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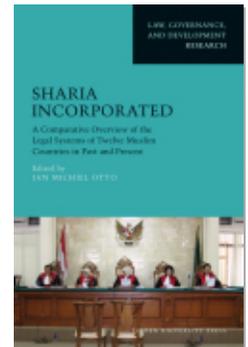
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# 10 Sharia and national law in Indonesia

*Jan Michiel Otto<sup>1</sup>*

## **Abstract**

This chapter addresses the relationship between sharia and national law in Indonesia. The historical sections 10.1-10.4 examine the (pre)colonial pluralities of law, and subsequently relate how Indonesia has accommodated sharia in its laws, administration, and court system, from independence in 1945 until today. The sections 10.5-10.8 pay attention to the law presently in force. While the constitution does not mention Islam explicitly, the government is keen to coordinate religious affairs and prevent excesses. The Ministry of Religion plays an important role in this respect. Religious Courts, as branches of the national judiciary, mainly hear marital disputes, but have recently been given jurisdiction in economic matters as well. The Marriage Act of 1974 is the main sharia-based law; in its provisions Indonesia has kept a significant distance from the patriarchal norms of classical sharia. In 1991, an official Compilation of Islamic Law, drafted by scholars and judges, was promulgated. It contains three chapters – on marriage, inheritance, and religious endowments – which, beside the law, should serve as main reference for the Religious Courts. In the province of Aceh, with its special autonomy, sharia-based law also extends to certain criminal offences.

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*The Republic of Indonesia (1945) has a population of approximately 235 million people. It is the world's most populous Muslim country. The Indonesian archipelago is inhabited by many ethnic groups, the largest being the Javanese, who occupy the densely populated island of Java along with other ethnic groups, such as the Sundanese (West Java) and the Madurese (East Java). Muslims – primarily Sunnis – make up 86 per cent of the population. Other recognised religions are Protestantism (6%), Roman Catholicism (3%), Hinduism (2%), and Buddhism (1%). Virtually everyone in Indonesia speaks the official language, Bahasa Indonesia, although the many ethnic groups in the archipelago also have their own languages.*

(Source: Bartleby 2010)

## 10.1 The period until 1920

### Sharia and scholars between three fires<sup>2</sup>

Islam reached Indonesia around the thirteenth century through the influence of traders coming from India (Ricklefs 1981: 3-13). At that time, the archipelago was made up of various kingdoms, which at times cooperated with one another, but at other times went through periods of great conflict and warfare. Many centuries earlier, Indian traders had brought Hinduism to Java, which was to affect religion, culture, and the form of government for a long time (De Graaf 1949: 21). Hinduism influenced primarily the large states that emerged from central Java, namely Majapahit in the fourteenth century and Mataram in the fifteenth and sixteenth centuries.

These princely states were relatively well-developed with distinct social, political, and legal institutions (Ball 1981: 1-2). But Islam increased in its importance, spreading slowly but surely from settlements in the northern coastal regions of Java to the hinterland. Consequently, the Islamic religion, including the Islamic jurisprudence of the Shafi'ite school, blended with the religion, politics, and legal practices in the princely courts. A certain degree of fusion also took place between Islamic norms and the local customs and law-ways (*adat law*)<sup>3</sup> in rural areas (Lev 1972: 5). During the sixteenth century, the sultans of Yogyakarta and Solo converted to Islam. In their islamised principalities, they began to appoint, alongside a prime minister and a military commander, a religious scholar (*panghulu*), who was to be responsible for religious affairs, including the administration of Islamic justice (Cammack 2003: 114-115; Hisyam 2001).

### *The Dutch East India Company*

In 1596, Dutch merchant ships arrived in search of spices. Initially, the Dutch East India Company (VOC), a powerful mercantile corporation, operated from small trading stations along the coast. For the Europeans living there, it established a comprehensive legal system based on Dutch models. With regard to the indigenous population, initially no colonial legal policy was deliberately pursued. In fact, only in 1747 – some one hundred and fifty years later – did the Company's Governor-General establish by decree the first court for the indigenous population of Java. The court, based in Semarang, was called the '*Landraad*'. It was chaired by a colonial administrator, and a few religious scholars (*panghulus*) were attached to it as advisers (Burns 1999: 61; Hisyam 2001). The management of the VOC itself was rather uninterested and ignorant about indigenous legal systems (Ball 1981: 17-25). This became clear when the VOC ordered various *compendia* of indigenous law to be drafted. Instead of accurate representations of the complex blending of *adat* law, Islamic law, and Javanese royal decrees that applied in practice, the colonial authorities clung to fallacious, one-sided assumptions; for example, it was wrongly assumed that the Islamic population was fully subject to religious, Islamic law only.<sup>4</sup>

### *The colonial state and sharia*

When the VOC went bankrupt in 1800 and the Netherlands East-Indies were transferred to the Dutch state, the era of full colonial administration began. From the outset, colonial policy had consistently placed a central emphasis on maintaining a budget surplus (*batig slot*), but after 1800 the Dutch became increasingly concerned with the political and socio-economic situation in the colony. Influenced by events in Europe at the beginning of the nineteenth century, the colonial government also took its legislative duties more seriously.<sup>5</sup> A 'proto-constitution' was drafted and brought into force as early as 1803, calling for respect of indigenous laws, customs, and institutions (Burns 1999: 62; Ball 1982: 80). Under the leadership of General Daendels (1808-1811) and during the short interim period of British rule under Raffles (1811-1816), more territories on Java were brought under colonial rule. A dualist, yet coherent, administrative hierarchy was established, made up of Dutch civil servants on the one hand, and indigenous officials on the other hand. More courts were established for the indigenous population – still called *Landraad* – and presided over by high colonial officials called '*resident*', who were regional administrators. When a dispute between Muslims was brought before the *Landraad*, the *panghulu* served as an adviser regarding Islamic laws. However, his opinion was often

disregarded because *panghulus* tended to cite primarily religious laws, regardless of whether or not these were applied in practice (Ball 1981: 69).

From around 1812, resistance against foreign domination started growing on Java. This resulted in the Java War (1825-1830), which in the end was won by the Dutch. Now colonial exploitation began in earnest (Ricklefs 1981: 111). The government implemented a repressive colonial agricultural policy that obliged Javanese farmers to use a set portion of their lands for the cultivation of crops for the colonial government, the so-called Cultivation System (*Cultuurstelsel*). Through this system the Dutch generated enormous wealth. Despite specific regulations calling for recognition of indigenous legal systems and the protection of local communities against abuses, colonial law served generally as an instrument for the government's extractive policy.

During this period, no satisfactory overall policy was made for the colonial administration of justice. As a consequence, also the position of the sharia remained unclear and ambiguous. The general ignorance of the Dutch East-Indies government with regard to *adat* and Islamic laws continued (Ball 1981: 35). Furthermore, according to a royal decree from 1830, the codified legislation of the Netherlands had to be applied in the Netherlands Indies to the extent possible (De Smidt 1990: 17-18). Thus, on 1 May 1848, ten major laws were brought into force in the colony, modelled after the innovative codifications of 1838 in the Netherlands. An 'Act on General Provisions of Legislation' divided the population into two groups: first, the Europeans and those with equal legal status; and, secondly, the natives and those with equal legal status (Art. 6). At first, all Christians were considered equal to the Europeans. The second category of natives and those with equal status included 'the Arabs, the Moors, the Chinese' as well as all others who were 'Mohammedans or Heathens'. While the codified civil and commercial legislation applied in principle to the Europeans, the native population was subject to 'the religious laws, social institutions and customs, insofar as these do not conflict with the generally recognised principles of fairness and justice' (Dekker & Van Katwijk 1993: 11-13). In 1854, the Netherlands Indies 'constitution' (*Regeringsreglement*) was promulgated; it further substantiated these provisions in Article 75(3).

The principle of legal dualism was by no means absolute. Indeed in public law there was a strong tendency towards unification. In 1867 a criminal code for Europeans was enacted, followed in 1873 by one for non-Europeans. Yet, the substance of both codes was identical, and as of 1918 all population groups would become subject to one unified criminal code. In 1879 labour law was also unified. But, in most matters of private law, legal dualism continued to prevail. When putting this system into practice, the colonial rulers were faced with the

question of what these religious laws, social institutions, and customs actually came down to, and which agencies should be tasked with applying them. In the Dutch institutes where indigenous law was studied and taught to future colonial officials, the focus lay in discovering and finding 'Muhammadan law' (Otto et al. 1994: 732). Salomon Keijzer, a scholar of Islamic studies who lectured at the Royal Academy for colonial civil servants in Delft, argued that pure Islamic law should serve as the main reference in any attempt to understand the laws of the indigenous population. A colleague of his, the jurist L.W.C. van den Berg, described the indigenous laws on Java and Madura as 'deviations' from Islamic law.<sup>6</sup>

In 1882, the colonial government decided to formalise and regulate the existing administration of Islamic justice, and, as such, enacted an ordinance on the procedural law of Religious Councils, popularly known as the 'Council Agama'.<sup>7</sup> Thus, the colonial government put together non-salaried religious officials, led by a *panghulu*, in these councils and granted them jurisdiction over marriage, divorce, and inheritance, as well as over religious endowments (*wakaf*) (Noer 1978: 43). The council applied Islamic law. The religious scholars and other members of the council were now no longer appointed by the native ruler in their districts, but by the Dutch *resident*. The decisions of the Religious Council could only be executed following approval by the *Landraad*, which continued to be the main state court for the native population. Such ratification was in many, if not most, cases withheld, effectively relegating the status of the Religious Council to little more than an advisory body (Hooker 2003: 13). Despite the council's formal jurisdiction to decide on marital issues according to Islamic law, colonial legislators enacted the Mixed Marriages Ordinance of 1898, which decreed that Muslim women were allowed to marry non-Muslims. This measure, which conflicted directly with the prevailing interpretations of the sharia, was to remain in force until 1974.

The *panghulus* saw themselves placed 'between three fires': God, the colonial government, and local communities (Hisyam 2001). In practice, they cast themselves as mediators between the latter two groups, the government being keen to use their services. Some new Muslim movements, however, depicted the Religious Councils as corrupt and 'lackeys of the non-believers'. In addition, doubts were increasingly placed on their alleged expertise, by both the nascent Muslim movements and the colonial government itself, which had imposed certain standards precisely for this purpose. At the same time, other informal religious scholars began to gain prominence. Under the auspices of the Sultan of Yogyakarta, from 1905 some *panghulus* established their own Islamic schools (*madrasahs*) employing modern methods to educate staff for the Religious Councils. Eventually, *madrasahs* supported by

new Muslim associations (see below) would spread across the island of Java.

*Legislative policies, adat law and sharia in the late colonial state*

Around 1900, various colonial administrators and scholars proposed the replacement of the existing legal dualism with a system of uniform private law codes based on the Dutch model for all inhabitants. They were of the opinion that the religious and customary laws were a source of legal uncertainty and that the corpus of different laws for different population groups created confusion (Ball 1981: 43). Others, however, believed that it would be wrong to apply the laws of the Dutch minority to the native majority, as it had its own laws. After a long political and academic struggle, the latter succeeded in convincing the Dutch parliament and government to stick to the pluralistic system and retain the indigenous law of the natives, rejecting proposals for the full unification of private laws. Around the turn of the century, *adat* law – Indonesia’s version of customary law – became the key concept in the colonial analysis of indigenous laws. The first person to use the concept of ‘adat-law’ – in 1893 – was Snouck Hurgronje, an expert of Islam, Arabic and Indonesian languages and cultures.<sup>8</sup> Jurists, and one legal scholar in particular, the young law professor Cornelis van Vollenhoven who taught in Leiden (1901-1933), further developed this concept. To him and his many students and supporters, the recognition of *adat* law was the main objective of the so-called Ethical Policy initiative (1901). He argued in favour of extended indigenous land rights of native communities and protection from land grabbing by European and Chinese entrepreneurs. Much of the political and legal debates and literature on *adat* law deals with these issues of land tenure security.

However, in the context of Islamic legal development, the promotion of *adat* law could also be regarded as a deliberate effort to undermine Islamic law. Indeed, when Snouck Hurgronje coined the term, he happened to be involved in preparing a government strategy to address the rebellious, fervently Islamic, province of Aceh. In his opinion, the transformation of Islam and Islamic law into political factors had to be stymied, not only in Aceh, but throughout the colony. However, while it is true that in his view political Islam had to be resisted, he also argued that Islamic law should *not* be prevented from playing a role in regulating the private relations of Muslims. After 1900, Snouck Hurgronje worked in close collaboration with Van Vollenhoven who, assisted by dozens of field researchers and PhD students, scientifically developed, elaborated, recorded, and promoted the colony’s customary law. As said, *adat* law was most important in the ‘ethical’ struggle for land tenure security, fitting in a new policy emphasis on the welfare and well-being of

the indigenous population. Its key characteristic was that its norms were *actually* applied by local communities; thus, *adat* law was *living* law. As a consequence, it was reasoned that *adat* law would include only those norms of ‘customary law’, of ‘princely decrees’, and of ‘religious law’ that were actively practiced by the community.

The principle that sharia norms were considered the law in force only in as far they applied in practice – thus belonging to the living *adat* law – became known among legal scholars in Indonesia as the ‘reception theory’.<sup>9</sup> This theory, however, was considered by orthodox and nationalist Muslims as a symbol of the subjugation of Islamic law to *adat* law. They accused the Dutch of engaging in divide-and-rule politics and of misusing the fact that *adat* laws differed from one place to another. Moreover, the repressive ‘pacification’ of Aceh reinforced both nationalist and Muslim resistance. As a consequence of these sentiments, various large Islamic popular movements were founded. In 1911, the ‘*Muhammadiyah*’ was established. In 1912, the Islam Association (*Sarekat Islam*) followed, which would later be surpassed in importance by the NU established in 1926 (*Nahdatul Ulama*, lit. ‘the awakening of the scholars’). The NU had its roots in the Islamic schools that taught sharia (Van Dijk 1988: 37-38). In 1923, an organisation of ‘orthodox’ Islamic intellectuals called ‘*Persis*’ (*Persatuan Islam*, lit. Islamic Unification) was created (Hooker 2003: 28-32).<sup>10</sup> All sorts of differences of opinion existed between these new movements and the *panghulus*, but there was also a common goal: furthering the cause of Islam *vis-à-vis* the colonial government (Hisyam 2001).

## 10.2 The period from 1920 until 1965

### The rise of nationalism, independence, and Sukarno’s rule

In 1922, the colonial government established a commission for the re-organisation of the Religious Council. In addition to Muslim leaders and Javanese local rulers (*bupati* or *regent*), this commission included Hussein Djajadiningrat, the government’s Deputy-Advisor for Native Affairs, and the professor of *adat* law Ter Haar (Lev 1972: 18). The work of this commission eventually contributed to the drafting and enactment of a regulation that came into force in 1937. This regulation changed the status, name, and composition of the councils on Java and Madura. It established ‘*Panghulu* courts’, to be comprised of a religious scholar (*panghulu*) serving in the capacity of judge, who could be assisted by two assessors and a clerk. These would all be salaried positions in an effort to professionalise the courts. In addition, an Islamic Court of Appeals (*Mahkamah Islam Tinggi*) was established for the whole of Java and Madura. Under the same regulation, South

Kalimantan was provided with an equivalent court structure.<sup>11</sup> The new Religious Courts retained their authority to settle marital disputes. However, adjudication of religious endowments (*wakaf*)<sup>12</sup> and of inheritance law was removed from their jurisdiction. The regulation granted the secular General Courts (*Landraden*) full authority in matters relating to property. Understandably, the 1937 reform was seen as being anti-Islamic and sparked much resistance from Muslim movements, but to no avail (Cammack 2007: 148; Lev 1972: 19-24).

### *The end of colonialism and the birth pangs of independence*

In 1942, Japan invaded the Netherlands Indies and took over the administration of the archipelago. All existing laws remained in force; therefore, the position of Islamic law remained largely unchanged. The Japanese did, however, concentrate the supervision of religious affairs into a single department of Religious Affairs instead of spread across various ministries as it had been previously (Lev 1972: 44).

From the end of 1944, when independence was in sight, a secret council of prominent Indonesians began meeting in order to advise the Japanese on administrative affairs. The agenda of these discussions included the position of Islam (ibid: 34-36). The visions of 'nationalists' and 'Muslim leaders' soon diverged on this issue, resulting in the council becoming deeply divided regarding the question of whether a future independent state of Indonesia should still have Religious Courts. A number of Muslim leaders hoped for an 'Islamic state' that would enforce the sharia for all Muslims. During negotiations in June 1945, their wishes were initially honoured in the so-called Jakarta Charter, which was intended as the preamble to the new constitution. This document stipulated that the new state would be based on the belief in God 'with the obligation to implement sharia for the adherents of Islam' (Cribb & Brown 1997: 15).

But in the following weeks, nationalist leaders Sukarno and Hatta changed their minds. When they pronounced Indonesia's independence on 17 August 1945 and read out and disseminated the first constitution, the cited words ('with the obligation to...') appeared to have been deleted. Sukarno and Hatta preferred a national state under a strong, unified leadership and with a secular, modernising orientation.

The ideological foundations of the Indonesian Constitution of 1945 lay in the five principles of the Pancasila. The Pancasila, which literally means 'five pillars', became part of the constitutional preamble. As such, it formed part of the highest source of law in the Indonesian state. The five principles were:

- belief in the One and Almighty God;
- just and civilised humanity;

- national unity;
- popular sovereignty governed by wise policies arrived at through deliberation and representation; and
- social justice.

This political formula incorporated the main ideological currents in Indonesia's political arena: Islam, internationally recognised principles of humanity, nationalism, traditional governance, democracy, and socialism. The general formulation of the first principle was meant to assuage the fears of the followers of other religions. Formally, no space was left for atheism or polytheism, but, culturally, religion in Indonesia was syncretic and tolerant.

*Islamist rebellions, Islamic politics, administration, and law in the young republic*

After independence, the Religious Courts remained in place, in accordance with the constitution's transitional provision that all laws and state institutions would remain unchanged as long as they did not conflict with the new constitution. The first twenty years of the young Indonesian republic, led by Sukarno from 1945 until the beginning of the New Order in 1965/1966, constituted a period of much military, political, and ideological tension and conflict. The struggle for independence undertaken against the Dutch lasted until December 1949. During this chaotic period, a number of insurrections against the republic occurred in various regions. In 1948, a mystic leader in West Java proclaimed himself to be the leader of an Islamic state based on the sharia and ruled by clergymen (Ricklefs 1981: 215-216). This *Darul Islam* insurgence sparked years of conflict with the government in the rural areas of West Java.

Starting in 1950, a rebellion against Jakarta also broke out in South Sulawesi, which aligned itself politically with *Darul Islam*. In 1953, Aceh joined in the insurgency (ibid: 232, 235). In 1956, army officers also rebelled in Sumatra and in 1957 in Kalimantan, the Moluccas, and North and South Sulawesi (ibid: 242). After a failed assassination attempt on Sukarno by Muslim extremists later that year, he began opting for a more dictatorial form of rule. The army supported him in this, as did his own nationalist party, 'Partai Nasional Indonesia' (PNI), and the communist party, 'Partai Komunis Indonesia' (PKI). Starting in 1957, he referred to his reign as 'Guided Democracy'. Relations with Aceh were restored in 1959 by giving the province a special legal status that granted it autonomy in matters of education, culture, and religion.<sup>13</sup> In West Java, the *Darul Islam* rebels were pushed back, but were not to fully give up their fight until 1965 (Van Dijk 1988: 40).

After independence, the Islamic mass organisation *Masyumi*, which had been founded during the Japanese occupation, had become the biggest political party. Initially, the NU, the *Muhammadiyah*, and other Muslim organisations worked together under the banner of *Masyumi*. Several prime ministers belonged to this coalition (Ricklefs 1981: 230). Following an internal conflict, however, between the 'pliable' conservatives and the 'strict' modernists, the conservative NU left the *Masyumi* during the 1950s and started working together with the nationalists and communists.

In 1955, general elections were held for parliament and for the *Konstituante*, the Constitutional Assembly of Indonesia. *Masyumi*, PNI, NU, and PKI became the biggest parties. In the *Konstituante*, which was inaugurated in 1956, Muslim politicians argued that the Jakarta Charter should be incorporated into the constitution, but this proposal was rejected by a small majority (ibid: 253). Sukarno, who adamantly continued his push for national unity, now tried to sway popular opinion in favour of the 'Nasakom' ideology, trying to unify three competing ideologies (*Nasionalisme*, *Agama* (religion), and *Komunisme* (ibid: 256). At this juncture, the communists were becoming more and more powerful, as the Muslim parties steadily lost ground.

On the administrative front, successive cabinets attempted to organise and regulate government and society following independence in 1945. A year later, in 1946, the Ministry of Religion was established (Lev 1972: 43). This new ministry opened local bureaus for religious affairs throughout the country, the so-called KUA (*Kantor Urusan Agama*). Oversight of the Religious Courts was also transferred in 1946 from the Ministry of Justice to the Ministry of Religion (ibid: 64). The ministry offered ample employment opportunities for supporters of the NU, and of the *Masyumi*, who, unlike other civil servants, mostly had their origins from pious, non-aristocratic circles (ibid: 53). Enactment of Law 22/1946 brought the contracting and registration of Muslim marriages and divorces within the administrative jurisdiction of the ministry (ibid: 54-57). The office of the salaried Civil Registrar, whose functioning followed national, uniform procedures overseen by the local bureaus for religious affairs, was also created. While the Ministry of Religion was viewed with hope by Muslim activists, it was seen with fear by others. Would it propagate Islam and undermine the state or would it control Islam on behalf of the state?

After the declaration of independence, nationalists made several attempts at abolishing the Religious Courts. The first was Act 19/1948, stipulating that the courts must be integrated into secular state courts. However, due to the ongoing struggle for independence against the Dutch, this law was not implemented and the Religious Courts simply continued to function as they always had, just now formally supported

by the Ministry of Religion. Finally, in 1957, the cabinet enacted Government Regulation 45, authorising the formation of Islamic courts in every district in the outer islands where they did not already exist (Cammack 2007: 149). While the jurisdiction of these Religious Courts outside of Java appeared to be broader, as it included inheritance matters (ibid), in fact, it was more limited because its scope was decreed to be for ‘the application of the laws living in society’. In essence, Regulation 45/1957 was a continuation of *adat* law policies, but now for the purpose of formation of a ‘national *adat*’ (Bowen 2003: 53).

The Supreme Court in Jakarta, led by the progressive Wirjono, was of the opinion that the position of widows under traditional *adat* law and Islamic law was too weak. Lev notes the court’s argumentation, including reference to ‘the equal participation of women in the national struggles’ and ‘the strong relationship between husband and wife’ (1962: 213-222). In 1960, the Supreme Court ruled that ‘adat inheritance law throughout Indonesia concerning the widow can be so formulated that a widow is always an heir to the separately owned property [...] of her husband.’ Lev further notes, ‘[t]he essential point of this decision [...] is that the Supreme Court’s view of justice has prevailed over the several adat views of justice [...]’ (ibid: 222). This new nationalist legal discourse with regard to the position of sharia *vis-à-vis* *adat* law in Indonesia’s national legal system came to expression in the plea of the eminent Muslim jurist Hazairin for the creation of a fifth Sunni school of Islamic jurisprudence, the *Madhhab Indonesia*. This would be based on an eclectic amalgamation of elements taken from the teachings of the four existing schools of jurisprudence complemented with Indonesian local *adat* practices, e.g. joint marital property (*harta bersama*).

### 10.3 The period from 1965 until 1985

#### The heyday of Suharto’s New Order

On 30 September 1965 the army allegedly foiled an attempted leftist coup. This sparked off an immense power struggle, which eventually devolved into a huge massacre in which the army – backed by Muslim groups – imprisoned and murdered hundreds of thousands of communists and communist sympathisers. Sukarno lost his authority and on 11 March 1966 he signed a document in which he transferred executive powers to Suharto, who, in turn, ordered the Communist Party to be abolished. The following year, Sukarno was officially deposed and Suharto proclaimed himself president of the republic (Cribb & Brown 1997: 110-111). His rule, generally referred to as the ‘New Order’ (*Orde Baru*), was to last for 32 years.

*Political control, bureaucratisation and two major laws*

Under Suharto's rule only three political parties were allowed, all of which were controlled by the government. Golkar, a secular mass organisation initiated by the army in 1964 to unite all forces against the communist party, became the dominant ruling party. All civil servants were pressured to become members of Golkar. Existing Islamic parties were ordered to merge, thus becoming the United Development Party, or PPP (Partai Persatuan Pembangunan). The PPP together with the nationalist Democratic Party of Indonesia, or PDI (Partai Demokrasi Indonesia – the third and final political party permitted to operate under Suharto's regime – engaged in a very restrained form of opposition politics. With the help of his generals, Suharto created a stable, but repressive police state that aimed for quick economic growth. Indonesia's natural resources – oil, gas, and wood – were exploited at rapid rates. Suharto also set about to improve relations with the West and the international community.<sup>14</sup>

Suharto's politics of stability, control, bureaucratisation, and forced 'Pancasila-harmony' also affected Islam in Indonesia, which was initially allocated a secure, but limited role. The Ministry of Religion exercised political and administrative oversight of Islamic organisations, Islamic education, and the administration of Islamic justice. In the 1970s, the government made two major new laws to further define the position of the sharia, namely the Basic Act 14/1970 on the Judiciary and the Marriage Act 1/1974.

The Judiciary Act of 1970 specified that the national judiciary would be comprised of four sectors: general, administrative, military, and religious. In this context the word 'religious' (*agama*) in effect only referred to Islam.<sup>15</sup> Courts in all four sectors would be state courts, with both courts of first instance and appellate courts. The new law signalled the unification, strengthening and expansion of the state-led Islamic judicial sector (previously regulated in 1882, 1937, and 1957). The Religious Courts still required, however, approval from the General Courts for execution of their judicial decisions. Moreover, the new law of 1970 set forth that judgments of the Religious Courts were subject to review by the Supreme Court. Thus, the expansion notwithstanding, the subjugation of Islamic law was once again formally established. Initially, the Ministry of Religion resisted the Supreme Court's newfound authority over the Islamic courts and tried to keep the courts 'insulated from the pressures to conform to the imperatives of a national legal system' (Cammack 2007: 156). But, in 1979 when the Supreme Court actually exercised its jurisdiction over two cases originating in the Religious Courts, this was by and large accepted by the Ministry.

Before the 1974 Marriage Act was promulgated, various drafts had been discussed, none of which were ever approved. In particular, Islamic modernists and orthodox groups disagreed about draft provisions on polygamy and divorce. The orthodox preferred to leave everything to the uncodified sharia, but in 1973 modernists succeeded in pressuring the government to propose a bill that would strengthen the position of women in many respects and expand state supervision. Orthodox groups rose up in sharp opposition to these proposals, and massive, heated demonstrations were held around the parliamentary premises. After physical and political intervention of the army, the parliament reached a compromise, replacing a number of the proposals by less far-reaching reforms (Butt 1999: 122-123). Some of the new provisions about divorce were, however, so ambiguously worded that after an initial reading, one was still left unsure as to whether they entailed a modernist or a conservative solution. In any case, the government was now able to proudly declare that a unified marriage law covered all of Indonesia, and that the colonial Mixed Marriage Ordinance of 1898 had been abolished.

Generally speaking, the Religious Courts put themselves to their tasks of reviewing applications for divorce and polygamy. While cases of polygamy were rather exceptional, unilateral repudiation was common, although the statistics fluctuated significantly per region (Otto & Pompe 1988). However, because the new act was still weak in defining norms in several areas (e.g. the validity of unregistered marriages, grounds for polygamy and divorce, and guidelines on interreligious marriages) it did not end legal uncertainty.<sup>16</sup>

In the meantime, the government actively prosecuted groups of Muslim radicals that remained active after the disbandment of the *Darul Islam*. Ba'asyir, who would later gain notoriety as the alleged mentor of the perpetrators of the Bali bombings in 2002, was arrested in 1970 for his activities in the underground *Komando Jihad*. The prime objective of this organisation was the creation of an Islamic state. It was notorious for its bombing attacks on cinemas, nightclubs, and churches, in resistance to the regime of Suharto.

#### *The Council of Indonesian Religious Scholars (MUI)*

During the 1970s there was little trust between the government and the conservative religious leaders. In reaction to this, in 1975, Suharto, in his usual, crafty manner, attended to the creation of a national Council of Indonesian Religious Scholars, the *Majelis Ulama Indonesia* (MUI). First, twenty-six provincial councils were formed, which, in turn, instituted a national council. The status of the MUI was unclear: was it a private or a semi-state institution? One of the responsibilities of the

MUI was to assess the religious quality of laws (Bowen 2003: 229-231). The council also proclaimed unsolicited legal opinions (*fatwas*) that could be very controversial at times. In 1980, for example, the MUI declared itself against all marriages between Muslims and Christians, and, in 1981, it declared the attendance of Muslims at Christian celebrations to be sinful (ibid: 235). In the 1980s, the MUI was involved in the establishment of an Islamic banking sector. Some of its members also participated in drafting the 'Compilation of Islamic Law', an attempt to have religious scholars and jurists decide on a restatement of the sharia in force in Indonesia (see section below).

Through these measures Suharto provided a place for Islam during the New Order. The focus lay on control; what could be seen as islamisation of national law often came down to nationalisation of Islamic law. Because of the infamous *Ormas* legislation (1985), Islamic organisations, like others, were legally obliged to recognise the Pancasila state ideology as their highest norm and sole foundation. Any source of serious opposition against Suharto's rule, Islamic or otherwise, was harshly suppressed.

#### 10.4 The period from 1985 until the present

The late New Order, the *Reformasi*, and recent developments

##### *Suharto's pro-Islam policies and mounting criticism*

Once major Muslim leaders had openly accepted the supremacy of the Pancasila, the proverbial hatchet between state and Islam could officially be buried. Rather than promoting political Islam, these leaders now turned their attention to 'cultural Islam' (Salim & Azra 2003b: 10). This, in turn, stimulated Suharto to embrace a pro-Islam policy. Incidentally, this came at a politically opportune moment, as Suharto had faced mounting criticism since the 1980s, and was, therefore, in crucial need of support from Muslim movements, notably in the elections of 1992 and 1993 (Hefner 2003: 155).

Criticism of Suharto's regime came from various corners. For years, the continuing violation of human rights by his regime had been openly condemned from abroad. In Indonesia, most people and organisations were more hesitant at voicing such criticism, partially out of fear, and partially because the achievements of Suharto for the country's stability and economy were still appreciated. When, however, the corruption of Suharto's family and inner circle rose to unprecedented heights, the support his regime enjoyed on the street level started to evaporate.

In the 1990s the regime's pro-Islam politics led Suharto's protégé Habibie, the Minister of Technology and Research, to form ICMI, a

national association of Muslim intellectuals (*Ikatan Cendekiawan Muslim Indonesia*). The ICMI brought together pious Muslim intellectuals, giving them a useful political instrument (Schwarz 1999: 179). The association had its own think tank and a newspaper to better disseminate its ideas. The goals of ICMI were the improvement of the economic position of Muslims and the incorporation of Islamic values into official government policy (ibid: 175-176).

During the 1990s Islam also manifested itself increasingly in other areas. Islamic schools educated a new generation of students, trying to instil in them devotion, discipline, diligence, and moral ideals, all in the name of Islam. Within the bureaucracy Muslim civil servants were now permitted to openly present themselves as devout Muslims. Meetings were opened with an Islamic prayer, and speeches were preceded by Arabic prayer blessings. Suharto also became aware of this change of winds and he himself made the pilgrimage to Mecca in 1991. Both he and Habibie, who became vice president, increasingly emphasised the Islamic character of the New Order. Nonetheless, the Pancasila state ideology remained the fundamental guideline for Indonesia's governance, including in matters pertaining to religion. National religious harmony continued to be imposed and enforced from above, a kind of 'totalitarian tolerance' so to speak.

Meanwhile, in 1989 a new legislative centrepiece, Act 7/1989 on Religious Courts had been enacted. This law further regulated the position and functioning of the Religious Courts. Earlier drafts had sparked heated debates (Bowen 2003: 185-189). Many nationalists, members of the Christian minority, and professional jurists were strongly opposed to the law because they viewed it as an implicit acknowledgment and acceptance of an autonomous sharia sector within the national legal system. In contrast, the government and the army rather saw the law as a means through which to increase the state's influence over Islam.

For the content of the applicable law, the Religious Courts had to rely on the aforementioned Compilation of Islamic Law, which had already been completed in 1988, at a time when the debates about the Religious Courts' bill were still raging. The Compilation was drafted by many commissions made up of religious scholars, jurists, and other experts. In this way, the Indonesian government had ensured national unification and codification of major parts of the Islamic jurisprudence (*fiqh*), with the endorsement of both leading religious scholars and prominent judges. In 1991, Suharto issued a presidential instruction ordering his Minister of Religion to disseminate the Compilation to be used by state institutions '[...] as a reference to the greatest possible extent in resolving the issues it covers [...]' (Nurlaelawati 2010: 89). The minister then instructed all relevant state agencies to 'apply as much as possible

the mentioned Compilation to complement the other legal regulations'. Nowadays the Compilation's rules are taught in schools and applied in Religious Courts. However, from studies of court decisions and interviews with judges, it appears that some judges still use *fiqh*-sources beyond the Compilation, as they want to be able to choose from a broad range of sources in order to arrive at just decisions that are also considered socially and religiously acceptable (*ibid*).

The Islamic revival taking hold in society in the late 1980s and 1990s also increased the demand for Islamic banking. Thus, in 1991, Suharto, who had hitherto been fearful of Muslim groups attaining financial power, agreed to the establishment of an Islamic bank. The founding of Bank Muamalat Indonesia (BMI) was intended both to strengthen the economic position of non-Chinese Indonesians as well as to serve as an example of corporate governance and honest banking.<sup>17</sup>

#### *The fall of Suharto, winds of constitutional change, and the Islamic axis*

When in 1997 the Asian Financial Crisis struck Indonesia, resistance against Suharto became massive and unstoppable. Students played a key role in these protests, demanding large-scale political reforms under the banner of *Reformasi*. Leading the resistance against Suharto were, among others, the NU leader and religious scholar Abdurrahman Wahid, a democratic-minded nationalist, and the more radical academic Amien Rais, leader of the *Muhammadiyah* movement. They dared to voice harsh criticism of the old president.<sup>18</sup> After large and protracted demonstrations, Suharto resigned in 1998. The *Reformasi* could then begin: democratisation, social justice, liberalisation, decentralisation, and possibly a chance for Islamic activists to wrest themselves free from the legacy of colonial and postcolonial state control.

Suharto was succeeded by Habibie, who swiftly pronounced a number of laws that regulated the upcoming processes of democratisation and islamisation. Law 22/1999 on regional autonomy, for instance, brought about a major political transformation of central-local relations. In addition, Habibie promulgated legislation concerning organisation of the pilgrimage (*hajj*), management of required almsgiving (*zakat*), and Islamic banking (Salim 2003: 228). It must be noted that these laws did not oblige Indonesians to undertake the *hajj*, pay *zakat* taxes, or open an Islamic bank account. They were procedural laws establishing an official legal framework for those Muslims who wanted to adhere to their religious duties in these fields (*ibid*: 229).

Habibie called parliamentary elections in the summer of 1999. Abdurrahman Wahid's PKB and Rais's PAN emerged as new Islamic parties. Together with the traditionally law-abiding PPP and a number

of smaller Islamic parties, they formed the so-called 'Islamic axis' in Indonesia's newly elected parliament. Of the axis parties only the PPP and one of the smaller parties strove for the revival of the Jakarta Charter and the islamisation of the constitution. The big winner of the 1999 elections was, however, a secular party: the Partai Demokrasi Indonesia (PDI-P) led by Sukarno's daughter Megawati. Nonetheless, not she, but PKB leader Wahid became president as a result of the political manoeuvring of the Islamic axis led by Amien Rais. Megawati was chosen as vice president; Rais became speaker of the parliament.

President Wahid further restricted the role of the army in politics and initiated several major constitutional changes, strengthening human rights and the free press, empowering elected representative bodies, and safeguarding the independence of the judiciary. He also strongly opposed an Islamic state and the introduction of sharia, as he was of the opinion that religion and politics must remain separated (Bowen 2003: 240). Attempts to further islamise politics and laws did not, therefore, stand much of a chance under Wahid, despite his Islamic background and support base as the NU leader. A majority in parliament shared his viewpoints on these issues.<sup>19</sup> In 2000, several Islamic parties supported a bill on interreligious harmony. This draft proposed to outlaw mixed marriages and to set stricter conditions on the building of new churches in terms of a minimum number of adherents and the permission of inhabitants in the neighbourhood. In response to such developments, and especially when their churches were occasionally set on fire, Christians rose in protest (ibid: 239, 247). In the end, the bill was rejected.

Wahid felt so confident that he occasionally took stands diametrically opposed to those held by prominent *ulama* and the MUI. In the high-profile *Ajinomoto* case in 2002 the MUI had ordered tests of flavouring agents produced by the Ajinomoto company, and it was concluded that one product contained substances from the pancreas gland of pigs and was therefore considered forbidden (*haram*). President Wahid, drawing on other lab test results, decided that the substance was permissible (*halal*), and went on to declare that both the MUI and he were correct, and that the matter was a case of free interpretation (*ijtihad*). To the public it was no longer clear who held ultimate authority on religious matters in the country and who could make binding decisions in cases such as these (ibid: 233-234).

#### *Decentralisation and local sharia-based regulations*

Wahid had carried through with the decentralisation process started by Habibie in 1999, which strongly expanded the autonomy of the districts. For two provinces, Papua and Aceh, special autonomy laws were

enacted that granted the provinces more authority in making their own provincial regulations. In Papua, these regulations referred to *adat* laws, while in Aceh, according to Act 18/2001 on Aceh, priority was paid to the sharia.

Act 18/2001 would form the legal basis for the provincial government of Aceh to issue a number of regional regulations called '*qanun*' (Arabic for law) on several contested issues. The central motive of the national government concerning Aceh is revealed by Ichwan (2007: 194-196) who demonstrates that both Abdurrahman Wahid and Megawati as presidents had instructed their minister of Religion 'to promote the initiative for creating security through a religious approach'. This played into the hands of the provincial branch of the MUI in Aceh, re-established in 2001 as MPU (ibid: 204), which had already played an active islamising role by issuing several *fatwas*. In particular, its *fatwa* ordering women to wear veils resulted in much uneasiness. But the government did not immediately take a stand on this thorny issue. As Bowen (2003: 231-233) noted, however, it became difficult to ignore the *fatwa*, particularly since in 2002 and 2003 the province's Sharia Office and the provincial parliament laid down Aceh's new sharia policy in a number of *qanuns* (Ichwan 2007: 205) (see 10.5).

Elsewhere in Indonesia, several districts enacted sharia-based regulations (*Perda Syariah*). Yet, in most areas, as a result of the 1999 decentralisation, it was not so much Islam that was undergoing a revival, but rather *adat*. Locally, rules of *adat* law dealt with issues of political authority and of land and natural resources. In the strongly Islamic province of Minangkabau, for example, the return of the *adat* was of a stronger political consequence than the return to Islamic beliefs. In other areas of the archipelago, the resurgence of traditional loyalties led to conflict. Consequently, ethnic and sectarian violence broke out in places such as Central Sulawesi and the Moluccas, where bloody fights between Muslims and Christians ensued.

#### *Dynamics of Islam and politics from Abdurrahman Wahid to Megawati*

Meanwhile, Wahid had come into conflict with parliament because of his increasing capriciousness and his rude and disdainful behaviour towards political opponents. Following accusations of mismanagement and involvement in corruption scandals, parliament pressured him into resignation for his 'grave' failure to abide to the 'main guidelines of state policy'. Megawati succeeded him as president in July 2001, with the leader of the Islamic PPP, Hamzah Haz, becoming her vice president.

Following the attacks of 11 September 2001 and the ensuing American attack on Afghanistan, the Indonesian government strongly

endeavoured to prevent these foreign geopolitical developments from having negative repercussions on interreligious harmony at home. In October 2002, Indonesia itself was hit by a major terrorist attack targeting a nightclub on Bali, as a result of which many Australians and Indonesians died. In 2003, an attack on the Marriott Hotel in Jakarta followed, and the year after the Australian Embassy became the target of Islamic terrorism. Subsequent investigations focussed on local groups, national organisations, and branches of international Muslim terrorist networks.<sup>20</sup> A number of individuals were condemned to death, but the involvement of Ba'asyir, the alleged leader of the *Jamaah Islamiyah*, could not be irrefutably established.

During Megawati's presidency, which strongly relied upon a number of 'superministers', able technocrats, and military figures, including president-to-be Susilo Bambang Yudhoyono, various developments surfaced signalling the continuing islamisation of society. With the appointment of a vice president like Hamzah Haz, for example, who himself had three wives, the official state policy of rejecting polygamy, which had been adhered to for years, became a dead letter. Polygamy now occurred openly and trouble-free. In order to circumvent the restrictive provisions of the Marriage Act of 1974, men chose to have their polygamous marriages contracted solely by an imam. Earlier studies revealed that of all divorces about half took place without the involvement of the Religious Courts or prescribed law (Cammack et al. 2007: 120; Debating 2003; see also 10.6).<sup>21</sup> Thus, under Megawati, the government's control and supervision of religion seemed to lose some of its strength.

In addition, a fierce argument arose on the new draft criminal code when word spread that a new definition of adultery (i.e. all extramarital sexual relations) was adopted directly from *fiqh* sources. Minister of Justice, Yusril Mahendra of the small Islamist party PBB, was supposedly employing this tactic in order to win the support of the Muslim voters. However, it was the new fundamentalist Muslim party PKS, which was established in 1998, that grew very swiftly thanks to a young, well-educated and highly disciplined cadre of volunteers, engaging in social work in villages and urban kampongs. The party, based on the ideology of Hassan al-Banna (founder of the Egyptian Muslim Brotherhood), tried to come to power by using democratic ways, and would do quite well in several elections. Meanwhile, the practice of Islamic banking also expanded. The MUI successfully campaigned for further formalisation and regulation of interest-free banking (Bank Indonesia 2002).

Despite these developments, no clear-cut, massive process of political and legal islamisation took place. So far, islamisation appeared indeed to be more cultural than politico-legal in nature. In fact, from 2001 to

2004, a working group under the authority of the Minister of Religion drafted a new marriage act trying to improve the status of women. This so-called Counter Legal Draft aroused so much protest from orthodox Muslim organisations upon its publication, that it had to be withdrawn by the end of 2004 (Mulia 2007: 128-145). However, Islamist sentiments did not altogether get the upper hand among the population as a whole. Since the fall of Suharto in 1998, an overwhelming majority of Indonesian Muslims has come out in favour of secular and nationalist parties; this was confirmed in the 2004 parliamentary and presidential elections. The two parties that won the parliamentary election in April 2004 – Golkar (21%) and PDI-P (19%) – were both secular in orientation, as was the third party, Wahid's PKB (12%), which is allied to the traditionalist NU. In October, Susilo Bambang Yudhoyono (SBY) became Indonesia's first directly elected president. SBY is a nationalist with a military background and an experienced cabinet minister. He leads a small secular party, the Partai Demokrat. Yusuf Kalla, a Golkar politician and entrepreneur from NU circles, became his vice president.

#### *The presidency of SBY (Susilo Bambang Yudhoyono)*

Since the 2004 elections several legal changes have affected the existing, balanced relationship between sharia and national law. These reforms went in different directions. In 2004 the 1970 Act on the Judiciary was replaced by Act 4/2004, which transferred supervision of Religious Courts fully to the Supreme Court, thereby reducing the supervisory role of the Ministry of Religion to an advisory one. In 2006, Act 3/2006 on Religious Courts, amending the 1989 Act, strengthened the court's jurisdiction in inheritance cases between Muslims, and expanded jurisdiction over cases in sharia economy (*Ekonomi Syariah*).

In order to establish guidelines for the resolution of economic disputes in the Religious Courts, the Supreme Court issued in 2008 the Compilation of Economic Sharia Law (*Kompilasi Hukum Ekonomi Syari'ah*, usually abbreviated as KHES). In the same year, the Indonesian parliament promulgated Law 21/2008 on Islamic Banking. Together with Law 41/2004 on Religious Foundations (*wakaf*) and Law 38/1999 on Almsgiving (*zakat*) the KHES and the banking law have now met the demand for an economic system based on principles of Islamic justice (see 10.8). The *Ekonomi Syariah* regulations, however, are all of a voluntary, optional nature.

In this process of islamisation, state institutions with a predominantly nationalist and secular outlook, such as the Bank Indonesia and the Supreme Court, kept the say over legal developments. In the same vein, in the area of marriage law, the secular General Courts were given

a role in registering interreligious marriages by Act 23/2006 on Civil Registration.

Act 11/2006 on special autonomy of Aceh replaced the 2001 Act on the subject. It further regulated the competence of Aceh's provincial government to issue *qanuns* as well as the jurisdiction of the special Islamic courts in the region (the Mahkamah Syari'ah). These powers went clearly beyond the 2001 Act.<sup>22</sup> The 2006 law confirmed and formalised regulatory practices that had emerged since 2002 in Aceh, notably the *qanuns* criminalising gambling and drinking and prescribing the corporal punishment of caning. It has broadened the jurisdiction of the Mahkamah Syari'ah by adding elements of criminal law (*jinayah*) and commercial law (*muamalat*) to it, as already was indicated in Qanun 10/2002. A legal debate has arisen about whether the *qanun* provisions on criminal matters now overrule the applicability of national criminal law, as laid down in the criminal code. The government and the Supreme Court have the power to annul Aceh's individual *qanuns* for 'going against the public interest or violating higher legislation, *unless the law regulates otherwise* [italics added]'. This may have occurred as the expansion of jurisdiction has been approved in a general way by national law. So far the *qanuns* have been limited to minor crimes. Human rights defenders have put forward that Aceh's *qanuns* and other sharia-based district regulations have encroached on human rights standards. This could subject such sharia-based regional regulations to review by the Constitutional Court.

What do these developments in Aceh mean for the existing relationship between sharia and national law? Lindsey & Hooker (2007: 252) consider Aceh's *qanuns* as potentially radical, but state that their implementation is considered by most Acehnese as symbolic rather than hard-line Islamist. They do note, however, that since the tsunami of December 2004, the *qanuns* have become more than just aspirational and that the new courts are more willing to exercise their expanded jurisdiction. Indeed, the first and widely publicised caning of gamblers in Bireuen in June 2005 has been repeated several times in other district towns.

In 2008, freedom of religion came under attack from Islamist organisations who were putting pressure on the government to pronounce a legal ban on the *Ahmadiyya*. The issue has been politicised since a 2005 MUI *fatwa* asking for a ban of this religious group, which considers itself Islamic, but which is not recognised by Sunni orthodoxy. Mosques and members of the group have been attacked by mobs on Lombok and elsewhere. While one government body advocated a legal ban, the president's legal advisors cautioned against it. In June 2008, a joint decree was issued by the ministers of justice and religion warning, on the one

hand, Ahmadiyya adherents to return to true Islam or leave it, while warning radicals, on the other hand, not to attack the Ahmadiyya, or they would be sanctioned. Legally speaking, though, this decree did not have the effect of a ban.

This illustrates the way issues of sharia and law are played out in present-day Indonesia. Time and again they are politicised by Islamist groups. Actually, since 1998 the MUI has shifted from a pro-government role to a rather oppositional, Islamist stance. Meanwhile, the state, while deliberately giving in to some demands, has consistently tried to maintain a balance as well as overall control.

A notable instrument of this balancing effort are the Religious Courts that have become a recognised and established part of the national judiciary under supervision of the Supreme Court. Cammack (2007: 169) has compared the role of Religious Courts in the 1970s, when they were ‘essentially informal and non-professional’ to their present role. He writes:

Despite their shortcomings [...] the unstructured Islamic courts were generally successful in addressing the needs of those who used them. [...] It is my sense that the professionalization and bureaucratization of the Islamic judiciary has not fundamentally altered the essential institutional culture of the courts.

Cammack calls the Religious Courts ‘a relative success story in Indonesia’s otherwise dysfunctional legal system’ (ibid). A 2008 study carried out by the Supreme Court and AUSAID revealed a high satisfaction rate among the courts’ users – over 70 per cent of all clients and 80 per cent of the total applicants. It appears, however, that the poor still face serious barriers in accessing the Religious Courts (Sumner 2008: 4). Indeed, it is a sobering thought that whatever law-makers or judges may decide on the position of sharia in the national legal system, it does not affect a considerable part of the population since they are simply unable to afford a life within the limits of the law.

## ■ 10.5 Constitutional law<sup>23</sup>

The words ‘Islam’, ‘Islamic law’, and ‘sharia’ do not feature in the constitution. Thus, Indonesia is not an ‘Islamic state’, and Islam is not the official state religion. Therefore, unlike in other Muslim countries, the supremacy of the national constitution over competing normative systems should be beyond any legal doubt. Yet, despite this presumptive clarity, one cannot consider Indonesia a fully secular state. The

preamble of the constitution refers to the Pancasila state ideology as the highest source of law, within which the first 'pillar' or principle is identified as 'the belief in the One and Almighty God'. Further to this, atheism is not recognised, and in order to marry, one must declare his or her religion. The Ministry of Religion has also been specifically tasked with translation of the first pillar into state policy and practice.

The Indonesian legislator has largely defined the relationship between national law and sharia in the 1989 Act on Religious Courts<sup>24</sup> in procedural terms, and in substantive terms in the Marriage Act 1/1974 and in the 1991 'Compilation of Islamic Law'. The legislator has further created space for districts and provinces to experiment with sharia-related regional regulations through use of the Act on Regional Autonomy (Act 22/1999, amended and replaced by Act 32/2004). Exceptionally, in Act 11/2006 on Special Autonomy for Aceh, Jakarta has empowered this autonomous region to enact regulations (*qanuns*) that go so far as to include certain sharia-based criminal regulations and punishments such as caning. In 2009 the outgoing provincial parliament of Aceh even approved a new *qanun* prescribing stoning as a punishment for adultery; the legal status of this regulation, however, remains highly contested. Beside these elements of potential 'sharia-isation' of the law, it should also be noted here that during the post-1998 constitutional reform process human rights were given a prominent position in Indonesia's constitutional law.

This section will address in particular five key aspects of how sharia-based law has been given legal and institutional spaces in Indonesia's constitutional system, namely the Religious Courts, the Ministry of Religion, the Compilation of Islamic Law, human rights, and decentralisation.

### *Religious Courts*

The Act on Religious Courts (1989) provides a uniform regulation of the position, support for, and competence of the Religious Courts (Cammack 2003: 96). There are three distinct levels of adjudication. In the first instance, each district has its own Religious Court, whose jurisdiction covers marital relations and inheritance issues of Muslims as well as the affairs of religious endowments (*wakaf*). On the provincial level, there are Religious Appellate Courts; at the apex is the Supreme Court in Jakarta. The 1989 law not only provides the Religious Courts with jurisdiction in matters of inheritance law, but also grants them the authority to execute their own rulings.

A gradual transfer of administrative supervision over the Religious Courts from the ministry to the 'one roof' jurisdiction of the Supreme Court has been initiated by Act 35/1999, and was finally effectuated in

2004.<sup>25</sup> Based on Law 4/2004 on the Judiciary, the Supreme Court now oversees the sector of religious jurisdiction as it has done for decades with its other, secular sectors of general (civil and criminal), administrative, and military jurisdiction. Presidential Instruction 21/2004 provides for the effectuation of this new policy for the Religious Courts.

While a Religious Court is essentially a state court, traditionally its judges have been trained as religious scholars (*ulama*). Most judges who presently work at these courts have a degree in sharia studies from the IAIN.<sup>26</sup> The law states that the judges of these courts must have earned a degree in law or in Islamic law from an institution of higher education. While most law degrees are obtained from secular faculties of law, a degree in Islamic law is provided by the sharia faculties of Islamic universities. Azra notes that the 2003 Advocates Act has also opened up the lawyer's profession to graduates of Islamic studies. Interestingly, the Faculty of Syariah at Jakarta's National Islamic University (UIN) has been renamed 'Faculty of Syariah and National Law'. Its former rector writes: 'Within this framework, Islamic law can be studied simultaneously with national law in ways that can serve to facilitate further development toward the development of a distinctly "Indonesian school of Islamic law"' (Azra 2007: 270).

In 2006, the 1989 Act on Religious Courts was amended to expand the courts' jurisdiction. Act 3/2006 provides that Religious Courts are currently the only competent court in inheritance cases between Muslims. The Act further grants the courts jurisdiction in matters of Islamic finance in the framework of 'Ekonomi syariah'. The Act also acknowledges the special jurisdiction of Religious Courts in autonomous regions, notably the Mahkamah Syariah in Aceh, inaugurated in 2003 (Ichwan 2007: 193).

### *The Ministry of Religion*

The Ministry of Religion provides supervision over Indonesia's varying religions, namely Islam, Catholicism, Protestantism, Hinduism, Buddhism, and, since 2006, Confucianism. As such, the ministry regulates Islamic education and the mosques, as well as the holy pilgrimage (*hajj*). The Ministry has offices in all provinces, districts, and towns, known as the Bureau of Religious Affairs (KUA, *Kantor Urusan Agama*). The Ministry has a Directorate for Islamic Affairs and the Development of Sharia. However, its previous tasks in developing the Religious Courts (Art.s 202-115 of the old Decree 1/2001) were removed since the abovementioned incorporation of these courts in the national judicial system in 2004.<sup>27</sup>

Together with the Ministry of Justice and the Supreme Court, the Ministry of Religion also exercises supervision over marriage

registration. It prints marriage certificates, with a standard *taklik talak* clause, which provides women with the option of a divorce by 'automatic repudiation (*talak*)' in the event that they are deserted, neglected, abused, or not provided with financial support by their husband for a specified number of months (Cammack et al. 2007: 112). Together with the Supreme Court, the Ministry has directed the courts to interpret the marriage act in ways favourable to women (Mulia 2007: 130).

### *The Compilation of Islamic Law and its legal status*

The 'Compilation of Islamic Law in Indonesia' (*Kompilasi Hukum Islam di Indonesia*) is a legal text intended to bring more legal certainty to the application of sharia-based law by the Religious Courts. Law 1/1974 on Marriage already stated in Article 2 that the requirements for marriage are based on religion (i.e. for Muslims on Islamic marriage law). Since the content of Islamic law is determined by the consensus of religious scholars, courts have had to rely on a wide range of *fiqh* texts.<sup>28</sup> This situation led to legal uncertainty, hence the government's desire for an authoritative restatement.

To obtain as much legitimacy as possible, the Compilation was drafted and discussed both by jurists representing state institutions, and by religious scholars well-versed in Islamic jurisprudence. The Compilation is constructed as a legal code with three sections: marriage law, inheritance law, and religious endowments (*wakaf*). It is comprised of 229 articles and an explanatory memorandum. Although it was officially launched in 1991, first by Presidential Instruction 1/1991 and subsequently through a ministerial decree, the Compilation is not a national law as such. Rather, it is presented by the government as a 'guideline' that the Religious Courts should 'take into account as much as possible'. The Compilation is formally presented as the Islamic law of Indonesia, which has been in effect in the Religious Courts (Ka'bah 2007: 87, 282). Through this construction, the government has been able to fend off accusations that it decides, by way of national law, about the interpretation of the sharia.

The Compilation stipulates that the eliciting of religious rules from the sharia is based on five sources: (a) standard texts from the Shafi'ite school of jurisprudence; (b) additional texts from other legal schools; (c) existing case law; (d) scholarly legal opinions (*fatwas*); and (e) the situation in other countries (cf. Hooker 2003: 23). While much of the contents reflect the mainstream Islamic thought of Indonesia's religious scholars, on a number of points, the Compilation has adopted a remarkably progressive stance.<sup>29</sup>

Since 1991, the verdicts of Religious Courts have increasingly referred to this Compilation. According to Justice Busthanul Arifin of the

Supreme Court, chairman of the drafting commission, the Compilation is an example of 'positive law'. Others insist that it is an authoritative restatement of existing legal practices, or of *living adat law* (Bowen 2003: 189-199). The renowned jurist Attamimi, on the other hand, argues that the legal design of the Compilation has limited its legal force (Mawardi 2003: 43-44). And, in fact, although the Compilation is now widely applied by the Religious Courts, it remains contested. Among its controversial features is a total prohibition of interreligious marriages. The Counter Legal Draft (see 10.4) testifies to a broadly perceived need for change to bring it in accordance with national and international human rights legislation (Mulia 2007: 133).

### *Human rights*

Soon after the *Reformasi* of 1998, Act 39/1999 on Human Rights was enacted in order to clearly incorporate human rights standards and principles into Indonesia's domestic law. Subsequently, this was laid down in the Indonesian constitution. A new chapter now includes principles such as equality before the law (Art. 28(D)(1)) and non-discrimination (Art. 28(I)(2)). However, women's legal status under the sharia-based family and inheritance law violates these principles on several points. In addition, the constitution provides for the freedom of all citizens to have a religion (*agama*) and to practice it, as well as for the freedom of conviction (*kepercayaan*) (Art. 28(E)(2)). These freedoms are guaranteed by the state (Art. 29(2)).

The key question as to how the rights of equality and religious freedom can be reconciled has been dealt with in a typically Indonesian style, which, depending on one's point of view, can be described as balanced, or ambiguous. In 2007, the Constitutional Court in a ruling<sup>30</sup> on the Marriage Law of 1974 (see 10.6) concluded that on the one hand the law's articles on polygamy are justified by the freedom of religion as a fundamental right accorded to every Indonesian citizen, while on the other hand the law's limitations to polygamy were not deemed contrary to the freedom of religion.

The degree to which freedom of religion applies in Indonesia appears limited in more than one sense. First, the official state ideology of Pancasila, which speaks of 'the belief in the One and Almighty God', is fundamentally centred on the notion of theism, leaving no formal acknowledgment of or room for atheism or polytheism. Secondly, there are certain problems inherent to the state's official recognition of six religions: Islam, Protestantism, Catholicism, Hinduism, Buddhism, and Confucianism. Minority groups within Islam, such as the Ahmadiyya, suffer from legal problems. As mentioned in the discussion above, in June 2008, a Joint-Decree of the ministers of justice and religion called

on the Ahmadiyya to stop practicing Islam in ways deviating from authoritative Sunni beliefs. Furthermore, in a formal legal sense, the six religions are all equal to one another, but in practice Islam occupies a much stronger and more prominent position. The corpus of national law includes several elements in the areas of marriage and criminal law that conflict with the principle of equality of Muslims and non-Muslims. Other difficulties are encountered in the area of administrative law. The 2006 Revised Joint Ministerial Decree on the Construction of Houses of Worship demands that religious groups wanting to build a house of worship first obtain the signatures of at least 90 members and 60 persons of other religious groups in the community stating that they support the establishment, as well as approval from the local KUA office.

### *Decentralisation*

Beside the incorporation of human rights, yet another post-1998 constitutional reform was to fundamentally change the nature of the Indonesian state. The far-reaching Act on Regional Autonomy – the 1999 Act amended as Act 32/2004 – has not only granted expanded responsibilities and powers to districts and provinces, but also democratised their composition and decision-making. Many districts and provinces have used these new powers to locally introduce sharia-based regulations (*PerDa Syariah*). According to Lindsey, around 160 such *PerDa Syariah* were enacted in at least 24 of Indonesia's 33 provinces (2008: 107-108). Most of them target perceived religious, social, and moral wrongs, such as prostitution, alcohol and drugs, gambling, and pornography. Others promote and prescribe Islamic practices, such as religious rituals, Quranic education, and dress codes. Salim cites the example of Martapura on Kalimantan, where a district regulation prohibited publicly eating or drinking during the month of Ramadan (2003: 229). Although legally speaking, legislative power concerning 'religion' belongs to the central government and not to the regional government, these *PerDa Syariah* have not been formally contested by central authorities.

Corresponding to the nation-wide democratic decentralisation, Aceh and Papua have been granted even more autonomy resulting in a special legal status (see 10.4). Since 1999, the Indonesian government has resumed granting Aceh special autonomy in the religious, cultural, and educational sectors. The successive governments, from Habibie (1999) to Yudhoyono, have taken legal measures permitting Aceh the authority to 'enforce the sharia'.<sup>31</sup> While Act 44/1999 on the Special Status of Aceh had still been vague on this point, Act 18/2001 was already more specific, both in creating space for Aceh's own regulations (or *qanun*)

and in setting the limits. The Act stated that: a) the province may not enforce sharia regulations conflicting with national laws (Art. 25); b) the sharia only applies to Muslims (Art. 25 § 3); and c) rulings from the sharia courts can be appealed before the Supreme Court in Jakarta, where they can be reviewed and, if necessary, annulled (Art. 26). On the basis of the 2001 Act, in 2002 and 2003 Aceh enacted several *qanuns* (hereinafter 'Q.'), such as Q. 10/2002 on Sharia courts, Q. 11/2002 on the Implementation of the Islamic creed, worship and symbolism, Q. 12/2003 on Intoxicants, Q. 13/2003 on Gambling, and Q. 14/2003 on Improper Relations between the Sexes (Ichwan 2007: 205).<sup>32</sup>

Act 11/2006 has replaced the Acts of 1999 and 2001 and significantly broadened the scope of sharia-based law in Aceh. Article 125 of this Act stipulates that implementation of sharia in Aceh covers the following areas: religion (*ibadah*); family law (*ahwal alsyakhshiyah*); private law (*muamalah*); criminal law (*jinayah*); the judiciary (*qadha'*); education (*tarbiyah*); and the mission, promotion, and safeguarding of Islam (*dakwah, syiar, dan pembelaan Islam*). Article 126 provides that every adherent of Islam is obliged to obey and carry out Islamic sharia. Everybody who lives or is present in Aceh is obliged to respect the implementation of sharia. According to Article 127, the provincial and local governments are responsible for the implementation of sharia. Article 128 provides that the Sharia Courts (*Mahkama Shar'iyah*) in Aceh form part of the national system of religious jurisdiction and are 'free from any external influence'. The jurisdiction, supervision, organisation, and procedures of these courts are further regulated in Articles 128-137 of the 2006 Act. In 2009, Aceh's legislature promulgated a regulation on Islamic criminal law, the validity of which is highly contested (see 10.7).

Indonesia's post-1998 constitutional law discontinued the authoritarian centralist system of Suharto's New Order, which strictly imposed on society an official, harmonious view of state-religion relations and stifled public debate in sensitive areas such as the relation between sharia and national law. The new, democratised constitutional law allows for debate and decision-making in multiple spaces about a broad range of subjects. Today these spaces range from national parliament to provincial and district legislatures, including the special case of Aceh; from the Supreme Court as the apex of the national court system to Religious Courts and General Courts throughout the country, including the special courts of Aceh; and the Constitutional Court acts as guardian of a constitution rejuvenated by references to all fundamental human rights. While the jurisdiction of Religious Courts has broadened, so has the supervisory role of the Supreme Court. In practice, in Indonesia, as in most other Muslim countries, the most pervasive influence of sharia remains in the area of family law.

## 10.6 Family and inheritance law

Marriage, divorce, and matrimonial property are regulated by Marriage Act 1/1974. Its provisions are elaborated upon by two Government Regulations (GR), namely GR 9/1975, which elaborates the substantive norms and procedures of the Act, and GR 10/1983 (amended by GR 45/1990), which contains special rules for civil servants. Both marriage law and inheritance law are addressed by the 1991 Compilation of Islamic Law (see 10.5). The text of the Compilation's chapter on marriage law matches the text of the 1974 Marriage Act in all respects, the only difference being that some Indonesian terms are replaced with equivalent Arabic words. There is no national legislation on inheritance law for Muslims. The competent court for disputes between Muslims concerning both marital and inheritance matters is the Religious Court. The Act on Religious Courts of 1989, as amended by Act 3/2006, contains procedural rules for marriage and inheritance law. More than 90 per cent of the caseload of the Religious Courts consists of divorce cases (Cammack et al. 2007: 164).

This section will first address four subjects of the marriage law, namely religion and validity, interreligious marriage, divorce and repudiation, and polygamy. This is followed by a short discussion about inheritance law. Finally this section will look into the role of Religious Courts and trends in case law deriving from these courts.

The 1974 Marriage Act represents a relatively liberal interpretation of sharia norms. It constrains the right of Muslim husbands to divorce their wives unilaterally by repudiation (*talak*). It also grants wives a variety of instruments through which to obtain divorce and sets clear limits on polygamy. The Act formulates substantive and procedural conditions that must be met for both divorce and polygamy. While decisions on these cases are entrusted to the Religious Courts, the review of their decisions is left to the national Supreme Court. Gradually, the Supreme Court has addressed many of the questions that Act 1/1974 and its government regulations had actually left unanswered. In doing so, the Supreme Court has established 'a regulatory regime which would certainly have met strong opposition if introduced transparently and directly in 1974' (Cammack et al. 2007: 111).

### *Article 2 and the validity of marriages*

The Marriage Act declares in Article 2(1) that a marriage is valid when the two parties have concluded the marriage in accordance with their religion and conviction. In this way, national marriage law for Muslims is linked to sharia, and not to *adat*, which has, thus, been given a

second-rate position. The Act further stipulates in Article 2(2) that all marriages must be registered according to the existing law.

Legal uncertainty has surrounded cases when a marriage was contracted in accordance with the religious rules, but was not officially registered as legally required. Was it still valid?<sup>33</sup> Yes, said the Islamists, the orthodox scholars, and their organisations. No, said the nationalists, the modernists, most jurists, and *their* organisations. The question is whether paragraph 1 of Article 2 supersedes paragraph 2 of the same article. Bowen maintains, to the contrary, that the Supreme Court has not developed a stable corpus of case law on the issue (2003: 182-185). Indecisively, the Supreme Court in 1991 sided with the no-camp, in 1993 with the yes-camp, only to switch sides again in 1995. According to Bowen, the debate continues (2003: 182-185). In any case, it is possible for unrecorded marriages to be registered retroactively.

The legal ambiguity pervasive in this area may also have negative repercussions on related subjects, such as polygamy, divorce and mixed marriages.

### *Interreligious marriages*

Religiously mixed marriages remain one of the most problematic areas of the marriage law. The legality or validity of marriages between a Muslim man and a Christian woman or between a Christian man and a Muslim woman in accordance with Article 2 of the Marriage Law is sharply contested.

In the dominant interpretations of the sharia, the first case is permissible (Muslim man marrying a non-Muslim woman), but the second is not. Nonetheless, judicial decisions tend to show otherwise. In 1974, the Supreme Court held that a marriage between a Muslim man and a Christian woman is valid.<sup>34</sup> In 1986, the Supreme Court reviewed a case in which a Muslim woman had married a Christian man, holding that such marriage was also valid.<sup>35</sup> Oddly, though, in the latter case the Court reasoned that the woman was supposed to give up her religion by marrying a Christian.

A *fatwa* by the MUI (the Council of Indonesian Religious Scholars) in 1980 declared both cases of interreligious marriage to be forbidden. The Compilation also forbids any interreligious marriage. Consequently, during the course of the 1990s, mixed marriages have become increasingly difficult to legitimise. Yet, Justice Bismar Siregar of the Supreme Court stated in 1994 that he was opposed to mixed marriages as a Muslim, but that he did consider them legal as a judge (Bowen 2003: 242-248). The rejected Counter Legal Draft also states that the marriage between Muslims and Non-Muslims is permitted. The matter has taken a new turn with Act 23/2006 on Civil

Registration, which grants general courts the authority to legalise inter-religious marriages.

In practice, the most common solution for Muslim-Christian couples wishing to get married is for the Christian spouse to convert to Islam. For a number of years, the organisation Paramadina, under the leadership of the late liberal religious scholar Nurcholih Madjid, made it possible for interreligious marriages to be contracted. The method used by this organisation was to first contract the marriage in accordance with Islamic precepts, and afterwards to marry the couple according to the other religion's norms. Subsequently, the couple could register the marriage at the civil registrar's office in the local government. Neither the husband nor the wife needed to convert in order to get married, and this option was, therefore, frequently used.<sup>36</sup> Civil registries are known, however, to have refused registration of interreligious marriages.

### *Divorce and repudiation*

This subsection will explain that Act 1/1974 has established two different procedures for divorce. The first procedure assigns a central role to the husband and comes close to a formal repudiation of the wife before the court. The second procedure prescribes how the wife can obtain a divorce from the court. The provisions for both procedures reflect efforts to make a compromised text acceptable to both islamists and liberal reformers.

### *Two procedures*

The drafters of the 1974 Marriage Act were forced to take a stance about the unrestricted unilateral repudiation (*talak*) of the classical sharia and options for women wishing to obtain a divorce on their own initiative. Remarkably, the word *talak* is neither mentioned in the Act, nor in its explanatory memorandum. Instead the Act regulates court procedures for 'divorce' (*perceraian*). It is only in the explanatory memorandum to GR 5/1975 regarding Article 14 that the legislator actually discloses that one of the legal procedures for a Muslim man to obtain a divorce is through repudiation (*cerai talak*). According to Article 38 of the 1974 Act on 'dissolution of the marriage' (*putusnya perkawinan*), a marriage can be dissolved only in three ways, namely by death, by divorce, or by a judicial decision. A Muslim man who goes through the divorce procedure by unilateral repudiation, even though he always has to address a judge, comes under the category of 'divorce by repudiation' (*talak*). In contrast, Muslim women, who according to sharia must also address a judge to obtain a divorce, come under the category of 'suing for divorce' (*gugat cerai*).

### *Divorce by repudiation (talak)*

With regard to the first procedure, the Act states: 'Divorce can only be *effectuated in a court session* after the court has tried to reconcile the parties' (italics added). The procedure for divorce through repudiation or *talak* starts with a written application from the husband to the Religious Court, explaining the reasons for his request. The court reviews whether the conditions are met, and, if so, summons the petitioner and his wife for reconciliation. If the court fails to reconcile the couple, repudiation is pronounced by the husband or a representative before the court. After the session, the presiding judge draws up a declaration that records the divorce, which he then sends on to the Marriage Registrar. The wife retains the right to appeal the *talak*.

Article 39(2) stipulates that such divorce 'can only take place, if there are sufficient grounds which make impossible the consensus which ought to exist between husband and wife.' The explanatory memorandum to this article as well as Articles 19 and 14 of GR 9/1975 further define the reasons for divorce. They include adultery; addiction, including addiction to alcohol, opium use, or gambling; desertion; imprisonment; cruelty which inflicts damage; physical disability; and, finally, continuous conflict and disruption of the marriage.

### *Suing for divorce (gugat cerai)*

The 1974 Marriage Act provides for dissolution through 'suing for divorce', as opposed to 'divorce by repudiation'. It contains several procedures for a judicial divorce to be obtained by the wife. The basic procedure is provided for in Article 20 of GR 9/1975. Largely the same procedures, requirements, and grounds apply as those in cases initiated by men (Art. 19). Many Religious Courts construe these procedures in such a way as to also comply with sharia rules about divorce options for women.

One option which is mentioned not in the law but in the Compilation (Art. 45) and which conforms to sharia rules and is often used in practice, is conditional repudiation (*taklik talak*). Prior to entering into a marriage, the groom assents to a number of conditions under which he would automatically repudiate his wife. These conditions would have to be proven in court. The practice of *taklik talak* is traditionally widespread in Indonesia – to the extent that the Ministry of Religion has incorporated them since 1955 into the standard pre-printed marriage certificate. The reasons for the use of *taklik talak* nowadays conform to the abovementioned legislative grounds for divorce.

A second possibility for divorce is the *syiqaq*, a mediation procedure that can be found in the classical sharia. A woman may use this

procedure when requesting a divorce because of irreconcilable differences. A mediator representing the husband can pronounce a *talak* for him (Cammack et al. 2007: 114). A third form of divorce is the *fasakh*, which is more of a legal annulment than a divorce procedure. In the classical sharia, this procedure tends to be used in cases of physical or mental incapacity of the husband, a condition that is also listed in Article 19(e) of GR 9/1975. A fourth possibility involves payment of a financial compensation (*khuluk*) by the wife; Bowen calls this 'divorce by ransom' (2003: 208).

Because these types of divorce exist in both religious and legal sources, Religious Courts, when styling a dissolution *taklik talak*, *syiqaaq*, *fasakh*, or *khuluk*, are able to adhere to both normative systems at the same time. In the eyes of conservative judges, the marriage legislation has created new procedures, but the substance is still deeply inspired by the sharia, which fundamentally grants the man stronger rights than the woman. Nationalists and liberal reformers naturally disagree, and they usually find the legislative texts as well as the Supreme Court rulings on their side (Cammack 2003: 106-107).

### *Polygamy*

The 1974 Marriage Act states in Article 3(1) that in principle a man can be married to only one woman at the same time, and a woman to one man only. The explanatory memorandum to the Act confirms that 'the act starts from the principle of monogamy.' However, Article 3(1) also establishes that 'the [religious] court can give permission to a married man to marry more than one wife, if this is the wish of the parties concerned.'

The procedure for obtaining permission for a polygamous marriage is laid down in Articles 4 and 5 of the Act, and Articles 40-44 of GR 9/1975. In short, the man must submit a written application. The Religious Court will only give permission if it finds that one out of three substantive conditions is met:

- the wife cannot fulfil her duties as a wife;
- the wife is physically disabled or incurably ill; and/or
- the wife cannot give birth.

In addition, the law mentions in Article 5(1) three other requirements of a more procedural nature:

- the wife must give her consent, unless this is not possible, or the court does not deem it necessary;
- the man must prove that he is able to financially maintain his wives and children, with a declaration from his employer, the tax agency, or otherwise; and

- the man must declare that he will give his wives and children a fair and equal treatment.

Once the paperwork is filed, the court summons the petitioning husband and wives. If it finds that the law's conditions for polygamy are fulfilled, it issues a decision permitting the polygamous marriage. Without such decision, the Marriage Registrar at the KUA is forbidden to register the marriage. If a man marries a second wife without a judicial decision, he faces a fine. Likewise, the registrar who registers a polygamous marriage without prior court permission faces sanction, even imprisonment.

For civil servants, the law is more limited. Government Regulation 10/1983 (amended as GR 45/1990) forbids polygamous unions between two civil servants altogether. Civil servants who want to enter into a polygamous marriage with someone who is not state-employed must obtain written permission from his or her superior. For these types of marriages, another specified procedure is prescribed.

In practice, polygamy is fairly exceptional in Indonesia<sup>37</sup>, and it accounts only for a very small part of the workload of the Religious Courts. However, its symbolic and political importance is considerable, deriving from the fact that it is considered as one of the milestones along the way to 'introducing the sharia' into national law.

Research of judicial decision-making in polygamy cases in the 1980s and 1990s suggests a difference in the holdings of lower Religious Courts and the higher courts who are asked to review cases on appeal. In a number of cases, courts wrongly granted permission for a polygamous marriage, but these were subsequently reversed by the Supreme Court (Otto & Pompe 1988: 14-15; Butt 1999: 128). This shows that the law on polygamy remains contested. During the post-1998 years of liberalisation new pro-polygamy voices came to the fore (Bowen 2003: 224-227). By contrast, in 2004, proponents of the Counter Legal Draft strived for a complete removal of polygamy (Mulia 2007) and President Yudhoyono declared that the abovementioned regulation, which bans polygamy by civil servants, is to be 'reactivated' (see 10.4). The Constitutional Court in its 2007 decision on polygamy mentioned above in the subsection on human rights (see 10.5) basically confirmed the balanced position of the 1974 legislation.

### *Inheritance law*

There is no national legislation concerning inheritance law. The Islamic inheritance law in force for Muslims in Indonesia is laid down in the 1991 Compilation of Islamic Law. This is an almost identical copy of the dominant interpretations of sharia. The Religious Court has

jurisdiction in inheritance affairs. Yet, several studies have revealed that it is rare for inheritance cases to be brought before the Religious Courts. Indeed, they form less than 1 per cent of the courts' workload (Cammack 2007: 164).

The Compilation includes the stipulation that when a person has sons and daughters, the sons will in most cases each inherit twice the share awarded each daughter. This contravenes a Supreme Court decision on *adat* inheritance law from 1961, which ruled that sons and daughters in modern Indonesia should inherit equal amounts. The abovementioned stipulation did not enter into the Compilation without controversy, and remains contested.

Yahya Harahap, a judge on the Supreme Court, argued for instance during the drafting process of the Compilation that an equal division of inheritance between men and women would not conflict with the Quran. The socio-economic position and role of women had changed, after all, therefore making the traditional allotment old-fashioned and outdated. The proposal offered by Harahap was, however, rejected by most religious scholars, who did not wish to diverge from the dominant interpretation (Cammack 1999: 30). Similarly, ex-Minister of Religious Affairs Munawir (1983-1993) frequently pleaded for an equal division.<sup>38</sup> He sometimes accused the *ulama* of hypocrisy in this matter (Bowen 2003: 161-165), maintaining that many religious scholars had told him in private that they would equally divide between their children. And, in fact, in practice, it appears that many Indonesians take measures to ensure that their property will be divided equally between sons and daughters because they consider this to be fairer than the prescriptions of Islamic inheritance law.

However, the way in which the Compilation dealt with inheritance issues, has left most classical rules unchanged. The few innovative parts deal with joint marital property (*harta bersama*) – a concept unknown in classical sharia – and inheritance by adopted children – who are typically not entitled to anything under Islamic inheritance rules. According to the Compilation, adopted children, even if they have not been named in the will of the deceased, are still entitled to up to one third of the total inheritance. Here Indonesia follows the model of the Egyptian inheritance law of 1946.

The 1989 Law on Religious Courts confirmed the longstanding freedom of choice of Indonesian Muslims to bring their inheritance disputes before either the secular General Courts (*pengadilan umum*) or the Religious Courts and to have them decided on the basis of national law, *adat* law, or Islamic law. Article 49 of this law attributed jurisdiction to the Religious Courts 'in cases relating to wills, inheritance [...] that are carried out according to Islamic law'. During parliamentary deliberations about the bill, this was interpreted as an implicit basis for

freedom of choice. It was then decided to lay this down in the General Elucidation, thus stating that '[...] prior to the [initiation of the] case the parties can choose which body of law shall be used in the division of the estate' (Cammack 2007: 159).

In an amendment of the 1989 law, by Act 3/2006, this freedom of choice may have been reduced. At least, the general part of the elucidation of the new Act suggests so in its citation of a phrase from the elucidation of the old law that explicitly allows the parties' freedom to choose the applicable law and states that that phrase is abolished. On the other hand, the new Article 49 does not clearly confirm any such change. It does entrust the Religious Courts with the task and legal powers to settle inheritance disputes between people 'who adhere to the Islamic religion'. But, the elucidation of the new Article 49 states that the phrase 'people (or entities) adhering the Islamic religion' include those 'who have *subjected themselves voluntarily to Islamic law* concerning those matters which belong to the jurisdiction of Islamic courts [...]'. The latter clause suggests a continuation of the legal tradition of free choice of law in inheritance matters. But the old provisions that deprived the Religious Court of the power to decisively settle any dispute concerning property, have now been removed.

#### *Practices and trends in the Religious Courts*

As a Religious Court has jurisdiction over marriage and divorce as well as over inheritance matters and its legal position has changed with the politico-religious tide, this section concludes with some observations about three aspects of the changing role of Religious Courts. First, how strictly do the courts follow the Marriage Act and the Compilation? Secondly, to what extent are their decisions informed either by classical, undulated sharia or by modern concepts of justice and equality between men and women? And third, to what extent does the general public make use of the Religious Courts, and why?

According to Butt (1999: 128), in most cases, the Religious Courts appear to comply with the marriage legislation. Where they have deviated, for example in some polygamy cases (see above), the Supreme Court is there to correct them. In-depth knowledge about the jurisprudence of Religious Courts in Aceh is provided in *Islam, law and equality in Indonesia* by Bowen (2003). The author undertook an anthropological study spanning many years of practices and rulings of Religious and General Courts in rural Aceh. From the research, it appears that in family matters, the courts are primarily approached by women, and in most of these cases they rule in their favour. Bowen explains that both national legislation and Islamic law are more accommodating to the rights of women than the rural *adat* prevalent in Aceh (Bowen 2003:

84-88). While during the 1960s these courts had shown themselves to be very sensitive to the consensus of rural communities,

[b]y the early 1990s, judges were emphasising the legal rights of the individual Muslim, usually the Muslim wife or daughter [...] Some judges, jurists and many others have attempted to construct an inclusive Islamic discourse that could take into account norms of gender equality, the traditions of *fiqh* and, selectively, adapt social norms (ibid 2003: 255-256).

The circulars and judgments of the Supreme Court in sharia-related cases also indicate incremental attempts at liberalisation. Cammack (2003: 109-110) cites Circular 2 of 1990, which emphasises that the role of the religious judge in repudiation cases is not that of a witness, whose task is merely to assess whether all conditions of the marriage law have been abided by, but rather that of a judge who must adjudicate in a matter involving two conflicting parties and who must resolve the issue with a judicial decision.

In the Nur Said case originating in Aceh, in which the brother of a deceased man demanded the entire inheritance, the Religious Court decided that not only the brother, but also the only daughter of the deceased would receive part of the inheritance. The Supreme Court, however, reversed this decision and argued that the child of the deceased must inherit everything, regardless of whether the child was a son or a daughter. Another inheritance case, *Warsih vs. Iim*, also demonstrates that decision-making by a Religious Court is certainly not a matter of a mechanical enforcement of sharia rules from the Compilation (Bowen 2003: 135-146). The judgment in this case does refer to the relevant article of the Compilation, but instead of directly implementing it, the argumentation is centred on a number of social norms. In the ruling, these norms are backed up by reference to 'the current Islamic law that is in force in Indonesia', which is taken from four legal sources: the Compilation, the traditions, the publications of a liberal Pakistani legal scholar, and finally a Shafi'ite *fiqh* book. The Compilation is, thus, complemented and legitimised by using other norms, carefully selected from among many possible sources in order to achieve a socially acceptable decision.

According to Nurlaelawati (2010: 143-144), judges in the Islamic courts have generally followed the provisions of the Compilation of Islamic Law in adjudicating cases before them. However, in some cases, judges have 'deviated' from the Compilation and referred to *fiqh* instead. Among the reasons is their intention to create public good (*ma-slahat*) or to guarantee satisfaction of the parties through their judgments. For reasons of legal justification, their decisions are then

presented in such a way as to demonstrate conformity with the sources of Islamic law. Another reason, according to Nurlaelawati's evaluation, is that a number of judges simply have not accepted all the reforms of the Compilation. Thus, judges continue to produce legal uncertainty and anomalous decisions. In contrast, both Bowen (2003, 2007) and Cammack (2007) make a more positive assessment of the 'deviations', arguing that they are mostly made on the grounds of fairness, justice, public interest, or common good (see 10.4).

Cammack et al. (2007) estimate that at least in the 1970s and 1980s 'no more than about half of all Muslim divorces [were actually] processed through Islamic courts.' These findings are confirmed by a 2008 study of the Supreme Court and AusAID (Sumner 2008). Cammack et al. conclude that 'practical considerations of costs, convenience, and knowledge of the law's requirements are the principal reasons for non-compliance with statutory divorce procedures' as 'costs of adherence in terms of expense and inconvenience outweigh the perceived benefits' (ibid: 121). They found that ignorance of the law is a factor in the non-compliance of divorce procedures, though the Indonesian government and a number of NGOs have disseminated much information about it. Another factor is the unavailability of documentary proof of a marriage, as '[t]hose who enter into unapproved marriages will invariably secure an unapproved divorce should the marriage fail' (ibid: 123).

Cammack et al. also explain why Indonesian Muslims find compliance burdensome, writing:

The simplest divorce requires at least three court hearings [... and moreover] entail[s] a certain amount of paperwork and bureaucratic annoyance. The parties must obtain a letter of residence from the local village head, and must present an original state-issued marriage certificate. For most litigants, the court staff translates the couple's wishes into a cognizable legal claim or claims, and complete forms that constitute the complaint or petition. Additional procedures are sometimes required to give notice to an absent spouse; the parties must secure the attendance of witnesses; and the court may require documentary evidence of the couple's property (ibid 122-123).

In addition, litigants must pay fees for obtaining documents and additional informal payments. It would appear, therefore, that non-compliance with the divorce rules contained in the Marriage Act of 1974 is primarily the consequence of neglect and avoidance, rather than principled rejection and refusal of the law itself (ibid: 125). Thus, the widespread evasion of statutory divorce requirements should not be interpreted as a

dramatic failure of the marriage act. In the words of Cammack et al., the '[c]hanges to the law that require reasons for divorce and grant increased rights to wives are undoubtedly changing popular attitudes' (ibid: 127).

## 10.7 Criminal law

The current criminal code of Indonesia is not Islamic in nature and design, and based on the French-Dutch legal tradition. It does not incorporate *hadd* crimes, Islamic corporal punishments, or retribution-based sentencing. Apostasy is not a criminal offence under national law. This being said, Indonesian law does include a few crimes that relate directly or indirectly to Islam and sharia. Article 156 of the criminal code makes the spreading of hatred, heresy, and blasphemy punishable by up to five years in prison. Although the law applies to all officially recognised religions, it is usually invoked in cases involving blasphemy and heresy against Islam.

Today's criminal code is to be replaced by a new code. This draft bill, which has been worked on for decades, was presented to the president in January 2005, but has since been postponed and shelved several times. Its presentation to parliament scheduled for 2008 was once again postponed. The latest versions of the draft bill reflect the French-Dutch legal tradition, with little reference to sharia except for a few provisions pertaining to sexual morality and virtuous behaviour. These articles have been the subject of intense discussion for a number of years, in part due to connotations with the sharia concept of *zina*. For example, draft Article 484 makes extramarital sexual intercourse (*zina*) punishable with a prison sentence of up to five years or a substantial fine. This offence could also be interpreted as covering homosexuality and the living together of unmarried couples, while Article 486 of the draft bill makes unmarried cohabitation punishable with a sentence of up to two years or a proportionate fine. Incidentally, the penalisation of unmarried cohabitation is not a new development in Indonesia.<sup>39</sup> Many questions have been raised on the mutual relations between the two provisions and on the imminent problems that will undoubtedly arise concerning evidence in such cases.

The latest draft bill also prohibits kissing in public, a provision that has been included in the chapter regarding virtuous behaviour. In addition to many moral objections, doubts have been raised with respect to the viability of enforcement as well as the economic consequences in areas that largely survive on the tourist industry like Bali. The Islamic mass organisation NU has spoken out against these proposals, arguing that the inclusion of elements of sharia into Indonesian criminal law

would undermine social cohesion and tolerance. Several orthodox Islamic parties and groups, on the other hand, have been eagerly propagating stricter legislation in these areas for years.<sup>40</sup>

Beside the contested drafts of a new criminal code, three subjects demand our attention here. First, the autonomous *qanuns* of Aceh; secondly, the criminalisation of behaviour that may disrupt interreligious peace; and thirdly, the Anti-Pornography Act.

The special status of Aceh province, regulated by a 2006 national law (see 10.4), has enabled the provincial government to make several crimes punishable under Islamic law. The criminal provisions of those provincial regulations or *qanuns*, take precedence over the criminal code, and thus form an important exception (Lindsey & Hooker 2007: 245-249). Since 2005, sharia-based sanctions such as public flogging have been applied occasionally in some of Aceh's district towns. Remarkably, since early 2007 no judicial order for such execution was issued in the area of the provincial capital Banda Aceh.<sup>41</sup>

On 14 September 2009 Aceh's legislative body, on the eve of its replacement by a newly elected council, passed a *qanun* on Islamic criminal law (*jinayat*) and criminal procedure law. Article 24, section 1 of this *qanun* regulates sanctions for adultery (*zina*). If it is proven that adultery has been committed by two married persons, they are to be stoned to death in a public place. In the case of unmarried persons, they will each receive 100 lashes. However, it is unlikely that this *qanun* is legally valid and can be implemented. The governor of Aceh, Irwandi Yusef, has declared his strong and continuous objection to the regulation. He stated that the regulation will never be implemented, that the newly elected council will revise it, and that he will not approve it.<sup>42</sup> According to Indonesian law, for the *qanun* to be valid the governor's consent during the making of a provincial regulation is required, as well as his approval of the council's decision to pass it. However, proponents of the new regulation have contested this and maintain that the *qanun* is already valid. Yet, the president of the Constitutional Court has stated that the validity of the new *qanun* is still problematic from a legal technical sense.<sup>43</sup>

Concerning the possible disturbance of interreligious harmony, a Joint Decree of the ministers of Justice and Religious Affairs, dating back to 1970, states that it is prohibited to convert people to a particular religion in a region where another religion is prevalent (Bowen 2003: 236). Bearing in mind that Islam is the most common religion by far, this decision can be seen as a form of official protection of Islam. A joint decree from 2008 by the same ministers, warns and directs adherents and leaders of the Ahmadiyya to refrain from religious practices that deviate from mainstream Islam. Referring to Act 1 (PNPS) of 1965 on the Prevention of Abuse and/or the Defiling of Religions, the decree

further states that non-compliance may lead to legal sanctions. The same decree also warns opponents of Ahmadiyya to respect religious communities and to refrain from illegal actions against this group, under penalty of sanctions.

The 2008 Anti-Pornography Act, which was strongly promoted by Islamist circles, bans images, gestures, or talk deemed to be pornographic. The law has defined pornography very broadly as anything ‘which may incite obscenity, sexual exploitation and/or violate the moral ethics of the community’. A section of the law allows members of the public to ‘participate in preventing the spread of obscenity.’ In the beginning of 2010, the Bandung police arrested four female dancers, who were showing their underwear during a ‘sexy’ New Year’s dance performance, and two men involved in the management of the alleged performance. A senior Bandung policeman said the six could be charged under the criminal code or the anti-pornography law, depending on the prosecutors. Those convicted under the anti-pornography act can face a maximum jail term of fifteen years. Rights groups have already lodged a judicial review at the Constitutional Court demanding that the law be dropped.<sup>44</sup>

## 10.8 Economic law and religious foundations

Following Law 3/2006, which extended the jurisdiction of Religious Courts to economic sharia law, the Supreme Court issued a Compilation of Economic Sharia Law (KHES) as an attachment to Supreme Court Circular Letter 2/2008<sup>45</sup>. Just like the Compilation of Islamic Law (see 10.5), the KHES is not a law and does not impose rules on citizens. Its four chapters address the following topics:

1. Legal Subjects and Property (*subyek hukum dan harta*);
2. Contract (*akad*);
3. Almsgiving (*zakat*) and Gifts (*hibah*); and
4. Sharia-based accountancy (*Akuntansi Syari’ah*).

The 796 articles of the KHES are formally based on legal sources and principles of sharia, notably the Quran, the Sunna, custom (*urf*), and consideration for the public interest (*maslahat*). In substance, this Indonesian version of economic sharia has been adjusted to the policies and rules of Indonesia’s national banking system and to practices on the ground. Influence of sharia on Indonesia’s economic law can also be found in laws regulating Islamic banking, Islamic taxation (*zakat*), and religious charitable foundations (*wakaf*).

### *Islamic banking law*

In 2008, a new Sharia Banking Act was passed by parliament. Like its predecessor (Act 10/1998), Law 21/2008 acknowledges the principles of Islamic banking as constituting part of the national banking system<sup>46</sup> and establishes the supervisory authority of the central bank to ensure a healthy and proper regulatory environment surrounding the Islamic banking sector. In addition to the country's central bank (Bank Indonesia), the MUI (see 10.3) has certain powers concerning sharia banking.<sup>47</sup> The law provides for the MUI to lay down the relevant principles of sharia in *fatwas*. A committee composed of officials from Bank Indonesia, the Ministry of Religion, and 'sharia experts' is to incorporate these *fatwas* into the Bank's regulations. Observers have pointed out the danger of conflicting opinions between the two agencies. Nevertheless, there can be no doubt that the national policy and supervision of Islamic banking will primarily fall under the jurisdiction of Bank Indonesia. For example, a regulation issued in the summer of 2005 required that all rurally-based sharia banks draw up monthly reports in accordance with strict guidelines; these reports are to be submitted for approval by Bank Indonesia. Forms of Islamic insurance, stockbrokers, mortgage providers, and micro credit institutions have also quickly begun to expand and now also fall under the financial supervision of Bank Indonesia.

### *Almsgiving law or Islamic taxation*

The Zakat Administration Law 38/1999 regulates the management of alms paid for the poor (*zakat*). This law does not establish an enforceable obligation for Muslims to pay *zakat*. Rather, it is targeted toward the unification, centralisation, and coordination of the numerous existing public and private *zakat* institutions. It is hoped that the act will increase the amount of *zakat* payments, direct *zakat* funds to social welfare for the poor, strengthen the legal basis of *zakat* collection, and boost participation levels and the religiosity of Indonesians in general (Salim 2008: 128). The law primarily deals with the tasks and powers of the National Zakat Agency (BAZNAS) for the management of *zakat*, but it also covers private *zakat*-related institutions. Furthermore, the law makes *zakat* a tax-deductible expense for both private individuals and firms. This has raised criticism that the law discriminates against followers of other religions for whom no similar tax-deductible regulations exist. Minister of Religion Munawir stated in 2001 that similar concepts existing in other religions shall be taken into consideration in the future; for the moment, however, priority lies with properly managing the *zakat* (ibid: 138).

### *Law on religious foundations (wakaf)*

A *wakaf* is a religious foundation endowed by the founders with real estate and/or tangible goods to be used in the interest of the community. Act 41/2004 concerning *wakaf* established the independent Indonesian Wakaf Agency ('Badan Wakaf Indonesia', abbreviated as BWI) and charged it with the supervision of those who manage *wakafs*. Government Regulation 42/2006 provides the substantive and procedural rules for *wakaf* administration and corresponds with Part III of the Compilation of Islamic Law, also dealing with *wakaf*. Local offices of the Ministry of Religion, the so-called KUAs (see 10.2, 10.5), are responsible for the registration of *wakaf* and report to both the Ministry of Religion and the BWI. The BWI has the power to discharge or replace the *wakaf* management and to decide in matters concerning the status of a *wakaf*. The Minister of Religion and the MUI exercise advisory powers only. Jurisdiction in matters pertaining to *wakaf* rests with the Religious Courts.

## **10.9 International treaty obligations concerning human rights**

We have pointed out above that some provisions in Indonesia's sharia-based national law are in conflict with its human rights law (see 10.5). In this section we examine whether Indonesia has ratified the main human rights treaties and whether, in doing so, it has entered into international legal obligations affecting its sharia-related domestic laws. In particular, we will note how the monitoring bodies of those treaties have assessed Indonesia's fulfilment of its duties under international law.

Indonesia ratified CEDAW in 1984, including its optional protocol. In doing so, the country made no reservations, and, therefore, agreed to the treaty principles affirming equality between men and women. Indonesia ratified the Convention Against Torture (CAT) in 1998 and, finally, in September 2005 the International Covenant on Civil and Political Rights (ICCPR). The National Commission for Human Rights (*Komnasham*) has played a major role in promoting such ratifications, and drawing attention to their legal consequences, such as Indonesia's obligation to report periodically to the monitoring bodies of those treaties. While the post-1998 democratic reforms have been hailed as remarkable improvements in human rights, concerns have been raised about stagnation in the law reform process regarding the status of women and about the introduction of sharia-based criminal law in Aceh.

In 2007, in response to Indonesia's periodic progress report, the international CEDAW Committee expressed its concern that

the discriminatory provisions in the Marriage Act of 1974 [...] perpetuate stereotypes by providing that men are the heads of households and women are relegated to domestic roles.<sup>48</sup>

The Committee further noted that the law allows for polygamy and sets a legal minimum age of marriage at 16 for girls and that in general there is a 'lack of progress in the law reform process with respect to marriage and family law, which allows the persistence of discriminatory provisions that deny women equal rights with men' (CEDAW 2007). Since the time of the Committee's previous report on Indonesia, where similar concluding comments were made, amendments to the discriminatory provisions of the Marriage Act (1974) have not been undertaken. This prompted the Committee to request that the Indonesian government 'take immediate steps to revise the Marriage Act of 1974 in accordance with its obligations under the Convention', to which Indonesian representatives expressed their intention to amend the law without further delay (*ibid*).

Members of the Committee further urged Indonesia to address women and their role in marriage and family relations in a comprehensive strategy for the elimination of discrimination. It noted with particular concern that the government's decentralisation policy had 'resulted in the uneven recognition and enforcement of women's human rights and discrimination against women in some regions, including Aceh' (*ibid*). It also took note of 'the rise of religious fundamentalist groups advocating restrictive interpretations of sharia law, which discriminate against women, in several regions of the country' and concluded that:

[The Indonesian government] has rescinded a number of local laws and regulations pertaining to economic matters such as taxes, but has failed to rescind local laws that discriminate against women on the basis of religion, including laws regulating dress codes, which are disproportionately enforced against women (*ibid*).

In 2008, the international Committee against Torture convened to monitor the implementation of the CAT in Indonesia.<sup>49</sup> They expressed deep concern that local regulations, such as the Aceh Criminal Code, adopted in 2005, introduced corporal punishment for certain new offences and furthermore that 'the enforcement of such provisions is under the authority of a "morality police", the Wilayatul Hisbah, which exercises an undefined jurisdiction and whose supervision by public State institutions is unclear' (*ibid*). The Committee also concluded that:

the necessary legal fundamental safeguards do not exist for persons detained by such officials [and] the execution of punishment

in public and the use of physically abusive methods (such as flogging or caning) [...] contravene the Convention and national law. In addition, it is reported that the punishments meted out by this policing body have a disproportionate impact on women (arts. 2 and 16). The State party should review all its national and local criminal legislations, especially the 2005 Aceh Criminal Code<sup>50</sup>, that authorize the use of corporal punishment as criminal sanctions, with a view to abolishing them immediately, as such punishments constitute a breach of the obligations imposed by the Convention [...].

It is hard to assess the impact of such conclusions of international committees on domestic decision-making in Indonesia. While certain groups and institutions, including the departing provincial council of Aceh in September 2009, choose to ignore, if not defy, the calls from these international human rights committees, the latter's conclusions have certainly added weight to the claims of moderate politicians and human rights defenders and are reflected in the policies of Aceh's present governor who belongs to the local Partai Aceh, which presently has the majority, as well as in the post-2007 judicial policy in Banda Aceh.

## 10.10 Conclusion

Has Indonesia's moderate Islam, for which the country has been known since long ago, changed to the extent that puritan forces and interpretations of sharia have pervaded national law? Several developments point in that direction. The jurisdiction of Religious Courts has increased; new national laws on Islamic economic law – banking, taxation, almsgiving – have been promulgated; two major Compilations of Islamic law have been issued by the government; inter-religious marriages have become difficult to pursue and legally dubious at best; religious freedom for Ahmadiyya has been curbed due to pressure from puritan groups; and Aceh introduced sharia-based law even in criminal matters. It is also notable that through a variety of regional regulations (the so-called *PerDa Syariah*), individual freedoms enjoyed by citizens – to dress as they want, to move when they want, to eat and drink as they like, to pursue religious studies as they like – have been curtailed in quite a number of districts, towns and provinces.

Yet, in a recent book on islamisation of Indonesia's law, Salim has raised an important question about the essence of these legal changes, namely whether they can be qualified as islamisation or Indonesianisation? He argues that:

The Islamization of laws in Indonesia [...] is not a real or complete introduction of shari'a. What on the surface appears to be the Islamization of laws in Indonesia is in reality a symbolic token for the most part. [...] [I]t is also an Indonesianization of sharia law that is currently taking place. This means that the Islamization of laws in Indonesia entails in part practical secularization of shari'a, namely human interference through parliamentary enactment in creating religious obligations that have non-divine character (Salim 2008: 177).

Salim is certainly right in stating that the introduction of sharia in Indonesia is not 'complete'. It should be realised that in Indonesia the bigger part of law has undergone little or no visible influence from Islam. Indonesia's constitution has remained secular, as have most of its codifications, whether in administrative law, criminal law, civil law, or laws of procedure. 'Islam' and 'sharia' lack a constitutional status as such.

Salim also states that the islamisation of laws in Indonesia is not a 'real' introduction of sharia. In his view, most of the abovementioned legal changes can also be interpreted as successful efforts by the state to incorporate, subjugate, and control Islamic law as a subsidiary part of national law and governance. Actually, I subscribe to this view, which, ironically, is probably shared by many discontented puritans as well. The powers of Religious Courts have indeed expanded. Yet, whereas these courts used to be supervised by the Ministry of Religion, a traditional bulwark of religious scholars, they have now come under the control of the Supreme Court, which of old has been a stronghold of professional jurists. Previously, Islamic banking, almsgiving, and the management of religious foundations were private matters, but they too are now regulated and supervised by national agencies.

From the above paragraph it may seem that islamisation of law should be understood simply as the outcome of a struggle between state institutions and religious scholars. Here, one should distinguish between two main politico-religious forces, namely moderates and puritans. Since Independence, the Indonesian government itself has been dominated by moderate nationalists. Both Soekarno and Suharto were essentially moderate Javanese Muslims, as were their successors. An important legislative achievement of Suharto's New Order regime was the 1974 Marriage Act. It was, and still is, the mainstay of sharia-based law. The 1974 law is a compromise between the government's previous drafts – which were decidedly more liberal – and the demands of a fierce puritan opposition. Despite ambivalent legislation and ongoing problems of implementation, the law brought an end to the unlimited freedom of Muslim men to divorce their wives at will and to take a

second, third, or fourth wife as they liked. It assigned the Religious Courts the power to decide whether a man had good reasons for a divorce or a next marriage. The law also almost equalised divorce procedures for men and women. Thus, in spite of puritan resistance over the past quarter of a century, the law of divorce by the Indonesian courts has been gradually and quietly transformed (Cammack et al. 2007: 126-127).

The processes of legal change, to which Salim refers in the above citation as 'Indonesianization' of shari'a law and elsewhere 'nationalization of shari'a' (Salim 2008: 2), go a long way back indeed. In pre-colonial Java, the sultans of Yogyakarta and Solo converted to Islam and supervised the administration of justice by their religious officials (*panghulus*). The Dutch already began in 1882 to formalise Islamic councils, thus charging state-controlled bodies with the application of Islamic law, in subservience to the secular, general state courts. After Independence, Sukarno's new government first transformed the Dutch colonial office for religious affairs into a Ministry of Religious Affairs to supervise Islamic affairs. Since Islamist forces such as *Darul Islam* posed serious threats to the young republic, the government tended to fear puritans, and to fight the militants among them. Hazairin's scheme to establish as a fifth Sunni school of Islamic law, the so-called *Madhab Indonesia*, expressed the ambitions and hopes of moderate Muslim legal scholars that Islam, local *adat* and a national legal tradition could go hand in hand. Such ideas were not welcomed, though, by puritan scholars, who since the 1970s came under the increasing influence of transnational Salafist propaganda from the Middle East, especially from Saudi Arabia.

Under Suharto's New Order, the government first did its utmost best to control and oppress religious opposition. To this end, it set up the MUI as a national *ulama* organisation and the PPP as an Islamic political party, and it expanded and further formalised the Religious Courts as part of the national judicial system. In the 1990s, when opposition against his increasingly oppressive and corrupt regime mounted, Suharto started to provide support to Islamist movements and organisations such as ICMI. Several Islamic scholars including NU-chairman Abdurrahman Wahid played a leading role in the pro-democracy and pro-rule-of-law forces that led to Suharto's fall. Suharto's vice president and successor Habibie enacted several laws to regulate Islamic affairs (see 10.4).

The next presidents, Wahid himself, then Megawati, and presently Susilo Bambang Yudhoyono (SBY), arranged for a formidable increase in democracy and human rights. Indonesia ratified major human rights conventions without reservations, the army returned to the barracks, and the civil war between the army and the Free Aceh Movement was

successfully ended with a peace agreement. Free elections on national and local levels now saw secular as well as Islamic parties bid for the public's favour.

Generally speaking, secular parties such as PDI, Golkar, and PD have been far more successful than Islamic parties such as PPP, PKB, PAN, and PBB. In elections neither of them has made sharia a big issue. In 1999 and 2004, nationalist parties like Golkar and PDI and the secular-oriented Islamic party PKB were the winners. In 2009, president Yudhoyono's Partai Demokrat won many votes. The Islamist PKS, which has become increasingly popular for its sense of decency and discipline, had success in 2004, but in 2009 it did not make the major breakthrough some had expected. It now seems to prefer the model of the Turkish AK party, which promotes democracy and economic growth, over the model of the more puritan Egyptian Muslim Brotherhood. As Azra noted, in the elections PKS leaders concentrated their political discourse on socio-economic subjects (2004: 12-14).

Remarkably, the promotion of sharia-based legislation, both in Aceh as well as in other provinces and districts, has largely been driven by non-Islamist parties such as Golkar and PDI (Bush 2008). Similarly, Aceh's turn to the sharia, based on 2001 and 2006 laws enacted in Jakarta, did not unequivocally express the strong demand of all Acehnese. On the contrary, when after the Peace Agreement the Free Aceh Movement had turned into a regular political party, and this newly formed Partai Aceh won the 2009 elections, they opposed the radical turn to sharia-based law. Governor Yusef Wanandi personally opposed the 2009 stoning regulation, which remains contested.

The election results confirm what had already been observed by socio-legal scholars. In spite of all attention drawn by puritan movements, and notwithstanding opinion polls reporting that a majority of Indonesians want to 'introduce the sharia',<sup>51</sup> legal development at the grassroots level is often marked by pragmatism. Backstage, throughout the country, numerous administrators, officials, judges, lawyers, and above all the common people are attempting in most cases to pragmatically utilise and blend the different normative systems in such a manner that they are able to achieve desirable solutions.

As Bowen (2003: 255-257) has observed in rural Aceh and elsewhere, Religious Courts in particular successfully attempt to construct an inclusive Islamic discourse that can take into account norms of gender equality (human rights) and the traditions of *fiqh*, as well as social norms prevailing in society. An obvious reason for common people to turn to the Religious Courts is their good reputation in terms of accessibility, integrity, and delivery of justice. For the time being, Religious Courts are preferred over General Courts, which are known for their corruption.

Indonesia is presently conducting a unique experiment with democratic law-making in the context of cultural islamisation. In this process, it has been responding both to Islamist pressure and the call to respect human rights.

On the one hand, puritan groups have become more vocal, more 'mainstream', and more influential than in the past. Some groups like FPI still use intimidation and violence to achieve their goals, unfortunately with incidental successes. Education programmes in the Middle-East and other exchanges with the Muslim world have created transnational networks and, as such, channels for dissemination of Saudi funds and puritan ideas. It also cannot be ignored that in the wake of Suharto's fall, Islam became for many Indonesians a symbol for the modern, self-conscious citizen and a political statement against New Order practices – against oppression and corruption, and for justice and human rights. While wearing the veil could indeed reflect oppression of women in some cases, for other women the veil became a symbol of seriousness, maturity, and social ambition (Brenner 1996).

On the other hand, the long tradition of most Indonesian Muslims being moderate traditionalists has not disappeared altogether. Many have associated themselves with their local *adat*, with local Sufi movements, with traditionalist and social service organisations such as the NU, and with the belief in the spirits of their ancestors and other spiritual forces. Among bureaucrats, politicians, military, police, judges, business, NGOs, academics, artists, intellectuals, journalists, and students, many favour national unity, economic growth, democracy, and human rights as the best path to socio-economic development. This large group has always been opposed to the strict implementation and enforcement of laws based on classical sharia.

In 2009, a team of Islamic scholars, representing two powerful mass movements, namely the NU and the Muhammadiyah, and led by the late Abdurrahman Wahid, published a book entitled *Ilusi Negara Islam* (The Illusion of an Islamic State). This book carefully documents the ways in which Saudi-funded Salafi puritans have tried to infiltrate Indonesia's public and private institutions. It contains strong condemnations of such infiltration from both Islamic organisations, calling it an attack on Indonesia's society and culture. Judging from the above-mentioned election results, these views are actually backed by a pragmatic, silent majority that has consistently supported moderate parties and politicians.

As Azra (2004: 12-14) has argued, terrorist bomb attacks have led most Indonesians to strongly condemn radicalism and have instilled in them a resolute will to tackle this problem. At the same time, most Indonesians are not willing to sever the connections with their Islamic

traditions. Against this background, the position and role of sharia-based law are bound to remain ambiguous and contested, moving back and forth in the decades to come as they have done in the recent past.

## Notes

- 1 The author is professor of law and governance in developing countries at Leiden University, the Netherlands. He wishes to thank Adriaan Bedner, John Bowen, Mark Cammack, and Andrew Harding for their valuable comments on previous versions of this chapter. He also thanks Stijn van Huis for his extensive research assistance and his meticulous documentation of post-2007 legal developments, notably in the area of economic law.
- 2 An earlier version of the historical part of this chapter was published in Otto 2009b.
- 3 The term *adat* law (in Dutch *adatrecht*) was first used by Snouck Hurgronje in order to describe local customs (*adat*) that fulfilled a legal function; he referred to ‘adats, which have legal effect’ (Snouck Hurgronje 1893: 357). The argumentation for using *adat* law as a standard legal concept was developed by Van Vollenhoven, for example in *Het adatrecht van Nederlandsch-Indië* (1918: 8).
- 4 Javanese informants may possibly not have been very clear either, used as they were to present themselves to the outside world as adherents of a specific religion, while in private embracing a body of syncretic, pluralistic convictions (Ball 1981: 24). Today, this tendency has not altogether disappeared.
- 5 In the Netherlands, the Batavian Republic was proclaimed in 1795 in the wake of the 1789 French Revolution. In France, during the first years of the nineteenth century, Napoleon directed the unification and codification of customs and regulations and modernised the government, the economy, and the military. As France’s political and cultural influence increased also in the Netherlands, the drive for codification also took hold there.
- 6 Both scholars were proponents of the legal theory of *receptio in complexu*, the total embracement of the complete corpus of religious Islamic law. Later on, this theory became subject to devastating attacks by Snouck Hurgronje.
- 7 Royal Decree of 19 January 1882, regarding the Religious Councils on Java and Madura, published in the official gazette (*Staatsblad*) 82-152 jo. 153. The official name of the councils was ‘Priests Councils’ (in Dutch *Priesterraden*).
- 8 From 1891 until 1898, he served as advisor to the Governor-General on ‘Oriental languages and Muhammadan law’ and from 1898 until 1906 he was the Adviser for ‘Native and Arab affairs’. Subsequently, he was appointed as professor of Arabic in Leiden.
- 9 This reception theory formed a reaction to the older theory of *receptio in complexu*, as defended by nineteenth century authors (see *supra* n. 6).
- 10 In *Indonesian Islam*, Hooker (2003) compares *fatwas* by the Muhammadiyah, NU, and Persis with those of the national council of religious scholars (the MUI), which was established later (see 10.3).
- 11 Here the courts in first instance were called ‘Kadi’s Council’ (*Kerapatan Qadi*) while the court of appeals was called ‘High Kadi’s Council’ (*Kerapatan Qadi Besar*), see Cammack 2007: 147.
- 12 *Wakap* or *wakaf*: the Indonesian term for *waqf* (Arabic) or religious endowment. It refers to property that, in accordance with the rules of the sharia, is set aside for religious or social purposes and is administered by a kind of foundation.
- 13 This did not go as far as the recent autonomy laws on Aceh of 2001 and 2006.

- 14 Under Sukarno's rule, Indonesia left the United Nations in January 1965 in protest of Malaysia's becoming a temporary member of the Security Council. In September 1966, under Suharto, Indonesia reassumed membership (Cribb & Brown 1997: 86, 116).
- 15 See Article 10 of Act 14/1970; In Indonesia, since colonial times, the term 'religious jurisdiction' has referred to jurisdiction for Muslims.
- 16 The enactment of the implementing Government Regulation 9/1975 only partially resolved this uncertainty (see 10.6).
- 17 Progressive Indonesian jurists were involved in the drafting of regulations on Islamic banking, sponsored in part by USAID, the official American aid agency.
- 18 Both Wahid and Rais were to form political parties: Wahid the PKB, based on the older NU; and Rais, the PAN, which had more in common with the old Masyumi party.
- 19 In 2002 the PPP and other small Islamic parties proposed to revise the constitution in order to make Indonesia an Islamic state. In August of the same year, the MPR (People's Consultative Assembly) rejected this proposal, with the support of the NU and the *Muhammadiyah*.
- 20 The *Laskar Jihad* was the biggest and probably best organised movement among the Islamic militias. Another organisation, the Islamic Defenders Front (*Front Pembela Islam*, or FPI) executed countless attacks on bars, brothels, and nightclubs in Jakarta and its environs. The *Jema'ah Islamiyah* (JI) is mentioned in relation to the attacks on Bali, and the Southeast Asian cell of Al-Qaeda. For an overview of these three organisations see Van Bruinessen 2002. In 2003, the perpetrators of the Bali attack, all of them members of the JI, were convicted and sentenced to death. In 2005 Abu Bakar Ba'asyir, suspected to be the spiritual leader of the JI and of the attacks on Bali was convicted to thirty months imprisonment. Besides these three organisations, a number of networks, often operating underground, have taken up the fight for an Islamic state. They have once again united under the name *Darul Islam* or NII/TII (abbreviations for Islamic State of Indonesia/Islamic Army of Indonesia). In addition, local radical organisations have often been active, such as the *Laskar Jundullah* in southern Sulawesi (ibid). On 10 November 2008, the men who had carried out the Bali bomb attack, Amrozi, Imam Samudera, and Ali Gufron were executed. New suicide bombings took place on 17 July 2009 in two Jakarta hotels killing nine people. In September 2009, Indonesia's most wanted Islamist militant Noordin Top, the suspected mastermind of violent bomb attacks, was finally traced and killed during a police raid in Solo. The Economist concluded in late 2008 that 'Indonesia is, overall, edging away from radical Islamism. But the trend is not irreversible, and the authorities must avoid fostering fundamentalists by pandering to them' (Economist 2008).
- 21 To explain this, it is sometimes argued that court procedures are time-consuming, complicated, and expensive (Cammack 2007). Furthermore, a lack of knowledge of rights and duties is cited, despite the fact that the Ministry of Religion has local advisory offices that offer every prospective couple information about their rights and duties.
- 22 In the concluding section of this chapter, I will point out that throughout Indonesia politicians of secular nationalist parties have been involved in the introduction of sharia-related regulations. In the case of Aceh the party which represents most voters, the Partai Aceh, has spoken out against this islamisation of law.
- 23 An earlier version of sections 10.5 and 10.6 was published in Otto 2009a.
- 24 Amended first in 2006, and for the second time by Law 50/2009.
- 25 Act 35/1999 was aimed at making the judiciary more independent from the executive by removing some of the influence held by ministries with supervisory powers. While the other special courts were granted five years in order to prepare administratively for the changes, an exception was made for the Religious Courts following

- protests by the Ministry of Religion and the MUI. According to appended Article 11 (A), section 2, no time limit was imposed on the Religious Courts (Salim 2003: 215-216).
- 26 IAINs (State Academies of Islamic Sciences) have for many years been the main institutes of higher education in Islamic studies. In 2002, a number of them were elevated so that they are now 'National Islamic Universities' (UIN).
  - 27 For a more detailed description and analysis of the historical development of this ministry, see Boland 1982. For many years, the Directorate for the Development of Religious Courts did essentially fulfill the function of a court of appeals in religious affairs. Since 1965, the Supreme Court has formally become the national court of appeals in religious matters; nonetheless, the supervisory role of the directorate continued for many years (Hooker 2003: 37-38) until it was abolished with the complete transfer of the sector of Religious Courts to the Supreme Court in 2004.
  - 28 In 1958, the Ministry of Religion issued a Circular Letter indicating thirteen *fiqh*-texts of the Shaf'ite school to be used by the Religious Courts. This canon has effectively been in use until present times.
  - 29 This is, for instance, the case in the stipulation that in cases where the only child of deceased parents is female, she inherits the entire estate when both of her parents die. This progressive interpretation was also followed by the Supreme Court in judgments made in 1995, 1996, and 1998. In contrast, the widely held traditional interpretation of sharia was that in such cases, the brothers and sisters of the deceased would also inherit a portion of the estate. This has now been pushed aside (Bowen 2003: 195-199).
  - 30 Decision 12/PUU-V/2007.
  - 31 It remained unclear what the scope and meaning of this provision would be. Prosecutor General Marzuki made it known that it could only pertain to private law and not to criminal law. PKB leader Wahid was of the opinion that it was about the underlying principles of the sharia, and not about the actual content. What was clear was that various parties used this question to score political points, especially the PKB towards the PDI, and not so much to resolve the real problems afflicting Aceh (Salim 2003: 227).
  - 32 For the content of these *qanuns* see Ichwan 2007: 205-214.
  - 33 The legal requirement of registration, complete with a criminal penalisation, is not contested. However, negligence and liability to punishment do not immediately and in all cases imply that the marriage would be invalid.
  - 34 Supreme Court decision 1650/K/Sip/1974, dated 13 November 1979, cited in Pompe 1991.
  - 35 Supreme Court decision 1400K/Pdt/1986, dated 1989, cited in *ibid*.
  - 36 Personal communication from a lawyer in Bandung, March 2005.
  - 37 Practices of men secretly marrying their mistresses are not uncommon, though. In this way sharia is used by men to legitimise their unfaithful behaviour. This, in turn, often becomes a reason for the first wife to seek divorce.
  - 38 Former Minister of Religious Affairs Munawir, for example, made no secret of the fact that in his testament, he had made sure that all heirs, whether male or female, would inherit the same amount, adding that many Islamic leaders had made the same arrangements (Bowen 2003: 159-165; Cammack 1999).
  - 39 In the 1990s, several cases led to convictions. On the one hand the prosecutors called on an interpretation of Article 378 of the colonial criminal code, in which 'stealing' the honour of a woman was made punishable, and on the other hand they called on *adat* law (Pompe 1994). Unmarried cohabitation is socially unacceptable in many areas of Indonesia. In traditional areas, couples living together are sometimes attacked and beaten by furious crowds. It is plausible that the government, by

- criminalising unmarried cohabitation, is trying to retain the initiative and to thereby prevent such incidents from recurring.
- 40 On this, see articles in *Tempo*, February 2005; *The Jakarta Post*, 11 October 2003; *Republika*, 30 March 2005.
- 41 Personal communication by Benjamin Otto, December 2009. A master student at Free University, Amsterdam, he carried out research about the implementation of Aceh's sharia criminal law in the capital Banda Aceh, during Spring and Summer of 2009.
- 42 'Standoff over Aceh Stoning Legislation', *Jakarta Globe*, 25 October 2009.
- 43 'Qanun Jinayat Perlu Diatur Teknis Hukumnya', *Serambi*, 15 September 2009.
- 44 "'Sexy Dancer' arrests condemned by Indonesian feminists", *Jakarta Globe*, dated 8 January 2010.
- 45 The Supreme Court had formed a committee to draft the Compilation of Economic Sharia Law. Experts of the central bank (Bank Indonesia), the MUI's national sharia board, experts in Islamic economic law, and judges of both Religious and General Courts shared their views during the drafting process.
- 46 Prior to 1992, it was not legally permissible to manage bank deposits without paying out interest (Hefner 2003: 153). Banking Law 7/1992 implicitly allowed Islamic banking, especially through implementing Government Regulation 72/1992, which paved the way for a dual banking system. At the initiative of the national council of religious scholars (MUI), 'the Bank Muamalat Indonesia' (BMI) was established. In the years until 1988, dozens of rural banks attained the status of 'rural sharia bank'. After 1998, the number of Islamic financial institutions rose sharply (Bank Indonesia 2002).
- 47 See *Republika OnLine*: <http://www.republika.co.id/>, dated 4 May 2005.
- 48 See CEDAW (2007), 'Concluding comments of the Committee on the Elimination of Discrimination against Women: Indonesia', para.s 18, 19. CEDAW/C/IDN/CO/5, dated 10 August.
- 49 See CAT (2008), 'Concluding observations of the Committee against Torture, Indonesia', para. 15. CAT/2/IDN/CO/2, dated 2 July.
- 50 Here the committee probably meant to refer to Act 11/2006 on the special autonomy of Aceh (see 10.4).
- 51 In June 2008 such polls were published by Australia's Roy Morgan Research. Esposito and Mogahed (2007) discuss similar Gallup polls, and explain why the press reports on such outcomes are usually misleading.

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