Indonesian
Syariah
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Indonesian Syariah

Defining a National School of Islamic Law

M.B. HOOKER
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Preface:
Indonesian Syariah: A Work in Progress

In its classical sense syariah means ‘path to water’—hence, allegorically, to life, and this means duty to God. But what that duty is, how it is to be defined, who does the defining and for whom it is being defined is a matter of intense and often divisive debate in Indonesia as elsewhere. Duty, in the context of the real, temporal world, has a myriad reference points. These include the classical fiqh; local Muslim and pre-Muslim practice; the politics of religion; national state codes and texts; philosophies; political commentary; public orthopraxy; and the ever-present weight of history, about which there is no consensus in Indonesia. The syariah is not now one path, if it ever were. Instead, many paths are offered. The essays in this book are likewise offered as examples from one place at one time to illustrate what choices have been made and to try and judge whether those choices are in reality viable routes to attaining the purpose of the journey, which is fidelity to revelation.

The concept of a distinctly Indonesian school of legal thought (mazhab) is necessarily complementary to the definition of syariah; we are talking about a specific syariah that is ‘national’ because it is ‘Indonesian’. Movement towards defining and establishing a national mazhab began with the rise of nationalist aspirations in the 1930s, and became especially focused in the 1940s with the successful achievement of independence and the debates as to what the proper foundation of the new state should be. As it happened, that foundation turned out to be secular principles, not the syariah. However, this did not prevent the parallel discussion of a national mazhab from continuing and may even, in reaction, have intensified it. By the late 1960s and early 1970s the idea of a national mazhab—a specifically Indonesian syariah—was being debated in sophisticated terms by the late Professor Hazairin. His proposals were resisted by both the (secular) state authority and the religious scholars (‘ulamā’) and went nowhere. The climate of the times was against him.
The 1940s and 1960s are now behind us. However, the debates of those times still resonate strongly, and for this reason I begin with the 1940s, a period of political turmoil in Indonesia. This obviously had serious repercussions for law generally and for syariah in particular. Indeed, some would hold that the past half-century has seen the destruction of Indonesia’s legal system. On the other hand, it has also seen the development of a formal syariah to a degree unimaginable in pre-independence times (Chapter 1). Similarly, I believe that we can now identify five schools of syariah philosophy (Chapter 2), although I do not claim that each is wholly discrete. The overall impression is of ambiguity and uncertainty, but there is nothing to be afraid of in this situation. It is normal in all systems of law, and an overemphasis on certainty, while uncomfortable for policy makers, is always damaging. As the history of any law tradition clearly shows, pluralism in the philosophy of law is natural and beneficial, and this includes the orientalism debate.

The next two essays (Chapters 3 and 4) are both concerned with how syariah is transmitted from one generation to the next. Part of the process is to define the object being communicated. Any such process has to: (a) convey basic principles; (b) explain them; and (c) present them in a coherent and justifiable form. I have chosen two examples. The first is the syariah curricula used in Indonesia’s Islamic colleges and universities (Chapter 3). They cover formal instruction in the principles of syariah, as well as reasoning about syariah. The various curricula are consciously and specifically defined for Indonesian needs and circumstances. As such they are always controversial and generate considerable tension at the national and local levels. Argument over content and method is continuous. The second example is the khutbah, the Friday sermon (Chapter 4). Although it may appear simpler in content, it is equally important because it is a public expression of syariah values and reaches many millions of Muslims each week. Of course, working from written collections is less than ideal. The whole theatre of khutbah presentation is lost, but the collections at least allow us to see how syariah values are transmitted to the ordinary person. They also give us a permanent record of the issues, addressed critically, through time.

Chapter 5 takes us into the Department of Religion (established in 1946). In direct contrast to the khutbah, which is completely independent of the state, the department is a total syariah bureaucracy. Its formal structure is not my direct concern here; instead, I take one of its most important duties—the pilgrimage (hajj)—as an illustration of how the department works. This also gives us the chance to see how the modern hajj is constructed.

The final essay (Chapter 6) takes us into regional varieties of syariah values, with examples from Aceh, West Sumatra and South Sulawesi. In this chapter, I also examine the proposal for a national syariah criminal code. Each code in its own way aims to express syariah values through the use of compulsion. It is noticeable that the major, indeed sole, emphasis in ‘implementing syariah’ is on conduct in public. This includes dress, ‘proper’ behaviour (that is, male–female relations), recitation of the Qur’ān and payment of zakat. Penalties up to and
including physical mutilation are proposed or recommended. There seems to be a somewhat naive belief that orthopraxy will make the person a ‘better’ Muslim. However, it is too easy to criticize: values issues always appear naive to those who prefer so-called pragmatism, which is really just shorthand for expediency or, in extreme cases, amorality and political opportunism.

The thesis put forward in this book is that there is a syariah that has been formulated to meet the needs of Islam in Indonesia on its own terms. I am speaking of an indigenous originality in which there is a high degree of public trust (which is more than can be said for the general secular state system). However, the significance of the Indonesian originality has wider implications. First, for general studies in Islamic law, Indonesia gives us a version of the classical inheritance that has been adapted so as to reflect (via selection) the social, political and intellectual structures in one place at one time (the 1940s to 2006). To anticipate, we find that the classical inheritance is fundamental but not primary for public or private law. This is an important lesson for generalist studies of ‘Islamic law today’.

Second, in the wider world of comparative law, local studies such as this act as necessary correctives to the tendency to construct grand theories about the nature of law itself. Until recently comparative law was largely Euro-American-centric, and the laws of the East, including syariah, were pretty much dismissed as pre-modern, irrelevant or, at worst, only marginally law at all. Fortunately this has now changed, and Islamic law in both its classical and modern versions is now emphatically recognized as part of international comparative law.

Having said this, it is still true that contemporary comparative law has difficulty with modern Islamic law because, as a general class, syariah has within itself so many variant references as to make it quite amorphous. That is a challenge for comparative law theory. It is also a vital challenge for the modern world, where ‘sharia’ is used by the media, in Muslim and non-Muslim countries, in a wholly indiscriminate way. I hope that the Indonesian material may act as some corrective in this respect (see also the epilogue).

I must stress that this book is very much a work in progress; in this it reflects the Indonesian syariah, which has always been a work in progress. I make no pretence to completeness; other scholars of Islam and syariah in Indonesia will have their own personal sets of significant issues. I do claim, however, a reasonable degree of comprehensiveness so far as formal syariah structures are concerned. What these formal structures are and what they mean is the subject of this book. I am aware that the essays in this book raise more questions than they provide answers, but that too is my intention—to initiate debate and suggest a framework within which it might take place.

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My colleagues in Indonesia were unfailingly generous with their time and advice. In particular, I acknowledge with gratitude the assistance of Drs. H. Suryadi, now Chief Judge of the Islamic High Court in Banten, and Professor Azyumardi Azra, formerly Rector of UIN Syarif Hidayatullah Jakarta. Drs. Yasrul Huda M.A., IAIN Imam Bonjol, and Akh. Muzakki M.Phil., IAIN Sunan Ampel, provided a great mass of primary material for which I am most grateful.

For detailed discussions I am indebted to Dr H. Al Yasa Abubakar, Head of Dinas Syariat, Aceh, and Dr Khoiruddin Nasution, UIN Sunan Kalijaga, Yogyakarta. In Australia, Ms Helen Pausacker and Mr Rowan Gould (both from the University of Melbourne) made translations and summaries of very difficult legal–bureaucratic material. Their care and competence are beyond praise. Mr Jeremy Kingsley and Ms Katheryn Taylor, also from Melbourne, and Ms Jemma Parsons and Mr Ismatu Ropi (both from the ANU) gave me considerable assistance. I am especially grateful to Ms Linda Elford of the ANU Law Library for searching out and alerting me to relevant material.

Initial formatting was done by Mrs Claire Smith with unfailing good humour. The editing and final formatting was done by Ms Beth Thomson and I am most fortunate to have had the benefit of her considerable technical skills. Mr Alan Walker compiled the index. I join a long list of authors who owe him a huge debt for the material improvement he has made to our books.

Mrs Triena Ong and her staff at the Institute of Southeast Asian Studies have been most helpful. I hope this book can take a place in the now well-established ISEAS Islamic series.
Much of the material in the book is from primary sources. A collection has been lodged with the Asian Law Centre, University of Melbourne, much of it now online or in the process of going online (see http://www.law.unimelb.au/alc/bibliography).

Dates are always a problem in Indonesian law generally, and for syariah as well. The practice of cross-referencing and back-referencing laws, regulations, instructions, decisions and letters is a minefield for anyone fixated on certainty of time(s). No doubt I have made errors, and for this reason I give dates as well as I can throughout each chapter rather than a comprehensive or final date for the whole law. I do not believe the latter is possible at the moment.

My guide to Indonesian spelling has been:


The main problem is that transliterations from Arabic are still not standardized in Indonesia, although there is a consistent trend towards following the system adopted in Studia Islamika. I use its system of transliteration except in cases of doubt, where I use that of Encyclopaedia of Islam (second edition). I have tried to strike a balance between fidelity to the primary sources and standard usage that directs the reader to the correct (Arabic) technical classes. However, the reader must accept that inconsistency is the norm.

Translations from the Qur‘ān are taken from:

Abdallah Yousuf Ali (1934), The Glorious Kur’ān, Lahore: Call of Islam Society

and


The former may appear archaic to the modern reader, although to those brought up on the King James version of the Old and New Testaments it has a sort of
comfortable resonance. Haleem (2004: xxvi ff.) provides a good short introduction to the issues involved in translating the Qur’an into English. For some striking examples of just how much translations can differ, the reader may wish to consult Ruthven (2006: 100–3).
Glossary

adab  civilization, culture
adat  customs, customary laws
ahkam  system of prescription
ahl al-Kitab  ‘People of the Book’; term used in the Qur’an to refer to Jews and Christians, who, like Muslims, have scriptures recognized as having been revealed by God
ahlus sunnah waljamaah  ‘those who follow the tradition of the Prophet and the [consensus of the] community’; long-hand term for the majority Sunni branch within Islam, though some self-ascribed Sunni groups use the term in a narrow and exclusivist way
ahwal al-shakhisiyah  Islamic civil law
akhlaq  ethics, character
‘alim  singular of ‘ulamā’
aqidah  creed, religious belief, theology
Arafah  the name of a plain 27 kilometres southwest of Mecca where all pilgrims must assemble on the ninth day of the pilgrimage month to perform wukuf
azan  the call to prayer
Badan Wakaf Indonesia  Indonesian Wakaf Board
bahtsul masail  forum for the examination of disputed issues
Baitulmal/bait ul-mal  ‘State Treasury’, a centralized institution for administering zakat
BAZ  Badan Amil Zakat (Zakat Collection Board)
BPAH  Badan Pengelola Asrama Haji (Board for Management of Hajj Accommodation)
BPH  biro perjalanan haji (hajj travel agency)
BPHI  Balai Pengobatan Hajj Indonesia (Hall for the Medical Care of Indonesian Pilgrims)
CE  Common Era
Indonesian Syariah: Defining a National School of Islamic Law

*dakwah* outreach, proselytizing

Dana Abadi Umat Islamic Community Perpetual Fund

dar ul-harb ‘realm of war’; non-Muslim lands

dhimmi non-Muslims accorded protection of life and property in Muslim lands

din religion, faith; more specifically, living in obedience to God (for which one will be held accountable on the Day of Judgment)

do’a prayers

DPR Dewan Perwakilan Rakyat (People’s Representative Council); also known as the House of Representatives or parliament

DPRD Dewan Perwakilan Rakyat Daerah (regional assembly)

dzikir / dzikr ‘remembrance’: repetition of phrases containing the name of God, chanted repeatedly to ‘remember’ or be mindful of God

Dzulhijjah the last month in the Muslim calendar; the *hajj* is performed during this month

ekonomi Islam Islamic economics

ekonomi syariah syariah economics

farā ‘id rules on inheritance set down in the Qur’an and Hadith

fatwā plural of *fatwā*

fatwā ruling on a point of law or dogma given by a scholar who has the authority to do so

fiqh formal rules of classical law, prescriptions

fitnah deviation

fitrah payment required at the end of Ramadan

five pillars of Islam (1) profession of faith (*shahada*); (2) performance of ritual prayers (*shalat*); (3) fasting (*sawm*); (4) payment of the wealth tax (*zakat*); and (5) performance of the pilgrimage (*hajj*)

FPI Front Pembela Islam (Islamic Defenders Front)

Guided Democracy the system of government during the Soekarno era (1945–65)

Hadith report or account of the words and deeds of the Prophet Muhammad transmitted through an accepted chain of narrators

Hajar Aswad the Black Stone (in the Ka’bah)

*hajj / haji* the annual pilgrimage to Mecca (and one of the five pillars of Islam)

halal lawful, permitted
**Glossary**

- **haram**: forbidden, something prohibited by *fiqh*
- **Haramain**: the cities of Mecca and Medina
- **Hijiri**: the Islamic calendar
- **Hijrah**: the Prophet’s flight from Mecca to Medina (622 CE); New Year; the base date for the Muslim calendar
- **hikmah**: underlying rationale for a new case (see ‘illa, *qiyaṣ*); wisdom, insight
- **HTI**: Hizbut Tahrir Indonesia (Liberation Party of Indonesia)
- **hudud**: plural of Arabic *hadd* (‘limit’, ‘prohibition’); a legal term for the offences and punishments set out in the Qur’an and Hadith, with the prescribed penalties ranging from various forms of corporal punishment to death
- **hukum negara**: law state, law-based state
- **IAIN**: Institut Agama Islam Negeri (State Islamic Institute); provides degrees at tertiary level
- **ibadah**: worship, prescribed ritual duty
- **Idul Adha**: religious festival celebrated during the *hajj*, commemorating Abraham’s willingness to sacrifice his son for God
- **Idul Fitri**: religious festival at the end of Ramadan
- **ihram**: a state of ritual purity for pilgrims before beginning the *hajj* and *umrah*, signified by special dress and behaviour
- **ijma’**: consensus of expert legal opinion
- **ijtihad**: independent judgment, based on recognized sources of Islam, on a legal or theological question (in contrast to *taqlid*, judgment based on tradition or convention)
- **‘illa**: effective cause for the extension of an existing principle to a new case/circumstance
- **imam**: an Islamic leader, often the leader of prayers in a mosque
- **iman**: faith
- **Isra’**: the Night Journey (of the Prophet)
- **istithsan**: finding the right principle from texts by exercising reason
- **jamrah/jamarat**: see *lontar jamrah*
- **jihad**: ‘to strive’, ‘to exert’, ‘to fight’
- **jilbab**: head covering, headscarf (for women)
- **jinayah**: criminal matters
Indonesian Syariah: Defining a National School of Islamic Law

Ka’bah | cube-like building located in the Grand Mosque (Masjid Haram) in Mecca
kabupaten | district, region
kalam | dialectical theology/philosophy
kecamatan | subdistrict
khatib | preacher at a mosque, mosque official
KHI | Kompilasi Hukum Islam (Compilation of Islamic Law)
khilafah Islamiya | Islamic caliphate
khutbah | the Friday sermon
kitab kuning | ‘yellow books’ (a reference to the colour of the pages); commentaries on the Qur’ān and Islamic law used as teaching texts in pesantren
kloter | kelompok terbang (travel group)
kota | city, municipality
KPPSI | Committee for the Enforcement of Islamic Syariah (Komite Penegakan Syari’at Islam)
KPSI | Committee for the Preparation of Enforcement of Islamic Syariah (Komite Persiapan Penegakan Syari’at Islam)
KUA | Kantor Urusan Agama (Religious Affairs Office)
KUHP | Kitab Undang-Undang Hukum Perdata (Civil Code)
kyai | religious expert, title for the head of a pesantren (Java)
Lailatul Qadar | the Night of Power (during Ramadan)
Landraad | civil native court (Dutch period)
LAZ | Lembaga Amil Zakat (Zakat Collection Agency)
LIPI | Lembaga Ilmu Pengetahuan Indonesia (Indonesian Institute of Sciences)
lontar jamrah | ritual ‘stoning of the devil’ during the hajj at Mina
mabit | waiting, staying; one of the rites of the hajj and umrah
madrasah | Islamic school
Mahkamah Agung | Supreme Court
Mahkamah Syariah | Syariah Court
Majlis Tarjih | Majlis Tarjih dan Pengembangan Pemikiran Islam (Council on Law-making and Development of Islamic Thought); founded by Muhammadiyah in 1927
maqasid al-syariah | the five purposes or aims of syariah: protection of religion, protection of life (self), protection of...
generations (family), protection of property and protection of intellect

*masālah al-mursalah*  
public interest, the public good

*masjid*  
mosque

Masjid Haram  
the Grand Mosque (in Mecca)

Masjid Nabawi  
the Prophet's Mosque (in Medina)

*maslahah*  
benefit, the public good (see *masālah al-mursalah*)

Masyumi  
Majelis Syuro Muslimin Indonesia (Indonesian Muslim Consultative Council)

*mazhab*  
‘direction’; school of legal thought; the four main schools in Sunni Islam are Shafi’i, Maliki, Hanafi and Hanbali, distinguished from each other by their different methods of jurisprudential reasoning

*mazhab nasional*  
a national school of legal thought

*mazhab syariah*  
a national syariah

Mi’raj  
the Ascension (of the Prophet, during the Night Journey)

MKDK  
Mata Kuliah Dasar Keahlian (Basic Skills Subjects)

MKDU  
Mata Kuliah Dasar Umum (General Basic Subjects)

MKK  
Mata Kuliah Keahlian (Specialist Skills Subjects)

MMI  
Majelis Mujahidin Indonesia (Council of Indonesian Mujahideen)

MPR  
Majelis Permusyawaratan Rakyat (People’s Consultative Assembly)

MPU  
Majlis Permusyawaratan Ulama (Consultative Council of Ulama) (Aceh)

*mu’amalat*  
principles of law dealing with non-ritual human/social relations, especially contracts

*muballigh*  
itinerant or lay preacher or speaker (male)

*muballighah*  
itinerant or lay preacher or speaker (female)

Muhammadiyah  
modernist Islamic organization founded in 1912

MUI  
Majelis Ulama Indonesia (Indonesian Council of Ulama)

New Order  
the Soeharto era (1966–98)

NU  
Nahdlatul Ulama (Revival of the Religious Scholars); traditionalist Islamic organization founded in 1926

Nuzulul Qur’ān  
the day on which the Qur’ān was first revealed to the Prophet (in Indonesia, the 17th day of Ramadan)
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<td>Old Order</td>
<td>the Soekarno era (1945–65)</td>
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<td>Pedoman Penghayatan dan Pengamalan Pancasila (Guidelines for Instilling and Experiencing Pancasila) (official government publications)</td>
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<tr>
<td>Pancasila</td>
<td>the five guiding principles of the Indonesian state (belief in God, humanitarianism, national unity, democracy and social justice)</td>
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<tr>
<td>pengadilan agama</td>
<td>religious court</td>
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<tr>
<td>peraturan</td>
<td>regulation, decree</td>
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<tr>
<td>perda</td>
<td>peraturan daerah (regional regulation)</td>
</tr>
<tr>
<td>perna</td>
<td>peraturan nagari (district regulation, West Sumatra)</td>
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<td>Persis</td>
<td>Persatuan Islam (Islamic Association); reformist Islamic organization founded in 1923</td>
</tr>
<tr>
<td>pesantren</td>
<td>traditional Islamic boarding school</td>
</tr>
<tr>
<td>PKI</td>
<td>Partai Kommunis Indonesia (Indonesian Communist Party)</td>
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<tr>
<td>PPIH</td>
<td>Panitia Penyelenggaraan Ibadah Haji (Hajj Management Committee)</td>
</tr>
<tr>
<td>PPOH</td>
<td>Panitia Pelaksanaan Operasional Haji (Committee for the Operational Implementation of the Hajj)</td>
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<tr>
<td>Priesteraad</td>
<td>priests’ court (Dutch period)</td>
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<tr>
<td>puskesmas</td>
<td>pusat keselamatan massa (community health centre)</td>
</tr>
<tr>
<td>qanun</td>
<td>regional statute or regulation (Aceh)</td>
</tr>
<tr>
<td>qath’iy</td>
<td>a definitive or categorical principle in the Qur’ān or Hadith whose meaning cannot be negotiated or reinterpreted</td>
</tr>
<tr>
<td>qisas</td>
<td>retribution through compensation as punishment for capital crimes and assault, the extreme form of compensation being ‘a life for a life’</td>
</tr>
<tr>
<td>qiyas</td>
<td>in Islamic law, reasoning by analogy to solve a new issue</td>
</tr>
<tr>
<td>Qur’ān</td>
<td>God’s word revealed to the Prophet Muhammad and the supreme source and absolute authority for Islam</td>
</tr>
<tr>
<td>Ramadan</td>
<td>ninth month of the Islamic calendar during which fasting is required</td>
</tr>
<tr>
<td>riba</td>
<td>interest, increase on capital</td>
</tr>
<tr>
<td>sa’i</td>
<td>‘seeking’, ‘trying’; one of the rites of the hajj and umrah</td>
</tr>
<tr>
<td>salat</td>
<td>see shalat</td>
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Shafi’i one of the four main schools in Sunni Islam and the dominant school in Southeast Asia

shalat the prescribed ritual prayer to be performed five times a day

Shi’a second largest branch of Islam after Sunni

siyasah policy, the practical application of the Qur’ān and Sunnah in the world

siyasah–jinayah constitutional and public law

SK surat keterangan (letter of instruction)

STAIN Sekolah Tinggi Agama Islam Negeri (State Islamic College)

Sufism mysticism; its doctrine

Sunnah custom, usage; established custom and normative precedent in Islam based on the example of the Prophet Muhammad

Sunni following or followers of early established traditions; the majority branch of Islam; in law, it means the law schools (Shafi’i, Maliki, Hanafi, Hanbali)

syariah Islamic law in the broadest sense, concept of law

ta’zir punishment administered at the discretion of the judge, as opposed to hudud or hadd (punishments for certain offences fixed by the Qur’an or Hadith)

tafsir exegesis of the Qur’an

taqlid close following of accepted texts/authority of one of the four Sunni schools, unquestioning acceptance

taqwa consciousness of God, fear of God

tasawwuf Mysticism

tauhid the doctrine of the unity of God; in Sufism, merging with the unity of the universe

tawaf circumambulating the Ka’bah seven times during the hajj and umrah

UIN Universitas Islam Negeri (State Islamic University)

‘ulamā’ Islamic scholars (plural of ‘alim)

ummah the Islamic community in the sense of ‘all Muslims’

umrah a pilgrimage to Mecca that can be undertaken at any time of the year [delete]

undang law, law text

ustadz teacher (male)

ustadzah teacher (female)
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<td><em>wakaf</em></td>
<td>donation for pious purposes</td>
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<td>guardian</td>
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<td><em>waris</em></td>
<td>heir</td>
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<td>Wilayatul Hisbah</td>
<td>the syariah police authority in Aceh</td>
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<td><em>wukuf</em></td>
<td>‘stopping’ or ‘staying’ on the plain of Arafah; one of the obligatory rites of the <em>hajj</em></td>
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<td><em>yurisprudensi</em></td>
<td>decision of a court</td>
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<tr>
<td><em>zakat maal</em></td>
<td>general calculation of <em>zakat</em> based on disposable income</td>
</tr>
<tr>
<td><em>zakat</em></td>
<td>‘wealth tax’, the payment of which is one of the five pillars of Islam</td>
</tr>
</tbody>
</table>