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Salim/Challenging the Secular State

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Introduction

The relationship between religion and law has been a recurring theme in the history of the major monotheistic faiths. Judaism and Islam, in particular, have always considered law inseparable from religion and hold God to be the one and the only legitimate lawmaker. Since the rise of the modern nation-state in the nineteenth century, however, the supremacy of holy laws has been endlessly challenged. There has been a growing debate about whether the law of a state should remain closely related to religion or be wholly detached from it. In many Muslim countries and in the Jewish state of Israel, religious leaders are attempting to realize the former option; that is, to give religious law status as the law of the land.¹

In Indonesia, home to more Muslims than any other nation in the world, attempts to give religious law (*shari'a*) a constitutional status have been undertaken several times since the nation's independence on 17 August 1945. Questions of the formal implementation of *shari'a* first appeared in the early days of Indonesian independence when some Muslim leaders (in June–August 1945) struggled to introduce the so-called *Piagam Jakarta* into the 1945 constitution. The *Piagam Jakarta*, or the Jakarta Charter, was actually the first draft of the preamble to that constitution and it contained what has since become a well-known seven-word phrase in Indonesia: *dengan kewajiban menjalankan syariat Islam bagi pemeluknya* [with the obligation of carrying out Islamic *shari'a* for its adherents]. This phrase, famous today simply as the 'seven words,' was eventually withdrawn from the final draft of the preamble on 18 August 1945.² Since then, however, the status of the seven words has been a constantly controversial issue.

One example of how the Jakarta Charter has remained an ongoing issue in Indonesian politics is the struggle that arose during the debates over the most appropriate ideology for the Indonesian state during sessions of the Constituent Assembly from 1957 to 1959. However, for those expecting a profound role for Islam in the modern nation-state, the struggle ended in failure. A decade later, the call for *shari'a* re-emerged in the Provisional People's Consultative Assembly (MPRS) sessions in 1966–1968, only to fail again. Although calls for implementa-

tion of *shari'a* rules were unsuccessful on both these occasions, they certainly did not end in the late 1960s. There have been four discernible Muslim constituencies demanding it in the aftermath of the New Order regime (1966–1998), namely Islamic political parties, certain regions with a majority of Muslim inhabitants, Muslim militant groups, and sections of the Islamic print media. Even though the People's Consultative Assembly (MPR) in its annual session in 2002 decided not to amend the 1945 constitution to give *shari'a* constitutional status, calls for the formal recognition of *shari'a* continue.

This book examines the interaction between *shari'a* and the nation-state and the profound and ongoing legal political dissonances that characterize this interaction. These dissonances can be traced back to the fact that the character of *shari'a* in the history of Islam has changed over the centuries and that the understanding of the role of the state is now fundamentally different from what it was at the time *shari'a* law developed in the seventh and eighth centuries.

This study of 'Islamization' focuses on the *shari'a* and the state laws of contemporary Indonesia and looks at the constitutionalization of *shari'a*, the nationalization of *shari'a*, and the localization of *shari'a* in Aceh. It argues that attempts to formally implement *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 result has been that *shari'a* rules remains tightly confined in Indonesia.

Approach of the Study

As far as calls for the implementation of religious law in a modern nation-state are concerned, there are at least five perspectives.

First, judicial discourses related to the application of religious law can be seen as political expressions linked to the legitimization of either incumbent regimes or the religious opposition.³ In the latter case, it is often suggested that calls for the implementation of religious law serve as a means of politicization and are often used as an ideological weapon to criticize the government (which, of course, has different political interests and religious goals).⁴ In my view, to claim that calls for religious law result solely from the political activism of religious groups is superficial, as there is a whole range of motives (religious, psychological, and economic) that should also be taken into account. One must go beyond this purely political approach to examine what religious law really means for the individuals involved.

A second view is that religious revivalism,⁵ or, more precisely, religious radicalism,⁶ is the impetus behind the movement toward the application of religious law.⁷ It has been observed that the emphasis upon morality and legal obedience is

the main objective of religious revivalist movements. These movements strongly believe that a return to religious law is the panacea for all modern evils. Moreover, through the application of religious law, the religious revivalists seek to transform the present reality of the religious community (which is deemed to have deviated or gone astray) into something that aligns better with the original teachings of the religion. However, to explain the growing aspirations for the implementation of religious law solely through a framework of religious revivalism is, again, unsatisfactory, as the term 'revivalism' is a concept that has almost no boundaries. Indeed, movements of religious revivalism in the contemporary world may include either attempts to purify religious beliefs (*tawhid*)⁸ or, as in Sufi movements, attempts to escape from the worldly non-transcendent state.⁹

The third explanation is that the current resurgence of support for religious law is a symptom of the emergence of so-called fundamentalist movements, observable especially in religions such as Judaism, Christianity, Islam, and Hinduism.¹⁰ These fundamentalist movements often support the restoration of elements of the past to contemporary reality, including the reintroduction of religious law. In order to legally transform religious law from the sacred texts into the law of the state, these movements disavow any distinction between public and private life. Therefore the state's lack of concern for the implementation of religious law has been a rhetorical device of the fundamentalist opposition.¹¹ Additionally, governments' attempts to incorporate religious law into national legal systems have been regarded as a symptom of fundamentalism.¹² The problem with this argument is that it often fails to distinguish between government campaigns and popular demands for the official implementation of religious law. The latter cannot be easily explained within the framework of a fundamentalist movement as it is often motivated either by emotional or practical reasons.

The fourth view is that the implementation of religious law can be seen as part of the reassertion of the religious identity of the state or society. As several states define themselves religiously, for example the Jewish state of Israel or the Islamic states of Pakistan and Iran, some nationals of these states see the implementation of religious law in these countries as a logical consequence, even a necessity.¹³ Likewise, it has been observed that the implementation of religious law is an essential expression of religious people.¹⁴ Therefore, the call for the implementation of religious law has often been claimed as the legitimate collective right of religious people to self-determination in terms of their religious identity.¹⁵ The difficulty with this approach is that it mainly focuses on the reactions of religious people to a potential threat to their religious identity and does not adequately consider the fact that religious law itself is not identical to state law. Indeed, for religious law to function as state law and to be applied by judicial bodies, intricate preconditions are required, and political or demographic identity alone is not sufficient.

The fifth perspective considers that implementation of religious law is not a goal in itself, but simply a means to religionize (Islamize or Judaize) the modern nation-state.¹⁶ A more or less similar approach is the argument that the hallmark of an authentically religious state system is the implementation of religious law, and not any particular political order.¹⁷

My theoretical position in this book shares much with this last approach in that I will mainly focus on the recent attempts of either Indonesian Muslim groups or the government apparatus to make the modern state of Indonesia more Islamized. These Islamization attempts, as further theoretically elaborated in chapters 2, 3, and 5, are viewed as the continuation of an ongoing process of Islamization that has been in progress since the coming of Islam to Indonesia in the thirteenth century.¹⁸

This book seeks to explore legal and political dissonances that occur in the attempts at Islamization of the Indonesian legal system. 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.’ Instead of using one of these words, I choose the term ‘dissonance’ because it relates to the profound inconsistencies of both theoretical and practical nature in Indonesia’s pluralistic society.

I propose in this book that there are at least two types of dissonance that would take place in the formal implementation of *shari‘a*. First is dissonant constitutionality, which would take place if the constitution required the state to standardize a number of Islamic practices by prioritizing a particular interpretation over other various religious interpretations. This situation would create an ambiguity since an individual Muslim would not be permitted to subscribe to an interpretation that does not comply with the state’s standard. The individual Muslim would no longer be free to exercise his or her religious liberty based on his or her own conviction, as guaranteed by the constitution. In addition, since the Indonesian constitution, for instance, grants religious rights to individuals, the official implementation of *shari‘a* would lead to an inconsistent application of the constitution as it deals with citizens as different religious groups. The way Islamic parties struggled for amending Article 29 on Religion of the constitution, as will be seen in chapters 10 and 11, demonstrates this dissonance.

Second is dissonant legislation in the sense that the formal implementation of *shari‘a* in a nation-state often produces tensions between different legal sovereignties, causes contradiction in its enactment, creates disagreement between national laws, raises conflict with higher laws, results in inappropriate legal drafting, leads to ambivalences in practice, and brings inequality between citizens. The discussion

of complexities relating to the legislation of *zakat* in part IV and the formal implementation of *shari'a* in Aceh, discussed in part V, clearly show this.

The latter type of dissonance emerges because of a dislocation in the minds of the proponents of the formal implementation of *shari'a* about the role of the state and the meaning of law in the era of the modern nation-state. There is a mistaken perception that the modern nation-state is similar to the premodern nation-state, where the religious law as well as the religious elite played a major role. This leads to the mistaken view that the religious elite would have legitimate power to enact the law of the land in accordance with religious injunctions.¹⁹ These two types of states are different. Unlike the traditional state, the modern nation-state is complex, with constitutions, parliaments, supreme courts, and legislatures that act as rival institutions to the position of religious law and religious elite in a traditional state.

There is also confusion over the term 'religious law,' which indicates either the divine meaning given by God's revelation on the one hand and the worldly meaning expanded by human interpretation on the other hand. Therefore, when proponents of religious law raise their demand, it is actually a call for the implementation of the acquired meaning of the term in human religious thought. This has further raised the issue of whether God alone imposes obligations for Muslims through divine revelation, or if human beings also have an authority to create obligations that have divine character.

Organization of the Book

After describing various explanations for calls for the implementation of religious law (*shari'a*) in this introduction, part I will develop the theoretical framework of this book. By explaining various conceptions of *shari'a* and its relation with the state, chapters 1, 2, and 3 will largely discuss why the implementation of *shari'a* rules in a modern nation-state often result in dissonances. Different approaches in different Muslim countries (Saudi Arabia, Iran, and Pakistan) toward the problem of dissonance will be considered as well. Yet, as chapter 3 argues, legal and political dissonance in the formal implementation of *shari'a* in a nation-state remains, in the end, inevitable. Chapter 4 will present a discussion of the millet system and its transformation to the nation-state. It is particularly important to demonstrate how many religious leaders were not aware of the implication of this shift and continued to seek privileges for their positions, which were no longer justifiable as the transition took place.

Part II consists of four chapters. It aims not only to describe early aspirations for the formal implementation of *shari'a* in Indonesia, but also how the conception

of religious law has since pre-independence Indonesia been perceived to be in conflict with the idea of the modern nation-state. Chapter 5 will look at the Islamization in Indonesia from both historical and theoretical points of view. Chapter 6 will present debates over the idea of nationalism and Islam-state relations in pre-independence Indonesia (from the 1920s to the early 1940s). Chapter 7 will trace the discourse between the nationalist groups and the Islamic groups on the formation of the Indonesian state in the important meetings of the Investigatory Committee for the Independence of Indonesia (BPUPKI) and the Preparatory Committee for the Independence of Indonesia (PPKI) in the early days of the new Republic of Indonesia in 1945. Focusing on the Ministry of Religious Affairs in Indonesia, chapter 8 will point out how the Ottoman millet system was reintroduced in an Indonesian context.

Part III has four chapters that focus on the efforts to have *shari'a* constitutionally acknowledged. Chapter 9 explores what Islamic constitutionalism means and its implications for Muslim countries. This chapter will look at the variety of Islamic constitutionalism available in the Muslim world and will demonstrate a basic dissonance in Islamic constitutionalism across the globe. Chapter 10 will present the historical facts of constitution making or reform in the Indonesian context, with particular reference to the position of *shari'a* in Article 29 on Religion. Chapter 11 will undertake a closer look at the stance of Islamic parties on amending Article 29 on Religion during consecutive Annual Sessions of the People's Consultative Assembly (MPR) from 2000 to 2002. Chapter 12 will be a comparative reference of the positions of Islamic parties on the amendment of Article 28 on Human Rights and an investigation of their maneuvers to put *shari'a* over warranties of religious freedom in the Indonesian constitution. Additionally, this last chapter of part III contains short remarks on the still vague nature of constitutional guarantees of religious freedom in Indonesia.

Part IV will explore the nationalization of *shari'a* in a modern nation-state by presenting a case study of the Zakat Administration Law (UU 38/1999). Rather than the Marriage Law (UU 1/1974), Religious Court Law (UU 7/1989), or the *Wakaf* or Religious Endowment Law (UU 41/2004), I prefer to focus on the Zakat Administration Law because it represents a test case of the complicated relationship between the religious duties of Muslim citizens and the non-religious character of the modern nation-state. There are three chapters in part IV that will not only look at how Islamization has been deepened with the enactment of *zakat* law, but also seek to demonstrate that incongruities have emerged from its implementation. To this end, by making a comparative reference to the experience of Pakistan in legislating *zakat*, chapter 13 explains how the institutionalization of *zakat* turns out to be a means of Islamization in Indonesia. Chapter 14 will briefly trace the historical background of the practice of *zakat* in Indonesia before independence,

and the rest of the chapter will discuss *zakat* administration under the New Order regime. Chapter 15 will present some issues of legislation that have emerged in the aftermath of the Soeharto government. And, focusing on the double burden of *zakat* and tax for Muslims living in a modern nation-state, chapter 16 shows a natural dilemma between dual circumstances as both an almsgiving adherent to religion and as a taxpaying citizen of the state.

Part V will discuss the efforts of certain Muslim local inhabitants to apply *shari'a* in their regions, such as in Aceh, Banten, West Java, and South Sulawesi. But it is Aceh that will receive particular attention in this book. Attempts at the Islamization of laws in Aceh are the most significant because Aceh is the only province in Indonesia that has been officially granted the opportunity to move toward a *shari'a*-based system. In order to examine the formal implementation of *shari'a*, one has to understand the position of *ulama* (religious scholars) in a political sphere of Muslim community. As the position of *ulama* becomes significant, the Islamization process in Aceh increases. Two chapters in this part (17 and 18), therefore, will focus on the reawakened role of the Acehnese *ulama* (represented by the MPU or the Ulama Consultative Assembly) in the formation of regional regulations (*peraturan daerah* or *perda*), known locally as *qanun*, in the post-New Order era. In fact, the MPU has almost created an Islamic territory within the secular state of Indonesia. Chapter 18, in particular, will show dissonant legislation in Aceh where some *qanun* of *shari'a* rules have already begun to restrict constitutional rights, not only by ruling out ideological freedoms but also by defining rights according to the *ulama*'s understanding of tolerable conduct and their view of Acehnese communal identity. Chapter 19 will close with some observations on how the tsunami generally affected the formal implementation of *shari'a* in Aceh.

Finally, in the conclusion, I will review the dissonances found in these motivations behind the process of Islamization. This last part will demonstrate how religious practices and sociopolitical life in Indonesia have been reconfigured by attempts to Islamize laws, and how this has meant as much an Indonesianization of *shari'a* as an Islamization of Indonesia.