugs and other psychotropic substances; 3) disrespect for the rules of fasting during Ramadan; 4) distributing or displaying pornographic material; 5) abuse of public places, including hotels,

³³ Total members of the parliament were 43 persons: there were 26 persons from Islamic political parties, they were 14 persons from PAN, 2 persons from PK, 6 persons from PPP, 2 persons from PBB, 1 persons from PUI and 1 persons from KAMMI; there were 13 persons from nationalist parties, 6 persons from PDIP, 6 persons from Golkar 6, and 1 persons from PKP; the rests were 5 persons representation of police and military (www.kpu.go.id).

cafés, tourist destinations and public transportation such as taxis³⁴ to facilitate public immorality offences; 6) living on the earnings from public immoralities. Section 6 rules on the penalties for these offences.

Offenders will be punished with a maximum of five months in jail or fined to a maximum of 5 million rupiah. To implement his law, section 3 gives authority to the mayor to issue any political decisions aimed at control, prohibition and prevention of public immorality offences, including determining which places or locations are permitted to run food businesses during Ramadan. The above classifications show that this draft is identical to the municipal law of Bukittinggi.

The draft was discussed in several public meetings. During August and September 2001 the parliament held a series of public meetings with several government institutions, academics, public figures, NGOs and Muslim organizations. These meetings reached agreement that such a municipal law on this issue was required. Subsequently, the parliament held several plenary sessions. On 2 December 2001, members of parliament agreed to send the draft to the mayor of Padang. This happened on 2 January 2002. Subsequently, the mayor delivered the position of the municipal government with regards to the draft in a letter, dated 20 April 2002, to the parliament. In the letter the mayor explicitly disagreed with the draft. He argued that the substantive laws in the draft were already regulated under national public laws. He further suggested that if there was an offence that was excluded in the national public law, but that contravened with *adat* or social values, then law 1/1955 regulated that a judge could authorize the punishment of offenders with a maximum of three months in jail. Thus, there was no need to issue a municipal law on these matters

³⁴ Most people believe that taxi drivers have been playing a role in prostitution business in the city in which they often provide prostitutes for the hotel guests (*conversation*, with a young businessman, 28/8/2010).

(Chaironi 2004:59; the letter of the mayor no.50/Huk/IV-2001). In addition, disapproval of the draft was also voiced by members of parliament, including the chair of the commission, (*Haluan* 19/12/2003). In short: as a result of insufficient support for the draft, the parliament finally withdrew the draft from the parliamentary agenda on 18 December 2003. This cancellation meant that the attempt by Islamic members of parliament, aimed at legalizing Sharia for at the municipal level, failed.

The wish for a municipal law concerning public immorality re-emerged soon after a new mayor was elected in Padang in 2004. The newly elected mayor held a different position on this issue. There are two factors contributing to this different stance: firstly, the mayor was maintaining his political power by collaborating with Muslims figures and organizations as well as Islamic political parties; secondly, he was responding to public demands to prioritize religious matters, including maintaining public morality. The municipality prepared a draft on this subject. In 2005, the mayor tabled the bill in parliament. In order to avoid public debate and controversy the mayor used a different approach to the issue and avoided any reference to or association with Sharia. The purpose of the draft appeared simple: to gain legal grounds for maintaining public morality. It took six months for the parliament to pass the draft and in 12 September 2005 the parliament and the mayor approved to the draft of municipality law 11/2005 on the public order and peaceful society (*Ketertiban umum dan ketentraman masyarakat*). A member of parliament expressed his views concerning the successful issuance of the municipal law saying that 'this municipal law marks an important achievement of the parliament. No single word related to Sharia or *adat* is used, but the purpose is clearly the same' (*Interview*, former member of the parliament, 07/07/2010).

The municipal law 11/2005 consists of twelve chapters and sixteen sections. Its purpose is to maintain public order, a peaceful society and, as the title of the law implies, to maximize the use of

public facilities to protect people's needs. Sections 2 and 3 prohibit the misuse of public roads; section 4 regulates the use of green spaces and public places; section 5 deals with cleanliness of the environment, including an obligation to keep public order in neighborhoods; section 9 mentions that business premises must only be used for the intended purposes. Section 10 explicitly outlines the prohibition of gambling and prostitution. Section 14 elucidates that these offences will be punished with a maximum of six months in jail or a fine with a maximum of 5 million rupiahs.

Although this legislation does not explicitly refer to the issue of public immoralities, any acts that contravene public order can be charged under the municipal law. In addition, issues relating to public immorality are implicitly regulated in a number of sections. For example, section 9 regulates that the owners of business premises such as hotels, tourist destinations and cafés, are only permitted to operate under license. In addition, municipal law 11/2005 results in two interconnected points: the municipal authority now has a legal basis for maintaining public morality, a domain previously belonging to the police and in which local authorities played a limited role. It also gives the authority to the mayor of Padang to take any political decision necessary for the maintenance of 'public order and peaceful society'.

On 26 March 2007, law 11/2005 was revised by municipal law 04/2007. This new law was only aimed at revising sections 13 and 14 concerning court procedures and the penalties for offences. It regulates that the offences may be punished with a maximum of three months in jail or a fine of a maximum of 5 million rupiah.

2.6 Actual practices for maintaining public morality in Padang

This section presents actual practices for maintaining public morality imposed by the municipal government of Padang. Before presenting the implementation of the municipal law, it presents an

overview of the civil service police unit (*Satuan polisi pamong praja*, abbreviated to *Satpol PP*), an institution authorized to implement the law.

2.6.1 *Satpol PP*

Satpol PP is a law enforcement institution that has significantly exceeded its power since the implementation of regional autonomy. It was established at the provincial and regional/municipal level. At the provincial level, *Satpol PP* is accountable to the governor and at the regional/municipal level it is directly accountable to the *bupati*/mayor. Its main tasks are dealing with the enforcement of the provincial or region/municipal laws and other rules and regulations issued by the governor or *bupati*/mayor (*Pembinaan* n.d:19).

Historically, this institution has existed since colonial times. It was part of the police institution that was called *de bestuurspolitie*, established in 1892, aimed at maintaining public order and security (Bloembergen 2009:110). During the Japanese occupation this institution was abolished, because the Japanese authority mainly relied on military forces. After the establishment of the police department on 18 August 1945, *Polisi pamong praja* became a part of the police institution. However, the government paid specific attention to this institution on 30 October 1948 when it established an institution called *datasemen polisi penjaga keamanan kapanewon* whose task was to maintain public security primarily in the Yogyakarta area. On 10 November 1948 its name changed to *datasemen polisi pamong praja*. On 3 March 1950, the Minister of Home Affairs issued a decree to establish this institution in Java and Madura and named it *Kesatuan polisi pamong praja*. In these provinces it was to support local government activities. In 1960, the institution was established in other islands (Dajoh & Suwirjo 1997:6-7). In 1962, law 13/1961 on the police changed the name of the institution once again, this time to *Kesatuan pagar baya*, and in

the following year the Minister of Home Affairs revised its title to *Kesatuan pagar praja*.

The final name change resulted in the title *Satuan polisi pamong praja*, commonly abbreviated to *Satpol PP* when the government issued local government law 5/1974. Section 86 (1) of law 5/1974 elucidates that *Satpol PP* is tasked to maintain public order at the province and regional/municipal levels. However, the government strengthened the legal position of *Satpol PP* more than two decades later when it issued the government regulation 6/1998 on 7 January 1998. This rule authorizes *Satpol PP* for two main tasks: to support local rulers in maintaining public security and to enforce regulations issued by the local authorities.

After the implementation of law 22/1999 and 32/2004, the role of *Satpol PP* gradually increased. The president issued the government regulation 32/2004 on *Satpol PP*. Section 3 elucidates two tasks for this body: to maintain security and public order and to enforce provincial or regional/municipal laws. In order to implement these tasks, it may coordinate other law enforcement institutions, including the police, civil service investigator and other authorities. *Satpol PP* has the authority to investigate offences regulated under provincial or regional/municipal law and to take 'repressive non-judicial' actions in respect of those who contravene provincial or regional/municipal laws.

Current developments show that the authority of *Satpol PP* grew significantly when the president revised government regulation 32/2004 with 10/2010 on *Satuan Polisi Pamong Praja*. Section 6 elucidates that it has the authority to: 1) conduct non-judicial (i.e. the case does not need to be decreed by a court of justice) action regarding offences regulated under local law or other local regulations; 2) take any actions to prevent offences regulated by local law and other local regulations; 3) facilitate and empower security; 4) investigate offences regulated under local law or other local regulations; 5) issue any administrative penalty for offences committed. Further, *Satpol PP* has the authority to ask

the police to follow up cases if the criminal law is broken. In addition, section 24 of government regulation 10/2010 regulates that the staff of *Satpol PP* may be armed with gas-powered revolvers, blanks and electric shock sticks.

In order to maintain the organization of *Satpol PP* in the Municipality of Padang, municipal law 14/2004 on the civil service police unit was issued. Currently, this law enforcement agency employs 200 staff, most of who work in administrative functions; less than half are actively working as law enforcers.

2.6.2 Actual practices relating to municipal law

As a law enforcement institution, *Satpol PP* is tasked with enforcing municipal law and other regulations issued by the mayor. In order to maintain public morality, it encompasses municipal law 11/2005 which forms the rules of public immorality in general terms. In terms of actual practices, *Satpol PP* mostly deals with cases concerning 1) gambling; 2) prostitution; 3) *khalwa*; 4) abuse of alcohol, drugs and other psychotropic substances; 5) disrespect for the rules of fasting during Ramadan; 6) pornographic conduct or matters relating to pornographic materials; and 7) abuse of public facilities. *Satpol PP* operates in two ways. First: by carrying out regular or incidental inspections of places where public immorality offences are common. Second, by pursuing reports or complaints from people concerning suspected public immorality offences.

Satpol PP inspects public places and facilities, including hotels, motels, tourist destinations, cafés, bars, billiard rooms and markets. These inspections are scheduled at both regular and irregular times. The purpose is to assess whether the place is being used in accordance with its intended purpose. Thus, at hotels for example, *Satpol PP* examines the identity of guests of the opposite sex who are staying in the same room to find if they are married. From the assessment, *Satpol PP* can reach two conclusions: either that the hotel is being used according to its permit and the guests are married couples; or, that the guests staying in the same room

are unmarried. If this is the case, *Satpol PP* will take the couple to its headquarters and the owner of the hotel will be warned that the hotel is being abused and that he is liable for public immorality offences.

In 2005, the owners of hotels became upset about the regular sweeping of their premises conducted by *Satpol PP*. The association of hotels and restaurants (*Perhimpunan Hotel dan Restoran Indonesia*, PHRI) protested to the mayor of Padang. They argued that their income had significantly diminished because of a decreasing number of guests staying at hotels as direct result of *Satpol PP* carrying out frequent inspections. They suggested that *Satpol PP* reduce its checks. In response to the protest, the mayor reacted by saying that the inspections would not be stopped and there should be no problems if the hotel was being used according to its permits (*Singgalang*, 29/11/2005).

Satpol PP also inspected tourist destinations, in particular a number of places that are popular with local youths spending time with their partners. These places are mainly located in coastal areas, close to the beach, situated in southwest and northern Padang. There, many native people run small-scale businesses, such as kiosks, restaurants and cafés. The owners often provide a small temporary building³⁵ where a couple can spend their afternoons or evenings. According to *Satpol PP*, this is a public immorality offence, namely, *khalwa*, i.e. close proximity between unmarried persons of the opposite sex. Posing a metaphorical question, the chief officer of *Satpol PP* said 'if they are not committing public immorality why are they sitting and spending time in hidden places?' There were 21 couples arrested during an inspection of a tourist destination conducted on 18 March 2011 (Interview, the chief officer of *Satpol PP*, 19/05/2010).

³⁵In colloquial language this temporary building is named *pondok baremoh*, literally meaning a place for gaining pleasure.



Figure 2.1. The two couples sitting on the bench have been accused of committing *khalwa* (Photo is printed in *Daily Haluan*, 08/06/2011).

During the inspection, *Satpol PP* firstly examines the identity of the suspected couple. If they are not married, they will be taken to the headquarters of *Satpol PP*.

Besides conducting inspections, *Satpol PP* also receives reports or complaints from people who suspect the occurrence of public immorality. These kinds of cases mostly occur in rented houses (*rumah kost*) and people from the neighborhood report the cases to the *Satpol PP*. *Satpol PP* follows up such reports by inspecting the house and the marital status of the tenants. If *Satpol PP* is suspicious that these people have committed public immorality, they are taken to the headquarters. The following image shows three pairs of the opposite sex being interrogated at the *Satpol PP* headquarters. They are accused of violating municipal law 11/2005 because they had been living in the same house. The case emerged as a result of reports from the neighborhood.

Satpol PP records show that most of the cases dealing with public immorality offences are prostitution, unlawful sexual intercourse, *khalwa*, gambling, abuse of alcohol and psychotropic substance, and pornographic offences (*interview*, staff of *Satpol PP*,

10/07/2010). On the whole, these cases are dealt with by the local law enforcement authority and only a few cases are forwarded to the police department.



Figure 2.2. Six females and two males are being interrogated at the headquarters of *Satpol PP* (Photo is printed *Daily Haluan*, 04/06/2011)

Cases of *khalwa* are usually dealt with using three solutions: firstly, if the offenders live in Padang, *Satpol PP* calls their parents or their relatives into the headquarters in order to discuss the situation. Most cases are solved by signing an agreement that their parents or relatives promise to tighten their control over the offenders. One parent told me that he felt so embarrassed when his child was arrested by *Satpol PP*. He acknowledged that it is a punishment (*conversation*, with a parent, 30/06/2010). Secondly, if the offenders do not have parents or relatives in Padang because they are studying at the university, *Satpol PP* asks for a member of the administrative or teaching staff to come to the headquarters. A university teacher told me that he once had dealings with *Satpol PP* when two of his students of the opposite sex were arrested (*Conversation*, with a teaching staff, 20/11/2009). Thirdly, if none of the above two solutions can be reached, *Satpol PP* asks the

offenders to sign a letter agreeing that they will not commit the offence in the future.

The case of prostitution is more complicated. This is because prostitution is generally well organized and in most cases there are government officers involved in protecting the practices, places and people involved (*interview*, with the staff of *Satpol PP*, 10/01/2009). On the whole, there are two solutions. One is to call the parent or relative of the prostitutes to the headquarters, and the other is to send them to a rehabilitation center located in the region of Solok. However, a number of cases have been closed when police or military officers have come to the headquarters and told to *Satpol PP* that the prostitute is his wife. In these cases, in order to avoid a conflict with officers of other law enforcement institutions, *Satpol PP* usually releases the prostitutes. The involvement of government officers in prostitution means that often people know when *Satpol PP* plan to inspect public places where there are occurrences of prostitution. This plan is leaked to the owner and, consequently, when *Satpol PP* arrives to inspect the premises there is no trace of public immorality.

Because the local government has no authority concerning national law – this is a matter for the judicial institutions of central government – those offences that are regulated under municipal law can only be prosecuted if they are also stipulated under the national public code. As previously mentioned, even when cases do breach national public law, *Satpol PP* tends to resolve these matters using its authority and it is reluctant to forward cases to the police. One particular example illustrates this. Two young women, SS and NA, were arrested by *Satpol PP* in Fallas café, located in the city center, while they were performing a striptease at 21.45 on 26 September 2011. After both of them signed a document in which they promised not to commit the same offence, *Satpol PP* released them. However, this case became the concern of the police following attention from the local media. On 15 October, the police arrested SS while she was in front of Busako Hotel in Bukittinggi

and NA was arrested the next day. Within a short time, the police had forwarded the case to the courts. They were charged under section 43 of the national law 44/2004 on pornography. After a number of court sessions, the judges of the criminal court punished them with one year in jail. The punishment was justified by the fact that they had breached section 34 of national law 44/2008 by performing a striptease. In this case, the judges did not use any sections of the municipal law to charge the women; rather they said that what they had done contravened the values of Minangkabau *adat* and contradicted attempts by the local government to maintain public morality. The verdict reveals that the judges executed the case using national public law, not municipal law (*Haluan and Singgalang, 09/02/2012*).

During the fasting month, Ramadan, the tasks of *Satpol PP* increase. Their attention turns not only to regular tasks such as inspecting public places, but also to incidents where the rules of fasting are disrespected. In this regard, since 2010, municipal authorities have paid an increasing amount of attention to when and where food businesses are permitted to operate during Ramadan. Restaurants, cafés and other food centers locate where, in areas where the majority of inhabitants are non-Muslim, are permitted. However, this requires *Satpol PP* to work harder in terms of inspecting whether the rules of fasting are being obeyed. The issue of disrespecting the rules of Ramadan is increasingly becoming a public concern. In 2005, *Satpol PP* dealt with many incidents relating to permits for owners of restaurants, cafés, and other food businesses. One case arose when several young people decided to play games in an internet café and Playstation center rather than performing evening prayers (*ṣalāt at-tarāwih*) during Ramadan.

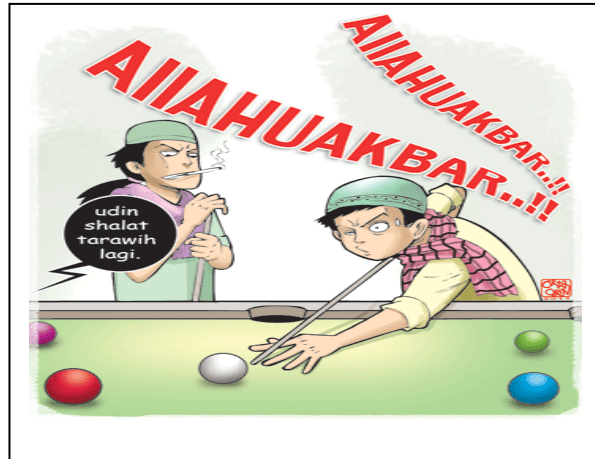


Figure 2.3. A cartoon of two young boys playing billiards in the evening during Ramadan. In the distance *adhān*, a call to prayer, has begun (Published in *Padang Ekspres* 14/08/2011)

Satpol PP also deals with issues concerning gambling and the abuse of alcohol, narcotics and psychotropic substances. However, according to the chief of *Satpol PP* these cases are mainly dealt with by the police because these matters are fully regulated under state laws. Where *Satpol PP* is involved in these matters, it is as part of a taskforce, called SK4, established by the municipal government and consisting of *Satpol PP*, police and military personnel.

Summarized, the actual practices relating to municipal law 11/2005 conducted by *Satpol PP* show that they are mostly in line with the rules mentioned in the draft of 2000 that was withdrawn by the parliament in 2003, rather than following the rules regulated under municipal law 11/2005. However, these practices are frequently justified using municipal law 11/2005, i.e. to maintain public order and peaceful society. The practices also reveal that the role of *Satpol PP* in maintaining public morality is dominant. Thus, it requires qualified and credible staff; otherwise, the issue of the accountability of this institution may arise.

2.7 Conclusions

The New Order government was commonly seen as unsuccessful in maintaining public morality, although there have been several state laws that prohibit immoral acts, such as the law on the prohibition of gambling, abuse of drugs, alcoholic beverages and other psychotropic substances. In order to solve public immorality problems, people generally see that it is necessary to authorize the provincial, regional and municipal governments (using a legal basis) to maintain public morality by issuing legislation. A number of the proponents of this plan advocate the legalization of Sharia.

This is evidenced by several drafts of the law in which the categories of offences have been regulated under Islamic criminal law. This includes the prohibition of unlawful sexual intercourse, homosexuality, close proximity between unmarried people of the opposite sex (*khalwa*), prostitution, living from the earnings of prostitution, provocatively disrespecting the rules of fasting during Ramadan, wearing clothes that are not in accordance with Muslim dress codes, gambling, spreading pornographic materials, drinking alcohol, and abusing narcotics and other psychotropic substances. This list reveals that a number of offences included in the regional/municipal legislation have already been regulated under the national law.

The drafts have evoked public debate and controversy. The resistance to the drafts was rooted in: 1) the fact that the substantive laws of the drafts have already been regulated under the national law; 2) the substantive laws were seen as not in line with legal principles; and 3) the legalization of Sharia is excluded from the authority of the provincial or regional/municipal government.

The proponents of the drafts, who mostly belonged to Islamic political parties, failed to ensure the legalization of Sharia as a solution for maintaining public morality. The effects of this failure are: firstly, the drafts were withdrawn from parliament, as was the case of the draft of 2000 in the municipality of Padang.

Secondly, the parliament made major revisions to the drafts and consequently elements of Sharia were excluded from, for example, the provincial law 11/2001 and other regional laws of Pesisir Selatan, Padang pariaman, Sawahlunto and Payakumbuh. Thirdly, the parliament made minor revisions which actually included several elements of Sharia in these local laws. The evidence for this can be seen in the laws issued in Bukittinggi and Padangpanjang.

Actual practices of maintaining public morality are enforced by the civil service police unit (*Satpol PP*) in the municipality of Padang. However, my research suggests that they did not enforce the rules that are explicitly regulated in the texts of the municipal law 11/2005. That said, they did deal with any acts that disturbed 'public order and peaceful society'. The offences included in this category include the prohibition of unlawful sexual intercourse, homosexuality, close proximity between unmarried people of the opposite sex (*khalwa*), prostitution, living from the earnings of prostitution, disrespecting the rules of fasting in a provocative manner during Ramadan, gambling, spreading pornographic materials, drinking alcohol, and abusing narcotics and other psychotropic substances. These offences refer to those regulated in the draft of 2000 that the parliament withdrew in 2003 because the categories were derived from Sharia.