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Arskal Salim

The *Shari'ah* Bylaws and Human Rights in Indonesia*

Abstrak: *Menyusul tumbangnya rezim Orde Baru pada tahun 1998, gagasan pemberlakuan syariat Islam yang sebelumnya selalu dihambat dan ditindak tegas pada masa Orde Baru muncul ke permukaan publik dalam berbagai corak dan bentuknya. Setidaknya ada tiga macam aspirasi pemberlakuan syariat Islam yang muncul pada masa pasca Orde Baru. Pertama, upaya konstitusional dalam Sidang Tahunan MPR tahun 2002 yang dilakukan oleh sejumlah partai Islam untuk memasukkan kembali tujuh kata dalam Piagam Jakarta ("dengan kewajiban melaksanakan syariat Islam bagi pemeluk-pemeluknya") ke dalam batang tubuh Undang-Undang Dasar 1945. Kedua, meningkatnya upaya legislasi untuk mengakomodasi sebanyak mungkin elemen-elemen syariat Islam ke dalam peraturan perundang-undangan nasional. Ketiga, upaya lokal penerapan syariat Islam pada level pemerintahan kabupaten dan provinsi baik melalui peraturan daerah (perda) maupun lewat kebijakan penguasa lokal.*

Artikel ini ingin melihat sejauhmana penerapan lokal syariat Islam telah menimbulkan perdebatan antara warisan kearifan agama pada satu sisi dan realitas kehidupan modern pada sisi lain, khususnya menyangkut penegakan hak asasi manusia. Untuk tujuan ini, tulisan ini akan menjelaskan apa makna dan cakupan syariat Islam yang diperjuangkan pada

tingkat pelaksanaan lokal di daerah dan ingin menguji sejauhmana peraturan-peraturan daerah (Perda) yang mengandung elemen syariat Islam berimplikasi pada pelanggaran kebebasan individu, hak-hak perempuan dan hak-hak kelompok non-Muslim.

Perdebatan yang terjadi itu bukan sekedar bagaimana orang-orang Indonesia memahami dan mencari tahu penerapan ideal syariat Islam, tetapi juga menyangkut penegakan hak asasi manusia yang universal. Sedikitnya ada dua wilayah perdebatan penerapan lokal syariat Islam di sejumlah daerah di Indonesia. Pertama adalah tentang pemahaman terminologi 'hak asasi' yang secara praktis lebih banyak dimaknai sebagai tugas atau kewajiban. Oleh karena itu, tidak mengherankan apabila pada satu sisi ada kelompok yang berpandangan bahwa negara memiliki kewajiban untuk memenuhi hak-hak warganegaranya untuk melaksanakan tugas kewajiban keagamaannya, biarpun dengan menggunakan cara-cara paksa. Sementara itu, pada sisi lain, ada kelompok yang berpendapat bahwa hak-hak warganegara dalam mengerjakan perintah ajaran agama yang dianut sesungguhnya bersifat pribadi. Dan oleh sebab itu, apakah mereka akan menjadi warganegara yang saleh atau tidak bukanlah urusan negara.

Wilayah perdebatan kedua adalah kenyataan bahwa konstitusi Indonesia bukanlah sebuah konstitusi yang murni sekuler atau bersifat Islami seutuhnya. Akan tetapi, konstitusi Indonesia selalu dianggap bersifat religius karena adanya prinsip Ketuhanan Yang Maha Esa di dalamnya. Oleh sebab itu, bagi sebagian kelompok Islam, semangat religiusitas yang terkandung di dalam konstitusi Indonesia itu selalu harus menjadi bahan pertimbangan dalam proses penegakan hak asasi manusia dalam konteks lokal Indonesia . Namun, pada sisi lain, berhubung UUD 1945 Indonesia yang telah diamandemen telah mengakomodasi berbagai bentuk hak-hak konstitusional dan meratifikasi sejumlah perjanjian internasional tentang hak asasi manusia, terdapat kelompok yang menekankan perlunya pemerintah Indonesia untuk mematuhi dan merasa terikat untuk menghormati dan melakukan pemenuhan hak-hak asasi manusia secara konsisten. Perdebatan mengenai soal ini tak jarang memanas karena satu kelompok cenderung memaksakan pendapatnya kepada kelompok lain.

Arskal Salim

The *Shari'ah* Bylaws and Human Rights in Indonesia*

الخلاصة: بعد سقوط نظام الطريقة الجديدة (Orde Baru) عام ١٩٩٨ ان المشروع لتطبيق الشريعة الإسلامية الذى كان فى الحكومة السابقة مرفوضا كليا، ظهر مرة أخرى فى المجتمع فى أشكال مختلفة. توجد على الأقل ثلاث تطلعات فى تطبيق الشريعة الإسلامية فى عصر بعد الطريقة الجديدة. الأول من خلال الجهود الدستورية فى دورة المجلس الاستشارى الشعبى عام ٢٠٠٢ التى قامت مجموعة الأحزاب الإسلامية بإدخال سبع كلمات للوثيقة الجاكرتوية ونصها "يجب تطبيق الشريعة الإسلامية على المسلمين" إلى مضمون الدستور الإندونيسى عام ١٩٤٥. والثانى تفعيل الجهود التشريعية لقبول أكثر ما يمكن من عناصر للشريعة الإسلامية فى القوانين الوطنية. والثالث الجهود المحلية لتطبيق الشريعة الإسلامية فى المحافظات والأقاليم من خلال اللوائح المحلية وتعليمات الحاكم المحلى.

يتناول البحث على مدى تطبيق محلى للشريعة الإسلامية الذى يثير الجدل بين التراث الدينى من ناحية وواقع الحياة العصرية من ناحية أخرى، خاصة فيما يتعلق بإقامة حقوق الإنسان. لذلك يشرح هذا البحث تعريف الشريعة الإسلامية ومجالاتها التى تكافح فى تطبيقها على المستوى المحلى،

ويرغب فى تحقيق مدى تأثير القوانين المحلية التى تتضمن عناصر الشريعة الإسلامية فى مخالفة الحرية الفردية وحقوق المرأة وحقوق غير المسلمين.

إن الجدل لم يحدث فى محاولة الفهم أو كيفية تطبيق الأمثل للشريعة الإسلامية فحسب، بل أيضا يتعلق بإقامة حقوق الإنسان العالمية. يوجد على الأقل المجالان المثيران للجدال فى التطبيق المحلى للشريعة الإسلامية فى المحافظات الإندونيسية. الأول فى تعريف "حقوق أساسية" التى تتعلق أكثر فى الواقع العملى بالمهمات والواجبات. على ذلك ليس من الغرابة إذا يرى البعض أن الدولة تجب أن تقيم حقوق أفرادها فى العمل بواجباتها الدينية إن كانت باستعمال القوة الجبرية. ويرى البعض الآخر أن حقوق الأفراد فى العمل بأوامر دينه تتعلق بأمر شخصى. لذلك أى فرد من الأفراد يرغب ان يكون متدينا صالحا أم لا، لم يكن من شأن الدولة.

والمجال الثانى المثير للجدال أن دستور إندونيسيا فى الواقع لم يكن علمانيا كليا ولا إسلاميا محضا، لكنه يكتسب صفة دينية، لأن نصها يتضمن مبدأ الايمان بأحدية الله. لذلك ينظر بعض المسلمين إلى روح دينية فى الدستور اعتبارا فى عملية إقامة حقوق الإنسان فى السياق المحلى الإندونيسى. لكن من ناحية أخرى وعلى أساس تعديلات الدستور التى اعترفت بمختلفة الحقوق الدستورية، كذلك التصديق على الاتفاقيات الدولية فى شـــأن حقوق الإنسان، يرى البعض أن الحكومة الإندونيسية تجب أن تلتزم بهذه الاتفاقيات وتحترمها وتعمل بها فى إقامة حقوق الإنسان بالكامل. قد بشتد الجدال فى هذا الأمر، لأن بعض الناس يريد فرض آراءهم على الآخرين.

The freer political atmosphere that has resulted from the democratic changes instituted by post-Suharto governments has spurred some sections of the Muslim community in Indonesia to voice their aspirations for the implementation of shari'ah (Islamic law) in the country. In this regards, there have been three notable attempts in recent years by supporters to bring more aspects of *shari'ah* law into the state legal system. The first was a constitutional effort whereby Islamic parties sought to have *shari'ah* recognized in the Constitution by amending the article on religion. This effort, however, failed in the last session of constitutional amendment in 2002.

The second effort came through the lawmaking process, which was initiated by the Ministry of Religious Affairs in cooperation with Islamic parties at the legislature, to produce more religion-based regulations. There are now, at least, three national statutes that exclusively concern Muslim affairs, including the service of *hajj* (the pilgrimage), the administration of zakat (alms) and the foundation of *waqf* (endowments). As more elements of *shari'ah*, such as Islamic banking, are to be enacted, this legislative approach remains important for furthering the implementation of *shari'ah* in Indonesia. The only drawback is that the process is quite slow and its scope is very limited.

The third effort, which is the main focus of this paper, has been the increasing trend of autonomous areas to introduce what has commonly come to be known as '*shari'ah* bylaws'. These bylaws have stirred heated debate among Indonesian citizens, including between members of the national legislature.

This paper examines the impact that these regional *shari'ah* bylaws have had on human rights. For this purpose, this paper will explain what kind of *shari'ah* is being implemented, and examine the extent to which those *shari'ah* bylaws have violated individual freedoms and the rights of women and non-Muslim minorities. I will argue that those *shari'ah* bylaws not only ignore legal pluralism (i.e. diversity of religious interpretation) found within the same religion, but also ignore the fact that Indonesia is a multi-faith community; the consequence is that the rights of other religious groups are not respected by the *shari'ah* bylaws.

I will begin this paper by looking at the concept of rights in Islam, and how it is often misinterpreted by Muslims. This will be followed by a discussion on how the application of *shari'ah* in Indonesia at the regional level has been made possible at the expense of religious liberties. Later, I will discuss how the introduction of Islamic legal rules has violated religious freedom for individuals, and negatively impacted on the rights of women and non-Muslims. Finally, the closing

section will provide a summary of why Indonesian people dispute the relationship between human rights and *shari'ah* and what the government has done to settle this dispute.

(Mis)Understanding 'Rights' in Islam

As explained by Ebrahim Moosa, the Arabic term '*haqq*' can best be defined by the English word 'right', despite the earlier having a wider meaning.[1] The word *'haqq'* can, in fact, mean 'right', 'claim', 'truth', 'reality' or 'duty' depending on its use in a specific context. Islam acknowledges two types of rights: (1) 'rights of God' (*haqq Allah*); and (2) 'rights of persons' (*haqq al-insan*). The 'rights of God' can be fulfilled either by observing religious rituals or performing acts that benefit the entire community. Amongst the 'rights of persons' are the rights of freedom of opinion, profession and movement.[2]

It is often empirically found, however, that human rights in Islam are only related to religious obligations (*al-takalif al-shar'iyya*). Islamic human rights are therefore mostly understood as "the corollaries of duties owed to God and to other individuals".[3] In addition, the duties of Muslims toward God are given more emphasis than the rights of individuals. It is for this reason that when the freedom of the individual (*haqq al-insan*) and religious rule (*haqq Allah*) are in conflict, it is the former that should give way.[4] In other words, instead of emphasizing human rights and freedoms, proponents of *shari'ah* might be inclined to pay more attention to the duties of (Muslim) citizens to obey what is purportedly said to be divine law or *shari'ah*.

This conception, however, has been challenged by Khaled Abou El-Fadl, a Professor of Islamic Law at the University of California Los Angeles, USA. He argued that the rights of individual are above the rights of God (*haqqul insan muqaddam 'ala haqqil Ilah*). This is because God is more than capable of defending His rights in the Hereafter, while human beings must secure their own rights in this world. For this reason, the violation of human rights is not pardonable, even by God Himself, unless those victims of human rights abuse would forgive the perpetrator. Meanwhile, the infringement of God's rights might be pardoned—by God Himself—thorough serious repentance and a strong willingness to not repeat a similar infringement.[5]

The fact that duties and obligations usually have priority over rights in most interpretations of Islam is also observable in the Universal Islamic Declaration of Human Rights (UIDHR), released at an International Islamic Conference held in Paris on September 1980. Given this,

Moosa was right when saying that the Declaration is better described as the Universal Islamic Declaration of Human 'Duties', instead of 'Rights'.[6] It is little wonder, therefore, that the principles of original freedom and the inviolability of life, honour and property in Islam were often treated as principles which merely secure the general order and well-being of the whole community (*umma*), but were not regarded as fundamental liberties of Muslim individuals.[7]

For this reason, the formulation of lists of the specific rights of Muslim individuals in the constitutions of Muslim countries seems more symbolic than actual. In fact, one would easily find that the constitutional law of many Muslim countries covertly suppresses individual rights. This can be seen through conditional phrases that curb individual freedoms which are frequently mentioned. Words or clauses like "if it is not contrary to *shari'ah*", "provided that they are not detrimental to the fundamental principles of Islam" and "in accordance with Islamic criteria" are examples of the sort of qualifications added to individual rights provisions in constitutional texts. According to Mayer, "imposing Islamic qualifications on rights sets the stage not just for the diminution of these rights, but potentially for denying them altogether."[8] In sum, rights in Islam are, in most cases, essentially religious duties, and they rarely guarantee individual rights to freedom in general.

That religious duties are above individual rights is not only a reflection of Muslims' lack of individuality and religious autonomy, but also a show of their rejection of individualism in favour of religious rule. This condition, unfortunately, is evident in the constitutional law, as well as in a number of local enactments, of Indonesia - the largest Muslim democracy in the world.

The Second Amendment of the 1945 Constitution adopted a progressive formula of civil liberties, among other things:

- the right to protection from violence and discrimination (Article 28B:2);
- the right to recognition, guarantees, protection and certainty before a just law, and to equal treatment before the law (Article 28D:1);
- to embrace and to practice the religion of his/her choice (Article 28E:1);
- the right to the freedom to hold beliefs (*kepercayaan*), and to express his/her views and thoughts, in accordance with his/her conscience (Article 28E:2);
- the right to feel secure against and receive protection from the threat of fear to do or not do something that is a human right (Article 28G:1);
- the right to be free from discriminative treatment based upon any grounds whatsoever and the right to protection from such discriminative treatment (Article 28I:2).

However, there is a constitutional stipulation (Article 28J:2) that limits the implementation of human rights in Indonesia. This article states: "In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society." According to some members of the legislature who are involved in the sessions of constitutional amendment, Article 28J:2 is an important key to understanding the issue of the implementation of human rights in Indonesia.[9] Thus, human rights may be restricted insofar there is a national statute that instructs to do so. This provision could result in a situation where individual citizens fail to enjoy rights relating to religious freedom, since to embrace, or carry out, a particular religious interpretation, which is different to the established practice or to the majority of Muslims' understanding, will be considered heresy, and, hence, becomes unlawful and has no right to survive.

As the constitutional guarantee of religious liberty remains vague, especially relating to the rights to have a different religious interpretation from that of the mainstream, it is needless to say that, at the regional level, proponents of *shari'ah* have been able to effectively constrain religious liberty of individual Muslims. Moreover, the local implementation of *shari'ah* has negatively affected women and non-Muslim citizens by marginalizing, and even discriminating, their legal and political standings.

Shari'ah in Local Legislation

The increasing call for *shari'ah* law at the local level was partially triggered by the central government's agreement to Aceh's special autonomy law to officially implement *shari'ah*. This development has spurred other provinces and districts in different parts of Indonesia to imitate Aceh by formally introducing Islamic injunctions through local regulations. While the application of *shari'ah* in Aceh is legitimate under the national legal system and was permitted by the central government chiefly as a way of resolving the prolonged bloody conflict in the area, the local application of *shari'ah* in other provinces was made possible through a national program of administrative decentralization. Moreover, as a result of the 2004 general election and the election of regional leaders (Pilkada, pemilihan kepala daerah), support for

the enactment of bylaws that contain strong elements of *shari'ah* has become greater in certain districts, especially those where Muslims constitute a majority. This reveals that while the process of legal Islamization has largely failed at the national level, it has been doing comparatively well at the regional level. What becomes important now is not exclusively obtaining constitutional status for *shari'ah*, but religious autonomy by which the proponents of *shari'ah* would be able to have the official implementation of *shari'ah* in a particular territory.

The implementation of *shari'ah* at the regional level largely requires the codification of *shari'ah* elements into state regulations. These regulations may take shape in the form of a regional regulation (*peraturan daerah*) passed by the local legislature, decree (*keputusan*), instruction (*instruksi*), or circular letter (*surat edaran*) issued by local officials such as the Governor, Head of District, or Mayor. Such regulations have almost nothing to do with the state's effort to protect religious freedom but rather deal with the state's instruction for Muslim people to observe their religious duties or to avoid doing anything against Islamic rules. As can be seen in Table 1 below, 12 of 33 provinces in Indonesia have seen the enactment of bylaws that contain Islamic injunctions.[10] These bylaws cover three broad areas: First, public order and social problems such as prostitution, consumption of alcohol and gambling; second, religious skills and obligations, such as reading the Qur'an, attending Friday prayers and paying zakat (Islamic alms); and third, religious symbolism, including Muslim dress.

Table 1:
Shari'ah Bylaws in Selected Districts and Municipalities

Province	District/Municipality	Content of Regulation	Type and Number of Regulation[11]
Aceh	All	Incorporation of aspects of theology (*aqidah*), rituals (*ibadah*) and activities that glorify Islam (*syiar Islam*) into sharia bylaws	Qanun No. 11/2002
	All	[Prohibition on] liquor	Qanun No. 12/2003
	All	[Prohibition on] gambling	Qanun No. 13/2003
	All	[Prohibition on] close proximity between unmarried or unrelated couples (*khalwat*)	Qanun No. 14/2003
	All	Management of zakat	Qanun No. 7/2004

Province	District/Municipality	Content of Regulation	Type and Number of Regulation
West Sumatra	All	Eradication of immoral acts (*maksiat*)	Perda No. 11/2001
	Padang	Requirement to wear Muslim dress	Mayoral Instruction No. 451.442/2005
	Padang	Requirement to be able to read the Qur'an	Perda No. 3/2003
	Solok	Requirement to wear Muslim dress	Perda No. 6/2002
	Solok	Requirement for students, brides and grooms to be able to read the Qur'an	Perda No. 10/2001
	Padang Pariaman	Eradication of immoral acts (*maksiat*)	Perda No. 2/2004
	Pasaman Barat	Requirement to wear Muslim dress	Unidentified
South Sumatra	All	[Prohibition on] immoral acts (*maksiat*)	Perda No. 13/2002
	Palembang	Ban on prostitution	Perda No. 2/2004
Bengkulu	Bengkulu	Ban on prostitution	Perda No. 24/2005
		Enhancement of faith and religiosity	Mayoral Instruction No. 3/2004
Banten	Tangerang	Prohibition on sale and distribution of liquor	Perda No. 7/2005
	Tangerang	Prohibition on prostitution	Perda No. 8/2005
	Pandeglang	Requirement to wear Muslim dress at work on weekdays	District Head Decree No. 25/2002
		Requirement that student uniforms include the headscarf	District Head Decree No. 9/2004
		Requirement that incoming primary school students be able to recite the 30th chapter of the Qur'an	District Head Decree No. 3/2005
West Java	Cianjur	Establishment of an institute to study and develop sharia	District Head Decree No. 36/2001
		Movement to improve the moral behaviour of the government apparatus and society	District Head Circular Letter No.551/2717/ASSDA1/9/2001
		Administration of zakat	Perda No. 7/2004
		Recommendation to wear Muslim dress at work on weekdays	District Head Circular Letter No. 061.2/2896/org.
	Tasikmalaya	Requirement for students to dress modestly	District Head Circular Letter No. 451/SE/04/Sos/1
	Garut	Requirement for the district's female civil servants to wear Muslim dress	Unidentified
		Improvement of moral behaviour	Perda No. 6/2000

Province	District/Municipality	Content of Regulation	Type and Number of Regulation
East Java	Gresik	Prohibition on prostitution	Perda No. 7/2002
	Gresik	[Limitation on] distribution of liquor	Perda No. 15/2002
	Pasuruan	Ban on prostitution	Perda No. 10/2001
	Pamekasan	[Limitation on] distribution of liquor	Perda No. 18/2001
		Application of sharia	District Head Circular Letter No. 450/2002
	Jember	Prohibition on prostitution	Perda No. 4/2001
South Sulawesi	All	Requirement for competency among Muslims in reading the Qur'an	Perda No. 4/2006
	Bulukumba	Requirement to wear Muslim dress	Perda No. 5/2003
		Prohibition on sale and distribution of liquor	Perda No. 3/2002
		On zakat, donations (*infak*) and charity (*sedekah*)	Perda No. 2/2003
		Requirement for students, brides and grooms to be able to read the Qur'an	Perda No. 6/2005
	Sinjai	Requirement to wear Muslim dress	Unidentified
	Gowa	Requirement to wear Muslim dress; increase in hours devoted to religious subjects in schools	Perda No. 7/2003
	Takalar	Requirement to wear Muslim dress	Unidentified
	Maros	Requirement for students and civil servants to be able to read the Qur'an	Perda No. 15/2005
		Requirement to wear Muslim dress	Perda No. 16/2005
		Administration of zakat	Perda No. 17/2005
	Enrekang	Requirement for females to wear Muslim dress and for students to be able to read the Qur'an	Perda No. 6/2005
South Kalimantan	All	Prohibition on liquor consumption	Perda No. 1/2000
	Banjarmasin	Observance of Friday as a day of religion	Perda No. 8/2005
		Requirement that students be able to recite the Qur'an	Perda No. 4/2004
	Banjarmasin	Respect for the month of Ramadan	Perda No. 4/2005
	Banjar	Respect for the month of Ramadan	Perda No. 10/2001

Province	District/Municipality	Content of Regulation	Type and Number of Regulation
West Kalimantan	Sambas	Prohibition on prostitution and pornography	Perda No. 3/2004
	Sambas	Prohibition on gambling	Perda No. 4/2004
West Nusa Tenggara	East Lombok	Administration of zakat for professional workers	Perda No. 9/2002 and District Head Decree 17/2003
Gorontalo	Gorontalo	Prevention of immoral acts (*maksiat*)	Perda No. 10/2003

It is important to mention here that the *shari'ah* bylaws in general have received the full support of the Indonesian Ulama Council (MUI). The transformation of this Islamic institution in the post-New Order era has been leaning more towards the political aspirations of the Muslim majority at the expense of the interests of non-Muslim minorities. Through its *fatwa* (legal opinion) and *tausiyah* (political recommendations), MUI has contributed to reinforcing a homogenized Islamic identity and a standardized Islamic practice in Indonesia. In fact, MUI joined various Muslim organizations and Islamic groups in making a political statement to support those regions that have enacted *shari'ah* bylaws and recommend other provinces or districts to adopt this approach (*Jawa Pos*, 22 June 2006).

The proponents of *shari'ah* bylaws use democracy to support their argument. According to Ma'ruf Amin, chairman of the *fatwa* commission of MUI, the position of *shari'ah* bylaws is legally and politically legitimate so long as it is not in conflict with the higher regulation and there is public consensus (*Indo Pos*, 20 August 2006). One very important characteristic of democracy is that every single citizen has equal rights, which must be reflected in the products of the legislative processes. These products should not enfeeble, or even deteriorate, the rights of minorities, including their legal standing. If this is the case, the decision made by the majority will be seen as a manipulated means and cannot be considered a democratic decision.[12]

As regional autonomy does not include religious affairs—with Aceh being the only exception—one must wonder how the *shari'ah* bylaws have been incorporated into regional regulations without any difficulty. Indrayana explains that these bylaws were deliberately

designed to avoid clashing with higher (national) laws stipulating that regional governments have no authority to regulate on religious matters. To this end, the bylaws emphasise methods and measures to establish public order within the society, rather than implement Islamic law itself. This means that they cannot be annulled by the central government following executive review, as would be possible if a lower-level government regulation was considered to be in conflict with higher-level laws or the constitution.[13]

Additionally, a peculiar problem that emerges from this local legislation is that the meaning of *shari'ah* remains unclear. If one looks at the definition of *shari'ah* that is employed by some supporters of its implementation, it seems that *shari'ah* covers almost every aspect of human life. However, this understanding of *shari'ah* is practically exclusive as its utilization in the process of legislation is limited to the matters that relate to specific Islamic injunctions. Instead of extending the meaning of *shari'ah* for more general public affairs, the use of the term '*shari'ah*' merely refers to Muslims' religious obligations as mentioned above. Likewise, although every Muslim agrees that *shari'ah* is the highest norm, and thus often attracts much support for its implementation, there has never been a consensus among Muslims over what exactly it entails. This particular situation has been identified as "solidarity without consensus".[14]

Finally, the incorporation of *shari'ah* into state regulations through a lawmaking mechanism at the legislature has raised a question on its divinity and human authority in its legislation. Is it God alone who creates obligations for Muslims through divine revelation, or can human beings also have the authority to create obligations that have divine character? It is apparent from the example of *shari'ah* bylaws in Indonesia that what is considered *shari'ah* has less to do with its sources and enactment process—whether obtained from Qur'an and Sunnah by the ulama's Islamic legal reasoning or politically worded by members of the legislature—but rather has much to do with its symbolic reference to Islam and Muslims. For this reason, the introduction of *shari'ah* bylaws is susceptibly misused to convey political messages. Indeed, it has been often utilized to increase public trust in the government and the legislature as well as to entertain the short-term political agendas of the incumbent governors or district heads, that is, to improve their chances of re-election.

The Contentious Relationship between Human Rights and the *Shari'ah* Bylaws

Abdullahi Ahmed An-Naim[15] argued that *shari'ah* in the modern era is in fact incompatible with international relations and human rights. According to him, *shari'ah*'s rigid categorizations of territories (*dar al-Islam* and *dar al-harb*) and people (Muslim and *dhimmi* or non-Muslim) are both morally untenable and practically unfeasible in the contemporary world. In this section, I would like to provide a closer examination to the local implementation of *shari'ah* in Indonesia as a way of further exploring these tensions.

Curtailing Freedom of Individual Muslims (Aceh and East Lombok)

As far as the local application of *shari'ah* is concerned, one of the salient features of this law is the monopoly that the official *ulama* (religious scholars) maintain in determining what is and isn't *shari'ah*. As a result, there is a standardized model and acceptable religious practice with which every single Muslim must comply. This is certainly in conflict with constitutional rights that allow citizens to freely exercise religious practices based on their own religious consciousness or interpretation. In addition, this has contradicted the principle of *takhayyur* where individual Muslims have a right to select and follow one legal doctrine from among divergent opinions of various Islamic legal schools (*madhhab*). In fact, the enactment of *shari'ah* into state regulation has meant that the government has seized the right to perform *takhayyur* from individual Muslims. The following cases will demonstrate this contention.

One of the regional regulations—often called Qanun—of Aceh concerns what has been stipulated to be the only acceptable *aqidah* (Islamic creed) in the region. The Qanun specifies that *Ahlussunnah wal Jama'ah*, or Sunni, is the only lawful interpretation of Islam in Aceh, and all Muslims who live in Aceh must faithfully embrace this creed. This particular provision (Article 1:7 of Qanun 11/2002) prevents Acehnese, who almost all of them are Muslim, from subscribing to non-Sunni Muslim creeds, such as Shi'i. Moreover, according to Muslim Ibrahim, chairman of the Ulama Consultative Assembly (MPU), Liberal Islam is also included in this category.

That the regional regulation determines only one kind of acceptable *aqidah* in Aceh not only ignores the plural reality of Muslims in Aceh, but also contravenes the spirit of the official name of the region 'Nanggroe Aceh Darussalam', which identifies Aceh as a 'peaceful

territory that protects everyone'. The legal stipulation of which Islamic creed must be adhered to is inappropriate, because it is not an issue between human beings but rather something between each individual and God himself. How could a public prosecutor prove that an Acehnese has failed to adhere to the creed of *Ahlussunnah wal Jama`ah*? Would this constitute apostasy? What would the punishment be for such a crime? The *Qanuns* are silent on this issue.

The stipulation of an exclusive Islamic creed as revealed in the Qanun 11/2002 has violated individual rights according to the 1945 Constitution (Article 28E (2)) insofar as it is incompatible with ideological freedom. This Qanun has defined individual rights according to the *ulama*'s understanding of tolerable conduct and for the sake of communal identity. When asked whether this provision would infringe human rights provisions as stated in the Constitution, and hence whether it should be judicially reviewed by the Supreme Court, the chairman of the MPU, Muslim Ibrahim, answered by stating that given the province of Aceh itself is exclusively administered under its special status as Nanggroe Aceh Darussalam, the Qanun must be considered an exception within the territory of Indonesia. As a result, he argued, once a Qanun is passed by the local legislature, there is no other legal choice available for Muslims in Aceh but to carry it out. As far as the implementation of Qanun in Aceh is concerned, as explained by Ibrahim, "The issue of human rights therefore must not be extensively taken into account. Otherwise, most Qanuns will be non-starters."[16] These comments conflict directly with the increasing demands in Aceh to investigate human rights abuses that have taken place since Aceh became a Military Operation Zone (*Daerah Operasi Militer*) in the early 1990s.

In 2002, the district legislature of East Lombok passed a regulation on the payment of zakat (Islamic alms). This regulation deals with the general payment of zakat, including *zakat fitrah* and *zakat mal*. To implement this regulation, the District Head of East Lombok, Mohammed Ali bin Dachlan, issued a decree (SK no. 17/2003) making the payment of zakat obligatory for civil servants and official teachers. Of the whole amount of their salaries, 2.5 percent is automatically deducted every month for charitable purposes. This policy drew on a particular Islamic legal opinion (*ijtihad*) of *zakat profesi*, that is, a religious tax that must be paid by professionals such as civil servants, lawyers, doctors, lecturers and others. However, this District Head decree could not be fully implemented. From the very beginning the decree met stiff resistance from teachers as well as civil

servants. Their main concern was that the zakat funds would not be managed properly as the government had not specified how the funds would be managed and what measures would be taken to ensure transparency and accountability. As a result, teachers organized a strike that ran for a number of days and led a major rally demanding that the decree be cancelled.

Since there is no clear instruction in Islamic sources on how zakat should be collected - whether Muslims are obliged to pay their zakat through an agency or whether they can voluntarily give their zakat directly to the poor and the needy - the decree of a centralized zakat payment system has the potential to infringe the rights of individual Muslims to freely choose a way to perform their religious obligations. Here in East Lombok, we found that the standardization of zakat payment by the local government has detracted from the sincere character needed in performing religious duties.

Additionally, the case of zakat in the district of East Lombok above illustrates how the spiritual purpose of zakat, namely the purification of one's soul and wealth, has been absorbed by the overwhelmingly political and economic objectives, which merely treats zakat as a source of official revenue. The result is a depersonalization of the payment of zakat. As the local government automatically levies the zakat from the salary of Muslim teachers and civil servants each month, there might be a feeling among them that money payable under the decree is just like any other tax demanded by the government. Furthermore, because of the terrible corruption that continues to run rampant especially in government departments in Indonesia, some Muslims are inclined to feel that zakat they pay through the government will not end up with those who should receive it. Thus, just as in Pakistan, some Muslims who are required by state regulation to pay zakat through the government feel compelled to make another, traditional payment of zakat.

Women's Rights under Threat (West Sumatra and Tangerang)

It has been argued that the foremost victim of the official implementation of *shari'ah* is women.[17] This is particularly true in the sense that regulations produced under this Islamic campaign often restrict women in their movement, access and opportunities. These restrictions affect many aspects of women's lives, including travelling at certain times and to some destinations, visiting particular places, wearing appropriate clothing, and securing specific employment po-

sitions. Some of these provisions are actually worded in a non-biased gender form, but the way they are implemented practically threatens the rights of women.

Following the commencement of the decentralization era, the provincial legislature of West Sumatra in early 2001 drafted a bill on the prohibition and the eradication of immoral acts (*maksiat*) as a way to eliminate social evils such as prostitution, abortion, pornography, and drug abuse (*Kompas* 18 June 2001; *Media Indonesia* 30 June 2001). The draft consisted of seven chapters and 17 Articles. Article 10 of this draft stipulated that 'each woman is banned from going out of her home from 10.00 pm to 4.00 am, except if she is accompanied by her close relatives (*muhrim*) and/or conducting activities that are protected by law'. This provision was certainly controversial and it therefore sparked fierce debate among local residents as well as between members of the legislature.

The draft was considered discriminatory for it explicitly points out that women are the cause of indecent acts. The drafters of the bill were unaware that some women have to work at night, such as vegetable sellers at the traditional market, nurses, waitresses and female labourers. In addition, it did not take into account that not all women have husbands who would provide them basic daily needs. In fact, many single women or widows have no choice to act as heads of households and have to work at night to provide for their families. Given this, it is needless to say that the draft received strong opposition from both local women activists and national figures who viewed it to clearly contradict the constitutional rights of women. As a result, the provincial legislature suspended its intention to pass the proposed regulation.

Unlike the province of West Sumatra that cancelled its bill to prohibit women from going outdoors at night, the legislature of Tangerang municipality has passed a regulation on the prohibition of prostitution, which has similar implications for the mobility of women at night. Of twelve Articles contained in this regulation (Perda 8/2005), there was a controversial stipulation (Article 4) that led to multiple interpretations.[18] Although there is not one single clear reference to 'women', one will easily find that the legislation specifically targets women. This was proven in February 2006, when Lilis Lindawati, a waitress who one night was waiting for a bus home, was arrested and accused of being a prostitute. Although Lindawati insisted that she was not a prostitute, the court prosecuted and charged her to pay a fine of 300,000 rupiah (roughly about USD 33.00). Since

she could not afford to pay the fine, she was imprisoned for three days instead (*Gatra*, 20 March 2006). This case of mistaken arrest caused a great deal of controversy and the case attracted considerable attention not just here in Indonesia but also overseas. Despite heavy criticism from the community, the Mayor of Tangerang and the municipal legislature refuse to reform this regulation and the way it is implemented.

From a constitutional perspective, the bylaw of Tangerang obviously has a number of flaws. Firstly, the authors of the regulation have forgotten all about constitutional rights as stipulated in the Constitution. The bylaw has indeed scared a majority of women from going outdoors after hours, regardless of any pressing needs. Such restrictions certainly constitute a restriction of women's basic rights to get access to livelihood. Secondly, instead of protecting the rights of citizens, the government of Tangerang has abused its power by accusing women based on groundless suspicions. The stipulation in Article 4 does not draw on presumption of innocence, but makes subjective opinion as preliminary evidence for the state to uphold the law. This certainly contravenes the fundamental rights of individuals to be treated innocent until proven guilty. Finally, seen in light of Islamic legal theory, the provision of the bylaw is really problematic as it has arbitrarily put a label on women who are going out at night as prostitutes without valid evidence, and, hence, it can be classified as a *qadhaf* or an unjustified accusation that someone has committed adultery. As *qadhaf* is a punishable crime under Islamic law, from an Islamic point of view it is the local government, and not the falsely accused women, who deserve punishment.

Given the Tangerang bylaw is considered to be in violation of constitutional rights, three female residents of Tangerang filed a judicial review asking the Supreme Court to annul the bylaw (*Media Indonesia* 20 April 2006). This was the first case on the issue of *shari'ah* bylaws brought before the court for judicial review, but, unfortunately, it ended in failure (*Jawa Pos* 14 April 2007). The decision made by the Supreme Court drew mostly on procedural processes, and not on the substantive elements of the bylaw. According to the spokesperson of the Supreme Court, the court refused to accept the claims that the bylaw has violated higher laws. Instead, the court was of the opinion that the bylaw was passed through a democratic process. In the eyes of the judges who examined this case, the bylaw is a political implementation of the Government of Tangerang, and, thus, it comes under the authority of executive and legislative branches of munici-

pal government. For this reason, the court found that the case brought forward by the petitioners was not eligible for judicial review (*Republika* 13 April 2007). This case shows that the Supreme Court sees judicial review more as a matter of legal procedures rather than a means to protect human rights and freedom.

For human rights defenders in Indonesia, this is certainly an upsetting result, as they cannot challenge the decision of the Supreme Court to the Constitutional Court. The jurisdiction of the Indonesian Constitutional Court extends only to the examination of national laws or statutes, and not to the examination of provincial and district government bylaws. It is the Supreme Court that serves as the final court for the judicial review of bylaws. However, it seems that the Supreme Court more likely functions as a guardian of regulations, and not as a protector of constitutional rights. In light of this, no one would deny that effective legal remedies for discriminatory treatment in Indonesia remain generally absent.

Neglecting Equal Rights of Non-Muslims

One common argument put forward to support the introduction of *shari'ah* bylaws is the fact that Muslims constitute the majority. This implies that Muslims' interests must be prioritized over the interests of other religious groups. As I have argued elsewhere, the willingness of the religious majority to impose its religious views and values on the entire population will negatively affect the rights of religious minorities.[19]

In most cases, equal rights is a legal matter, including the rights to be treated like others, to not be classified differently, to be subject to the same provisions and practices as other citizens, and not to be distinguished by difference of religion. This strong emphasis on legal equality reflects that minorities wish to be assimilated into the general public, and be viewed not on the basis of their religion, but rather their sameness in citizenship.[20]

Meanwhile, to force minorities to be bound with those specific religious bylaws is considered a violation of their religious liberties. There are a small number of municipalities in Indonesia that have introduced regulations which illustrate perfectly how the *shari'ah* bylaws can constrain the rights of minorities. In Padang, female high school students—regardless of their religious affiliation—are required to replace their leg-baring short skirts with long skirts (*Jakarta Post* 10 July 2006, *Media Indonesia* 26 August 2005). What is crucial here is the fact that the regulation lacks a spirit to protect the diversity of peo-

ple's beliefs. Above all, the discriminatory effects of the regulations will send the wrong message to the non-state actors that they are allowed to discriminate against minorities.

The increasing passion of local bureaucrats and Muslim politicians, which relatively dominate the seats at the regional legislature, to introduce more elements of *shari'ah* injunctions, has shifted the focus of debate from the choice between religious or secular legislation to the degree to which Islamic legislation should be applied. This shift of focus may have significant impact on the rights of minorities. Debates in the legislative meetings then would not be critical as a consensus over the legislation of *shari'ah* aspects have sometimes been reached beforehand, albeit informally. As Philip noted in Egypt, the role of non-Muslims as critical participants in the legislative process was gradually diminished because of this shift of focus.[21] Additionally, as a strong non-religious party frequently utilizes *shari'ah* for political purposes, non-Muslim minorities often lack the appropriate agency necessary for resisting any decision or regulation that may disadvantage them.

Closing Remarks

The foregoing discussion shows Indonesian experiences in upholding constitutional rights on the one hand and in implementing *shari'ah* on the other. There is no unanimous agreement, however, on whether or not the implementation of *shari'ah* should suitably match human rights principles. The dispute here is not only about the ways Indonesians understand and see *shari'ah* being ideally enforced, but also the universal applicability of human rights. The introduction of *shari'ah* bylaws in large parts of Indonesia suggests two possible areas of dispute. Firstly, as I already pointed out earlier, rights are often understood practically as duties. Thus, while one camp sees that the state has an obligation to ensure the rights of its citizens to observe religious duties are not restricted, other camps think that the right of citizens with respect to religious observance is personal and whether or not they would become pious citizens is not the state's concern.

Secondly, as the Indonesian Constitution is neither secular nor Islamic, but rather 'religious', various Islamic groups argue that religion should be taken into account when determining which human rights are applicable. On the other hand, since Indonesia has stipulated constitutional rights and ratified a number of international cove-

nants of human rights, some have emphasized that the Indonesian government has no other option than to respect and implement them consistently and vigorously, sometimes at the apparent expense of religious doctrine. The dispute on this point increases as each camp seeks to impose their own claims over others. It seems difficult that they could reach a compromise on a voluntary basis. In fact, they have to rely on a formal judiciary to settle this dispute. However, as already discussed above, the dispute on the contentious relationship between human rights and the *shari'ah* bylaws cannot be simply resolved through the available legal means. While the Constitutional Court has no authority to conduct a judicial review that involves the provincial or district bylaws, the Supreme Court made a disclaimer of its inability to examine political implementation of the district governments, even if such policies, ironically, suppress people's rights, which are guaranteed by higher laws.

As the dispute of contending views of human rights in Indonesia currently finds no way to be resolved, the government cannot let this situation remain unchanged. The government should take a clear stance by providing a measure to end the discrimination and the violation of human rights resulting from the introduction of *shari'ah* bylaws. One way to realize this is to extend the jurisdiction of the Constitutional Court to examine whether provincial and district bylaws are in compliance with the stipulated constitutional rights.

Endnotes

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1. Ebrahim Moosa, "The Dilemma of Islamic Rights Schemes," Journal of Law and Religion 15 (2000).
2. Moosa. See also Riffat Hassan, "Religious Human Rights and the Qur'an," Emory International Law Review 10 (1996); and Maqbul Ilahi Malik, "The Concept of Human Rights in Islamic Jurisprudence", Human Rights Quarterly (1981).
3. Donna E. Artz, "The Application of International Human Rights in Islamic States," Human Rights Quarterly 12 (1990): 205.
4. Ann Elizabeth Mayar, *Islam and Human Rights* (Colorado: Westview Press, 1999)
5. Khaled Abou El Fadl, *Islam and the Challenge of Democracy* (Princeton: Princeton University Press, 2004) 27-8.
6. Moosa, 197.
7. Noel J. Coulson, "The State and the Individual in Islamic Law," International and Comparative Law Quarterly 6 (1957): 51.
8. Mayer (1999), 81.
9. See "Ketentuan HAM dalam UUD Dikunci oleh Pasal 28J" available from http://hukumonline.com/detail.asp?id=16774&cl=Berita <7 July 2007>
10. Arskal Salim, "Muslim Politics in Indonesia's Democratization: The Religious Majority and the Rights of Minorities in the Post-New Order Era," *Democracy and the promise of good governance: Indonesia Update Series 2006,* ed. Andrew MacIntyre and Ross McLeod (Singapore: ISEAS, 2007).
11. Perda is Regional Regulation, while Qanun refers exclusively to regional regulations produced by the legislature of Aceh since 2002, whether or not they are connected to *shari'ah.*
12. David Beetham and Kevin Boyle, *Introducing Democracy: 80 Questions and Answers* (Cambridge: UNESCO Publishing, 1995).
13. D. Indrayana, "The Complexity of *Shari'ah*-derived Bylaws: A Constitutional Perspective" [in Bahasa], paper presented to Seminar on Public Policy and People's Participation in the Era of Regional Autonomy: A Case Study of Bylaws with Religious Dimensions, Banjarmasin, 1 October, 2005, page 6.
14. M.S. Berger, "The Shari'a and Legal Pluralism: The Example of Syria," *Legal Pluralism in the Modern World,* ed. Baudouin Dupret, Maurits Berger and Laila al-Zwaini (The Hague-London-Boston: Kluwer Law International, 1999) 120.
15. Abdullahi Ahmed An-Na'im, "Religious Minorities under Islamic Law and the Limits of Cultural Relativism," Human Rights Quarterly, vol. 9:1 (1987): 1-18.
16. Interview with Muslim Ibrahim, 15 July 2004.
17. Muslim Abdurrahman, "Korban Pertama dari Penerapan Syariat Adalah Perempuan (2001)", http://islamlib.com/id/index.php? page=article&id=175 <10 July 2007>

18. Article 4:1 says, "Anyone whose action or conduct is suspicious and leads to an assumption that s/he is a prostitute is banned from being present in the streets, grassland, public lodging, inn, motel, hotel, dormitory, home residents/rented flats, cafés, amusement centres, theatres, road corners, pathways or other places in the region [Setiap orang yang sikap atau perilakunya mencurigakan, sehingga menimbulkan suatu anggapan bahwa ia/mereka pelacur dilarang berada di jalan–jalan umum, dilapangan–lapangan, dirumah penginapan, losmen, hotel, asrama, rumah penduduk/kontrakan, warung –warung kopi, tempat hiburan, gedung tempat tontonan, di sudut–sudut jalan atau di lorong–lorong atau tempat-tempat lain di daerah]."
19. Salim.
20. Sule Toktas, "The Conduct of Citizenship in the Case of Turkey's Jewish Minority: Legal Status, Identity and Civic Virtue Aspects", Comparative Studies of South Asia, Africa and the Middle East 26, no. 1 (2006): 127.
21. Philip (1995:146) Thomas Philip, "Copts and Other Minorities in the Development of the Egyptian Nation-State," *Egypt from Monarchy to Republic: A Reassessment of Revolution and Change*, ed. Shimon Shamir (Boulder-San Francisco-Oxford: Westview Press, 1995) 146.

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