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DEWAN REDAKSI
Azyumardi Azra
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TATA LETAK
M. Adam Hesa


Identitas Jurnal:

Daftar Isi

Religious Celebrity: The Metamorphosis of Islamic Preachers in Indonesia
Ilhamul Hayatud Dhiyeh .......................................................... 1-16

Wakaf Uang dan Pengaruhnya Terhadap Program Pengentasan Kemiskinan di Indonesia
M. Nur Rianto Al Arif ............................................................. 17-29

Which and Whose Shari'a?: Historical and Political Perspectives on Legal Articulation of Islam in Indonesia
Arska Salim ................................................................. 31-44

Simbol Keislaman pada Tradisi “Roket Tase” dalam Komunikasi pada Masyarakat Desa Nepa, Banyuates-Sampang Madura
Wahyu Ilaih dan Siti Asah .................................................. 45-58

“Sacrifice” Among Ahmadi Women
Winy Triantita ................................................................. 59-73

Menuju Kesetaraan dalam Aturan Kewarisan Islam Indonesia: Kedudukan Anak Perempuan versus Saudara Kandung
Euis Nurilaewati ............................................................. 75-90

Tantangan Studi Hukum Islam di Indonesia Dewasa Ini
M. Atho Mudzhar ......................................................... 91-103

Political Aspects of Shari'a Banking Law in Indonesia
Djawahir Hejazziey .......................................................... 105-124
Which and Whose Shari'a?:
Historical and Political Perspectives on Legal Articulation
of Islam in Indonesia

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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’ah and constitutional rights of religious freedom. Arguing that despite shari’ah has been able to seep into scattered legal aspects within Indonesian state and society and that the state has allowed shari’ah 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’ah remains tightly confined in Indonesia.

Keywords: shari’ah, state, Indonesia, Islamization, legalization

Introduction

One of my previous works focused on the intersection between shari’ah and state laws of contemporary Indonesia. I argued therein that “attempts at the implementation of shari’ah in Indonesia have always been marked by a tension between political aspirations of the proponents and the opponents of shari’ah and by resistance from the secular state”. My prognosis was that this tension had led to the profound and ongoing legal political dissonance in the formal application of shari’ah 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’ah, (2) the “nationalization” of shari’ah, and (3) the “localization” of shari’ah in Aceh.

The first theme was about efforts to give shari’ah a constitutional status. These efforts to constitutionalize shari’ah 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 kebijakan menjalankan syariat Islam bagi _peneliti_ – “with the obligation of carrying out Islamic shari’ah 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 (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’ah remains lacking a constitutional status.

The second theme demonstrated the extent to which the state has accommodated shari’ah 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 Hajj, 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’ah in Indonesia. Since the constitutional efforts have failed and that national legislation to apply shari’ah 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 is now 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’ah and whose shari’ah is to be implemented in contemporary legal contexts of Indonesia.

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2. 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,' 'incoherence,' 'ambivalence,' 'ambiguity,' 'conflict,' 'contradiction,' 'discrepancy,' 'tension' and 'inappropriateness'.

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Anikal Salim (31-44)

Historical and Political Perspectives on Legal Articulation of Islam in Indonesia

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INDO-ISLAMIKA, Volume II, Nomor 1, 2012/1433
**Shari'a: which one are you 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. 5

Al-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. 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.

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 distinguishes *shari'a* from others is the notion of justice contained therein. As Ibn Qayyim asserted, “Fa an zararat amanara al-adl, wa astura wafihhu biqayti fariqin kanda. Fa ishtama sharidlah wa diuwi...Faa'yyu fariqin istakhrajna biha al-adl wa al-qist fihiyya mta al-din” [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].

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*.

With these criteria in mind, one can argue that *shari'a* is not necessarily manifests 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. Although this is not in line with the classical *fikrah 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* “Aqhd al-halali il-lahili al-talagh [of permitted matters the most loathsome before Allah is divorce]”. From this example, it can be argued that such a secular stipulation (that is, divorce is considered valid

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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, 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. Yet, it must be immediately noted that gambling, alcohol consumption and other pre-Islamic local practices remained noticeable.

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. 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." Despite certain aspects of shari`a have been voluntarily practiced within Muslim communities of Indonesia, the enforcement of shari`a’s 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, Sultan Agung (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 Pradatta court, a Hindu Majapahit court that had existed in Java prior to the coming of Islam, and abolished the Suramadu court, a court that was founded in accordance with Islamic tradition.

Historical and Political Perspectives on Legal Articulation of Islam in Indonesia

by Sultan Agung. 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.

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. 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.

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 syariah 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...
debate over all the meeting of MPR Annual Sessions in which the meaning of shari’ah 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’ah it was, that the Islamic parties actually proposed; it seems that all elements of Islamic shari’ah 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’ah would be officially implemented in Indonesia came from Lukman Hakim Saifuddin (PPP). He argued that his party views Islamic shari’ah in three categories. The first is ‘universal shari’ah’, which comprises the principle values embraced by all religions, such as justice, equality and masyawarah (consultation). The second is ‘shari’ah 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’ah rules’, most of which are either legal interpretations of shari’ah. 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.22

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

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’ah in Indonesia “depends much on the outcome of

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22Interview with Lukman Hakim Saifuddin, a national legislator of the PPP, 13 February 2004.


of debates in the legislature." He added, "the final result of this debate would not be a Shafi'ite 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'aticreates in the discussion are basically products of human deliberation—that is, they are mostly products of legislatures. As Khaled Abu El Fadil 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'at law only to the extent that any set of human legal opinions can be said to be a part of shari'at." Given this, it is no wonder that a huge number of Indonesian Muslims, at least as represented by the two biggest Islamic organizations, Nahdlatul Ulama and Muhammadiyah, have very different visions of the Islamic parties to amend Article 29 in the 2002 MPR Annual Session.

Conclusion

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

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'at in many majority-inhabited Muslim countries, they actually advocate a return to the period of colonial states, where shari'at had an organizational structure compatible with the modern nation state, and not to the time of the Prophet or the era of the caliphs. 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'at implementation would restrict religious freedom of individuals in the name of communal religious obligations. Certain citizens of the Indonesian state would be treated as autonomous individual subjects but as members of a religious community—something that is fundamentally contradicted by 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. Much clearer inconsistency is discernible between the aspiration for the formal implementation of shari'at and constitutional rights of religious freedom. As the constitutional principle of equal citizenship in Article 28(2) mandates that all citizens have equal rights, regardless of their ethnicity, gender, or religion, lawmaking that is solely based on, and for the interest of, one particular religious may breach this provision of Constitution.

Despite shari'at's been able to seep into scattered legal aspects within Indonesian state and society, it is nonetheless largely a state product rather than a cultural process. The state not only allows shari'at to be incorporated in many ways into its structure, as well as into its legal system, nationally and internationally.
regionally, but also skillfully controls and restricts this dispersion. In short, shari‘a remains tightly confined in Indonesia.

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Simbol Keislaman pada Tradisi Rokat Tase' dalam Komunikasi pada Masyarakat Desa Nepa, Banyuates-Sampang Madura

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Abstract

Human uses symbol in its communication activity. The symbol can manifest in verbal and non-verbal things. Original culture of a society defines the way how they communicate and the symbol they use. The society of desa Nepa is not an exception. They have used a symbol in performing their local tradition. Rokat Tase'. The symbol used in Rokat Tase' is a non-verbal symbol of communication, which is manifested in actions and delivery of foods and goods (sesaji). This article discusses the Tradisi Rokat Tase' and its meaning within the society of desa Nepa. Using bibliographical and empirical investigation, this article argues that the main meaning and aim of that symbol is to pray and hope that God (Allah) protects the society in general and sailors in particular. That is also to prevent the occurrence of disaster and calamity and to ask for prosperity and for abundant fishes from sailing. It also stresses that the meaning of this symbol is reached within society’s interaction process and is agreed by all the parties involved in the interaction.

Abstrak

Manusia melakukan komunikasi dengan menggunakan simbol yang dapat berupa simbol verbal maupun non verbal. Budaya asal sebuah orang sangat menentukan bagaimana orang tersebut berkomunikasi dengan menggunakan simbol, seperti halnya masyarakat desa Nepa, yang mayoritas beragama Islam, menggunakan simbol pada tradisi Rokat Tase' yang dilakukan secara turun temuran. Bentuk simbol komunikasi pada tradisi Rokat Tase' berupa simbol komunikasi non verbal, yaitu sesaji dan tindakan-tindakan. Artikel ini mengajak tentang tradisi Rokat Tase' dan maknanya di kalangan masyarakat desa Nepa. Artikel ini mengungkapkan bahwa inti dari makna simbol dalam tradisi Rokat Tase', adalah do’a dan pengharapan kepada Allah agar memberikan keselamatan bagi masyarakat secara umum dan bagi para nelayan ketika melaut serta menolak segala bala yang mungkin akan datang. Do’a juga dipanjatkan untuk meminta rejeki yang berlimpah dari hasil tangkapn ikan ketika melaut. Artikel ini menegaskan bahwa pemakaan simbol tersebut adalah hasil dari