

# Which and Whose *Shari'a*?: Historical and Political Perspectives on Legal Articulation of Islam in Indonesia

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## Abstrak

Upaya penerapan syariah di Indonesia tidak lepas dari adanya pertentangan antara aspirasi politik dari para pendukung dan penentang dan dari adanya resistensi dari negara yang sekuler. Tensi ini telah melahirkan perbedaan politik hukum yang sangat serius terkait penerapan hukum Islam secara formal di negara ini. Perdebatan atau perbedaan yang terus menerus tentang makna atau maksud dari kata syariah itu sendiri dan istilahnya menyebabkan munculnya perdebatan tentang syariah yang mana, penafsiran dan pandangan siapa tentang syariah yang akan diterapkan.

Artikel ini menelisik akar dan sumber dari perdebatan dan perbedaan pandangan tentang politik hukum penerapan syariah. Artikel ini menganalisa faktor-faktor yang menyebabkan artikulasi dan ungkapan tentang penerapan syariah secara nyata berbeda. Artikel ini menegaskan bahwa perbedaan yang paling nyata dapat secara jelas terlihat dalam hal aspirasi masyarakat Muslim atas penerapan hukum Islam secara formal dan perlindungan hak-hak konstitusional kebebasan beragama. Menampilkan argumen bahwa meskipun penerapan syariah telah terlihat dalam beberapa bidang hukum yang diterapkan di Indonesia dan pemerintah telah mengupayakan syariah terkorporasi ke dalam sistem hukum baik secara nasional maupun lokal, pemerintah masih melakukan kontrol dan pembatasan dan syariah akhirnya masih saja secara ketat dibatasi pemberlakuannya.

## Abstract

Attempts at the implementation of *shari'a* in Indonesia have always been marked by a tension between political aspirations of the proponents and the opponents of *shari'a* and by resistance from the secular state. The tension had led to the profound and ongoing legal political dissonance in the formal application of *shari'a* rules in the country. A continuum between conflicts in meanings and direct contradictions in terms has resulted in a debate of which and whose *shari'a* to be implemented.

This paper looks at the roots as well as the sources of those dissonances. It observes a number of conditions that make the articulation of religious law dissonant. It argues that more direct dissonance is discernible between the aspiration for the formal implementation of *shari'a* and constitutional rights of religious freedom. Arguing that despite *shari'a* has been able to seep into scattered legal aspects within Indonesian state and society and that the state has allowed *shari'a* to be incorporated in many ways into its legal system, nationally and regionally, it concludes that the state continues to control and restrict this dispersion and that *shari'a* remains tightly confined in Indonesia

**Keywords:** *shari'a*, state, Indonesia, Islamization, legalization

## Introduction

One of my previous works focused on the interaction between *shari'a* and state laws of contemporary Indonesia.<sup>1</sup> I argued therein that “attempts at the implementation of *shari'a* in Indonesia have always been marked by a tension between political aspirations of the proponents and the opponents of *shari'a* and by resistance from the secular state”. My prognosis was that this tension had led to the profound and ongoing legal dissonance<sup>2</sup> in the formal application of *shari'a* rules in the country. It is discordant in the sense that it has been characterized by a continuum between conflicts in meanings and direct contradictions in terms. I have identified this conflicting articulation of Islamic law in Indonesia via three themes: (1) the ‘constitutionalization’ of *shari'a*; (2) the ‘nationalization’ of *shari'a*; and (3) the ‘localization’ of *shari'a* in Aceh.

The first theme was about efforts to give *shari'a* a constitutional status. These efforts to constitutionalize *shari'a* in Indonesia appeared four times since the early days of independence. Firstly, some Muslim leaders (in June-August 1945) struggled to introduce the well-known phrase contained in the “Jakarta Charter” (i.e. seven words: *dengan kewajiban menjalankan syariat Islam bagi pemeluknya* – “with the obligation of carrying out Islamic *shari'a* for the Muslims”) into the 1945 Constitution. Secondly, the same request arose during debates over the ideology of the state during the sessions of the Constituent Assembly in 1957-1959. Thirdly, a similar aspiration re-emerged in the MPRS

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<sup>1</sup>Arskal Salim, *Challenging the Secular State: The Islamization of Laws in Indonesia* (Honolulu: Hawaii University Press, 2008).

<sup>2</sup>What I mean here by the term ‘dissonance’ is a spectrum between mild tension in meanings on the one hand and a direct contradiction in terms on the other hand. It becomes an umbrella term to cover a large range of meanings such as ‘inconsistency,’ ‘incongruity,’ ‘ambivalence,’ ‘ambiguity,’ ‘conflict,’ ‘contradiction,’ ‘disagreement,’ ‘tension,’ and ‘inappropriateness.’

(Majelis Permusyawaratan Rakyat Sementara or Provisional People's Consultative Assembly) sessions in 1966-1968. And lastly, it was demanded once again in the 2000-2002 Annual Sessions of MPR (People's Consultative Assembly). All these attempts, however, ended in failure and *shari'a* remains lacking a constitutional status.

The second theme demonstrated the extent to which the state has accommodated *shari'a* by incorporating its rules into the national law. Since 1970s, the New Order regime started allowing, albeit limited, some principles of Islamic marriage law to be accommodated as national law. A step forward for national legal Islamization was the enactment of Law number 7/1989 on the Religious Court, which exclusively single out Muslim citizens. This Law opened the gate for further legislations not based on citizenship in general but on religious adherence in particular. The promulgation of three statutes exclusively for Muslims (Law no. 17/1999 on the Management of *Haji*, Law no. 38/1999 on the Management of *Zakat* (Islamic Alms) and Law no. 41/2004 on *Wakaf* or Endowment) was possible partly because a precedent already exerted.

The third theme discussed how the state began granting degrees of autonomy to particular religious communities or regions to locally implement religious law in a limited territory. This legal Islamization through the enactment of Regional Regulations (known as *Qanun* in Aceh) becomes a new strategy of the proponents of *shari'a* in Indonesia, since the constitutional efforts have failed and that national legislation to apply *shari'a* has only achieved a limited success.

Unlike my work above that explored legal and political dissonances that occur in the attempts at Islamization of Indonesian legal system, this paper would like to look at the roots as well as the sources of those incongruities. The dissonances can be traced back to the fact that the character of religious law in the history has changed over the centuries and that the notion of the modern state now is fundamentally different from the understanding of the role of the state at the time religious law initially developed in the pre-modern period. This particular issue was not dealt with properly in my work above. This paper therefore would like to present what are conditions that make the articulation of religious law inharmonious with the concept of nation-state. To this end, I will not only discuss legal articulation of Islam during constitutional debates in the history of modern Indonesia, but also examine various views presented concerning the question of which *shari'a* and whose *shari'a* is to be implemented in contemporary legal contexts of Indonesia.

### ***Shari'a*. which one you are talking about?**

In the view of Muhammad Sa'id al-Ashmawi, an Egyptian jurist scholar, there was a major shift in the meaning of *shari'a* in the history of Islam over the centuries. He stated that the original broad meaning of *shari'a*, which included principal values, codes, institutions, practices and legal rules, has been narrowed down and restricted to denote only fixed legal rules.<sup>3</sup>

Ashmawi views evolution of the meaning of *shari'a* took place in four phases. First, the original meaning of *shari'a* in the Arabic language in the Qur'an, "refers not to legal rules but rather to the path of Islam consisting of three streams (1) worship, (2) ethical code, and (3) social intercourse". This proper meaning of *shari'a* was initially applied by the first generation of Muslims. Second, over time the meaning of *shari'a* extended to also refer to the legal rules found in the Qur'an. Third, after some time, despite the meaning of *shari'a* was seemingly expanded, it was actually narrowed down by incorporating more legal rules, both in the Qur'an and in the Prophetic traditions. Finally, the concept of *shari'a* came to include the whole body of legal rules developed in Islamic history, with all varying interpretations and opinions of the legal scholars.

These four phases indicate that the way the term *shari'a* is applied today is not the way the word was used in the Qur'an, and no longer corresponds to its original meaning in the Arabic language.<sup>4</sup> As a result, the concept of *shari'a* consisted of both its principal values and its legal subject matter, and it is, in fact, this latter portion which has become widespread through the Muslim countries. It is no wonder then that this understanding of *shari'a* as meaning 'legal rules' has inevitably had an impact on the current growing political demand for the implementation of *shari'a* in many countries including Indonesia.

The notion of *shari'a* in Indonesia is highly contested. The meaning of *shari'a* in the modern history of Indonesia stretches broadly depending on who interprets and observes it, how it is being stipulated, what kind of context it engages with, and when and where it is enforced. Despite there are two general concepts of *shari'a*, as principal values as well as legal rules, it appears that the definition of *shari'a* as legal subject-matter gains more support among the proponents of the formal application of *shari'a* in present-day Indonesia.

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<sup>3</sup>Muhammad S. Ashmawi, *Against Islamic Extremism*, trans. and ed. C. Fluehr-Lobban (Florida: University Press of Florida, 1998).

<sup>4</sup>Ashmawi, *Against Islamic*, 97-98.

Despite it is not easy to identify exactly to what extent can a rule or law be included under the term *shari'a*, there are at least two ways for identifying or classifying a rule as part of it.

Firstly, following Ibn Qayyim al-Jawziyya (d. 1373), the determining factor that distinguish *shari'a* from others is the notion of *justice* contained therein. As Ibn Qayyim asserted, "*Fa'in zaharat ammara al-adl, wa asfara wajhuhu biayyi țariqin k̄ana, fa thamma sharullāh wa dīnuh...Fa'ayyu țariqin istakhraja bihā al-adl wa al-qist fahiya min al-dīn*" [If the indications of justice or its expressions are evident through any means, then the *shari'a* of God (Islam) must be there.... Any means that can produce justice and fairness is certainly part of the religion].<sup>5</sup>

The second criterion is *legitimation*, that is, by way of making a valid reference to the *shari'a* or at least taking inspiration from it. This means that a legal code is identified as *shari'a* via so-called 'incorporation by valid reference'. The reason behind this is that everything in this world is not necessarily divine and hence to deny the existence of secular matters is impractical. Thus non-religious aspects might be religiously justified if there is legitimation or a valid reference is made to (the sources of) *shari'a*.<sup>6</sup>

With these criteria in mind, one can argue that *shari'a* is not necessarily manifest in a textual legal form, but it is being found more in the substantive content of a legal rule. One example of this is derived from the secular stipulations in the Marriage Law of many Muslim countries. According to classical jurisprudence of Islamic marriage, a husband can divorce his wife wherever and whenever he wishes. But, the Indonesian Marriage Law stipulation, for an instance, states that a divorce in order to be valid and lawfully enforceable must be examined and executed only before the court.<sup>7</sup> Although this is not in line with the classical *fiqh* jurisprudence, this stipulation is religiously acceptable, as its objective is to prevent the overly frequent occurrences of divorce. In fact, this stipulation was closer to the implied meaning of the *hadith*: *Abghađ ul-ħalāli ila-llāhi al-ťalāq* [of permitted matters the most loathsome before Allah is divorce].<sup>8</sup> From this example, it can be argued that such a secular stipulation (that is, divorce is considered valid

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<sup>5</sup>Ibn Qayyim al-Jawziyya, *al-Ťuruq al-Ĥukmiyyah fi al-Siyāsa al-Shar'iyyah aw al-Firāsāt al-Mardiyyah fi Ahkām al-Siyāsa al-Shar'iyyah* (Bayrut: Dar al-Kutub al-Ilmiyyah, 1995), 11.

<sup>6</sup>See Knut S. Vikor, "The *Shari'a* and the Nation State: Who Can Codify the Divine Law?," in *The Middle East in A Globalized World*, ed. Bjørn Olav Utvik and Knut S. Vikor (Bergen: Nordic Society for Middle Eastern Studies, 2000), 232.

<sup>7</sup>See Article 39 of the Law no. 1/1974 on Marriage.

<sup>8</sup>See Muhammad ibn Yazid ibn Majah, *Şahīh Sunan ibn Majah* (al-Riyad: Maktabat al-Ma'ārif lil-Naşr wa-al-Tawzi, 1417 [1997]), Chapter on Divorce, *ħadīth* no. 2008.

only before the court) should be seen as *shari'a*, since it substantially refers to the source of *shari'a*, namely *hadith*.

### ***Shari'a* whose understanding to be accepted?**

There is no a comprehensive record as to the way *shari'a* was understood and practiced for the first time in earlier history of Indonesia. As the Islamization of Indonesia was an evolutionary process beginning from as early as the second half of the tenth century,<sup>9</sup> the establishment of *shari'a*, in its variety of meanings and forms, took place gradually. It is probable that *shari'a* in Indonesia was initially present in Muslim practical lives. These include a number of social aspects and rituals from dietary meals to family matters.<sup>10</sup> Yet, it must be immediately noted that gambling, alcohol consumption and other pre-Islamic local practices remained noticeable.<sup>11</sup>

The institutionalization of *shari'a* within legal and political structures of several Muslim kingdoms in different regions of Indonesia began only by the Seventeenth century. For an example, as noted by Reid, amputations as the punishment for thieves were enforced by the Aceh kingdom of the Seventeenth century.<sup>12</sup> According to Peletz, although this kind of punishment was considered Islamic in nature, it was “not representative of Indonesia, Malaysia, or Southeast Asia as a whole before, during, or after that century”.<sup>13</sup>

Despite certain aspects of *shari'a* have been voluntarily practiced within Muslim communities of Indonesia, the enforcement of *shari'a* rules or the foundation of its legal institution always rely on the government efforts. The process of legal institutionalization was therefore dependent very much on the extent to which a ruler has a good understanding of *shari'a*. Sultan Agung (d. 1645) of the Mataram sultanate, for instance, was considered more pious than his successor, Susuhunan Amangkurat (d. 1677). When the latter came to power replacing the former, he did the opposite to what had been established by his predecessor. Amangkurat restored the Pradata court, a Hindu Majapahit court that had existed in Java prior to the coming of Islam, and abolished the Surambi court, a court that was founded in accordance with Islamic tradition

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<sup>9</sup>Azyumardi Azra, *Islam in the Indonesian World: An Account of Institutional Formation* (Bandung: Mizan, 2006), 1-25; cf. Merle Ricklefs, *History of Modern Indonesia since c. 1200* (Stanford California: Stanford University Press, 2001).

<sup>10</sup>Anthony Reid, *Southeast Asia in the Age of Commerce 1450-1680. Vol. 1: The Lands Below the Winds* (New Haven: Yale University Press, 1988); Arskal Salim, “Perkembangan Awal Hukum Islam di Nusantara (Early Development of Islamic Law in the Archipelago),” *Jurnal Respublica* 5.2 (2005): 60-73.

<sup>11</sup>Arskal Salim, “Perkembangan Awal”, 63.

<sup>12</sup>Anthony Reid, *Southeast Asia*, 143

<sup>13</sup>Michael G. Peletz, *Islamic Modern: Religious Courts and Cultural Politics in Malaysia* (Princeton: Princeton University Press, 2002), 16-17.

by Sultan Agung.<sup>14</sup> Likewise, the establishment of the religious court system in Java by the Dutch government for the first time in 1882 was very much due to colonial interests and their understanding of law in Islam rather than, for an instance, the piety of Indonesian Muslims. In spite of this, such legal initiative was seen as a foundational stone for the modern structure of Islamic court in Indonesia.<sup>15</sup>

As pointed out by Judith Tucker, *shari'a* is not only a matter of legal doctrine. It is also a body of substantive law that took institutional form under a series of socio-political events throughout much of its history.<sup>16</sup> *Shari'a* as articulated in Indonesia today can be seen as an upshot of a long struggle between different actors and agencies, including state functionaries, politicians, legal professionals and religious scholars.

As early as the first half of the twentieth century, discussions on which *shari'a* and whose *shari'a* was to be enforced in Indonesia have emerged. The polemic between Natsir and Soekarno in early 1940s articulated the different views on this controversial topic. On the one hand, it was contended that *shari'a* in Indonesia would create a sense of discrimination, particularly among non-Muslims. Additionally, it was considered improper in a modern nation-state to enact a national law by looking only at one source of religion to apply over various people with different backgrounds. On the other hand, it was argued that the implementation of *shari'a* in Indonesia would not spoil or endanger other religions or religious groups. In fact, a refusal to implement Islamic law in Indonesia based on the reason that it would hurt non-Muslims feelings, it was said, would tyrannize Indonesian Muslims whose population dominates the country, and would thus violate the rights and the interests of the majority.<sup>17</sup>

When Indonesia's independence was about to be proclaimed in 1945, contending parties agreed to make a compromise so as to allow *shari'a* to be inserted in the formulation of the Pancasila (as part of the preamble of the 1945 Constitution). This compromise was well known later as the 'Jakarta Charter', which includes 'the seven words' *dengan kewajiban menjalankan syariat Islam bagi pemeluk-pemeluknya* [with the obligation to observe Islamic *shari'a* for the Muslims]. However, this compromise was vague since there was no clarity

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<sup>14</sup>John Ball, *Indonesian Legal History 1602-1848* (Sydney: Oughtershaw Press, 1982), 68.

<sup>15</sup>Muhammad Hisyam, *Caught Between Three Fires: The Javanese Pangulu under the Dutch Colonial Administration 1882-1942* (Jakarta: INIS, 2001); Mark Cammack, "Indonesia's 1989 Religious Judicature Act: Islamization of Indonesia or Indonesianization of Islam?" *Indonesia* 63 (1997):143-168.

<sup>16</sup>Judith Tucker, *Women, Family and Gender in Islamic Law* (Cambridge: Cambridge University Press, 2008), 15.

<sup>17</sup>Arskal Salim, *Challenging the Secular*, 55.

about what the ‘seven words’ would actually mean in practice. The compromise was therefore interpreted differently according to the interests of the respective parties. For one group, the compromise meant that the government had to actively put *shari’a* into practice. For the other group, the practice of Islamic *shari’a* was a duty of Muslims, not the state. The implication of this formula and its precise interpretation in Indonesian legal realms has been controversial since then.

For decades, the Jakarta Charter was not considered part of the 1945 Constitution, regardless of how the Islamic parties viewed it. Despite there being a number of contending interpretations,<sup>18</sup> the standpoint of the government that the Jakarta Charter was not part of the 1945 Constitution was widely accepted. Many of Muslim leaders have accepted the Presidential Decree issued by Soekarno on 5 July 1959 that acknowledged the position of the Jakarta Charter as being ‘inspirational’ and be ‘linked’ to the 1945 Constitution. However, whether this should have given *shari’a* legal force and designated the state as being responsible for its implementation remains unclear. According to Roeslan Abdul Gani, a former aide to Indonesia's first president Soekarno and a key player at the formulation of the Presidential Decree, the word ‘*rangkaian*’ (linked) should be inserted in the decree. This word, according to him, signified that the Jakarta Charter is not automatically integrated with the text of the Constitution.<sup>19</sup> Given this, during the discussion of the amendment of Article 29 in the MPR Annual Sessions (2000, 2001 and 2002), although Islamic parties took the view that the preamble to the Constitution was inspired by the Jakarta Charter, as the Presidential Decree of 1959 put it, other parties did not share this opinion. In fact, these non-Islamic parties considered it a historical document that might function as a formula for political compromise, rather than as a formal accommodation of *shari’a*.

### ***Shari’a* which interpretation to be applied?**

In the eyes of Islamic parties, a constitutional status for Islamic *shari’a* is necessary, since only then could *shari’a* be officially implemented in Indonesia. However, Islamic parties were not able to agree on what kind of *shari’a* they would give a constitutional legitimacy.<sup>20</sup> This appeared from the running

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<sup>18</sup>See Endang Saefuddin Anshari, *Piagam Jakarta 22 Juni 1945* (Jakarta: Gema Insani Press, 1997), 129-143; Yusril Ilha Mahendra, “Dekrit Presiden 5 Juli 1959 dan Implikasinya terhadap Perumusan Politik Hukum Nasional”, *Dinamika Tata Negara Indonesia* (Jakarta: Gema Insani Press, 1996), 73-88.

<sup>19</sup>See “Risalah Rapat Pleno ke-9 Panitia Ad Hoc I Badan Pekerja MPR”, *Buku Kedua Jilid I: Risalah Rapat Panitia Ad Hoc I Badan Pekerja MPR RI ke-1 s.d 10 Tanggal 11 Januari 2002 s.d 5 Maret 2002* (Jakarta: Sekjen MPR RI, 2002), 639-640.

<sup>20</sup>Cf. Tim Lindsey, “Indonesian Constitutional Reform: Muddling Towards Democracy”, *Singapore Journal of International & Comparative Law* 6 (2002): 270.



debate over all the meeting of MPR Annual Sessions in which the meaning of *shari'a* as interpreted by Islamic parties remained unclear. If one reads carefully through the proceedings of the meetings of Panitia (committee) Ad Hoc I in the 2002 MPR Annual Sessions, it becomes evident that there was no clarity about what kind of Islamic *shari'a* it was that the Islamic parties actually proposed. It seems that all elements of Islamic *shari'a* would be included in their proposal. In that case, they wanted the constitution to formally declare that Muslim citizens are obliged to perform religious duties, without any precision as to what those duties might be.

One explanation about what kind of *shari'a* would be officially implemented in Indonesia came from Lukman Hakim Saifuddin (PPP). He argued that his party views Islamic *shari'a* in three categories. The first is 'universal *shari'a*', which comprises the principle values embraced by all religions, such as justice, equality and *musyawarah* (consultation). The second is '*shari'a* norms', which includes all ideals of Islamic beliefs and practices that are applicable only to Muslims, and not to other believers. The last is '*shari'a* rules', most of which are *fiqh* or legal interpretations of *shari'a*. Some Muslims might accept this last category, but most would reject it and argue over its content. According to Saifuddin, the PPP put high priority on the first two categories and struggles for their inclusion into the Indonesian legal system through legislative procedures. However, as for the third category, such as the obligation of wearing *jilbab* and severe punishments for criminals, the PPP was not, he said, in a position to struggle for it any further.<sup>21</sup>

It was always very unlikely that a consensus over the meaning of *shari'a* could be reached among Islamic parties. While the PK(S) emphasized universal *shari'a* as the stepping stone for further introduction of the Islamic *shari'a* into public sphere,<sup>22</sup> Hamdan Zoelva (F-PBB) contended that the *whole* of *shari'a* must be legalized. In his words, "a Muslim should carry out Islamic *shari'a* not only in term of rituals but also in all legal aspects including penal, civil, foods and trade. All these aspects of *shari'a* law require the support of the state if successful implementation is to be achieved."<sup>23</sup>

It is interesting to note here that the F-PBB, as represented by Zoelva, was ironically leaning to 'secularize' Islamic law by acknowledging that the official implementation of *shari'a* in Indonesia "depends much on the outcome

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<sup>21</sup>Interview with Lukman Hakim Saifuddin, a national legislator of the PPP, 13 February 2004.

<sup>22</sup>Nandang Burhanuddin, *Penegakan Syariat Islam Menurut Partai Keadilan* (Jakarta: Al Jannah, 2004), 119-127.

<sup>23</sup>See "Pendapat Akhir Fraksi Partai Bulan Bintang Terhadap Rancangan Putusan MPR RI Hasil Sidang Tahunan MPR RI 2001" in *Memperjuangkan Syariat Islam*, 90-92.

of debates in the legislature”.<sup>24</sup> He added, “the final result of this debate would not be a Shafi’i Law, Hanafi Law or Hanbali Law, but a National Law produced by the Indonesian legislature.” For Zoelva, the final wording regarding the application of *shari’a* does not belong to a council of *ulama* like that of Iran. In fact, it is legislative members that hold decisive authority, while the *ulama* are just invited to present their opinions before a decision is made. Zoelva finally concluded that it does not matter that the legislated *shari’a* is actually a human product, so long as it is still based on God’s revelation.<sup>25</sup>

Zoelva’s pragmatic stance raises the question of how *shari’a* can be referred to as God’s Law and its implementation strongly demanded, when the laws in question are basically products of human deliberation—that is, they are mostly products of legislatures. As Khaled Abou El Fadl has pointed out, “All laws articulated and applied in a state are thoroughly human and should be treated as such. These laws are a part of *shari’a* law only to the extent that any set of human legal opinions can be said to be a part of *shari’a*”.<sup>26</sup> Given this, it is no wonder that a huge number of Indonesian Muslims, at least as represented by the two biggest Islamic organization: Nahdlatul Ulama and Muhammadiyah, have very different visions of *shari’a*,<sup>27</sup> opposed the proposal of the Islamic parties to amend Article 29 in the 2002 MPR Annual Session.<sup>28</sup>

## Conclusion

Although Islamic parties and some state functionaries have been keen to formally facilitate the implementation of *shari’a* in Indonesia, this is frequently rejected by various groups criticizing what they mean by the term *shari’a*. What these people often want is to go back to the authentic application of *shari’a*;

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<sup>24</sup>Interview with Hamdan Zoelva, 16 February 2004. Cf. Aharon Layish, “The Contribution of the Modernists to the Secularization of Islamic Law”, *Middle Eastern Studies* 24 (1978): 263-277.

<sup>25</sup>Interview with Hamdan Zoelva, 16 February 2004. Other proponents of *shari’a* in Indonesia, such as Majelis Mujahidin Indonesia, Front Pembela Islam, Hizbut Tahrir and Laskar Jihad, would vehemently disagree with Zoelva’s statement. For more information on the *shari’a* views of these Islamic groups, see, for instance, Jamhari and Jajang Jahroni (eds.), *Gerakan Salafi Radikal di Indonesia* (Jakarta: Raja Grafindo Persada, 2004); “Islam and Peace Building in Indonesia: The Analysis of Radical Movement and Their Implication for Security-Development Prospects” (Jakarta: ICIP-JICA, 2004); Khamami Zada, *Islam Radikal: Pergulatan Ormas-Ormas Islam Garis Keras di Indonesia* (Jakarta: Teraju, 2002).

<sup>26</sup>Khaled Abou El Fadl, *Islam and the Challenge of Democracy* (Princeton: Princeton University Press, 2004) 36; Cf. my working definition of *shari’a* (Figure 2.1) in Chapter Two.

<sup>27</sup>In a discussion held by the AsiaLink, the University of Melbourne, 15 February 2003, Hasyim Muzadi, chairman of NU, explained the stance of NU opposing the insertion of seven words into Article 29 of the Constitution. He said that NU does not expect *shari’a* to be codified as state law, but merely as communal directives for Muslims.

<sup>28</sup>See “NU Tolak Piagam Jakarta”, *Suara Pembaruan*, 12 September 2001; “Tiga Ormas Islam Tolak Piagam Jakarta”, *Media Indonesia*, 30 May 2002; “Muhammadiyah Lega, Pasal 29 Tetap”, *Media Indonesia*, 12 August 2002.

although it is not clear what they mean by this. In fact, as Kozlowski points out, when religious actors or Muslim politicians call for the official implementation of *shari'a* in many majority-inhabited Muslim countries, they actually advocate a return to the period of colonial states, where *shari'a* had an organizational structure compatible with the modern nation state, and not to the time of the Prophet or the era of the caliphates.<sup>29</sup>

Proposals of the Islamic parties to amend Article 29 of the 1945 Constitution were inappropriate because they intended to restrict the list of specific liberties mentioned in Article 28 on Human Rights in the Constitution, which had been decided earlier. This incongruence stems from the fact that Islamic parties' proposals gave emphasis to (religious) duties over rights, despite their proposals being expressed in terms of rights. If successful, the proposal for *shari'a* implementation would restrict religious freedom of individuals in the name of communal religious obligations. Certain citizens of the Indonesian state would be treated not as autonomous individual subjects but as members of a religious community—something that is fundamental contradiction with the concept of a nation-state. This would likely alienate and coerce citizens who do not subscribe to the official or dominant religious interpretation and would foster political divisiveness among citizens of different religious affiliations.<sup>30</sup> Much clearer inconsistency is discernible between the aspiration for the formal implementation of *shari'a* and constitutional rights of religious freedom. As the constitutional principle of equal citizenship in Article 28I (2) mandates that all citizens have equal rights, regardless of their ethnicity, gender, or religion,<sup>31</sup> lawmaking that is solely based on, and for the interest of, one particular religion may breach this provision of Constitution.

Despite *shari'a* has been able to seep into scattered legal aspects within Indonesian state and society, it is nonetheless largely a state product rather than as a cultural process. The state not only allows *shari'a* to be incorporated in many ways into its structure, as well as into its legal system, nationally and

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<sup>29</sup>See Gregory C. Kozlowski, "When the "Way" Becomes the "Law": Modern States and the Transformation of *Halakhah* and *shari'a*", *Studies in Islamic and Judaic Traditions II*, eds. William M. Brinner and Stephen D. Ricks, (Atlanta, Georgia: Scholars Press, 1989), 106; Cf. MB. Hooker, "Introduction: Islamic Law in Southeast Asia", *The Australian Journal of Asian Law* 4 (3) (2002): 217-218; Also cf. Ahmad Baso, *Islam Pasca-kolonial: Perselingkuhan Agama, Kolonialisme dan Liberalisme* (Bandung: Mizan, 2005).

<sup>30</sup>Cf. Lucinda Peach, *Legislating Morality: Pluralism and Religious Identity in Lawmaking* (Oxford: Oxford University Press, 2002), 7.

<sup>31</sup>Specifically, Article 28I (2) of the 1945 Constitution reads "Each person has the right to be free from discriminatory treatment in order to gain the same opportunities and benefits in the attainment of equality and justice."

regionally, but also skilfully controls and restricts this dispersion. In short, *shari'a* remains tightly confined in Indonesia.

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### **Interviews**

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Article 39 of the Law no. 1/1974 on Marriage.